CAN A TRIBUNAL DECISION BE SUBJECT TO MORE THAN ONE REVIEW STANDARD – THE SO-CALLED SEGMENTATION ISSUE

by Justice Stéphane Sansfaçon, Quebec Superior Court.

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The topic that I have decided to tackle today has to do with reviewing the state of the jurisprudence of the Supreme Court of Canada in order to see if there is still a door left open on the question of the number of applicable standards of review that may be applied to a single case.

Of course, such an exercise is always perilous, as we judges are not well versed in reading crystal balls. Also, one must keep in mind that as I involved myself in this exercise, I was not too sure to where it would lead me. Nonetheless, I thought it would be interesting to look into that question.

So, the question at hand is not in how to decide which standard of review should be applied by the reviewing court, but rather, based on past Supreme Court decisions, when does it become necessary or appropriate to apply more than one standard of review?

The idea that a case at bar may present more than one single question and that each such question would call for its own standard of review, is certainly not new. For example, as early as 2003, Lebel, J. in *Toronto (City) v. C.U.P.E., Local 79*,[1] hinted at that possibility.

As we will see, there certainly are drawbacks to situations where a reviewing judge applies both standards, and possibly more than once, in a single decision under review, the least of which being that it adds a certain degree of complexity to the task,

[1] [2003] 3 SCR 77, 2003 SCC 63.

and that, the more questions there are to be reviewed, the more possibilities of intervention by the reviewing tribunal into the decision of the specialized administrative body there are.

► *Mouvement laïque québécois v. Saguenay (City)*

In April 2015 in *Mouvement laïque québécois v. Saguenay (City)*,[2] the Supreme Court was seized of an appeal from the Quebec Appeal Court that had judicially reviewed a prior decision by the Human Rights Tribunal, a tribunal created under the *Quebec Charter* whose expertise relates mainly to cases involving discrimination.[3] The Human Right Tribunal had concluded that the mayor of the City of Saguenay had infringed on a citizen's religious rights by reciting a prayer at the opening of every public council meeting.

- *Justice Gascon*

Justice Gascon, writing for the majority, in deciding what standards of review were applicable to the case, writes that "*the choice of the applicable standard depends primarily on the nature of the questions that have been raised, which is why it is important to identify those questions correctly*", citing *Mowat* and *Khosa,*[4] although in these decisions, the Supreme Court was talking about the importance of identifying the question raised and not particularly about the possibility that more than one question could be raised.

Justice Gascon adds that "*Deference is in order where the Tribunal acts within its specialized area of expertise, interprets the Quebec Charter and applies that charter's provisions to the facts to determine whether a complainant has been discriminated against*", and that, on judicial review of a decision of a specialized administrative

2 2015 SCC 16.
3 ss. 71, 111 and 111.1 of the *Quebec Charter.*
4 *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at para 21 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339.

tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness,[5] in which situations "*deference should normally be shown*".

However, he writes, this presumption can sometimes be rebutted, such as when it is found that the tribunal was granted concurrent and non-exclusive jurisdiction on the point of law in dispute, or "*where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise*" [6].

According to majority opinion, in that instance, one question of law of importance to the legal system was raised: the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*. Therefore, the correctness review standard was to be applied to that issue.

So, was that correctness standard of review to be applied to the whole decision of the Tribunal?

The answer of the majority to that question is negative: that standard was to be applied to that specific "*question of law of importance to the legal system*", and not to the other questions raised before the administrative tribunal, such as whether that specific prayer was religious in nature, to the extent to which the prayer interfered with the complainant's freedom, to the question pertaining to the qualifications of the experts that testified before the Human Rights Tribunal, and to the assessment of the probative value of their testimony, all questions also in review that, according to the Supreme Court, fell squarely within the Tribunal's area of expertise but were not general questions of law of importance to the legal system.

In other words, the majority of judges of the Supreme Court reiterate that there may very well be more than one question to be analyzed by the reviewing tribunal, and that

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5 At para 46.
6 At para 46, citing *Dunsmuir*.

each one of these questions may be reviewed under its own distinct standard of review, so that both correctness and reasonableness standards of review can, and will, be used, maybe even (some will say and worse!) more than once.

Therein lies the importance of correctly identifying the questions raised before us. We will come back to that later.

- *Justice Abella*

That there could be more than one standard of review per decision was not to the liking of all judges or the Supreme Court in the *Saguenay* decision.

Justice Abella writes a twofold loud dissenting opinion on that very topic in her concurring reasons, expressing her concerns: that principled and sustainable foundation for reviewing tribunal decisions would disappear and that decisions such as the one by the majority would equate to having "*thrown out Dunsmuir's baby with the bathwater*".[7]

Firstly, she criticizes the majority's reasoning on their finding that the scope of the city's duty of religious neutrality that flows from that *Charter* should be analyzed under the scope of the correctness standard, for if that question was indeed a general question of law that was of importance to the legal system, it did not meet the second requirement formulated in *Dunsmuir*,[8] that the question must also fall outside the specialized administrative tribunal's area of expertise.

It is, however, the second fold of Justice Abella comments that are of interest to this presentation.

Although she concurs with the majority on its conclusions, she rejects the use of different standards of review for each different aspect of a decision, citing two prior

7 At para 173.
8 2008 SCC 9, [2008] 1 SCR 190.

decisions by the Supreme Court, *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*,[9] where the Court had expressly rejected the proposition that a decision of a tribunal can be broken into its many component parts and reviewed under multiple standards of review, and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,[10] where it wrote that the reasons of a specialized tribunal must be read as a whole to determine whether the result is reasonable.

In respect to the exercise made by the majority to separate one of the questions of law from the other questions at hand, she uses the words "*dissect*",[11] "*excavate*",[12] "*extricate*"[13] and "*atomise*",[14] as in having to "*excavate the decision to find and separately scrutinize aspects of the tribunal's discrimination analysis that might be of central importance to the legal system*"[15] and "*We have never dissected the right in order to subject its components to different levels of scrutiny*".[16]

She then put forwards the dreaded questions, the ones reviewing judges all fear: "*How many components found to be reasonable or correct will it take to trump those found to be unreasonable or incorrect? Can an overall finding of reasonableness or correctness ever be justified if one of the components has been found to be unreasonable or incorrect?*".[17]

► *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*

The second, and most recent, decision by the Supreme Court on that issue was rendered last November in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,[18] where the majority of judges once again decided that there may be more than one

9 2007 SCC 15, [2007] 1 SCR 650.
10 2011 SCC 62, [2011] 3 SCR 708.
11 At para 170.
12 At para 171.
13 At para 168.
14 At para 172.
15 At para 171.
16 At para 170.
17 At para 173.
18 2015 SCC 57.

question to be analyzed by the reviewing tribunal, each under its own standard of review.

- *Justice Rothstein*

Justice Rothstein wrote for the majority. The decision under review was one by the Copyright Board, a specialized tribunal that was called upon to decide whether the sections of the *Copyright Act* applied to broadcast-incidental copies made by the CBC, which would force it to apply and pay for a licence for every CBC's broadcast-incidental copying to SODRAC, a collective society organized to manage the reproduction rights of its members. If these questions put to the Copyright Board were questions of law, then it would be presumed that the decisions the Board were to receive deference because it was then interpreting or applying its home statute.

As it had already decided in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,[19] the Supreme Court writes that that presumption was here rebutted because of the "*unusual statutory scheme under which the Board and the court may each have to consider the same legal question* [*under the* Copyright Act] *at first instance*".[20] Thus, the standard of correctness applied to these issues.

However, as to the other questions put to the Copyright Board, because they involved the interpretation of the licences, and because that contractual interpretation involved issues of mixed fact and law, the standard of reasonableness applied when reviewing the Board's determination,[21] as well as to the Board's decision establishing the monetary value of a broadcast-incidental copying licence, it is the standard of reasonableness that would be applied.[22] That same standard of review was also to be applied to three more questions, but for other reasons that are outside the scope of this presentation.

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19 2012 SCC 35, [2012] 2 SCR 283, at para 15.
20 At para 35.
21 At para 36.
22 At para 37.

- *Justice Abella*

Here again, justice Abella writes a dissenting and colorful opinion. Once again, as in *Saguenay*, she suggests that the court should seek to identify what the main issue is in order to decide which standard of review should be used.

In her view, that central issue was whether the Copyright Board ought to have imposed royalty fees on the CBC for the creation of the incidental copies that arise as a technical part of the digital broadcasting process. That being the question at the heart of the Copyright Board's specialized mandate, it should have been reviewed on the reasonableness standard.

On the decision of the majority, she offers the following comments:[23]

> Why apply reasonableness? Here we come yet again to this Court's prodigal child, the standard of review. Too much obfuscation has already cluttered the journey, but while I hesitate to add words to an already overcrowded space, I have concerns that the majority has created yet another confusing fork in the road.

She then goes on with what she qualifies as the "*latest movement in Rothstein J.' shifting tectonic reviewing plates – extricating the various aspects of a tribunal's decision for their own individual standard of review analysis – [which] creates even more confusion in an area of jurisprudence already burdened by too many exceptions*".[24]

She adds that justice Rothstein' decision to identify no less than five separate issues, each of which would attract its own discrete standard of review analysis, takes judicial review "*through the Looking Glass*"[25] and "*further erodes the careful framework the Court endorsed in* Dunsmuir *[…], and risks creating an unworkable template for the*

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23 At para 185.
24 At para 190.
25 At para 187.

judicial review of administrative decision-making",[26] adding that it "*may lead to absurd results*", for "*Reviewing courts will be left to wonder just how many unreasonable or incorrect components of a decision it takes to warrant judicial intervention*".[27]

Justice Rothstein's reply to justice Abella comments is short: her objections are the same as those she had raised the year before in *Saguenay*. He writes that *Saguenay* is now the controlling authority and that, on the issue of standard of review, all there is to do, and therefore all he does, is apply *Saguenay* to his reason.

One may wonder if the end result would have been the same had justice Abella's approach – one standard of review for it all – had been applied by the majority of the judges of the Supreme Court in *Mouvement laïque québécois v. Saguenay (City)* and in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*: would the correctness standard of review or rather the reasonable one have been applied?

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Here is an example of a judgment where several questions called for the application of both standards of review.

Last November in *Université McGill v. McGill University Non Academic Certified Association (MUNACA)*,[28] the Quebec Court of Appeal confirmed a judgment of the Quebec Superior Court that had annulled a decision of a grievance arbitrator, who had declared himself without jurisdiction to hear a grievance.

In Quebec, as in other provinces, the law provides for a complete program on compensation for employment injuries. If no improvement of the state of health of the injured worker is foreseeable, the CSST will determine a "*suitable employment*" for the employee, which is defined as an "*appropriate employment that allows a worker who*

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26 At para 189.
27 At para 190.
28 2015 QCCA 1943.

has suffered an employment injury to use his remaining ability to work and his vocational qualifications, that he has a reasonable chance of obtaining […]".

If the employer cannot offer such "*suitable employment*", it may fire the employee, in which case the CSST will determine what is called the "*equivalent employment*" the employee could occupy somewhere else on the market, and compensate him or her consequently.

At McGill University, the collective agreement provided that, contrary to the rule provided by the Act,[29] and if asked for by the employee, McGill was to be provided a position even if such position did not qualify as ~~a~~ "suitable employment", that is, even if such position called for much less than his remaining ability to work and his vocational qualifications.[30]

The injured employee asked McGill to be placed in such a position. McGill refused, arguing that that position was less than the "suitable employment" that had already been determined by the CSST and that the CSST was the only one authorised by law to determine what was an appropriate position for the injured employee. The grievance arbitrator accepted McGill's argument and declared himself without jurisdiction to decide if the employer was to give him that position.

Here lay the following questions as put to the reviewing judge:

1. Can a collective agreement include such a provision that would be more favourable to the employee? If yes, who, between the CSST and the

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[29] s. 4 of the Act Respecting Industrial Accident and Occupational Diseases, CQLR, c. A-3.001, provides that: *This act is a public Act. Notwithstanding the first paragraph, any covenant or any agreement or order giving effect thereto may provide more favorably for a worker than does this act.* s. 4 of the Act Respecting Occupational Health and Safety, CQLR, c. S-2.1, provides for a similar provision.

[30] The collective agreement contained the following section: "*An employee who becomes able to work, but who remains afflicted by a permanent functional disability that prevents him or her from occupying the position they previously held, is placed, without any posting, in another position that their state of health allows them to occupy, taking into consideration the available positions that need to be filled*".

arbitrator, has jurisdiction to determine the state of health of the injured worker and his or her “suitable employment”?

2. If a positive answer is given to the first aspect, who will decide if the collective agreement provides more favourably for the injured worker, and how to decide upon it?

Justice Marie-France Bich, writing for the Court of Appeal, refers to Justice Gascon’s comments in *Saguenay* and decides that each of these questions must be addressed separately and must be analysed under different glasses, that is, under its own review standard.[31]

Because the first aspect was in regard to the jurisdictional lines between two or more competing specialized tribunals, she writes that it was subjected to review under the correctness standard, as it was decided in *Dunsmuir v. New Brunswick*[32] and *Canadian National Railway Co. v. Canada (Attorney General).*[33]

As to the second aspect, because it involved questions of facts, it fell into the arbitrator’s specialized domain, for which he possessed a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime of collective agreements. Therefore, it is the reasonableness standard of review that was to be applied.

► ***Food for thought***

So what are we to learn from these most recent decisions of the Supreme Court?

Firstly, it now seems relatively established that a judicial review may present itself under more than one angle, that is, that it may call for the application of both standards.

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31 At para 25.
32 2008 SCC 9, [2008] 1 SCR 190, at para 61
33 2014 SCC 40, [2014] 2 SCR 135, at para 59.

However, the Supreme Court has also in the recent past said that a decision under review "*should be approached as an organic whole, without a line-by-line treasure hunt for error*",[34] that "*a reviewing court [should not] undertake two discrete analyses one for the reasons and a separate one for the result*" and that "*the reasons must be read together with the outcome*".[35]

These remarks were themselves echoing similar previous ones made almost ten years earlier by Lebel, J. in *Toronto (City) v. C.U.P.E., Local 79*, in which he wrote of the rarity of such situations as he then foresaw:

> 75. The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case [references omitted]. This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.
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> 76. However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

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34 *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, Abella, J., at para 54.

35 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, Abella, J., at para 14.

Ten years later, it looks like that situation will present itself more often than Lebel, J. had envisioned.

Will Lebel's more "integral" approach to the adjudicator's decision, and Abella, J.'s discending point of view, be one day adopted by the majority of the judges of the Supreme Court? Remember in 2003 when, in *Toronto (City) v. C.U.P.E., Local 79* (Lebel, J. and Deschamp, J., discending on that issue), at the same time that the Supreme Court wrote that there were three standards of review and even hinted that there could be even more, Lebel, J. argued unsuccessfully with his colleagues that there should be only two such standards, only to come back in force years later to win his point in *Dunsmuir*?

So, is that door still open today?

Secondly, assuming that the reasonableness standard presents a greater degree of difficulty than the correctness standard to the party asking for the decision to be reviewed, the presiding judge should be vigilant to the fact that lawyers wishing to represent their clients as best as possible, could be inclined to divide the litigation under review into more than the number of issues the case really warrants.

Similarly, lawyers may formulate the question at bar in such a way as to extricate from it the facts of the case, so as to make it appear to be a pure question of law. In *Khosa*,[36] Justice Binnie wrote that "*Reasonableness is a single standard that takes its colour from the context*". We may therefore encounter situations where the context will have been removed from the question as presented so as to make it appear to be a pure question of law, which would open the door to the argument that it is a general one that is of central importance to the legal system and, why not again, one that is outside the specialized area of expertise of the tribunal.

[36] At para 59.

In other words, we may face situations where the aspiring party will subdivide, craft and cut and paste the questions in dispute in such a way as to make one of them fall under the correctness category, whereas it should not.

One must therefore be careful not to take for granted the formulation of the questions at hand as presented by the parties when that question as written would normally call for the application of the correctness standard, especially if that question is dubbed by the petitioner to be a preliminary matter.[37]

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[37] *C.U.P.E. v. Liquor Corporation*, [1979] 2 SCR 227, p. 232-4.