Advanced Judicial Seminar on Administrative Law

Dunsmuir on Life Support: Will There Ever Be Light at the End of the Tunnel?

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REASONABLENESS OR CORRECTNESS PART TWO – WHAT IS THE STANDARD OF REVIEW TO BE APPLIED TO ISSUES OF PROCEDURAL FAIRNESS

1. INTRODUCTION

It was suggested that the law on the standard for reviewing questions of procedural fairness is currently unsettled, creating a "jurisprudential muddle".[1]

Recent appellate court decisions in Canada have in fact applied three different standards to review questions of procedural fairness: no standard – the question being whether the procedures are fair in the circumstances; the correctness standard; and the reasonableness standard, considering that procedural questions are within the discretionary authority of administrative bodies.

This paper will review the genesis, the development and the application of the procedural fairness review framework in the Supreme Court of Canada. The paper will then review recent Canadian appellate decisions on the question, including in the Federal Court of Appeal, where a lively debate is ongoing.

The paper will attempt to address whether, from a judicial policy perspective, the law is ripe for a change on the standard for reviewing questions of procedural fairness.

2. NATURAL JUSTICE AND PROCEDURAL FAIRNESS – AN EVOLUTION

Traditionally at common law, natural justice required that administrative tribunals reach their decision in a way that is procedurally fair.[2]

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[1] *Bergeron v. Canada (Attorney General)*, 2015 FCA 160, para. 71 (leave to appeal dismissed in *Bergeron v. Canada (Attorney General)*, [2015] S.C.C.A. No. 438).

[2] David JONES and Anne de VILLARS, *Principles of Administrative Law*, 5th Edition, Toronto, Carswell, 2009, page 208.

Natural justice comprises to main sub-rules: *audi alteram partem* – the person must know the case being made against him and be given an opportunity to respond – or the right to be heard; and *nemo judex in sua causa* – no one should be a judge in his own cause – or the rule against bias.[3]

A breach of natural justice was considered a jurisdictional error, thus voiding the decision which could be set aside by way of certiorari, or preventively attacked by way of prohibition.[4]

Procedural fairness, which developed later, is a more flexible concept. The content of the duty of procedural fairness is variable and depends on the circumstances. Natural justice and procedural have the same roots,[5] and procedural fairness rights are essentially a subset of natural justice rights.

For example, procedural fairness comprises certain sub-rights to the right to be heard, which may or may not find application, depending on the nature of the decision and the functions of the administrative body[6] – right to notice, right to a hearing, right to make submissions, right to counsel, right to examine and cross-examine witnesses,[7] right to reasons.[8]

Procedural fairness also comprises the rule against bias,[9] applied with flexibility on a spectrum depending on the nature of the administrative body. At one end, adjudicative tribunals expected to comply with the impartiality standard applicable to courts of justice. At the other end, a more lenient standard will apply to boards with policy making functions.[10] A middle standard may find application, for example in the case of investigative bodies.[11]

In the United Kingdom in the 1960's, the House of Lords essentially erased the distinction between quasi-judicial and administrative proceedings for the application of a "duty to act fairly".[12]

Those developments did not immediately permeate in Canada. Until the late 1970's in Canada, the rules of natural justice were only applicable if the

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[3] *Ibid.*, page 210.
[4] *Ibid.*, page 209.
[5] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, para. 25.
[6] *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602, page 630 (Dickson J.).
[7] David JONES and Anne de VILLARS, *Principles of Administrative Law*, supra, note 2, pages 253 ff.
[8] On the right to reasons, see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708.
[9] David JONES and Anne de VILLARS, *Principles of Administrative Law*, supra, note 2, pages 395 ff.
[10] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.
[11] *Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 F.C.R. 527 (F.C.A.), para. 27.
[12] *Ridge c. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.); *R. v. Gaming Board for Great Britain*, [1970] 2 Q.B. 417 (Eng. C.A.); David JONES and Anne de VILLARS, *Principles of Administrative Law*, supra, note 2, pages 217 to 223.

administrative body could be qualified as judicial or quasi-judicial.[13] Powers qualified as "executive", such as ministerial expropriation decisions, were not subject to the requirements of natural justice.[14]

An important shift to broaden the scope of the duty to act fairly in Canada came in 1979 with the decision of the Supreme Court in *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*.[15] That case concerned the dismissal of a police constable by a Board of Commissioner of Police without notice.

In that case, the Supreme Court abolished the distinctions between quasi-judicial and administrative decision makers,[16] and recognized a general duty of fairness applicable not only to quasi-judicial bodies, but also in the executive and more broadly in the administrative fields.[17]

In *Cardinal v. Director of Kent Institution*, the Supreme Court expanded on this point in the correctional law context, stating that "there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".[18]

Gradually, the Supreme Court developed factors for the determination of the existence and content of the duty of fairness.

In *Knight v. Indian Head School Division No. 19*, in the context of the dismissal of a school board employee, the Supreme Court retained three factors for determining the existence of a duty of procedural fairness: "(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."[19]

The Court recognized that the concept of procedural fairness was "eminently variable and that its content is to be decided in the specific context of each case".[20]

The Supreme Court fleshed out those ideas in *Baker v. Canada (Minister of Citizenship and Immigration)*,[21] making a distinction between the determination of the existence of a duty of procedural fairness and the determination of the content of the duty of fairness.

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[13] David JONES and Anne de VILLARS, *Principles of Administrative Law*, *Ibid.*, page 210; *Alliance des Professeurs Catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140.
[14] *Calgary Power Ltd. and Halmrast v. Copithorne*, [1959] S.C.R. 24.
[15] *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311.
[16] *Ibid.*, page 325.
[17] *Ibid.*, page 324.
[18] *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, para. 14.
[19] *Knight v. Indian Head School Division No. 19*, supra, note 5, para. 24.
[20] *Ibid.*, para. 46.
[21] *Baker v. Canada (Minister of Citizenship and Immigration)*, supra, note 8.

Quoting *Cardinal*, the Court determined that the fact that a decision is administrative in nature and affects the rights, privileges or interests of a person, is sufficient to trigger the application of the duty of procedural fairness.[22]

Once the existence of a duty of procedural fairness is established, the Court recognized that the content of that duty is variable and depends on the circumstances of each case,[23] considering the following non-exhaustive factors:

> (a) The nature of the decision being made and the process followed in making it; the more the process resembles judicial decision making, the more likely that procedural protections closer to the trial model will be required;
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> (b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates; for example, greater procedural protections will be required when no appeal procedure is provided within the statute;
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> (c) The importance of the decision on the person affected;
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> (d) The legitimate expectations of the person affected by the decision;
>
> (e) The choices of procedure made by the administrative body, particularly when the statute leaves to the decision maker the ability to choose its own procedures, or when the body has an expertise in determining what procedures are appropriate in the circumstances.[24]

Once it is established that a duty of procedural fairness applies and that the scope of the duty is defined, the reviewing court then determines whether the administrative body has breached the requirements fairness in the particular circumstances of the case.[25]

To this day, the *Baker* framework remains the analytical framework applicable in Canadian administrative law for the review of procedural fairness questions.[26]

3. JUDICIAL REVIEW AND PROCEDURAL FAIRNESS – THE SUPREME COURT OF CANADA

Administrative decisions may be challenged on judicial review because of procedural deficiencies in the administrative process (process review) or because of deficiencies in the analysis of the decision maker on the merits (merits review).

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[22] *Ibid.*, para. 20; *Cardinal v. Director of Kent Institution*, supra, note 18, para. 14.
[23] *Baker v. Canada (Minister of Citizenship and Immigration)*, *Ibid.*, paras 21, 22.
[24] *Ibid.*, paras 23 to 28.
[25] *Ibid.*, paras 44, 48.
[26] *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, para. 38.

The Supreme Court has developed separate analytical frameworks to address process review and merits review. Questions of process are reviewed on a standard of fairness in the circumstances (the *Baker* framework),[27] and questions of merits are reviewed on a standard that takes into account the expertise of the administrative body (the *Dunsmuir* framework).

That cleavage appeared in *Cardinal*, where it was argued that a breach of procedural fairness (right to be heard) should not result in an excess of jurisdiction if it does not cause substantial injustice, having regards to the substantive issue under consideration. In other words, the argument was that the decision of the Director of the penitentiary institution should not be set aside despite the breach of fairness, to the extent that it is "reasonable and fair".[28]

The Court rejected that argument and clearly established that procedural fairness is an independent right which does not depend on the merits of the decision:

> […] The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[29] **Our emphasis.**

A breach of procedural fairness is therefore considered a jurisdictional error,[30] which renders an administrative decision void.[31] The rationale is that legislatures are presumed not to have delegate regulatory functions to administrative agencies contrary to the basic tenets of fairness.[32]

This did not necessarily mean a black and white approach where any perceived procedural irregularity might cause an administrative decision to be quashed on judicial review. Courts have been sensitive to recognize an appropriate degree of deference to administrative bodies with respect to procedural matters.

In *Knight*, the Supreme Court noted that the content of the duty of procedural fairness had to take into account the autonomy of administrative bodies on procedural matters:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice

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[27] John M. EVANS, *Fair's Fair : Judging Administrative Procedures*, (2015) CJALP 111.
[28] *Cardinal v. Director of Kent Institution*, supra, note 18, para. 23.
[29] *Id*.
[30] *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, para. 43.
[31] David J. MULLAN, *Administrative Law*, Toronto, Irwin Law, 2001, pages 227 to 230; David JONES and Anne de VILLARS, *Principles of Administrative Law*, supra, note 2, pages 248 to 250; Patrice GARANT, *Précis des administrations publiques*, 5e édition, Cowansville, Éditions Yvon Blais, 2010, page 274.
[32] David JONES and Anne de VILLARS, *Principles of Administrative Law*, *Ibid.*, page 249.

> that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. […][33] **Our emphasis.**

Adopting a similar reasoning, in *Université du Québec à Trois-Rivières v. Larocque*, the Supreme Court wrote on the issue of whether a refusal to admit evidence constitutes a breach of procedural fairness:

> […] A breach of the rules of natural justice is regarded in itself as an excess of jurisdiction and consequently there is no doubt that such a breach opens the way for judicial review. […]
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> The proposition that any refusal to admit relevant evidence is in the context of a grievance arbitration a breach of natural justice is one which could have serious consequences. It in effect means that the arbitrator does not have the power to decide in a final and exclusive way what evidence will be relevant to the issue presented to him. That may seem incompatible with the very wide measure of autonomy which the legislature intended to give grievance arbitrators in settling disputes within their jurisdiction and the attitude of restraint demonstrated by the courts toward the decisions of administrative bodies.
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> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.[34] **Our emphasis.**

That demarcation between process and merits for the purpose of judicial review was maintained by the Supreme Court in following cases.

In C*.U.P.E. v. Ontario (Minister of Labour)*, Binnie J. wrote for the majority that the "content of procedural fairness goes to the manner in which [the decision maker goes about] making his decision, whereas the standard of review is applied to the end product of his deliberations".[35]

Although there are some common factors in the analysis of the fairness of the administrative process and the merits of the decision on judicial review, the Court emphasized that the focus and object of the inquiries are different.[36]

Bastarache J., who dissented but agreed with the majority on the question of the standard of review, wrote that the assessment of the content of the duty of procedural fairness and the determination of the applicable standard of review

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[33] *Knight v. Indian Head School Division No. 19*, supra, note 5, para. 49.
[34] *Université du Québec à Trois-Rivières v. Larocque*, supra, note 30, paras 43, 44, 46.
[35] *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, para. 102 (Binnie J.).
[36] *Ibid.*, paras 103 (Binnie J.), para. 5 (Bastrarache).

both "examine the context of an administrative decision [and the] same factor may be salient for both exercises".[37] However, he added that the two inquiries proceed separately:

> […] Nevertheless, the two inquiries proceed separately and serve different objectives. The content of the duty of procedural fairness seeks to ensure the appropriate relationship between the citizen and the administrative decision maker. In contrast, the standard of review speaks to the relationship between the administrative decision maker and the judiciary. In the former case, there is no need to determine a degree of deference.[38] **Our emphasis.**

In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, the Supreme Court confirmed that the review of the procedural fairness of administrative actions or decisions is an exercise independent of the standard of review analysis:

> The [issue of procedural fairness] requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation [according to the factors developed in *Knight* and *Baker*].[39] **Our emphasis.**

In 2008, the Supreme Court issued its decision in *Dunsmuir v. New Brunswick*. That case concerned the review of a labour arbitrator's decision on a grievance brought by a terminated employee of the Department of Justice for the Province of New Brunswick.

The Court tackled two core issues in that case. Firstly, the determination of the appropriate standard of review and the review of the merits of the decision. The Court seized the opportunity to "re-examine the foundations of judicial review and the standards of review applicable in various situations".[40] Secondly, whether a public law duty of procedural fairness applies to a public employee under an employment contract.

On the standard of review, Bastarache and Lebel JJ. wrote that the application of the multiple standards brought theoretical and practical difficulties, and that reconsideration of the number and of the definition of the various standards was necessary.[41] Two standards of review would now apply to the judicial review of the merits of administrative decisions: correctness and reasonableness.[42]

The following considerations point to a standard of reasonableness: the existence of a privative clause; if the question under review is one of fact,

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[37] *Ibid.*, para. 5 (Bastrarache J.).
[38] *Id*.
[39] *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, para. 74.
[40] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 24.
[41] *Ibid.*, para. 39.
[42] *Ibid.*, para. 34.

discretion or policy; the expertise of the administrative body; and, if the question under review is within the specialized area of expertise of the body.[43]

On the other hand, the following issues would, in principle, be reviewed on a standard of correctness: questions regarding the division of constitutional powers; "true questions of jurisdiction", or whether an administrative body has the authority to decide a particular matter; the determination of jurisdictional lines between competing specialized tribunals; general questions of law of central importance to the legal system.[44]

Procedural fairness is not mentioned as a factor relevant to the standard of review analysis. Some might say that the *Dunsmuir* decision implies that procedural questions are jurisdictional in nature, or "true questions of jurisdiction", which should attract the application of the correctness standard.

However, this silence concerning procedural fairness in the discussion on the standard of review may also be explained by the adherence of the Court to its prior position that the review of the process for making an administrative decision and the review of the merits of a decision follow separate tracks.

Bastarache and Lebel JJ. seem to confirm that view, when they indicated at the outset that: "[t]he function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes".[45]

As indicated previously, the second issue considered in *Dunsmuir* specifically concerned procedural fairness, in particular whether procedural fairness applies to a public employee under an employment contract.

Bastarache and Lebel JJ. wrote on this point that procedural fairness is "a cornerstone of modern Canadian administrative law [and that public] decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual".[46]

The Court then reversed its earlier position in *Knight* and found that a public law duty of procedural fairness should not be imposed to public bodies in the exercise of their contractual rights as employers.[47]

Bastarache and Lebel JJ. concluded, without applying any standard of review that: "[b]y imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the

[43] *Ibid.*, paras 52 to 56.
[44] *Ibid.*, paras 57 to 61.
[45] *Ibid.*, para. 28.
[46] *Ibid.*, para. 79.
[47] *Ibid.*, paras 90, 117.

appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench."[48]

Binnie J., who wrote a separate opinion, but concurred with the result, substantially confirmed that no deference is owed to questions of procedural fairness. He indicated that there were three jurisdictional limits on the exercise of administrative action: firstly, the protection of the constitutional jurisdiction of superior courts; secondly, the existence of statutory or prerogative powers as a foundation for administrative action; and, thirdly, the requirements of procedural fairness. On that last point, he wrote:

> […] a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. […][49]

In cases following *Dunsmuir*, the Supreme Court appears to have taken the view that issues of procedural fairness should be reviewed on a standard of correctness,[50] without however reassessing the rationale expressed in C*.U.P.E.* and *Moreau-Bérubé* to the effect that process review directly goes to jurisdiction, and that there is no need to determine whether a particular degree of deference should be applied.

In *Canada (Citizenship and Immigration) v. Khosa*,[51] the main issue was whether paragraph 18.1(3) of the *Federal Courts Act*[52] ousted the principles developed in *Dunsmuir* on the standards of review. The Court concluded that paragraph 18.1(3) of the *Federal Courts Act* dealt with grounds of review, not standards of reviews, and that *Dunsmuir* remained the appropriate analytical framework to determine the appropriate standard of review in a particular situation.[53]

In his analysis of sub-paragraph 18.1(3)(b) of the *Federal Courts Act*, which authorizes Federal Court intervention where a federal board, commission or tribunal "failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe", Binnie J. made the following comment:

> No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined

[48] *Ibid.*, para. 117.
[49] *Ibid.*, para. 129.
[50] Although this standard was used by Major and Binnie JJ., dissenting in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, para. 65.
[51] *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.
[52] *Federal Courts Act*, RSC 1985, c. F-7.
[53] *Canada (Citizenship and Immigration) v. Khosa*, supra, note 51, para. 36.

> by a court on the basis of a correctness standard of review. Relief in such cases is governed by common law principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice. […][54] **Our emphasis.**

As indicated, however, the Court in *Dunsmuir* did not explicitly attribute a standard of review to questions of procedural fairness. The comments of Binnie J. in *Khosa* may be therefore interpreted to mean that no deference is owed to questions of procedural fairness because nobody should have his or her rights adversely affected by an unjust process.[55]

Similarly, in *Mission Institution v. Khela*, which concerned the question of whether the transfer of a federal inmate from a medium to a maximum security penitentiary institution met the statutory requirements of procedural fairness, the Supreme Court wrote:

> […] the ability to challenge a decision on the basis that it is unreasonable does not necessarily change the standard of review that applies to other flaws in the decision or in the decision-making process. For instance, the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".[56]

The Court added the following, which is consistent with its prior position that procedural unfairness is a jurisdictional error, voiding the decision under review:

> It will not be necessary to determine whether the decision made by the Warden in the instant case was unlawful on the basis of unreasonableness. As I will explain below, the decision was unlawful because it was procedurally unfair.[57] **Our emphasis.**

While applying the correctness standard, the Court recognized in *Khela* that a "margin of deference" was owed to the decision maker on procedural matters under the *Corrections and Conditional Release Act*:

> Section 27(3) [of the *Corrections and Conditional Release Act*] authorizes the withholding of information when the Commissioner has "reasonable grounds to believe" that should the information be released, it might threaten the security of the prison, the safety of any person or the conduct of an investigation. The Commissioner, or his or her representative, is in the best position to determine whether such a risk could in fact materialize. As a result, the Commissioner, or the warden, is entitled to a margin of deference on this point. Similarly, the warden and the Commissioner are in the best position to determine whether a given source or informant is reliable. Some deference is accordingly owed on this point as well. If, however, certain information is withheld without invoking s. 27(3), deference will

[54] *Ibid.*, para. 43.
[55] *Dunsmuir v. New Brunswick*, supra, note 40, para. 129.
[56] *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, para. 79.
[57] *Ibid.*, para. 80.

> not be warranted, and the decision will be procedurally unfair and therefore unlawful.[58] **Our emphasis.**

That appropriate "margin of deference" of the decision maker on procedure did not mean that the reviewing court should apply a standard of reasonableness. As indicated, the Court in *Khela* applied correctness on the question of procedural fairness and ultimately concluded that:

> It is clear from the record that the Warden, in making the transfer decision, considered information that she did not disclose to Mr. Khela. Nor did she give him an adequate summary of the missing information. The withholding of this information was not justified under s. 27(3) . As a result, the Warden's decision did not meet the statutory requirements related to the duty of procedural fairness.
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> To be lawful, a decision to transfer an inmate to a higher security penitentiary must, among other requirements, be procedurally fair. To ensure that it is, the correctional authorities must meet the statutory disclosure requirements. In this case, these statutory requirements were not met, and the decision to transfer Mr. Khela from Mission Institution to Kent Institution was therefore unlawful. The British Columbia Supreme Court properly granted *habeas corpus*. Mr. Khela was properly returned to a medium security institution […].[59] **Our emphasis.**

Finally, in *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, the essential question was whether the insufficiency of reasons of a decision maker goes to procedural fairness or whether the inadequate reasoning of the decision should be reviewed applying the appropriate standard of review. The Court wrote on this issue:

> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. […]
>
> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.[60] **Our emphasis.**

To summarize, the Supreme Court has consistently expressed that procedurally unfair administrative procedures constitute an excess of jurisdiction rendering the impugned actions or decisions of administrative bodies void.

Because procedural fairness goes to the decision making process, as opposed to the merits of a decision, the Court does not apply the standard of review analysis to questions of procedural fairness. Under the *Baker* framework, if a duty of

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[58] *Ibid.*, para. 89.
[59] *Ibid.*, paras 92, 98.
[60] *Newfoundland and Labrador Nurses' Union*, supra, note 8, paras. 21, 22.

procedural fairness exists, the scope of that duty is determined based on a contextual analysis, taking into account the nature of the decision, its importance to the person affected, and the choice of procedures made by the administrative body, with a margin of deference on that last point.

The Supreme Court did not alter that framework in *Dunsmuir*. It has since applied the correctness standard to questions of procedural fairness, but procedural unfairness remains a jurisdictional error, which renders an unfair administrative decision unlawful and void.

The review of the merits of an administrative decision follows a distinct analytical framework, and relates to the relationship between the administrative decision maker and the reviewing court. Reviewing courts should recognize the expertise of administrative bodies in the implementation of government regulatory policy and consequently attach a measure of deference to their substantive decisions.[61]

4. THE REVIEW OF PROCEDURAL FAIRNESS QUESTIONS – PROVINCIAL APPELLATE COURT AND OTHER DECISIONS

In recent years, provincial appellate courts have followed three approaches to the review of procedural fairness questions. In some cases, no standard of review was applied; in others, correctness was the standard retained; in some cases, the standard of reasonableness was applied.

a. Ontario

Since *Dunsmuir*, the Ontario Courts have generally applied the fairness in the circumstances test. The leading case is the 2009 Ontario Court of Appeal decision in *Ontario (Commissioner, Provincial Police) v. MacDonald*, which dealt with an issue of reasonable apprehension of bias involving a disciplinary adjudicator. The Court wrote:

> In my view, it was unnecessary for the Divisional Court to even address the issue of standard of review because procedural fairness does not require an assessment of the appropriate standard of review. The proper approach is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met […].[62] **Our emphasis.**

The Ontario Court of Appeal adopted a similar position in the 2009 case of *Clifford v. Ontario Municipal Employees Retirement System*[63] and in the 2014 decision of *Terceira v. Labourers International Union of North America*.[64] In *Clifford*, the Court of Appeal wrote that no deference was owed to an

[61] *Dunsmuir v. New Brunswick*, supra, note 40, para. 49.
[62] *Ontario (Commissioner, Provincial Police) v. MacDonald*, 2009 ONCA 805, para. 37.
[63] *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 (leave to appeal dismissed in *Clifford v. Ontario Municipal Employees Retirement System*, [2009] S.C.C.A. No. 461).
[64] *Terceira v. Labourers International Union of North America*, 2014 ONCA 839, para. 41.

in that case), and that this position remained unchanged since *Dunsmuir*.[65]

That fairness in the circumstances test was generally applied by the Ontario Divisional Court in subsequent cases,[66] although the correctness standard also was applied.[67]

In 2013, a panel of the Ontario Divisional Court took a slightly different position in the case of *Senjule v. Law Society of Upper Canada*.[68] The Court noted that when allegations of procedural unfairness are brought forward, "the standard of review does not apply in the usual sense [and the] court must determine whether a party has been denied procedural fairness or natural justice".[69]

However, the Court acknowledged that administrative decision makers have the inherent power to control their own processes, which includes the power to grant adjournments.[70] The Court concluded that "[g]iven the deference that is usually accorded discretionary determinations, the standard of review in this case is akin to one of reasonableness", and consequently, "[n]atural justice and procedural fairness were infringed only if it can be said that the panel exercised its discretion in an unreasonable or non-judicious fashion."[71]

b. Quebec

In the 2007 decision of *McDonald c. Arshinoff & Cie ltée*, the Quebec Court of Appeal found that the Quebec workplace safety appeal board could not err on questions of procedural fairness without exceeding its jurisdiction. Consequently, the Court wrote that: "[TRANSLATION] There is no need to apply the pragmatic and functional analysis to determine the applicable standard of review".[72]

Following *Dunsmuir*, the Quebec Court of Appeal generally tended to apply the correctness standard to questions of procedural fairness.[73]

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[65] *Clifford v. Ontario Municipal Employees Retirement System*, supra, note 63, paras 22 to 24.
[66] *Knoll North America Corp. v. Adams*, 2010 ONSC 3005 (Ont. Div. Ct.), para. 27; *Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685 (Ont Div. Ct.), paras 24, 59; *D.F. v. Ontario (Human Rights Tribunal)*, 2012 ONSC 1530 (Ont. Div. Ct.), para. 9; *Wong v. Globe and Mail Inc.*, 2014 ONSC 6372 (Ont. Div. Ct.), para. 16*; Payne v. Law Society of Upper Canada*, 2014 ONSC 1083 (Ont. Div. Ct.), para. 9; *Barbe v. Morin*, 2015 ONSC 743, paras 33, 34; *Ontario (Securities Commission) v. MRS Sciences*, 2015 ONSC 6317 (Ont. Div. Ct.), para. 13.
[67] *Gymnopoulos v. Ontario Assn. of Basketball Officials*, 2016 ONSC 1525 (Ont. Div. Ct.), para. 55.
[68] *Senjule v. Law Society of Upper Canada*, 2013 ONSC 2817 (Ont. Div. Ct.).
[69] *Ibid.*, para. 20.
[70] *Ibid.*, para. 21.
[71] *Ibid.*, para. 22.
[72] *McDonald c. Arshinoff & Cie ltée*, 2007 QCCA 575, para. 27.
[73] *Murphy c. Chambre de la sécurité financière*, 2010 QCCA 1079, para. 30; *Syndicat des salariés de Béton St-Hubert — CSN c. Béton St-Hubert inc.*, 2010 QCCA 2270, para. 25; *Syndicat des employées et employés professionnels et de bureau, section locale 574, SEPB, CTC-FTQ c. Groupe Pages jaunes Cie*, 2015 QCCA 918, para. 39 (leave to appeal dismissed in *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 v. Yellow Pages Group Inc.*, [2015] S.C.C.A. No. 313); *Smith c. Page*, 2016 QCCA 300, para. 8.

However, the standard of reasonableness was applied in *Syndicat des travailleuses et travailleurs de ADF - CSN c. Syndicat des employés de Au Dragon forgé inc.*[74] In that case, the Quebec Labour Board certified an association (CSN) to replace another association (Syndicat des employés d'ADF) to represent the employees of Groupe ADF.

One of the central questions on judicial review was whether Board was required, under the applicable legislation, to disclose the identity of the members of each association to the other so that they could eventually challenge the representative nature of the other association. This information was ordinarily considered as confidential under statute. The Board refused to disclose the membership lists, which was requested by Syndicat des employés d'ADF.

The Court of Appeal determined that the issue of certification was at the heart of the jurisdiction of the Labour Board, justifying the application of the reasonableness standard. On the refusal of the Board to disclose the membership lists, the Court noted that "[TRANSLATION] the respect of the rule *audi alteram partem* is being raised here in a particular legislative context, and consequently, it is not the correctness standard that is applicable, but rather the standard of reasonableness".[75] **Our emphasis.**

However, the Court wrote that, in its assessment of the reasonableness of the procedural decision of the Board, the reviewing court had to verify whether it had balanced the terms of the statute and the purpose of the legislation with the fundamental value of natural justice.[76] In other words, is the procedural decision "[TRADUCTION] reasonable considering the context of the matter, that is to say does it reasonably takes natural justice into account".[77]

This view, according to the Court, was consistent with the orientation of the Supreme Court on the deference that should be afforded to administrative tribunals in the interpretation of their home statutes.[78] The Court concluded on this point as follows:

> [TRANSLATION] Considering all of the above, I believe that, by analogy, the standard of reasonableness should apply when a question of natural justice arises in the context of the interpretation of an administrative tribunal's home statute, and incidentally to the legal provisions that it must interpret and apply […][79]

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[74] *Syndicat des travailleuses et travailleurs de ADF - CSN c. Syndicat des employés de Au Dragon forgé inc.*, 2013 QCCA 793.
[75] *Ibid.*, para. 38.
[76] *Ibid.*, para. 45.
[77] *Id*.
[78] *Ibid.*, para. 46.
[79] *Ibid.*, para. 47.

c. Saskatchewan

The Saskatchewan Court of Appeal adopted a similar approach in *Saskatchewan (Workers' Compensation Board) v Gjerde*.[80] On judicial review of a decision of the Workers' Compensation Board, the reviewing judge found that the Board had breached procedural fairness by failing to constitute a Medical Review Panel in accordance with the applicable legislation.

The Court of Appeal determined that the process by which physicians were chosen to sit on the Medical Reviews Panel was governed by specific provisions of *The Workers' Compensation Act*. The matter was therefore primarily a question of the Board's interpretation and application of its home statute, which under *Dunsmuir*, should presumptively be reviewed on a standard of reasonableness.[81]

d. Manitoba

Adopting a different approach, the Manitoba Court of Appeal held in *The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*, that it was "not the correct terminology to discuss the duty of procedural fairness in terms of the standard of review analysis".[82]

The main issue in that case was whether procedural fairness required a public Commission of inquiry to disclose witness interview transcripts to the parties and interveners with standing before the Commission. The Court wrote:

> […] Therefore, instead of discussing the standard of review, the court must ascertain whether the Commission's procedures are procedurally fair in light of the five well-established *Baker* factors, which explain the content of the duty of procedural fairness. […][83]

In the end, balancing those factors, and taking into account the Commission's home statute, its Order in Council and its rules of procedure, the Court found that the disclosure of witness interview transcripts was not mandated and that procedural fairness was satisfied by the provision by the Commission of detailed summaries of witnesses' evidence to parties and interveners.[84]

e. Nova Scotia

The Nova Scotia Court of Appeal adopted a similar reasoning in *Waterman v. Waterman*: "[t]he third ground of appeal argues there was a breach of the rules of

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[80] *Saskatchewan (Workers' Compensation Board) v Gjerde*, 2016 SKCA 30.
[81] *Ibid.*, paras 56 to 59.
[82] *The Southern First Nations Network of Care et al. v. The Honourable Edward Hughes*, 2012 MBCA 99, para. 35.
[83] *Id.*, para. 35.
[84] *Id.*, paras 55, 72, 77.

natural justice or procedural fairness. This is a question of law. Our review does not engage concerns associated with the concept of a standard of review. […] either there was a breach of the principles of natural justice, or there was not."[85]

f. British Columbia

British Columbia has legislated standards of review in its *Administrative Tribunals Act*.[86] Under section 58 of the Act, a finding of fact or law in the exercise of discretion by a tribunal on a matter for which it has exclusive jurisdiction is reviewable on a standard of patent unreasonableness; "questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly";[87] all other matters are reviewed on a standard of correctness.

5. THE REVIEW OF PROCEDURAL FAIRNESS QUESTIONS – THE FEDERAL COURTS

The issue of whether reasonableness should apply to procedural fairness questions has generated a significant debate at the Federal Court of Appeal level. Until recently, the Federal Courts either applied no standard of review or applied correctness to questions of procedural fairness.

In *Ha v. Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal wrote in 2004 that:

> […] In my opinion, the Motions Judge was correct in not applying the pragmatic and functional approach to determine the standard of review in this case. Since the issue at hand involves a determination of the content of the duty of fairness that the visa officer owed to the appellants as opposed to the visa officer's ultimate determination on the merits of the case, the pragmatic and functional approach need not be applied and the Motions Judge was correct in proceeding to conduct her own determination as to the content of the duty of fairness.[88] **Our emphasis.**

In *Tahmourpour v. Canada (Solicitor General)*, a 2005 decision which concerned the fairness of a Canadian Human Rights Commission investigation, the Federal Court of Appeal wrote that a "reviewing court owes no deference in determining the fairness of an administrative agency's process".[89] However, the Court acknowledged that a degree of deference should be afforded to the Commission on procedural matters: "[n]onetheless, the court will not second guess procedural choices made in the exercise of the agency's discretion which comply with the duty of fairness."[90]

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[85] *Waterman v. Waterman*, 2014 NSCA 110, para. 23.
[86] *Administrative Tribunals Act*, SBC 2004, c. 45.
[87] *Ibid.*, subsection 58(2)(b).
[88] *Ha v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 49, para. 42.
[89] *Tahmourpour v. Canada (Solicitor General)*, 2005 FCA 113, para. 7.
[90] *Id*.

In 2006, the Federal Court of Appeal wrote in *Sketchley v. Canada (Attorney General)* that: "the pragmatic and functional approach does not apply to questions of procedural fairness" and that the role of the reviewing judge is to determine whether the administrative process was fair.[91]

In the 2009 Federal Court decision in *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, the issue was whether a public inquiry commissioner breached procedural fairness by demonstrating bias. The Court discussed whether the standard of review analysis applied to this question:

> […] It is well-established that the standard of review analysis does not apply to issues of procedural fairness […]. They are always reviewed as questions of law and, as such, the applicable standard of review is correctness (*Dunsmuir*). No deference is owed when determining the fairness of the decision-maker's process. If the duty of fairness is breached, the decision in question must be set aside […].[92] **Our emphasis.**

In *Air Canada v. Greenglass*, the Federal Court of Appeal wrote that, based on the Supreme Court decision in *Khela*, "there can be no doubt that [issues of procedural fairness] must be assessed against a standard of correctness".[93]

The 2014 Federal Court of Appeal case in *Re:Sound v. Fitness Industry Council of Canada*[94] concerned a decision rendered by the Copyright Board. According to the Court in that case, the "black-letter rule" is that procedural fairness should be reviewed on a standard of correctness, based on *Khosa*.[95] Accordingly, no deference will be owed to administrative decision makers on whether the duty of procedural fairness applies.[96]

On the determination of the content of the duty of procedural fairness and the application of that duty, the Court recognized that there was a "degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision makers have discretion over their procedure".[97]

To reconcile those considerations, the Court held that the standard remains correctness, but the reviewing court should be respectful of the administrative body's choices of procedures and afford it a "degree of deference":

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[91] *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392, para. 111.
[92] *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, [2009] 2 F.C.R. 417, para. 66 (appeal dismissed in *Chrétien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*, [2010] F.C.J. No. 1274 (F.C.A.).
[93] *Air Canada v. Greenglass*, 2014 FCA 288, para. 26.
[94] *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48.
[95] *Ibid.*, para. 34.
[96] *Ibid.*, para. 35.
[97] *Ibid.*, para.39.

> In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.[98]

In the 2014 case of *Maritime Broadcasting System Limited v. Canadian Media Guild*,[99] the Canada Industrial Relations Board had certified the Guild as the bargaining agent for the employees of a bargaining unit of Maritime. The Board reaffirmed its original decision in a subsequent reconsideration decision. Both decisions were challenged on judicial review, on substantive and procedural grounds. The procedural challenge related to the method of responding to submissions and the necessity to hold an oral hearing on the submissions.

The majority of the Federal Court of Appeal determined that the Supreme Court had clearly established that the standard of review applicable to questions of procedural fairness was correctness.[100]

Stratas J. concurred with the result but expressed a dissent on the standard of review as it applied to procedural fairness. He noted that, as a master of its own procedure, the Board was free to assess, design, vary and apply its procedure to ensure that they are fair, efficient and effective.[101] He noted that the Supreme Court changed the direction of administrative law in *Dunsmuir*, and that discretionary decisions are presumptively subject to the reasonableness standard.[102]

In this context, Stratas J. therefore understood the decision in *Re:Sounds* to mean that the application of a "degree of deference" to procedural choices really equate the standard reasonableness, as described in *Dunsmuir*.[103] He would therefore have granted the Board "some leeway under a reasonableness review".[104]

The 2014 decision in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*[105] concerned the review of interlocutory decisions of the National Energy Board on procedural matters in anticipation of the larger substantive proceedings before the Board.

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[98] *Ibid.*, para. 42.
[99] *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59.
[100] *Ibid.*, paras 79, 80.
[101] *Ibid.*, para. 50.
[102] *Ibid.*, para. 51.
[103] *Ibid.*, para. 61.
[104] *Ibid.*, para. 63.
[105] *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245.

Writing for the Court, Statas J. made reference to *Re:Sound* and to his dissent in *Maritime Broadcasting*, and recognized that, with respect to procedural fairness, under "the current state of the authorities in this Court, the standard of review is correctness with some deference to the Board's choice of procedure".[106] He concluded in saying that: "in its process decision, the Board is entitled to a significant margin of appreciation in the circumstances of this case".[107]

Finally, in the 2015 decision in *Bergeron v. Canada (Attorney General)*, after a review of some of the recent Supreme Court and Federal Court of Appeal jurisprudence, Stratas J. wrote for the Court that the "law concerning the standard of review for procedural fairness is currently unsettled" and that the current situation was a "jurisprudential muddle".[108] However, the Court determined that it did not need to resolve the matter in this particular instance.[109]

6. ISSUES AND ANALYSIS

Is the Canadian administrative law in a "jurisprudential muddle" on the matter of the judicial review of procedural fairness questions?

While there is conflicting jurisprudence on this point at the Canadian appellate level, the Supreme Court has been consistently clear that fairness review and merits review serve different objectives in administrative law and are subject to two distinct analytical frameworks, although some factors may overlap.

For the fairness review, it is the nature of process *vis à vis* the person concerned that is the focus of the inquiry. This is why the nature of the decision and the importance of the decision to the person affected are central criteria, which are not central factors in the standard of review analysis.

The merits review focuses on the relationship between the court and the administrative body. This is why the existence of a privative clause, signalling a legislative intention of deference, is an important factor. The expertise of the administrative body is also a key factor in the standard of review analysis. Deference will be called for if an administrative body is "more expert than the court" on the question under consideration.[110] Regulatory bodies with delegated economic, social or cultural functions have been qualified as experts in their respective fields, and will be granted deference for that reason by reviewing courts.[111] These are not central factors under fairness review.

In *Dunsmuir*, the Supreme Court did not change the direction of administrative law on the review of questions of procedural fairness. Under *Baker*, fairness review

[106] *Ibid.*, para. 70.
[107] *Ibid.*, para. 72.
[108] *Bergeron v. Canada (Attorney General)*, supra, note 1, paras 67, 71.
[109] *Ibid.*, para. 72.
[110] *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para. 28.
[111] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, para. 51.

addresses three questions which do not mandate the application of a standard of review (reasonableness or correctness): whether procedural fairness applies, what is the duty of fairness in the circumstances, and whether the administrative body breached that duty of procedural fairness.

In fact, The Court did use that framework in *Dunsmuir* when it considered whether procedural fairness applied to a public employee under an employment contract.

The question which arose more recently at the appellate level is whether standard of reasonableness should apply when a question of procedural fairness arises in the context of the interpretation of an administrative body's home statute. Does this require a restructuration of the judicial review of procedural fairness under the standard of review analysis?

This recent controversy should not oust the application of the fairness in the circumstances test at least in four categories of cases.

Firstly, when the reviewing court considers a common law duty of procedural fairness. That was the case in *Baker* where one of the questions was whether procedural fairness applied to a ministerial immigration humanitarian and compassionate decision, and whether an oral hearing was part of the duty of procedural fairness.

In such cases, there is a need to determine whether fairness applies and to define what fairness requires using the non-exhaustive factors listed in *Baker*. The standard of review analysis is not particularly helpful in that regards.

Secondly, when a general procedural fairness guarantee exists in statute, but its particular application needs to be fleshed out depending on the circumstances. For example, in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, a number of recipients of notices of misconduct issued by a commission of inquiry under section 13 of the federal *Inquiries Act*[112] alleged unfairness in relation to the timing, the level of details and the wording of notices.

That case was determined by the Supreme Court using the classic fairness in the circumstances framework: does fairness apply, what is the scope of the duty, and whether the process was fair.[113]

Thirdly, the application of standards of review does not fit well with the determination of whether a duty of impartiality was breached by an administrative body.[114] The role of the reviewing court in such cases is to determine the

[112] *Inquiries Act*, RSC 1985, c. I-11, section 13.
[113] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440.
[114] *Ontario (Commissioner, Provincial Police) v. MacDonald*, supra, note 62; *Chrétien v. Canada*, supra, note 92.

appropriate standard of impartiality, and then assess whether the administrative body breached that standard by its declarations, conduct or actions.

Fourthly, in some cases, there may be no procedural "decision" to review, because the procedural deficiency is discovered after the decision is rendered. For example, if the decision maker clearly did not consider a key argument brought forward by one of the parties; if the administrative body failed to notify counsel on record of a decision, which prevented counsel to launch judicial review proceedings in due course; or if the administrative body failed to provide any reasons for its decision.[115] It is difficult to apply the standard of review analysis to such breaches of procedural fairness.

The crux of the problem seems to be when a decision on procedure is firmly rooted in the interpretation of the administrative body's home statute. Should the standard of review analysis be applied in such cases?

Courts have widely recognized that administrative bodies are the masters of their own procedures.[116] It is also firmly established that the reasonableness standard of review should presumptively apply when an administrative body interprets its home statute.[117] Discretionary decisions are also presumptively subject to the reasonableness standard.[118]

In the context, why applying an approach that may be seen as interventionist when an administrative body interprets its home statute?

The fact that breaches of procedural fairness should not be treated deferentially – either under the fairness in the circumstances test or under the correctness standard, does not mean that the reviewing court should ignore an administrative body's discretion in defining its procedural rules and in determining procedural questions.

The discretion of administrative bodies to craft their own procedural rules, and implement procedural decisions, whether rooted in common law or in statute, has been recognized as a relevant factor under the *Baker* fairness review framework.

As indicated by the Federal Court of Appeal in *Re:Sounds*, reviewing courts should afford a degree of deference to administrative bodies on procedural matters. The Supreme Court used the expression "margin of deference" in *Khela*. That degree or margin of deference is considered at the stage of determination of the

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[115] David JONES and Anne de VILLARS, *Principles of Administrative Law*, supra, note 2, page 248; Guy RÉGIMBALD, *Canadian Administrative Law*, 1st Edition, Markham, LexisNexis, 2008, page 322; *Torres c. Commission des lésions professionnelles*, 2016 QCCS 119; *Newfoundland and Newfoundland and Labrador Nurses' Union*, supra, note 8.
[116] *Therrien (Re)*, [2001] 2 S.C.R. 3, para. 88.
[117] *Syndicat des employés de Au Dragon forgé inc.*, supra, note 74, para. 46.
[118] *Maritime Broadcasting System Limited*, supra, note 99, para. 51.

scope of procedural fairness, and may also be considered when the reviewing court considers whether the duty of fairness was breached in the circumstances.

Conceptually, procedural fairness as a question of statutory interpretation could possibly be dealt with either under the fairness in the circumstances framework (*Baker*), or under the standard of review analysis (*Dunsmuir*).

In fact, to say that the correctness standard applies, but with a degree or a margin of deference towards the administrative body's choices of procedures,[119] or that an administrative decision should reasonably take into account procedural fairness requirements (*Au Dragon Forgé*),[120] may substantially mean the same.

This should not be sufficient, however, to justify a restructuration of the procedural fairness review framework. The procedural fairness review framework is likely there to stay.

As indicated, the standard of review analysis will not be adequate in circumstances such as bias, or where procedural requirements do not formally exist in statute and have to be defined under common law.

From a judicial policy perspective, it may not be desirable to have two parallel frameworks to deal with essentially similar questions – whether fairness was breached under common law or under statute.

Consequently, it appears desirable to maintain a distinction in the analytical frameworks applicable to the review of process of administrative action and the review of substance of administrative decisions in Canadian administrative law.

To conclude, a terminology comment is in order. In *Moreau-Bérubé*, the Supreme Court wrote that the review of procedural fairness does not call into question the application of the standard of review analysis. The test is <u>whether the procedures are fair in the circumstances</u>.

More recently, the Supreme Court has applied the <u>correctness standard</u> to questions of procedural fairness. Correctness implies that the reviewing court is free to substitute its own view of the correct answer to the procedural question.[121]

The difficulty with applying correctness to questions of procedural fairness is that it may tend to overlook the procedural discretion granted to administrative bodies, a factor included in the *Baker* fairness review framework.[122]

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[119] *Mission Institution v. Khela*, supra, note 56, para. 89; *Re:Sound v. Fitness Industry Council of Canada*, supra, note 94, para. 42.
[120] *Syndicat des employés de Au Dragon forgé inc.*, supra, note 74, para. 45.
[121] *Dunsmuir v. New Brunswick*, supra, note 40, para. 60.
[122] John M. EVANS, *Fair's Fair : Judging Administrative Procedures*, supra, note 27.

Therefore, the pre-*Khosa* traditional formulation of the review of procedural fairness questions may be preferable, that is whether the procedures are fair in the circumstances of the case.[123]

7. CONCLUSION

The judicial review of procedural fairness questions has attracted significant judicial attention at the Canadian appellate and other levels in the recent years.

The view was expressed that, in light of the administrative law developments since *Dunsmuir*, reviewing courts should show deference and apply the reasonableness standard to procedural decisions of administrative bodies, particularly when they interpret their own statute.

Some authors have suggested that it may be time to restructure the judicial review of procedural fairness under the standard of review analysis.[124] Another wrote that this was a solution in search of a problem.[125]

A careful review of the Supreme Court jurisprudence over the last thirty years demonstrates that procedural fairness review and merits review serve different objectives, which justify the application of two distinct analytical frameworks.

For the fairness review, it is the nature of process *vis à vis* the person concerned that is the focus of the inquiry. An unfair procedure is a jurisdictional flaw which renders the administrative action or decision void.

The merits review focuses on the relationship between the court and the administrative body. Administrative bodies will often be experts in their fields, which justify applying a deferential approach on judicial review.

The distinctions between those frameworks have not been altered by *Dunsmuir*. The Supreme Court has held since *Dunsmuir* that no deference will be owed to administrative bodies on matters of procedural fairness.

From a judicial policy perspective, there appears no need to restructure the judicial review of procedural fairness to bring under the fold of the judicial review analysis under *Dunsmuir*.

The discretion granted to administrative bodies on procedural matters may properly be considered under the *Baker* fairness in the circumstances review framework, without the need to resort to the standard of review analysis.

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[123] *Id*.
[124] Guy RÉGIMBALD, *Canadian Administrative Law*, supra, note 115, page 320; Christopher D. BREDT and Alice MELCOV, *Procedural Fairness in Administrative Decision-Making : A Principled Approach to the Standard of Review*, (2015) 28 CJALP 1. Canadian Journal of Administrative Law & Practice, 28 Can J. Admin. L. & Prac. 1.
[125] John M. EVANS, *Fair's Fair : Judging Administrative Procedures*, supra, note 27.