

# A FRAMEWORK FOR REVIEW OF ADMINISTRATIVE TRIBUNALS

## 1.1 THE ADMINISTRATIVE CONTEXT

Administrative law is a subset of the larger body of jurisprudence recognized as public law. It is comprised primarily of the legal principles governing the delegation, implementation and oversight of a wide array of government functions. Constitutional considerations figure prominently in the study and practice of administrative law, as do philosophical debates about the appropriate role of the state in our society. Within the realm of administrative law, a discrete legal analysis addressing the relationship between the legislature, administrative tribunals and courts has developed. In essence, the jurisprudence built upon this analysis represents the nexus at which social program implementation and the rule of law converge. This topic has been dubbed the “standard of review”.

As a result of the growing complexity of modern society, the legislature often delegates responsibility to specialized administrative bodies in order to implement statutory programs designed to address particular social or regulatory issues. It is the role of the judiciary to oversee the exercise of delegated responsibility. Simply stated, the judiciary, operating at arm’s length, ensures that administrative tribunals do not act in a manner contrary to fundamental constitutional principles such as democratic accountability, predictability or, generally, the rule of law.

### 1.1.1 The Basic Tension

The law of judicial review is fraught with concern for protecting procedural and substantive rights while permitting the administrative body to perform its appointed functions efficiently and effectively. Thus, the fundamental tension that underlies the law of review involves balancing the legislature’s express delegation of power to specialized agencies with the courts’ overarching obligation to ensure that administrative tribunals comport themselves in accordance with constitutional, jurisdictional, procedural and substantive requirements.

Courts acknowledge this tension and, therefore, scrutinize administrative decision-making with differing degrees of intensity by subjecting the decisions of administrative tribunals to varying standards of review. Essentially, there are two questions that must be answered by the judiciary. Should a particular decision-maker be afforded any curial deference in respect to a given issue? If so, what degree of deference is appropriate? Ultimately, the answer to these questions, and hence the appropriate standard of review, depends upon which of two conflicting rationales is paramount and by what margin. The following brief discussion highlights the principles underpinning the competing goals of curial review.

### *1.1.1.1 Defending Judicial Deference*

Judicial deference is most easily defensible by invoking the concept of Parliamentary supremacy, which demands respect for the legislature's intention to guarantee the autonomy of its administrative delegates. Democratic legitimacy requires that elected representatives, accountable to the public, are responsible for determining the best manner in which to govern. Therefore, the most powerful rationale for judicial deference to administrative decisions is the recognition that the legislature intended that curial deference be afforded.

The clearest indicator of the legislature's intent that the judiciary defer to the decisions of an administrative tribunal is the privative clause, which attempts expressly to insulate a tribunal from the supervisory jurisdiction of the courts. Similarly, the legislature can evince its intention by conferring broad discretion on an administrative tribunal. In either of these cases, Parliament's instructions will be found in the statute empowering the administrative tribunal to fulfil its mandate.

In addition to giving effect to the express will of the legislature, courts may exercise self-restraint and defer to administrative decision-makers for another reason: expertise. Deference to expertise does not result from the express instructions of the legislature, but from an inference by the courts that Parliament intended to delegate ultimate responsibility for administrative functions to knowledgeable and expert decision-makers for good reason. Therefore, courts will decline to interfere with the decisions of administrative tribunals in an effort to promote the efficient and effective delivery of social programs and other legislative initiatives. If it appears that Parliament delegated a task to an administrative tribunal because that decision-maker is better suited than the courts to decide a particular matter, then judicial deference is warranted.

The efficient allocation of state resources is connected to the idea that expertise breeds deference. Indeed, courts often acknowledge that it would be an unwieldy system were Parliament to create statutory tribunals

in an effort to more efficiently implement legislative programs, only to have each and every decision reviewed by the courts. Thus, deference avoids the delay and endless litigation that would otherwise favour the party with the greatest resources.

### ***1.1.1.2 Justifying Judicial Intervention***

Judicial interference with administrative decision-making is premised on the courts' role as the "guardians of the rule of law".<sup>1</sup> Indeed, the "superintending and reforming" power of the courts is constitutionally entrenched.<sup>2</sup> The essence of the constitutional values safeguarded by the courts may be summarized simplistically in three precepts underlying the rule of law:<sup>3</sup> that political action should be exercised according to law and no one should suffer but for a breach of a clear law; that the same laws should apply in the same way to everyone, including the state; and that the law should not be applied whimsically or arbitrarily.<sup>4</sup> In turn, these tenets may be seen as restatements of constitutional cornerstones such as democratic accountability, predictability and liberty, in the broadest sense. Most instances of judicial intervention are justified by reference, directly or indirectly, to one or more of these principles.

Judicial intervention may be warranted where an administrative tribunal exercises power in a manner contrary to its delegated mandate, thereby offending the principle that administrative action must be authorized by elected representatives of the people. Thus, courts often speak of administrative tribunals losing or exceeding their "jurisdiction". In this way, the courts guarantee democratic legitimacy by ensuring that admin-

<sup>1</sup> *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 5.

<sup>2</sup> See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

<sup>3</sup> For, arguably, one of the most familiar views of the rule of law, see A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1961). Notably, there are many critics of Dicey's conception of the principles underpinning the rule of law. See, for example, H.W. Arthurs, "Rethinking Administrative Law: a Slightly Dicey Business" (1979) 17 *Osgoode Hall L.J.* 1; P.P. Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 *L.Q.R.* 105 at 118-119. See also J.M. Evans *et al.*, *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995) at 29-31.

<sup>4</sup> A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1961) at 188-203. See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1332-33 *per* Wilson J. (concurring). For other perspectives, see: W.B. Harvey, "The Rule of Law in Historical Perspective" (1960) 59 *Mich. L. Rev.* 487; H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall L.J.* 1; B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 *Canadian Journal of Administrative Law and Practice* 171; P.P. Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 *L.Q.R.* 105.

istrative action is exercised according to law, as defined by the legislature and interpreted by the courts.

The independence of the judiciary also enables it to ensure the accountability of administrative decision-makers. Because the courts are divorced from the legislature, whereas administrative tribunals find their conception, composition and jurisdiction entirely in the legislature's directions, the judiciary can guarantee that the law applies to everyone, including the state. Similarly, judicial review indirectly safeguards effective public participation in administrative decision-making by ensuring that government agencies respect the ideals of openness and fairness, thus enhancing democratic accountability. Another of the courts' functions, related to accountability, is to ensure that the law is not applied whimsically or arbitrarily.

The call for predictability is perhaps the clearest incarnation of the rule of law. This principle is inexorably related to the idea that liberty, in the broadest possible sense, may not be compromised except in accordance with a clear law. It is, arguably, the courts' role to define the law with certainty and clarity. The inability to predict the consequences of one's actions can lead to uncertainty, disorder and an erosion of public confidence in the system.<sup>5</sup> Thus, the law-making role of the courts is often invoked as a justification for interference with the decisions of administrative tribunals, particularly where the matter in dispute involves issues of general application.

Of course, once one acknowledges that legislation may be ambiguous, the rationale that the judiciary, due to its independence, legal expertise and law-making function, is undoubtedly in the best position to determine the correct meaning of a statutory provision, disintegrates. In that case, the contextual sensitivity of administrative tribunals to the goals that the legislature intended to achieve suggests that a tribunal is arguably better placed to interpret ambiguous legislation. However, proponents of judicial intervention quickly point out that judicial independence, in conjunction with the breadth and depth of the judiciary's legal experience across a range of fields, counteracts the "tunnel-vision" developed by many tribunals.

### **1.1.2 Remediating "Errors"**

When the judiciary determines that it is appropriate to interfere with, rather than defer to, an administrative decision, the exercise will often be labelled the correction of "error", whether of law, fact, jurisdiction, procedure or otherwise. This is a concept familiar to appellate courts, which have

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<sup>5</sup> See *Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504 at 515.

struggled for centuries to determine the appropriate level of deference to grant to their counterparts in trial courts.<sup>6</sup> The selection of a standard of review for error committed by administrative tribunals, however, is a relatively modern phenomenon and the influences outlined above bear uniquely upon this task.

Reviewing administrative decisions for “error” is often perceived as a task of classification. What type of error was committed? How egregious was it? However, the judicial assessment of administrative “error” presupposes a standard of review in itself, since by embarking on the inquiry the judiciary has recognized that, in certain circumstances, the tribunal is not entitled to be wrong. An “error” is simply another term used to connote those circumstances where an administrative tribunal has reached an unacceptable decision, in light of the competing interests weighed by the judiciary. The purpose of identifying a “standard of review” is to determine when a decision is entitled to fall within a range of alternatives, and when a decision must conform to a single, “correct” result, if one exists. If the indicia of Parliament’s intention to delegate ultimate decision-making powers to specialized experts outweigh any perceived encroachment on fundamental constitutional rights, the judiciary will typically defer to the tribunal’s decision. However, if the balance is tipped in the opposite direction, the judiciary will likely intervene. In either case, only when an “unacceptable” decision has been reached, in light of the competing rationales for review, will the courts remedy the “error”.

Therefore, the essential determination for the purposes of resolving the tension outlined above and, consequently, for assessing the standard of review, concerns not whether a tribunal has erred, but more precisely whether or not an administrative tribunal is permitted to err. Colloquially, this notion has been labelled “the right to be wrong”.<sup>7</sup> If a tribunal does not have the right to be wrong, the standard of review is “correctness”. If, however, a decision-maker is permitted to err, the question concerns the scope of the right. When more leeway is appropriate, courts will review decisions for “patent unreasonableness”. If less deference is warranted, courts will ensure that the decision under review was simply “reasonable”. Typically, courts will plot on a spectrum of deference a point that corresponds with the scope of the “right to be wrong”.

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<sup>6</sup> See R.P. Kerans, *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994).

<sup>7</sup> See *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245; *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230; and *United Brotherhood of Carpenters and Joiners of America Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316.

The bulk of this chapter, and indeed the entirety of this text, explains how courts will determine that point. However, before proceeding further, it is appropriate to spend some time exploring how judges in the past have answered the question, “when is judicial interference justified?” or, from the opposite perspective, “when is judicial deference warranted”?

## 1.2 THE ROAD TO A PRAGMATIC AND FUNCTIONAL APPROACH

Dramatic changes in attitudes toward judicial review have occurred over the past quarter-century.<sup>8</sup> Although no doubt exists that there are limits to the powers of administrative tribunals created by statute — administrative tribunals must act within the jurisdiction conferred upon them by the legislature — delineating those limits has proved to be a difficult and controversial task.<sup>9</sup> As indicated above, the core of the dilemma is the constitutional imperative that courts adhere to the will of the legislative body, which often conflicts with the courts’ equally pressing objective of protecting fundamental procedural and substantive rights. Thus, the historical development of the law surrounding curial review represents, primarily, the courts’ struggle to legitimize judicial intervention in the face of express statutory language precluding review.

### 1.2.1 An Interventionist Policy

Initially, courts applied a formalistic approach toward review of administrative decision-makers by distinguishing between “judicial” or “quasi-judicial” and purely “administrative” types of decisions,<sup>10</sup> or by speaking of “preliminary” or “collateral” questions in contrast to those related to the merits of a tribunal’s decision.<sup>11</sup> While administrative tribunals were required to decide preliminary questions and collateral issues correctly, deference was afforded to their substantive decisions.

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<sup>8</sup> Helpful accounts of the evolution of Canadian policy on this matter are provided by Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, and by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 (“*Econosult*”) (dissenting). See also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 (“*PSAC, 1993*”) at para. 22.

<sup>9</sup> *Union des employés de service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1087.

<sup>10</sup> See, for example, *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24.

<sup>11</sup> See, for example, *Parkhill Bedding & Furniture Ltd. v. International Molders and Foundry Workers Union of North America, Local 174* (1961), 26 D.L.R. (2d) 589 (Man. C.A.); *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; and *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756.

Perhaps the most notable development in the early Canadian law of judicial review was the adoption of the interventionist policy manifest in a number of cases decided prior to the late 1970s. In *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*,<sup>12</sup> *Bell v. Ontario (Human Rights Commission)*<sup>13</sup> and *Blanco v. Rental Commission*,<sup>14</sup> the Supreme Court of Canada accepted the approach taken by the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*<sup>15</sup> (“*Anisminic*”). To avoid the statutory bar to review presented by a strong privative clause, the House of Lords characterized as *ultra vires* the tribunal’s jurisdiction any administrative decision in which the decision-maker asked itself the wrong question, took into consideration irrelevant factors or ignored factors that it was required to consider. Thus, the class of errors that could take a tribunal outside of its jurisdiction was significantly expanded. In effect, “the House of Lords set forth a definition of jurisdictional error that was so broad as to include any question involving the interpretation of a statute.”<sup>16</sup> Since decisions made outside of administrative tribunals’ jurisdiction were null and void, the consequence of this view was to render privative clauses, which were interpreted to refer only to *valid* decisions, inapplicable.

Supporters justified the interventionist approach by reference to Dicey’s conception of the rule of law.<sup>17</sup> Notably, however, not everyone approved of this view. The consequences of judicial intervention were, according to critics, to undermine Parliament’s express intention to delegate decision-making power to administrative tribunals and to thwart the efficient delivery of programs by specialist bodies.<sup>18</sup>

### 1.2.2 A Deferential Posture

In a marked departure from the rationale underlying the interventionist approach, Canadian law gravitated toward a policy of substantial deference, epitomized by the unanimous decision of the Supreme Court of Canada in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*<sup>19</sup> (“*C.U.P.E.*”). Dickson J., writing for the Court,

<sup>12</sup> [1970] S.C.R. 425.

<sup>13</sup> [1971] S.C.R. 756.

<sup>14</sup> [1980] 2 S.C.R. 827.

<sup>15</sup> [1969] 2 A.C. 147 (H.L.).

<sup>16</sup> *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at 644, *per* Cory J.

<sup>17</sup> A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1961).

<sup>18</sup> See, for example, *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 8, *per* Wilson J.

<sup>19</sup> [1979] 2 S.C.R. 227.

rejected the notion that courts could define the scope of an administrative tribunal's authority by classifying a question as a "preliminary or collateral matter".<sup>20</sup> In place of formalistic classification, the Court substituted a rationalized view of the expertise of administrative tribunals in relation to courts. The Court recognized that deference may further the goals and purposes underlying the legislature's decision to delegate ultimate responsibility to an administrative agency rather than to the courts. This "more sophisticated understanding of the role of administrative tribunals in the modern Canadian state"<sup>21</sup> was undeniably among the most significant developments in the Canadian law of judicial review to that point, and set the stage for the evolution of the modern approach.

Perhaps one of the most novel and important elements of Dickson J.'s reasons for judgment was the admission that statutory language may be ambiguous and, therefore, capable of multiple legitimate interpretations. Indeed, this acknowledgement opened the door to judicial deference, since without the assumption that legislation inevitably has a single, correct meaning, it was impossible to deny that specialist administrative bodies were often in a better position than the courts to determine the most appropriate interpretation in light of the ends that the legislature sought to achieve.

*C.U.P.E.*'s deferential approach was perceived by many as representing a ubiquitous declaration of administrative independence. This rationale was adopted in "situations where labour boards were protected by a privative clause in cases of consensual arbitrators, statutory arbitrators and, as well, to labour relations board decisions not protected by a privative clause".<sup>22</sup> However, the new policy of plenary deference was not cast in stone. Before long, the Supreme Court had occasion to reconsider its position, and once again tightened the leash on administrative tribunals.

### 1.2.3 The Return to Classification

In *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*<sup>23</sup> ("l'Acadie"), the Supreme Court retreated

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<sup>20</sup> *Ibid.*

<sup>21</sup> *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 9.

<sup>22</sup> *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at para. 74, citing *United Automobile, Aerospace and Agricultural Implement Workers v. Volvo Canada Ltd.*, [1980] 1 S.C.R. 178; *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245; *Alberta Union of Provincial Employees v. Olds College*, [1982] 1 S.C.R. 923; *Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1003-04; and *Teamsters Union, Local 938 v. Massicotte*, [1982] 1 S.C.R. 710. See also *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at paras. 16-20, *per Wilson J.*

<sup>23</sup> [1984] 2 S.C.R. 412.

somewhat from the deferential stance propounded in *C.U.P.E. Beetz J.* reiterated that there were indeed limits upon the power of administrative tribunals to interpret their enabling statutes. He stated that once a question is classified as one of jurisdiction, the reviewing court must ensure that the administrative tribunal's decision is correct.<sup>24</sup>

In *Union des employés de service, Local 298 v. Bibeault*<sup>25</sup> (“*Bibeault*”), the Court fully revived the dichotomy between those provisions of an agency's enabling statute that conferred or defined an administrative tribunal's powers and those that are within the tribunal's jurisdiction. According to Beetz J., when the former is being interpreted, the tribunal's decision must be correct. Decisions concerning the latter, however, could only be set aside if the tribunal's interpretation was patently unreasonable.

Notably, this approach bore a striking resemblance to the pre-*C.U.P.E.* policies embodied in *Anisminic*. Indeed, on the distinction drawn in *Bibeault*, courts could go out of the way to conclude that an administrative tribunal had made an error, no matter how trivial, in the interpretation of a “jurisdiction-conferring” provision of its statute. Hence, too quick and ready a finding of jurisdictional error could easily frustrate the important role of administrative tribunals.<sup>26</sup>

The most obvious concern with the “jurisdictional” approach was that “it will not always be easy to know when a given statutory provision deals with matters that are within jurisdiction and when it confers jurisdiction.”<sup>27</sup> Beetz J. himself admitted, “I doubt whether it is possible to state a simple and precise rule for identifying a question of jurisdiction, given the fluidity of the concept of jurisdiction and the many ways in which jurisdiction is conferred on administrative tribunals.”<sup>28</sup>

However, in an attempt to more clearly delineate which errors are properly characterized as “jurisdictional”, Beetz J. rejected the formalistic categorization of matters into “preliminary” or “collateral” questions. Instead, he formulated what has now become the touchstone manner of

<sup>24</sup> *Ibid.*, at 441-42.

<sup>25</sup> [1988] 2 S.C.R. 1048.

<sup>26</sup> *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at para. 86, *per* Cory J.

<sup>27</sup> *Per* Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 23. Although she attributed this criticism to J.M. Evans in “Developments in Administrative Law: The 1984-85 Term” (1986), 8 S.C.L.R. 1 at 33-34, it is clear from her reasons that she shared this belief. J.M. Evans (now Evans J.A. of the Federal Court of Appeal) explains that “it proved impossible to maintain a coherent distinction between the grant and the exercise of legal authority.” See Brown and Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) (loose-leaf) at 13-14.

<sup>28</sup> *Union des employés de service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1087.

balancing Parliament's intentions as to the role of an administrative tribunal and the inherent supervisory function of the courts — a pragmatic and functional approach. In introducing a more principled view, he stated that courts should examine not only the wording of the statute, but also its purpose, and the corresponding expertise of the tribunal's members in the context of the nature of the problem to be resolved.<sup>29</sup>

### 1.2.4 A Pragmatic and Functional Approach

Since *Bibeault*, the Supreme Court of Canada has revisited this issue countless times, constantly tweaking the analysis, yet never formally abandoning the remnants of past approaches. Nevertheless, there is little doubt that Canadian law has entered a new stage in the evolution of the approach to judicial review. This stage represents a recognition that the pragmatic and functional test is appropriate, not only to determine when a matter is “jurisdictional”, but indeed to determine generally what the standard of review should be. Judicial interference or deference is now informed by a contextual and purposive view toward determining the best approach in each particular case. Thus, the pragmatic and functional analysis is now the accepted methodology for determining whether the courts' duty to adhere to the will of the legislature or its obligation to safeguard the rule of law is paramount and, consequently, for determining the applicable standard of review.

One of the most identifiable signposts marking the modern approach is found in the reasons of Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*<sup>30</sup> (“*Pushpanathan*”):

[I]t is still appropriate and helpful to speak of “jurisdictional” questions which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which “goes to jurisdiction” is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, “jurisdictional error” is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.<sup>31</sup>

The thrust of these remarks is to illustrate that “jurisdictional error” is not so much an analytical approach as a conclusory statement. The standard of review may no longer be determined solely by the formalistic categorization of questions as “preliminary” or “collateral”, by rigid classifica-

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<sup>29</sup> *Ibid.*, at 1088.

<sup>30</sup> [1998] 1 S.C.R. 982.

<sup>31</sup> *Ibid.*, at para. 28.

tion, such as errors of fact or of law, nor by conclusory labels, such as “jurisdictional”. Pinning a particular label upon the nature of the question addressed by the tribunal does little to recognize or address, let alone resolve, the fundamental issue of determining Parliament’s intention to place ultimate responsibility in the hands of the decision-maker best suited to deal with a given matter.

Evans J.A. suggested in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers (“SOCAN v. CAIP”)* that “the concept of jurisdiction can safely be abandoned as a useful determinant of the standard of review applicable to a specialist administrative agency’s interpretation or application of a provision of its enabling legislation on which the agency based its decision.”<sup>32</sup> He went on to explain that “the invocation of jurisdiction does not dispense with the need to conduct a pragmatic or functional analysis to determine the applicable standard of review.”<sup>33</sup>

However, Evans J.A. observed that the Supreme Court has not jettisoned the concept entirely, but has relegated it to being a factor in the mix.<sup>34</sup> Thus, in *Chieu v. Canada (Minister of Citizenship and Immigration)*,<sup>35</sup> the Supreme Court recently determined that, in conjunction with other considerations, the fact that the “jurisdictional” nature of the question fell outside of the expertise of the board under review militated against a deferential stance. Although the Supreme Court upheld Justice Evans’ conclusions on the issue of standard of review in *SOCAN v. CAIP*, it made no mention of his comments about the utility of “jurisdiction”.

There are valid grounds for continuing to consider the “jurisdictional” nature of the question as one of the key elements in a pragmatic and functional analysis. By remaining cognizant of this factor, it is far easier to respect the rationale underlying the interventionist approach of early British and Canadian jurisprudence — the supervisory function of the courts as “guardians of the rule of law”.<sup>36</sup> At the same time, however, an awareness of other factors in the pragmatic and functional analysis enables one to weigh the many justifications for deference, including respect for Parliament’s express or implied intention to delegate authority to administrative bodies, and acknowledgement of the expertise of the tribunal under review. However, the outcome of the analysis will not be determined solely by one consideration but by balancing all indicia of the best result in each case.

<sup>32</sup> [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.) at para. 46, rev’d in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>33</sup> *Ibid.*, at para. 47 (footnotes omitted).

<sup>34</sup> *Ibid.* (footnotes omitted).

<sup>35</sup> [2002] 1 S.C.R. 84.

<sup>36</sup> *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at para. 5.

Thus, one must be cautious in accepting too hastily jurisprudence that has merely invoked the concept of jurisdiction as the sole justification for an exacting review, without having explored the possibility that other pragmatic and functional considerations might point to a more appropriate standard. That the pragmatic and functional analysis is the courts' preferred tool in resolving the basic tension between legislative intent and safeguarding the rule of law was made explicit by the Supreme Court of Canada in *Dr. Q. v. College of Physicians and Surgeons of British Columbia* ("*Dr. Q.*"), where McLachlin C.J.C. wrote, under the heading "The Primacy of the Pragmatic and Functional Approach", that "[i]n every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach."<sup>37</sup> This is no longer in any serious doubt. With the foregoing discussion in mind, it is appropriate to turn and explore in more detail the variety of factors to be considered in a pragmatic and functional analysis.

### 1.3 PRAGMATIC AND FUNCTIONAL PRINCIPLES

In order to determine the appropriate standard of review of an administrative tribunal's decision, courts have identified several considerations. In *Bibeault*, Beetz J. suggested that one should examine "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".<sup>38</sup> In *Pushpanathan*, Bastarache clarified that the relevant factors can be divided into four categories: (i) Privative Clauses; (ii) Expertise; (iii) Purpose of the Act as a Whole and the Provision in Particular; and (iv) The "Nature of the Problem": A Question of Law or Fact?<sup>39</sup> Other courts have phrased the relevant considerations in slightly different terms,<sup>40</sup> yet the same themes inevitably arise in every

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<sup>37</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at 235, [2003] S.C.J. No. 18 (QL). See also *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL); *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.), rev'd in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL); *Halifax Longshoremen's Assn., Local 269 v. Offshore Logistics Inc.* (2000), 257 N.R. 338 (C.A.) at para. 15; *Canada (Attorney General) v. McNally Construction Inc.* (2002), 291 N.R. 139 (F.C.A.) at paras. 12-25.

<sup>38</sup> *Union des employés de service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088.

<sup>39</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38.

<sup>40</sup> See for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 61; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 28, 53; *Baker v. Canada (Minister of Citizenship and Immigration)*,

discussion, and these factors have been recently referred to as the “customary four factors”.<sup>41</sup> No list of considerations is exhaustive,<sup>42</sup> and there will always be certain factors that are paramount to others. Indeed, there will be occasions where, in the words of La Forest J., “a *mélange* of several factors” might be “so intertwined as to be most conveniently considered in one analysis”.<sup>43</sup>

However, for the purposes of this discussion, it is appropriate to segregate the relevant considerations according to the underlying roles they serve in addressing the rationales for interference or deference, highlighted at the outset of this chapter. First, an examination of the statutory provisions governing access to review enables a court to uncover direct evidence of Parliament’s intended roles for both the court and the tribunal. Second, a discussion of the purpose of the tribunal and any relevant legislation facilitates an understanding as to the reason that Parliament delegated decision-making responsibility to the tribunal. In conjunction with the third consideration, the expertise of the tribunal, this analysis informs the court’s perception of the relative strengths of the tribunal and the court to tackle the matter at issue. Finally, exploring the nature of the decision provides an opportunity to tie the analysis together by asking whether the question asked by the tribunal falls within the expertise of the tribunal. All of these factors enable a reviewing court to carry out the key task in determining the standard of review: uncovering Parliament’s intention to delegate responsibility to the decision-maker best suited to resolve an issue, given all competing considerations.

### 1.3.1 Statutory Access to Review

Through statutory language, Parliament can evince one of several intentions regarding the role of the courts in relation to an administrative tribunal. Courts often consult the language of the statute at the outset of the analysis, recognizing that the fundamental enquiry involves a search for Parliament’s intent. On one hand, the practitioner can argue that where Parliament has expressly specified its intention in a carefully drafted statutory provision, it is unnecessary for a court to look beyond the language of the legislation. On the other hand, one must be aware that courts are relying less often upon this factor as determinative of the standard of review, for two primary reasons. First, privative clauses are

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[1999] 2 S.C.R. 817 at para. 55; and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 26, [2003] S.C.J. No. 18 (QL).

<sup>41</sup> *SOCAN v. CAIP*, 2004 SCC 45, [2004] S.C.J. No. 44 (QL) at para. 48.

<sup>42</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 79, per L’Heureux-Dubé J.

<sup>43</sup> *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230 at para. 34.

sometimes ambiguous, and their effect often depends upon the characterization of the question at issue as one contemplated by Parliament to fall within the ambit of the statutory provision. Thus, determining the meaning of such a clause requires an interpretation in light of the surrounding contextual factors and policy considerations. Second, no matter how clearly drafted a clause may be, it is constitutionally impermissible for the legislative body to implement its mandate through administrative tribunals free from the superintending and reforming powers of the judiciary.<sup>44</sup> Thus, language that attempts to achieve complete judicial deference may be more than simply watered down; it may be rendered moot.

Nevertheless, in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*<sup>45</sup> (“Bradco”) Sopinka J. explained:

Legislative provisions conferring jurisdiction upon a tribunal often purport either to broaden the scope of judicial review by providing for a statutory right of appeal or to narrow it by invoking words of preclusive effect. ... The statutory provisions to be interpreted in this manner range from “true” privative clauses which clearly and specifically purport to oust all judicial review of decisions rendered by the tribunal ... to clauses which provide for a full right of appeal on any question of law or fact and which allow the reviewing court to substitute its opinion for that of the tribunal.<sup>46</sup>

Indeed, there are essentially three methods through which Parliament may provide direct indicia of its intent: privative clauses, rights to review or silence.<sup>47</sup>

### ***1.3.1.1 Privative Clauses***

The clearest indicator of the legislature’s intent that the judiciary defer to the decisions of an administrative tribunal is a privative clause. There are many incarnations of the privative clause, yet all share the common goal of insulating an administrative tribunal from review by the judiciary. In essence, having entrusted expert bodies with responsibility for implementing social or regulatory objectives, Parliament establishes privative clauses in order to thwart attempts by the judiciary to trespass on the administrative domain.

Parliament may achieve this goal in several ways, using varying language to convey the intended degree of deference in a particular circum-

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<sup>44</sup> See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

<sup>45</sup> *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316.

<sup>46</sup> *Ibid.*, at paras. 24-25 (footnotes omitted).

<sup>47</sup> See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 30-31.

stance.<sup>48</sup> Some clauses focus on the role of the administrative tribunal itself by stating that decisions are “final, binding or not subject to review”. Parliament may strengthen such a clause by conferring exclusive jurisdiction upon a tribunal to deal with certain matters. Alternatively, the legislature can achieve a similar effect by focussing on the role of the courts, for example, by removing from the courts the authority to exercise certain remedial powers and limiting their inherent supervisory function.<sup>49</sup> Arguably, these alternative formulations of Parliament’s intent are simply two sides of the same coin. “Full” or “true” privative clauses, however, address the issue of review from the perspective of both the tribunal and the courts. They utilize the strongest possible language to declare “that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded”.<sup>50</sup>

It has been suggested that slight differences in statutory language are indicative that varying degrees of deference are to be afforded to administrative tribunals.<sup>51</sup> This is certainly true with respect to full privative clauses in comparison to more weakly worded provisions.<sup>52</sup> However, in *Pasiechnyk*, Sopinka J. commented that “[w]here the legislation employs words that purport to limit review but fall short of the traditional wording of a full privative clause, it is necessary to determine whether the words were intended to have full privative effect or a lesser standard of deference.”<sup>53</sup>

<sup>48</sup> Some commentators have identified five categories of privative clauses: (i) final and binding clauses; (ii) exclusive jurisdiction clauses; (iii) no-*certiorari* clauses; (iv) full or true privative clauses; and (v) elastic jurisdiction clauses. See D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999) at 692-96.

<sup>49</sup> However, it is constitutionally impermissible for the legislature or, arguably, Parliament to entirely insulate a tribunal from review by the courts. See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220. See also Chapter 1, section 1.1.1.2 above; and J.M. Evans et al., *Administrative Law: Cases, Text, and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995) at 980-81.

<sup>50</sup> *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17.

<sup>51</sup> For example, in *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230 at para. 33, La Forest J. stated that the phrase “final and binding upon the parties” has only a “limited privative effect”, and should be contrasted with strong and explicit language such as “final and conclusive for all purposes”.

<sup>52</sup> See *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890 at para. 16, where Sopinka J. found that where a full privative clause applies, the courts’ powers of review are significantly limited. See also *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at para. 27, indicating that clauses using other language may have similar import, although “their preclusive effect may be less obvious”.

<sup>53</sup> *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17.

Although the precise language used will be influential to this enquiry,<sup>54</sup> it will not likely be determinative of the matter. Rather, the key to deciphering the legislature's intent regarding the standard of review is the context surrounding the clause itself. Thus, the interpretive exercise will be guided by other factors in the pragmatic and functional analysis. This notion led La Forest J. to qualify, in *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*<sup>55</sup> ("*Dayco*"), that "[o]ne could quibble over the distinctions between the phrases 'final and conclusive' and 'final and binding upon the parties' ... [b]ut the important point is that the driving factor ... was not the clause alone but deference to the relative expertise of the administrative tribunal over the specialized questions involved."<sup>56</sup> He further explained, "I cannot accept that courts should mechanically defer to a tribunal simply because of the presence of a 'final and binding' or 'final and conclusive' clause."<sup>57</sup> Thus, a finality clause should also be considered in the context of the type of question and the nature and expertise of the tribunal.<sup>58</sup> Generally speaking, the stronger a privative clause, the more curial deference is due;<sup>59</sup> however, as noted above, the other relevant factors in the analysis may together indicate that less deference is due, overcoming the *prima facie* strength of the "strong" privative clause.

In sum, the statutory inclusion and strength of the clause are important indicators that Parliament intended to shield a tribunal's decision from review by the judiciary. However, the privative clause is merely one indication of legislative intent, and will not constitute the sole consideration in adopting a deferential stance on review. Cases in the past that have suggested that a privative clause makes a tribunal's intra-jurisdictional decisions unassailable<sup>60</sup> must now be viewed with some scepticism, given that the modern approach requires canvassing all relevant contextual considerations.

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<sup>54</sup> See *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230 at para. 33. Note, however, that Cory J., dissenting, argued at para. 105 that "[t]o open the way to many and varied interpretations of the words of any privative clause as to whether it was more or less privative in nature can do little but encourage a proliferation of litigation and interminably delay a final resolution."

<sup>55</sup> [1993] 2 S.C.R. 230.

<sup>56</sup> *Ibid.*, at para. 33.

<sup>57</sup> *Ibid.*, at para. 40.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 27, [2003] S.C.J. No. 18 (QL).

<sup>60</sup> See, for example, *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412 at 419-20.

### 1.3.1.2 Rights to Appeal or Judicial Review

In contrast to privative clauses, statutory rights of appeal or judicial review demonstrate that Parliament intended the courts to play at least some role in a matter initially delegated to an administrative body. However, even given the most lucid of provisions, it will be difficult to determine precisely the boundaries of that role. Confusion results, in part, from the fact that Parliament creates administrative regimes to address issues that it feels a tribunal is better suited than a court to resolve, yet, at the same time, foresees the need for judicial supervision. This is not attributable to mistrust on behalf of the legislature, but rather evinces a recognition that there are some matters that either are beyond the scope of a highly specialized tribunal, or require the breadth of experience of a generalist court.

Where Parliament includes a provision expressly granting a right of review, “the appellate court enjoys jurisdiction by virtue of a statutory right of appeal. The legislative intent is clear.”<sup>61</sup> The question, however, involves the limits that an appellate court should observe in the exercise of its statutorily mandated appellate function.<sup>62</sup> In the struggle to ascertain the limits of the courts’ role, other elements of the pragmatic and functional analysis must guide the enquiry. As it was said in *Southam*:

[w]here the statute confers a right of appeal ... [t]he manner and standard of review will be determined in the way that appellate courts generally determine the posture they will take with respect to the decisions of courts below. In particular, appellate courts must have regard to the nature of the problem, to the applicable law properly interpreted in the light of its purpose, and to the expertise of the tribunal.<sup>63</sup>

Other considerations, such as the purpose of the tribunal and the polycentric nature of its decisions, will likewise bear upon a court’s interpretation of a statutory right of appeal.<sup>64</sup> Of course, the expertise of the tribunal under review will also be particularly influential.<sup>65</sup>

<sup>61</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 31.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*, at para. 32.

<sup>64</sup> See *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; and *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. See also *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

<sup>65</sup> See *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at paras. 31-32, referring to the decision in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, and *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321.

A statutory right of review can encompass either a right to appeal a tribunal's decision or, alternatively, a right to have a tribunal's decision subject to judicial review. In *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*<sup>66</sup> (“*Bell Canada*”), Gonthier J. remarked that “[i]t is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.”<sup>67</sup> This statement can be taken as indicating that courts will be less deferential on appeals than on applications for judicial review.<sup>68</sup> Indeed, the Federal Court of Appeal held that it is also trite law that more deference is warranted on judicial reviews than on statutory appeals.<sup>69</sup>

However, careful examination reveals that the broader powers of courts in appeals are typically related to the remedy available and to the record that may be considered by the reviewing court. For example, on an appeal from the decision of an administrative tribunal, the Federal Court of Appeal can “give the decision that should have been given”<sup>70</sup> but has more limited remedial powers on applications for judicial review.<sup>71</sup> One could argue, however, that these factors have little direct impact on the standard of review, particularly in the context of the *Federal Courts Act*.<sup>72</sup> In essence, these matters impact on what the court may do *after it has concluded* that the decision under review or appeal was inappropriate. This distinction does not directly affect the standard of review that will be applied to determine *whether* the decision under review or appeal was inappropriate.<sup>73</sup> Moreover, some judges have identified a “diminution of the distinctions between rights of appeal on questions of law and applications

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<sup>66</sup> [1989] 1 S.C.R. 1722.

<sup>67</sup> *Ibid.*, at 1745-46.

<sup>68</sup> Or, from the other perspective, courts will be more deferential in judicial reviews than appeals.

<sup>69</sup> See *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.* (1997), 3 T.T.R. (2d) 263, [1997] F.C.J. No. 1543 (QL) (C.A.) at para. 3.

<sup>70</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 52(c)(i). See also *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.).

<sup>71</sup> The *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(3), grants the Federal Court the power on judicial review to order a tribunal to do anything it has unlawfully failed to do, or invalidate, set aside or refer back for determination any decision or order of a federal tribunal. Subsection 28(2) grants the Court of Appeal the same powers.

<sup>72</sup> R.S.C. 1985, c. F-7.

<sup>73</sup> In the context of the Federal Court this is subject to one important caveat. On questions of fact, the *Federal Courts Act* specifies precisely the standard to be applied to the decisions of tribunals by authorizing review only where the tribunal made a finding of fact “in a perverse or capricious manner or without regard for the material before it”: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d). See section 1.3.4.4 below.

for judicial review that are not limited by a preclusive clause”.<sup>74</sup> Thus, it has become less important to distinguish between appeals and judicial reviews in the context of decisions of administrative tribunals.

It is important at this juncture to note the conceptual differences between the approach to be taken by courts on judicial review pursuant to a statutory right of appeal, and later appeals from the decision of the reviewing judge. An appeal from a trial judge is also clearly different from an appeal or judicial review from an administrative tribunal.

Furthermore, it is also important to distinguish the legal test to be applied by an administrative tribunal from the standard of review to be applied by a reviewing court. In *Dr. Q.*, a physician appealed a decision of the Inquiry Committee of the British Columbia College of Physicians and Surgeons to the British Columbia Supreme Court, pursuant to a statutory right of appeal.<sup>75</sup> The legal standard to be applied by the Inquiry Committee was whether there was “clear and cogent evidence” of wrongdoing on the part of the physician. The reviewing judge allowed the appeal after re-evaluating the evidence on this standard. The Supreme Court of Canada held that this was in error, as it was the task of the reviewing court, even on a statutory appeal, to apply the pragmatic and functional approach to determine the appropriate standard of judicial review. The legal test to be applied by the administrative decision-maker does not inform the standard to be applied by the reviewing court or instruct the reviewing court “on how to scrutinize the decision of the administrative decision-maker. This is solely a question of standard of review, to be resolved by applying the pragmatic and functional approach”.<sup>76</sup> It makes no difference whether there is a right of appeal, or a right of judicial review.

In conclusion, Bastarache J. summarized the influence of a statutory right to review concisely in *Pushpanathan* when he stated: “a clause in an Act permitting appeals ... is a factor suggesting a more searching standard of review.”<sup>77</sup> Importantly, however, this influence is minimal. In *Southam*, the Supreme Court admitted that “a broad, even unfettered right of appeal ... *perhaps* counsels a less-than-deferential posture for appellate courts.” (emphasis added)<sup>78</sup> However, courts will inevitably look beyond the right of appeal and consult other factors. It is well settled that deference may be

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<sup>74</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.), rev'd in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>75</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 18 (QL).

<sup>76</sup> *Ibid.*, at para. 19.

<sup>77</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 30.

<sup>78</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 46.

warranted in certain situations, “notwithstanding the fact that there is a statutory right of appeal and there is no privative clause”.<sup>79</sup>

### ***1.3.1.3 Silence: Default Rights***

In *Pushpanathan*, Bastarache J. noted that “[s]ome Acts will be silent or equivocal as to the intended standard of review.”<sup>80</sup> Silence is neutral, and does not, in and of itself, imply a higher standard of scrutiny.<sup>81</sup> Where the legislature is silent, the question concerns the proper inference to be drawn. One must therefore look to other sources to determine Parliament’s intent regarding the appropriate standard of review, including the purpose of the tribunal, its expertise and the nature of its decision.

However, practitioners and courts alike often overlook the additional evidence of Parliament’s intent contained in legislation addressing generally the review of administrative decisions, such as the *Federal Courts Act*.<sup>82</sup> The prevailing attitude in the jurisprudence seems to ignore the rights of judicial review under such legislation, and concentrate instead on either the absence of a privative clause or a right of review in a tribunal’s enabling statute.<sup>83</sup> Some courts, however, have taken the extreme opposite position that a right to judicial review in the *Federal Courts Act* is indicative that an entirely unique standard of review should be applied.<sup>84</sup>

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<sup>79</sup> See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 84. See also *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; and *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at para. 30.

<sup>80</sup> See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 31.

<sup>81</sup> *Ibid.*, at para. 30.

<sup>82</sup> Sections 18 and 28 expressly grant the Federal Court the exclusive jurisdiction to judicially review the decisions of all federal boards, commissions and tribunals. As D. Sgayias *et al.* note in *Federal Court Practice*, 2002 ed. (Toronto: Carswell, 2001) at 86, “[i]n most cases, judicial review will originate in the Trial Division; however, for those tribunals listed in section 28(1), it will originate in the Court of Appeal.” In relation to both s. 18 and s. 28, the powers of the court and the grounds for judicial review are dealt with in s. 18.1. In the provincial context, legislation also exists that addresses generally a right of judicial review. See for example Ontario’s *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; British Columbia’s *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; Prince Edward Island’s *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3; and Alberta’s Rules of Court, Parts 56 and 56.1.

<sup>83</sup> But see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 58, where the requirements of the *Federal Courts Act* regarding the necessity of leave to appeal, and the certification of “serious questions of general importance” suggested a lower level of deference on issues related to the certified question itself.

<sup>84</sup> In *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.* (1997), 3 T.T.R. (2d) 263, [1997] F.C.J. No. 1543 (QL), the Federal Court of Appeal

Where a tribunal's constituent legislation is silent, the review provisions of legislation such as the *Federal Courts Act* indicate Parliament's intention to leave its decisions open to review. Arguably, the statutory right of review in the *Federal Courts Act* is as instructive as a provision contained in a tribunal's enabling legislation, although the former is, admittedly, usually not crafted with a specific tribunal in mind. The Federal Court is empowered to undertake judicial review of administrative decisions solely because Parliament entrusted it with that task.<sup>85</sup> Unless it has enacted some form of privative clause, Parliament must be taken to have intended the Federal Court to act upon its delegated mandate. Therefore, silence in a tribunal's enabling legislation is not indicative that Parliament intended a tribunal's decisions to be immune from review. Perhaps, however, where either rights of appeal or privative clauses are the norm, one could draw an inference from the conspicuous absence of a provision that Parliament intended that a particular tribunal be treated differently.<sup>86</sup>

### 1.3.2 Purpose of the Tribunal and Relevant Legislation

This branch of the pragmatic and functional analysis requires the practitioner to first determine the program or objective that the tribunal in question is designed to implement. It is crucial for practitioners to distinguish between the purpose of a tribunal or statute generally, and the specific purpose of a particular provision.<sup>87</sup> As noted in *Dr. Q.*, the difference between the purpose of the governing legislation or the administrative body generally and the specific provision under review becomes important where the question under review is of a specific or legal nature. McLachlin C.J.C. wrote that “[i]f the question before the administrative body is one of law or engages a particular aspect of the legislation, the analysis under this factor must also consider the specific legislative purpose of the provision(s) implicated in the review.”<sup>88</sup> This is so because the specific question or issue on review may have implications that are either within or beyond the expertise of the administrative body, may have far-reaching legal implications, or may reflect the balancing of diverse interests beyond the scope of other provisions of the governing legislation. Often, a tribunal may have a mandate that requires it to balance a host of polycen-

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held that the statutory access to review contained in s. 18.1 suggested a degree of deference between “patent unreasonableness” and “unreasonableness”.

<sup>85</sup> The Federal Court is created pursuant to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 101.

<sup>86</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 4.

<sup>87</sup> For that reason, this factor is often addressed during a consideration of the nature of the question actually decided.

<sup>88</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 30, [2003] S.C.J. No. 18 (QL).

tric issues, yet render a decision that affects only limited and specific interests. In such circumstances, the proper focus is on the purpose of the tribunal in the context of the particular question before it.

As explained by Bastarache J., “some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance the benefits and costs for many different parties.”<sup>89</sup> Since *Pushpanathan*,<sup>90</sup> courts have characterized this consideration as the “polycentricity principle”. In that case, Bastarache J. stated:

Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes. ... Also of significance are the range of administrative responses, the fact that an administrative commission plays a “protective role” *vis-à-vis* the investing public, and that it plays a role in policy development.<sup>91</sup>

A reviewing court will afford greater deference to administrative decision-makers where the governing statute requires the decision-maker to select from a range of remedial choices or administrative responses, is aimed at the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations.<sup>92</sup> In *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, the court acknowledged that the express language of the statute itself will inform this analysis, insofar as the statute’s words can be interpreted as suggesting “polycentric” purposes.<sup>93</sup> Hence, where the governing statute directs the decision-maker to “have regard to all such circumstances as it considers relevant” or grants to the decision-maker a broad discretionary power, polycentric or “policy-laden” purposes may be evident, and a less searching standard of review is favoured.<sup>94</sup>

In essence, the more a tribunal is required to evaluate, weigh and satisfy diverging interests, the more it will be entitled to deference by the judiciary. This can be contrasted with the less deferential stance that will be taken if a “decision relates directly to the rights and interests of an

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<sup>89</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 36.

<sup>90</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

<sup>91</sup> *Ibid.*, at para. 36, citing *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

<sup>92</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 31, [2003] S.C.J. No. 18 (QL).

<sup>93</sup> [2001] 2 S.C.R. 281 at para. 57, [2001] S.C.J. No. 43.

<sup>94</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 31, [2003] S.C.J. No. 18 (QL).

individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them”.<sup>95</sup>

The nature of the rights affected by a tribunal’s decisions is also conveniently considered under the rubric of the purpose of the tribunal. Some decisions

cannot be said to impinge on constitutional or *quasi*-constitutional rights, and may therefore attract less intense judicial scrutiny than, for example, determinations made by agencies responsible for administering legislation relating to human rights or refugee status.<sup>96</sup>

Generally, where economic or property rights, rather than constitutional or human rights, are at issue, less deference will be warranted. This is not only because the latter rights are perceived to require greater safeguarding by the courts, but also because questions concerning the latter type of rights are more often squarely within the expertise of the judiciary.

Indeed, the purpose of an administrative tribunal and relevant legislation is intimately linked with the concept of expertise. Often, because of its lack of specialized expertise, an appellate court is likely to encounter difficulties in understanding the ramifications of a tribunal’s decisions and consequently be less able to secure the fulfilment of the purpose and goals of the legislation the tribunal was intended to implement.<sup>97</sup>

### 1.3.3 Expertise of the Tribunal

In *Southam*, Iacobucci J. explained that the expertise of the tribunal “overlaps with the purpose of the statute that the tribunal administers”.<sup>98</sup> The impact of a tribunal’s expertise is clear and simple:

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.<sup>99</sup>

Although the influence of expertise in the overall analysis is unmistakable, determining whether a decision-maker should or should not be considered an “expert” is sometimes difficult. One should begin with

<sup>95</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 60.

<sup>96</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.), rev’d in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>97</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 49.

<sup>98</sup> *Ibid.*, at para. 50.

<sup>99</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 32.

awareness that it is more appropriate to consider the expertise of the institution or statutory body, than the personal expertise of a specific decision-maker.<sup>100</sup> Moreover, the Supreme Court has emphasized that expertise is inevitably a relative consideration.<sup>101</sup> The fundamental question is not whether a tribunal is ideally suited to resolve a matter, but instead whether the court or the tribunal is better suited to address a particular issue. In the words of McLachlin C.J.C. in *Dr. Q.*, “[g]reater deference will be called for only where the decision-making body is, in some way, *more expert than the courts* and the question under consideration is one that *falls within the scope of this greater expertise*”<sup>102</sup> (emphasis in original).

Because the search for legislative intent is paramount in the analysis, a tribunal’s constituent legislation will be of primary importance to an analysis of expertise. The clearest indication of expertise will be a clause dictating that members of a tribunal must possess certain qualifications or background experience. One may also infer expertise from various other provisions of an enabling statute. The constituent statute, in mandating the membership and constitution of the tribunal, will often advert to Parliament’s intention by populating the tribunal with decision-makers drawn from a pool of individuals well versed in the issues at which legislation is aimed.

Many of the relevant influences were concisely summarized in the following statement of Evans J.A.:

In short, the claim that the Board possesses the kind of expertise that attracts judicial deference is supported by its independence, permanent nature, the legal and other expertise available to it, its participatory procedures and the broad discretion conferred on it.<sup>103</sup>

For example, one might be able to infer from the processes in place to select decision-makers, that they will be expert in a given area. Where a tribunal is constituted from persons nominated by the parties to the dispute, they may be expected to have knowledge that can be used to

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<sup>100</sup> Since reference to expertise is justified in principle by the search for the legislature’s intention, albeit implicit, one should confine the enquiry to the statute itself. But see, for example, *University of Alberta v. Assn. of the Academic Staff of the University of Alberta*, [2002] 7 W.W.R. 204, [2002] A.J. No. 515 (QL) at para. 17, where the Alberta Court of Appeal held that it was appropriate to consider the personal expertise of an arbitrator; and *Maliseet Nation at Tobique v. Bear* (1999), 178 F.T.R. 121 at para. 22, where a similar conclusion was reached.

<sup>101</sup> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 33.

<sup>102</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 28, [2003] S.C.J. No. 18 (QL).

<sup>103</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.) at para. 76, rev’d in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

assist in decision-making.<sup>104</sup> In addition, where a tribunal's rules governing hearings, submissions, testimony, evidence and other participatory procedures resemble those of the courts, not only is its claim of relative expertise strengthened, but also, the likelihood of reaching an unacceptable result is diminished. In some cases, permanent tribunals may be entitled to more deference than decision-makers appointed on an *ad hoc* basis, because institutional bodies have a greater opportunity to accumulate experience. Of course, this proposition depends upon the expertise of the members of the pool from which decision-makers are drawn.<sup>105</sup> One might generalize, however, that permanent bodies are more often struck to address polycentric issues, whereas decision-makers might be more likely to be appointed *ad hoc* where their decisions affect individual rights disputes.

Expertise may also be the result of the contextual sensitivity of the decision-maker. In the words of L'Heureux-Dubé J.:

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.<sup>106</sup>

Thus, courts may indirectly consider the impact of actual expertise, rather than statutorily deemed or inferred expertise. This recognizes that the acumen of some tribunals may simply be the result of dealing with certain issues on a regular basis. Importantly, however, courts and practitioners alike should be careful not to assume that a tribunal possesses expertise simply because the issues may seem complex or even overwhelming. Nor should one assume that simply because a matter falls within the jurisdiction of an administrative tribunal, the tribunal is automatically better suited than the court to resolve the issue. The Supreme Court of Canada's qualification in *Dr. Q.* that an administrative tribunal, no matter how expert, is only entitled to deference on those matters that fall within its expertise is of the utmost importance. Thus, one must examine the nature of the question decided with a view to determining whether the tribunal drew upon its unique expertise. If so, deference is warranted. If not, courts may be justified to intervene.

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<sup>104</sup> See, for example, *Budhai v. Canada (Attorney General)* (2002), 216 D.L.R. (4th) 594, [2002] F.C.J. No. 1089 (QL) (C.A.) at para. 34.

<sup>105</sup> See, for example, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185, [2001] F.C.J. No. 455 (QL) (C.A.) at paras. 69-70, where the Court underlined the importance of a judicial member on a panel of the Competition Tribunal as it relates to expertise in matters of law.

<sup>106</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 598, *per* L'Heureux-Dubé J.

### 1.3.4 Nature of the Question

In appellate review of judicial decisions, the nature of the question — that is, fact, law — or mixed fact and law, is generally determinative of the appropriate standard of review of a trial judge’s decision by the appeal court. However, as has been discussed throughout this text, the conceptual framework governing review of administrative decisions is fundamentally different. The “nature of the question” is but one of the four customary factors to be considered in determining the appropriate level of deference to be granted by the reviewing court.<sup>107</sup>

Still, the nature of the question to be decided by a tribunal is the thread that ties the pragmatic and functional analysis together. Only where the nature of the decision made by a specialized tribunal is in accordance with its purpose and expertise will the courts afford deference. The more these concepts overlap, the more deference is appropriate. The further removed a decision is from a tribunal’s core purpose and the less obvious the correlation between the nature of the decision and a tribunal’s expertise, the less deference is warranted. Courts have spoken of this concept in terms of whether a question is within a tribunal’s “home territory”,<sup>108</sup> or whether the matter involves “shared space”<sup>109</sup> with the courts. Regardless of the language used to describe this notion, it is arguably the most crucial aspect of the pragmatic and functional analysis.

#### 1.3.4.1 Jurisdictional Questions

Jurisdictional questions relate to the assumption of delegated power. They are primarily concerned with whether a tribunal has the power to make a particular decision. Simply put, where the tribunal assumes power outside its statutory purview, it commits an error. A jurisdictional analysis, it follows, is one going to the legality (or *vires*) of the tribunal’s exercise of power, as opposed to the merits behind that exercise.

The judiciary’s assessment of a tribunal’s jurisdiction is a complex undertaking where statutory language, policy considerations and competing constitutional directives must be balanced. This difficulty has led to considerable judicial debate over the treatment of administrative decisions concerning “jurisdictional” questions.<sup>110</sup> Although the standard of review

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<sup>107</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 33, [2003] S.C.J. No. 18 (QL).

<sup>108</sup> *Alberta Union of Provincial Employees v. Olds College*, [1982] 1 S.C.R. 923 at 931, *per* Laskin C.J.C.

<sup>109</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.) at para. 87, *rev’d* in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>110</sup> See section 1.2 above.

applicable to such decisions may not have changed, the methodology for justifying that standard certainly has. That is, the classification of a question as one of “jurisdiction” is no longer determinative of the standard of review, but rather is seen as a conclusory description of an issue that a tribunal must decide correctly.<sup>111</sup> The “jurisdictional” nature of the question is but one of several factors to be considered by a reviewing court.<sup>112</sup>

Of course, it is unlikely that other pragmatic and functional considerations would point overwhelmingly toward a deferential standard of review. For example, the nature of a “jurisdictional” question is such that it is, in essence, a question of law implicating complex constitutional principles, which is usually beyond the expertise of administrative bodies. Even in the rare situation where one could identify the legislature’s intention to grant a tribunal uninhibited authority to determine the boundaries of its own power, the court’s constitutional mandate as guardian of the rule of law would likely outweigh the legislature’s intent.

If it is even possible to easily identify a statutory provision as “jurisdiction-conferring”, the concept may still be helpful,<sup>113</sup> for it is still true that where a tribunal interprets its constituent statute incorrectly and assumes the power to take action, the judiciary will likely intervene. However, the analysis is better served by reference to the principles underlying review for “jurisdictional” error than by invoking a formalistic label.

#### 1.3.4.2 Questions of Law

In the course of resolving a dispute, an administrative tribunal may be called upon to rule on a question of law, either by interpreting a statutory provision or by distilling a common law principle. Broadly speaking, questions of law concern the selection of the appropriate legal test.<sup>114</sup> Once a matter has been characterized as a question of law, it is necessary to determine how, in light of other functional considerations, this factor influences the standard of review. Questions of law are not necessarily reviewed for correctness and courts may afford deference to the decision of an administrative tribunal.<sup>115</sup> As expressed by L’Heureux-Dubé J. in

<sup>111</sup> See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 28; *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.) at paras. 46-47, rev’d in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL). See generally Chapter 1, section 1.2.4 above.

<sup>112</sup> *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84.

<sup>113</sup> See D.J. Mullan, *Administrative Law* (Irwin Law, 2001) at Chapter 3.

<sup>114</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35.

<sup>115</sup> See *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *United Brotherhood of Carpenters and Joiners of America*,

*Baker v. Canada (Minister of Citizenship and Immigration)*, “standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference and others entitled to less.”<sup>116</sup> Though an issue of “pure law” will weigh in favour of a more searching, or less deferential, standard of review,<sup>117</sup> the appropriate degree of deference depends, in part, upon deeper scrutiny of the nature of the question.

For one, the practitioner should query whether the question of law is of a general or “special” nature. Courts will more readily interfere with decisions on matters of general law because the rule of law demands that legal rights and obligations only be affected by the law as determined by the “ordinary” courts.<sup>118</sup> This is especially so where the statute in question is one of general application, and where issues or litigation under the statute is generally heard before the courts, and not the tribunal.<sup>119</sup> Related to this notion is the principle that where a tribunal addresses a legal issue that is not limited by the facts of the case before it, or is likely to have a precedential effect, review for correctness is the norm.<sup>120</sup> Thus, courts must ensure predictability in the legal system by clearly establishing the laws to which individuals are subject.

Questions of general law typically include the interpretation of constitutional rights, the common law and statutes other than a tribunal’s enabling legislation or other provisions it is specifically empowered to deal with. However, simply because the interpretative exercise arises in the context of a tribunal’s constituent legislation does not mean that the question is not one of general law. Key indicators that the question is one of general rather than “special” law, are whether the dispute is one that may come before the courts in other contexts, and whether the question is one of legal significance beyond the scope of the narrow question before the tribunal.<sup>121</sup>

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*Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; and *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

<sup>116</sup> [1999] 2 S.C.R. 817 at para. 55.

<sup>117</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 34, [2003] S.C.J. No. 18 (QL).

<sup>118</sup> See section 1.1.1.2 above.

<sup>119</sup> *SOCAN v. CAIP*, 2004 SCC 45, [2004] S.C.J. No. 44 (QL) at para. 49.

<sup>120</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 36-37.

<sup>121</sup> See *SOCAN v. CAIP*, 2004 SCC 45, [2004] S.C.J. No. 44 (QL) at para. 49, where the issue was the legal determination of whether an infringement of copyright had occurred within Canada, a point of legal significance “far beyond” the Copyright Board’s mandate in that case to determine an appropriate royalty tariff.

On questions of “special law”, an administrative tribunal is usually operating in its “home territory”.<sup>122</sup> On questions of general law, however, it cannot be said that the tribunal “occupies the field”, but rather “shares space” with the courts in deciding the question.<sup>123</sup> The distinction is hinged on the unique perspective of the tribunal with respect to that issue. It follows that the characterization of a question of law as general or “special” cannot be divorced from an assessment of the expertise of the tribunal and the legislature’s expression of the tribunal’s exclusive jurisdiction in privative clauses. Questions of “special” law involve matters specific and familiar to the administrative tribunal under review.

On such questions, a court will not necessarily interfere with the administrative decision-maker, especially where the provision being interpreted is ambiguous. Rather, deference recognizes that the institutional attributes of an administrative tribunal place it in a better position than the generalist courts to resolve ambiguities in the statutory text. Nevertheless, a court may still intervene on the premise that administrative “tunnel-vision” has produced an interpretation that is more the result of the blind pursuit of legislative goals than of an objective and rational interpretation of the legislature’s intent.

#### ***1.3.4.3 Questions of Mixed Fact and Law***

Questions of mixed fact and law involve the application of a statutory provision or legal principle to the facts of a case. The administrative tribunal will be required to decide whether the facts satisfy the legal test selected in the interpretative process.<sup>124</sup> The distinction between application and interpretation of a statutory provision, however, may not always be readily apparent. An example helps illustrate the concept:

In the law of tort, the question what “negligence” means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.<sup>125</sup>

It follows that questions of mixed fact and law are of narrower import than pure questions of law, given the nexus between law and the

<sup>122</sup> *Alberta Union of Provincial Employees v. of Olds College*, [1982] 1 S.C.R. 923 at 931; *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230 at para. 19.

<sup>123</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) (C.A.) at para. 87, rev’d in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>124</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35.

<sup>125</sup> *Ibid.*

particular facts of the case. Decisions on such matters typically involve an assessment of the facts and the weight to be assigned to items introduced into evidence.

The degree of curial deference to questions of mixed fact and law will depend on the characterization of the question as being more fact-intensive, in which case greater deference is called for, or more law-intensive, in which case less deference will be granted.<sup>126</sup> The key is therefore to determine whether the legal principle decided by the tribunal is readily extricable from the factual components of the matter. If so, the legal aspects of the decision can be adjudged on a standard of correctness, as such a standard is favoured where the question is one of “pure” statutory interpretation.

If, however, the legal and factual components are truly inextricable, or if the tribunal applied the proper legal test, more deference will be warranted. Judicial intervention is less clearly mandated where the tribunal is “merely” applying the statute to the facts before it, which is a question of mixed fact and law.<sup>127</sup> Thus, where the decision is neither purely legal nor purely factual, a court might require the administrative tribunal to reach a “reasonable” decision.<sup>128</sup> Reviewing courts will be generally reluctant to venture into a re-examination of the conclusions of the tribunal on such questions.<sup>129</sup>

#### ***1.3.4.4 Questions of Fact and Inferences from Facts***

Pure questions of fact are often easily identifiable. Bluntly stated, questions of fact are questions about what actually took place between the parties.<sup>130</sup> They “require making a conclusion of fact based on a set of facts”.<sup>131</sup> Sometimes, however, what does not appear initially to be a question of fact may be treated as one. For example, a question of mixed fact and law will be regarded as a question of fact unless the decision-maker

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<sup>126</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 34, [2003] S.C.J. No. 18 (QL); *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at para. 26.

<sup>127</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35; *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL) at para. 81, rev'd in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 44 (QL).

<sup>128</sup> *SOCAN v. CAIP*, [2002] 4 F.C. 3, [2002] F.C.J. No. 691 (QL), rev'd in part on other grounds 2004 SCC 45, [2004] S.C.J. No. 94 (QL).

<sup>129</sup> *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at para. 38.

<sup>130</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35. See also *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at para. 101.

<sup>131</sup> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at para. 26.

“made some extricable error in principle with respect to the characterization of the standard or its application”.<sup>132</sup>

Once identified, questions of fact are generally granted broad judicial deference. However, there are various ways of labelling the standard of review typically applied to factual findings, depending on the context in which the decision under review was made. In the context of appeals from a trial judge, courts have deemed the standard of review to be “palpable and overriding error”.<sup>133</sup> When reviewing administrative tribunals, courts sometimes speak of review for “patently unreasonable” error. Pursuant to the *Federal Courts Act*, however, a federal administrative tribunal’s findings of fact are only reviewable if made “in a perverse or capricious manner or without regard for the material before it”.<sup>134</sup> Whether there is any substantive difference will be discussed below.

This deferential approach to findings of fact has been justified in the appellate context on three grounds: limiting the number, length and cost of appeals, promoting the autonomy and integrity of trial proceedings, and recognizing the expertise of the trial judge and his or her advantageous position.<sup>135</sup> The same justifications apply equally, if not more so, to judicial review of findings of fact from administrative bodies, especially where the tribunal is expressly designed to facilitate the efficient and expedient resolution of disputes.

Confusion may arise in the context of decisions relying on inferences from facts, rather than direct findings of fact. The Supreme Court of Canada stated in *Housen* that “to apply a lower [less deferential] standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.”<sup>136</sup> However, in *Gould v. Yukon Order of Pioneers*, it was said that “where the issue is not the facts themselves but rather the inferences to be drawn from agreed facts, the policy considerations which ordinarily militate in favour of deference ... are significantly attenuated.”<sup>137</sup>

<sup>132</sup> *Ibid.*, at para. 37.

<sup>133</sup> See *Stein v. “Kathy K” (The)*, [1976] 2 S.C.R. 802 at 808; and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at para. 10.

<sup>134</sup> *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.1(4)(d). This is a somewhat unique example of a situation where Parliament has expressly stated its intention as to the proper standard of review.

<sup>135</sup> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at paras. 15-18.

<sup>136</sup> *Ibid.*, at para. 19, per Iacobucci and Major JJ. The Court also cited *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 388-89, per Wilson J.; *Palsky v. Humphrey*, [1964] S.C.R. 580 at 583; *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 426, per La Forest J.; and *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114.

<sup>137</sup> *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 4.

The statement in *Gould* was justified by noting that the administrative board heard no evidence since it was all in written submissions presented entirely by admission and agreement.<sup>138</sup> Since the tribunal did not rely on its opportunity to observe witnesses first-hand or did not assess credibility, Iacobucci J. in *Gould* felt that the primary rationale for deference was not present.<sup>139</sup> However, it is difficult to reconcile this distinction with the comments of the majority of the Supreme Court in *Housen* that, “[t]he essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.”<sup>140</sup> In *Housen*, the Court identified a host of rationales, in addition to the ability to observe witnesses and assess credibility, that supported a deferential stance toward inferences of fact.<sup>141</sup> Thus, assuming that the same rationales apply to both trial judges and administrative tribunals,<sup>142</sup> it appears that the comments in *Gould* no longer apply and that there is currently no distinction in the approach toward findings of fact and inferences of fact.

### ***1.3.4.5 Discretionary Decisions***

There are some issues that are not readily characterized as questions of law, fact, or mixed fact and law. These may be classified as “discretionary” in nature and involve, in essence, an active choice on the part of the decision-maker to choose one course of action over another in light of all the circumstances. The concept of discretion refers to decisions where the law does not dictate a specific outcome or where the tribunal is given a choice of options within a statutorily imposed set of boundaries.<sup>143</sup> There can be no precise dichotomy between “discretionary” decisions, on one hand, and “non-discretionary” decisions, on the other; the discretion to be exercised in each case is a matter of degree. Most decisions incorporate

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<sup>138</sup> *Ibid.*

<sup>139</sup> See also the minority decision in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL).

<sup>140</sup> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 (QL) at para. 24.

<sup>141</sup> *Ibid.*, at para. 25:

Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge’s relative expertise with respect to the weighing and assessing of evidence, and the trial judge’s inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both.

<sup>142</sup> See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 647.

<sup>143</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 52.

some degree of discretion, as in deciding the appropriate remedy or the weight to be attributed to a particular item of evidence.<sup>144</sup>

Traditionally, where a tribunal has exercised or failed to exercise its discretion to choose one or more possible courses of action, such decisions may only be reviewed on limited grounds.<sup>145</sup> This approach has been linked to judicial respect for the legislature's conferral of discretion on the tribunal, provided that the tribunal acts within its statutory mandate.<sup>146</sup> Jurisdictional limits on the exercise of discretion are not the sole limitations, however, since:

discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038).<sup>147</sup>

In *Baker*, the Supreme Court of Canada adopted a pragmatic and functional approach to determine the degree of curial deference appropriate to administrative discretion.<sup>148</sup> Thus, the Supreme Court confirmed the applicability of the standard of review analysis beyond traditional concerns regarding the *vires* of administrative decision-making. The Supreme Court acknowledged that

[t]he spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament.<sup>149</sup>

It follows that the Supreme Court of Canada has not so much replaced the traditional approach to administrative discretion as it has informed the analysis with further relevant factors. The pragmatic and

<sup>144</sup> Many of the decisions that are more easily classified as "purely discretionary" are in the nature of ministerial discretion: see, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84.

<sup>145</sup> Examples of such grounds include the bad faith of decision-makers, the exercise of discretion for an improper purpose and the use of irrelevant considerations. See *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 7-8.

<sup>146</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 55; applied in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at 35-36; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at para. 22.

<sup>149</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 55.

functional approach is the most accurate descriptor of the legislature's intent, since it considers the language of the statute, the expertise of the tribunal and the host of other factors that influence the analysis. Indeed, the judiciary "can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options".<sup>150</sup>

#### ***1.3.4.6 Denials of Procedural Fairness or Natural Justice***<sup>151</sup>

Often, administrative tribunals are granted extensive powers to grant or limit a citizen's rights to undertake some action or receive some benefit. Importantly, an administrative tribunal cannot impose restrictions on those rights without doing so fairly, especially where the administrative tribunal's decision affects an individual personally.<sup>152</sup> The existence of a general duty to "act fairly" is premised on three considerations: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.<sup>153</sup>

The duty of procedural fairness is most often concerned with the level of participation afforded to the citizen by the tribunal in the decision-making process. The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances, since the concept of procedural fairness is "eminently variable and its content is to be decided in the specific context of each case".<sup>154</sup> The nature and extent of the duty to act fairly will depend on a number of factors, including: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; the importance of the decision to the individual affected; the legitimate expectations of the

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<sup>150</sup> *Ibid.*, at para. 56.

<sup>151</sup> The terms are used interchangeably. At one time, a duty of procedural fairness was said to apply to administrative tribunals, while "natural justice" applied to judicial and quasi-judicial bodies. The distinction continued due to the inclusion in the *Federal Courts Act*, R.S.C. 1985, c. F-7, of disparate standards of review for quasi-judicial and administrative decisions. In *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at 629, Dickson J. (as he then was) stated: "In general, courts ought not to seek to distinguish between the two concepts, for the drawing of a distinction between a duty to act fairly, and a duty to act in accordance with the rules of natural justice, yields an unwieldy conceptual framework." Given that Parliament has repealed all references to the distinction in the *Federal Courts Act*, Dickson J.'s approach is applied herein.

<sup>152</sup> See *Cooper v. Wandsworth Board of Works* (1863), 143 E.R. 414 (C.P.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

<sup>153</sup> *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 24.

<sup>154</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 21 (citing *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 682).

person challenging the decision; and the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures or when the tribunal has an expertise in determining what procedures are appropriate in the circumstances.<sup>155</sup> The resultant requirements of the duty to act fairly may include, *inter alia*, the right to be represented by counsel; to make submissions; to call witnesses; to respond to adverse evidence; or to receive reasons for the tribunal's decision. Further, principles of natural justice may impose obligations on the decision-maker to act without undue delay, to provide means for discovery or to hold oral hearings.

Once the scope of the duty of fairness is determined, that duty cannot be "reasonably" breached; a tribunal cannot "reasonably" deny natural justice. This has led some commentators to suggest that the spectrum of review does not apply to principles of natural justice.<sup>156</sup> Although it is true that the usual concepts and language associated with a standards of review analysis may not apply as readily to an analysis of procedural fairness, the flexibility inherent in a contextual approach, and the rationale underlying the pragmatic and functional analysis, do fit well with the principles of natural justice. In particular, determining the scope of a duty of fairness is often a complex undertaking involving a careful cost-benefit analysis by administrative decision-makers. Moreover, the duty of fairness is often couched in discretionary language. In reviewing such decisions, courts should be aware that Parliament may have intended to afford some flexibility to administrative tribunals in determining the procedures that best reflect both their needs and the goals of the legislation they were established to implement.

#### 1.4 THE SPECTRUM OF STANDARDS

The Supreme Court of Canada's unanimous decision in *Pezim v. British Columbia (Superintendent of Brokers)*<sup>157</sup> first articulated one of the most important developments in standards of review jurisprudence: the concept of a "spectrum of standards of review".<sup>158</sup> Iacobucci J. wrote,

<sup>155</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 22-27.

<sup>156</sup> D.P. Jones and A.S. de Villars note in *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999) that although the concept might "resonate with the concept of a spectrum of standard of review ... this standard does not really fit along the spectrum identified by the Court. ... The language of natural justice is simply different from the language of 'correctness' or 'reasonableness' or any points in between".

<sup>157</sup> [1994] 2 S.C.R. 557.

<sup>158</sup> D.P. Jones and A.S. de Villars note in *Principles of Administrative Law*, 3rd ed. (Toronto: Carswell, 1999) at 476 that the credit actually belongs to Kerans J.A. of the Alberta Court of Appeal in *Alberta (Workers' Compensation Board, Appeals Commission) v. Penny* (1993), 12 Alta. L.R. (3d) 238.

“[h]aving regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness.”<sup>159</sup> The articulation by the Court of this “spectrum” was essential for the evolution of standard of review analysis. By moving away from an approach that forced courts to review decisions on the basis of rigid boxes of “correct” or “not patently unreasonable” decisions, the Court allowed for the development of additional standards of review.<sup>160</sup> More flexibility seemed appropriate for the myriad of administrative decision-makers that come before the courts, either by way of appeal or by way of judicial review.

Until the decisions in *Law Society of New Brunswick v. Ryan*<sup>161</sup> (“*Ryan*”) and *Dr. Q.*,<sup>162</sup> which were released together in April 2003, the Supreme Court of Canada’s jurisprudence on the “spectrum” of standards did not foreclose the possibility of the development of numerous standards of review. In *Ryan*, the court unequivocally stated that there were only three recognized standards of review of administrative action: correctness, reasonableness and patent unreasonableness.<sup>163</sup>

Iacobucci J., writing for the Court in *Ryan*, resolved the confusion arising from the “spectrum of standards” metaphor by acknowledging that the spectrum concept related to a continuum of deference, but noted that the metaphor “was never meant to suggest an infinite number of possible standards”.<sup>164</sup> The three standards of review, it follows, are definite points lying on a spectrum of deference, which provokes “deferential self-discipline” on the part of the reviewing court. If the standards could “float” through infinite levels of deference, the discipline necessary for rationalized judicial review could be lost.<sup>165</sup> In these circumstances, Iacobucci J. concluded that it is “difficult, if not impracticable” to conceive of more than the three customary standards of review; further, though additional standards may someday be appropriate, new standards of review should not be developed until such time as issues arise to which the three existing standards are “obviously unsuited”.<sup>166</sup>

The Supreme Court’s decision in *Ryan* therefore limits the recognized standards of review to correctness, reasonableness and patent

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<sup>159</sup> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para. 62.

<sup>160</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 57.

<sup>161</sup> [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL).

<sup>162</sup> *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, [2003] S.C.J. No. 18 (QL).

<sup>163</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 20.

<sup>164</sup> *Ibid.*, at para. 45.

<sup>165</sup> *Ibid.*, at para. 46.

<sup>166</sup> *Ibid.*, at para. 24.

unreasonableness. However, as there had been relatively little jurisprudence regarding the development of alternative standards, the *Ryan* decision appears to simply freeze the law of the “spectrum” of standards in place until new standards can be shown to be necessary and appropriate.

### 1.4.1 Points on the Spectrum

The Supreme Court has thus recognized only three distinct points on the spectrum moving from more to less deference: “patent unreasonableness”, “reasonableness *simpliciter*” and “correctness”. In sum, if a pragmatic and functional analysis indicates that no deference at all should be afforded to a tribunal’s decision, the court will review that decision for “correctness”. If, however, some deference should be afforded, the question becomes, how much? Broad deference is given by reviewing for a “patently unreasonable” decision, while less deference is given by reviewing a decision for “reasonableness”.

#### 1.4.1.1 Correctness

Review of a decision for “correctness” is the most invasive standard of review. In essence, the court will give no judicial deference to the decision of an administrative tribunal. Courts have spent little time attempting to explain what “correctness” means since, unlike the other standards, it is a relatively intuitive term. Errors in this context are simply considered to be issues where the court concludes that the tribunal was incorrect. The fundamental question that must be dealt with by a court applying a standard of correctness is its agreement or disagreement with the decision of the tribunal.<sup>167</sup> Where a decision is reviewed for correctness, it will be overturned if the court disagrees with that decision. A court’s disagreement will not necessarily result in the decision being overturned where it is reviewed on other standards. Consequently, decision-makers reviewed on this standard do not have the “right to be wrong”.

The effect of review for “correctness” should be contrasted with review for “patent unreasonableness” or “reasonableness”. Where a tribunal is required to reach the correct result, it is incumbent upon the court to determine the correct result. When undertaking a correctness review, the court may apply its own reasoning process to arrive at a result it judges to be correct.<sup>168</sup> Therefore, in such cases, the court will itself arrive at the

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<sup>167</sup> J.B. Hall, “Judicial Review: Three Standards Not Two, Deliberative Secrecy & Other Developments”, paper presented at 14th annual Council of Canadian Administrative Tribunals (CCAT) Conference, May 31, 1998, available at [http://www.ccat-ctac.org/en/conferences/docs/1998\\_Hall.pdf](http://www.ccat-ctac.org/en/conferences/docs/1998_Hall.pdf).

<sup>168</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 50.

only correct result and will set a binding precedent to be followed by administrative decision-makers and lower courts in future cases.<sup>169</sup> There can be only a “single right answer” to the questions under review.<sup>170</sup> Thus, some decision-makers are not entitled to disagree as to, for example, the proper interpretation of a statute.

### ***1.4.1.2 Patent Unreasonableness***

The standard of “patent unreasonableness” lies at the most deferential end of the spectrum. However, courts may interfere with “patently unreasonable” decisions. Intervention in such cases is premised on the foundation that Parliament could not have authorized a tribunal to act in a patently unreasonable manner without violating the rule of law. Hence, the error makes the tribunal’s decision either *ultra vires* or contrary to fundamental constitutional principles. In any event, a patently unreasonable decision is one that is “so flawed that no amount of curial deference can justify letting it stand”.<sup>171</sup>

The jurisprudence contains various attempts to articulate the meaning of this term, and its interpretation seems to change with the circumstances.<sup>172</sup> Perhaps the most oft-quoted definition of this standard was provided by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada* (“PSAC, 1993”):

It is said that it is difficult to know what “patently unreasonable” means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary “patently”, an adverb, is defined as “openly, evidently, clearly”. “Unreasonable” is defined as “[n]ot having the faculty of reason; irrational. ... Not acting in accordance with reason or good sense”. Thus, based on the dictionary definition of the words “patently unreasonable”, it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.<sup>173</sup>

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<sup>169</sup> *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers’ Assn.* (2001), 56 O.R. (3d) 85 at para. 29 (C.A.).

<sup>170</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 51.

<sup>171</sup> *Ibid.*, at para. 52.

<sup>172</sup> One judge has noted that the definition “appears to vary with the degree of judicial intervention contemplated by the court”: *Kindersley Co-operative Assn. Ltd. v. Retail, Wholesale and Department Store Union* (1996), 151 Sask. R. 112 (Q.B.) at para. 15.

<sup>173</sup> [1993] 1 S.C.R. 941 at 963-64.

This statement continues to form the basis of the concept of patent unreasonableness. Indeed, as recognized in *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*,<sup>174</sup> the Supreme Court of Canada has, on several occasions, defined the content of the patent unreasonableness standard of review as a “clearly irrational error”. In *Ryan*, the Supreme Court expanded on Cory J.’s definition by noting that a patently unreasonable defect, “once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective”.<sup>175</sup>

The Supreme Court has also considered in a number of decisions the circumstances that render a decision of an administrative body “patently unreasonable”.<sup>176</sup> However, as noted by Cory J. in *Toronto (City) Board of Education v. Ontario Secondary School Teachers’ Federation, District 15*,<sup>177</sup> the test has been articulated somewhat differently for findings of fact and conclusions of law. When a tribunal is interpreting a legislative provision, Cory J. adopted the test from *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp. (C.U.P.E.)*, where the Supreme Court asked, “was the Board’s interpretation so patently unreasonable that its construction cannot rationally be supported by the relevant legislation and demands judicial intervention by the court upon review?”<sup>178</sup> On the other hand, when reviewing a tribunal’s findings of fact or “the inferences made on the basis of the evidence”, Cory J. outlined the test for intervention by the reviewing court as “where the evidence, viewed reasonably, is incapable of supporting a tribunal’s findings of fact”.<sup>179</sup>

LeBel J., in two dissenting opinions, has indicated that the problems of definition may be taken as indicators that the patent unreasonableness standard is inadequate, and provides little guidance to reviewing courts.<sup>180</sup> In any event, all of the presently accepted tests are strict<sup>181</sup> and the very

<sup>174</sup> [2001] 2 S.C.R. 565 at para. 33.

<sup>175</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 52.

<sup>176</sup> Cory J. recognized this in *Toronto (City) Board of Education v. Ontario Secondary School Teachers’ Federation, District 15*, [1997] 1 S.C.R. 487 at para. 41.

<sup>177</sup> *Ibid.*

<sup>178</sup> [1979] 2 S.C.R. 227 at 237.

<sup>179</sup> *Toronto (City) Board of Education v. Ontario Secondary School Teachers’ Federation, District 15*, [1997] 1 S.C.R. 487 at para. 45, citing *W.W. Lester (1978) Ltd. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644.

<sup>180</sup> *Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92*, [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL); see also LeBel J.’s reasons for decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL).

<sup>181</sup> *Toronto (City) Board of Education v. Ontario Secondary School Teachers’ Federation, District 15*, [1997] 1 S.C.R. 487 at para. 46.

high standard will not be easily met.<sup>182</sup> Regardless of the subtleties in the definition of the standard, the obviousness and the severity of the error make a decision “patently unreasonable”. On one hand, the standard of “patent unreasonableness” might be viewed as a reference to the magnitude of the error underlying the decision. This led Beetz J. to describe a patently unreasonable error as a “fraud on the law”.<sup>183</sup> Hence, not only is a “patently unreasonable” decision considered wrong, it is considered irrational and so egregious as to mandate judicial intervention despite any indicia that Parliament intended deference to be accorded.

On the other hand, the obviousness of the error is also a relevant consideration. As Cory J. explained, “patently” means “openly, evidently, clearly”.<sup>184</sup> As noted in *Ryan*, a patently unreasonable defect is susceptible of a simple and easy explanation, and does not require “significant searching or testing.”<sup>185</sup> Indeed, this aspect of the standard most easily distinguishes a “patently unreasonable” decision from one that is merely “unreasonable”. In a decision that does not withstand review for “patently unreasonable” error, one will not have to look far to uncover the flaw in a decision-maker’s reasoning. The Supreme Court of Canada described this notion in *Canada (Director of Investigation and Research) v. Southam Inc.* as follows:

This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem ... But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.<sup>186</sup>

In *Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92*,<sup>187</sup> Major J., writing for the majority, tweaked the definition of patent unreasonableness and somewhat limited its application. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. Moreover, by its nature, the application of the standard of patent unreasonableness will be rare. A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where

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<sup>182</sup> *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079 at para. 61.

<sup>183</sup> *Syndicat des employés de production du Québec et de l’Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412 at 420.

<sup>184</sup> *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673 at 690.

<sup>185</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 52.

<sup>186</sup> [1997] 1 S.C.R. 748 at para. 57.

<sup>187</sup> [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL).

that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.<sup>188</sup>

The effect of applying the “patent unreasonableness” standard is to forbid intervention by a court simply because it disagrees with the tribunal’s reasoning or because it would have reached a different conclusion.<sup>189</sup> That a decision would have been overturned by most appellate judges does not render it patently unreasonable. As Sopinka J. noted in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*:

[T]he court will defer even if the interpretation given by the tribunal to the collective agreement is not the “right” interpretation in the court’s view nor even the “best” of two possible interpretations, so long as it is an interpretation rationally attributable to the words of the agreement.<sup>190</sup>

When a decision is reviewed for “patent unreasonableness” the court does not decide whether the award was the only possible award or even the best possible award. In such cases, the court is only dealing with the decision being reviewed. It remains open for a different decision-maker to come to a different conclusion, provided that this subsequent conclusion is also “not patently unreasonable”.<sup>191</sup>

In *Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92*,<sup>192</sup> LeBel J. questioned the utility of the patent unreasonableness standard, and put the “conceptual validity” of the standard in issue. LeBel J.’s reasons for decision pose the question: if, on any standard other than correctness, the court is ultimately concerned with preventing irrational decisions from standing, then of what use is the patent unreasonableness standard? Will not a “reasonableness” standard suffice? These questions are discussed in greater detail in the following section.

<sup>188</sup> *Ibid.*, at para. 18.

<sup>189</sup> *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079 at para. 62.

<sup>190</sup> [1993] 2 S.C.R. 316 at 340-41.

<sup>191</sup> The Ontario Court of Appeal found that different arbitrators, interpreting identical legislation and virtually identical collective agreements, could come to different decisions, both of which could stand as not “patently unreasonable”. See *Essex County Roman Catholic School Board v. Ontario English Catholic Teachers’ Assn.* (2001), 56 O.R. (3d) 85 (C.A.) and *Ontario English Catholic Teachers’ Assn. v. Lanark, Leeds and Grenville County Roman Catholic Separate School Board* (1998), 164 D.L.R. (4th) 429.

<sup>192</sup> [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL); see also LeBel J.’s reasons for decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL).

### 1.4.1.3 Reasonableness *Simpliciter*

In the past, a reviewing court could only apply a standard of either “patent unreasonableness” or “correctness” to the decision of an administrative tribunal. However, applying the concept of the “spectrum” introduced in *Pezim v. British Columbia (Superintendent of Brokers)*,<sup>193</sup> the Supreme Court of Canada in *Southam*<sup>194</sup> articulated the standard of review of “reasonableness *simpliciter*”. This standard may also be referred to as “reasonableness” or, from the opposite perspective, “unreasonableness”.<sup>195</sup> It was conceived by the Court to be a middle standard, falling somewhere between the most deferential standard of “patent unreasonableness” and the least deferential standard of “correctness”.<sup>196</sup>

In *Ryan*, it was argued before the Supreme Court of Canada that the reasonableness standard occupied the middle ground between correctness and patent unreasonableness, and could “float” to varying points on a continuum of lesser or greater deference, depending on the circumstances of the case. This argument was based on the “spectrum” metaphor arising from the decision in *Pezim*. In response to this argument, Iacobucci J. wrote for the Court that

[i]f 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.<sup>197</sup>

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<sup>193</sup> [1994] 2 S.C.R. 557.

<sup>194</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 57.

<sup>195</sup> Indeed, speaking of this middle standard in the negative (that is, “unreasonableness”) makes the analysis much clearer. By using consistent language, one can more easily identify the difference between the standard of “patent unreasonableness” and “reasonableness *simpliciter*”. Some judges have suggested that “unreasonableness” is a distinct fourth standard of review, commenting that the “[a]ppropriate standard of review ... is somewhere between ‘reasonableness *simpliciter*’ and ‘patent unreasonableness’, in a portion of the spectrum that might be described as ‘unreasonableness’ or ‘unreasonableness *simpliciter*’”: *Trainor v. Canada (Attorney General)* (April 18, 2000), File No. T-1759-99 (F.C.T.D.), [2000] F.C.J. No. 503 (QL). However, it is obvious from *Southam* itself that the Supreme Court of Canada views “reasonableness” and “unreasonableness” as two sides of the same coin, not as distinct standards: see *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-58. The lesson is that it is advisable to use, whenever possible, consistent language to avoid confusion.

<sup>196</sup> J.B. Hall, “Judicial Review: Three Standards Not Two, Deliberative Secrecy & Other Developments”, paper presented at 14th annual Council of Canadian Administrative Tribunals (CCAT) Conference, May 31, 1998, available at [http://www.ccat-ctac.org/en/conferences/docs/1998\\_Hall.pdf](http://www.ccat-ctac.org/en/conferences/docs/1998_Hall.pdf).

<sup>197</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 44.

It is often not easy to distinguish a “patently unreasonable” decision from an “unreasonable” decision. However, Iacobucci J. explained the difference as follows in *Southam*:

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.<sup>198</sup>

It has been said that the question to be asked when reviewing a decision for “unreasonableness” is whether the decision can be “supported by any reasons that can stand up to a somewhat probing examination”.<sup>199</sup> To determine whether any reasons support the decision, courts should be aware that “[t]he defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.”<sup>200</sup> A court cannot intervene merely because it would have reached a different conclusion.

Iacobucci J., writing for the Court in *Ryan*, adverted to his previous reasons for decision in *Southam*, and articulated the test to be applied on a reasonableness standard as follows:

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. ... 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.<sup>201</sup>

The differences between the standards of reasonableness and correctness are obvious. When deciding whether a decision was unreasonable, the reviewing court should never query whether that decision was correct, nor even ask itself what the correct decision is, or should have been; the standard of reasonableness gives effect to the legislative intention to grant to the decision-maker the primary responsibility to decide the issue in accordance with its own process and for its own reasons. Consequently,

<sup>198</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 57.

<sup>199</sup> *Ibid.*, at para. 56.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17 (QL) at para. 55.

“there will often be no single right answer to the questions that are under review against the standard of reasonableness.”<sup>202</sup>

The obviousness and magnitude of an error may also help explain the difference between “patent unreasonableness” and “reasonableness *simpliciter*”. As discussed above, a “patently unreasonable” decision can be labelled as “irrational”. If there is no logical basis for the decision, it will be immediately obvious to the observer that the decision cannot stand. An “unreasonable” decision, however, falls short of “irrational”. The decision will have some basis in logic, albeit flawed. Yet because there is some foundation for the decision, it is necessary to examine the evidence, inferences and logical conclusions before it is possible to ascertain whether the decision was “reasonable”. Hence, unlike review for “patently unreasonable” error, a “somewhat probing examination” or even “significant searching or testing” is required to determine whether a decision meets the standard of “reasonableness *simpliciter*”.<sup>203</sup>

The effect of a standard of “unreasonableness” is quite similar to that of “patent unreasonableness”, however, as neither results in a binding substantive decision by the reviewing court. Each decision under review is examined by the court on its own merits and assessed individually as to whether it is “unreasonable”. Thus, just as in the case of decisions that are “not patently unreasonable”, different decision-makers may reach different conclusions on the same question, yet neither is necessarily “unreasonable”.

It is partly for this reason — namely, that the effect of the patent unreasonableness and reasonableness *simpliciter* standards is ultimately the same — that LeBel J. has questioned the conceptual validity of the patent unreasonableness standard. In *Voice Construction*,<sup>204</sup> LeBel J. advocates for the return of the original definition of patent unreasonableness as explained by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* a decision will only be patently unreasonable if it “cannot be rationally supported by the relevant legislation”.<sup>205</sup> LeBel J. also argues that it is time for the Court to re-evaluate the appropriateness of using the patent unreasonableness and reasonableness *simpliciter* standards. Patent unreasonableness, he writes, is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness

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<sup>202</sup> *Ibid.*, at paras. 50-51.

<sup>203</sup> *Ibid.*, at paras. 48 and 53; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 56-57.

<sup>204</sup> *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL) at para. 41; see also LeBel J.'s reasons for decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL).

<sup>205</sup> [1979] 2 S.C.R. 227 at 237.

*simpliciter*.<sup>206</sup> In essence, he would use the old definition set out above as the definition of a new standard of deference to the decision-maker. If the tribunal's decision can be rationally supported by its governing statute, then it will be allowed to stand. Conversely, as under either of the reasonableness or patent unreasonableness standards, an irrational decision will not be permitted to stand.

It remains to be seen whether the Supreme Court will move from three standards to two, especially given the fact that in *Alberta Union of Provincial Employees v. Lethbridge Community College*,<sup>207</sup> the latest decision analyzing the standard of review, a unanimous Court restated that the three standards still existed.

#### ***1.4.1.4 The Development of Other Standards of Review***

While it appears that standards beyond the three discussed above will not likely be recognized by the Supreme Court of Canada, until such time as additional standards are proven necessary and appropriate, courts have referred in the past to other standards of review along the spectrum. In light of the jurisprudence discussed above, and most notably *Ryan*, these cases must be viewed and utilized with some caution.

Some courts have merely interpreted already existing standards as representing new points on the spectrum,<sup>208</sup> or marked new points with existing labels, depending on one's interpretation. Others have applied a new standard without a precise label. For example, in *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.*,<sup>209</sup> the Federal Court of Appeal articulated a fourth standard of review for certain decisions of the Canadian International Trade Tribunal. The Court reasoned that while the Tribunal was to be viewed as an expert body, Parliament had not protected its decisions with a true privative clause, but instead had provided a right to apply for judicial review pursuant to the *Federal Courts Act*.<sup>210</sup> The Court stated:

<sup>206</sup> *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, [2004] S.C.J. No. 2 (QL) at para. 40.

<sup>207</sup> [2004] 1 S.C.R. 727, [2004] S.C.J. No. 24 (QL).

<sup>208</sup> In *Trainor v. Canada (Attorney General)* (2000), 188 F.T.R. 77, [2000] F.C.J. No. 503 (QL), the Federal Court Trial Division reviewed an application for judicial review of a decision of the Veterans Review and Appeal Board. In determining the appropriate standard of review, it was said (at para. 9) that on the spectrum the "appropriate standard of review ... is somewhere between 'reasonableness *simpliciter*' and 'patent unreasonableness', in a portion of the spectrum that might be described as 'unreasonableness' or 'unreasonableness *simpliciter*'".

<sup>209</sup> (1997), 3 T.T.R. (2d) 263, [1997] F.C.J. No. 1543 (QL) (F.C.A.).

<sup>210</sup> R.S.C. 1985, c. F-7.

[T]here is a fourth standard of review that falls between reasonableness *simpliciter* and patent unreasonableness which is reserved for those cases where a decision has been rendered by an expert tribunal on an issue within its field of expertise and has arrived at a higher Court by way of application for judicial review. This fourth standard of review requires more deference to a tribunal's findings than that given to expert tribunals containing a statutory right of appeal but slightly less deference than that given to tribunals protected by a true private clause.<sup>211</sup>

Whether the access to judicial review contained in the *Federal Courts Act* is indicative of an entirely unique standard of review or is merely a factor that militates in favour of one of the standards already recognized by the Supreme Court is no longer debatable, unless it can be shown that the existing standards are obviously unsuitable. One would be wise, therefore, to use language that recognizes the three points on the spectrum of deference as articulated by the Supreme Court.

#### **1.4.2 Standards of Review and the *Federal Courts Act***

Under subsection 18.1(4) of the *Federal Courts Act*, administrative decisions may be challenged on a number of grounds. In particular, Parliament has expressly stated that alleged errors of fact are only reviewable if made in a “perverse or capricious manner or without regard for the material before it”. Sometimes, the fact that Parliament has expressly stated the applicable standard of review of findings of fact in subsection 18.1(4) is either overlooked or completely ignored.<sup>212</sup> Often, however, Federal Court decisions contain attempts to define and apply “perverse and capricious” and “without regard for the material before it”. In doing so, the Federal Court of Appeal has taken the language found at paragraph 18.1.(4)(d) and translated it into the spectrum of standards acknowledged above.<sup>213</sup> One should be aware of the perils of such attempts, however, and bear in mind the following comments of Evans J.A. in *Stelco Inc. v. British Steel Canada Inc.*:

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<sup>211</sup> *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.* (1997), 3 T.T.R. (2d) 263, [1997] F.C.J. No. 1543 (QL) (C.A.) at para. 3.

<sup>212</sup> See, for example, *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 68, per L'Heureux-Dubé J. (dissenting).

<sup>213</sup> The Federal Court noted as early as 1995 in *Stelco Inc. v. Canada (Canadian International Trade Tribunal)* (May 23, 1995), Appeal No. A-360-93 (F.C.A.), [1995] F.C.J. No. 831 (QL) (F.C.A.) at para. 2, that there was no practical difference between the standard in s. 18.1.(4)(d) and the standard of patent unreasonableness. This has been subsequently adopted in other Federal Court of Appeal decisions such as *Jaworski v. Canada (Attorney General)* (2000), 255 N.R. 167 (F.C.A.) at para. 72, application for leave to appeal to S.C.C. dismissed January 25, 2001; *Canadian Pasta Manufacturers' Assn. v. Aurora Importing & Distributing Ltd.* (1997), 208 N.R. 329 (F.C.A.) at paras. 6-7; and *Stadnyk v. Canada (Employment and Immigration Commission)* (2000), 257 N.R. 385 (F.C.A.) at para. 22.

It does not seem to advance matters appreciably to try to determine whether this equates to a “patently unreasonable” or an “unreasonable *simpliciter*” standard. Indeed, there is a danger that an inquiry of that kind may serve to divert the Court’s attention from a careful consideration of the words in which Parliament has formulated the standard of review for the factual findings on which federal administrative tribunals base their decisions.

However, this is not to say that the words of paragraph 18.1(4)(d) are self-applying. Far from it. It is certainly useful to approach the question of giving more specific content to the statutory language by considering the common law standard for reviewing findings of fact and the factors that are included in a pragmatic or functional analysis.<sup>214</sup>

In response to the increasing complexity of the pragmatic and functional approach to standards of review, British Columbia recently enacted the *Administrative Tribunals Act*.<sup>215</sup> The standard of review of most major tribunals in B.C. is now codified in section 58 or 59 of the Act, apparently eliminating the need to conduct a pragmatic and functional analysis to determine the standard of review intended by the legislator. This legislation has yet to be tested in the courts. However, if it is successful in B.C., it is conceivable that such an approach could eventually govern the standards of review for administrative tribunals in the federal sphere also. For now, statutory instructions are found only in the *Federal Courts Act*, or in particular tribunals’ enabling legislation.

## 1.5 CONCLUSIONS ON THE FOUNDATION OF STANDARDS OF REVIEW

Reviewing courts are torn between their supervisory function as independent guardians of the rule of law and their respect for the will of a legislature to delegate decision-making responsibility to administrative tribunals. Therein lies the tension between judicial interference with and deference to administrative decision-makers. The Canadian approach to resolving this tension has evolved in four distinct stages. The modern approach is to conduct a pragmatic and functional analysis to determine the best standard of review in each case. This principled and contextual analysis is flexible, but will inevitably consider influences such as the statutory language surrounding access to review, the purpose of the tribunal and its constituent legislation, the expertise of the tribunal and the nature of the question decided. Based on the outcome of this analysis, courts will apply a spectrum of judicial deference, with three defined standards ranging from “correctness” to “patent unreasonableness”, with

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<sup>214</sup> [2000] 3 F.C. 282 (C.A.) at paras. 15-16.

<sup>215</sup> S.B.C. 2004, c. 45.

“unreasonableness” lying somewhere in the middle. Further standards may be developed, but only where the application of the three recognized standards is “obviously unsuitable”.