A "Template" for a Possible Approach to Considering Applications for Judicial Review*

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Mary J.L. Gleason

Federal Court of Appeal

*The views in this template are my own and are offered in the spirit of assisting colleagues in approaching administrative law files. Where I have made reference to case law, I have endeavoured to note the most relevant decisions from the Supreme Court of Canada. I have also included, in places, references to the *Federal Courts Rules* and the case law of my own court, the Federal Court of Appeal. The template will therefore need to be tailored for use in other jurisdictions to take account of authorities from that jurisdiction as well as the requirements of any relevant statute governing judicial review and the applicable Rules of Court.

I. Introduction

- In a judicial review case, it may be useful to group and consider the issues under the following headings:
  - Preliminary issues
  - Selection of the appropriate standard of review applicable to the question(s) that arise
  - Application of that standard of review to the question(s)
  - If there are grounds for intervention, selection of the appropriate remedy

II. Preliminary Issues

- There are a host of preliminary issues that may arise. Those that are often argued include:
  - Standing and identification of the correct parties to the application
  - Compliance with applicable procedural rules and deadlines
  - Especially in the Federal Court, the extent of the Court's jurisdiction over the matters raised
  - Justiciability of the issues
  - Mootness, prematurity and declining to exercise jurisdiction
  - Timing of motions to strike portions of the application or evidence
  - Content of the record and requests for access to additional materials in the hands of the tribunal
  - Confidentiality issues

a. <u>Standing and identification of the correct parties to the application</u>

- Identification of the appropriate parties is typically governed in the first instance by the Rules of Court or the statutes applicable to judicial review.
- An applicant will generally have standing if its rights are affected by the decision under review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131 [*Air Canada*].
- In the Federal Courts, Rule 303(1) of the *Federal Courts Rules*, SOR/98-106 provides that an applicant shall name as respondent every person directly affected by the order sought in the application or those required to be so named by the Act of Parliament under which the application is commenced. Where there are no persons who can be so named, the Attorney General of Canada is to be named as the respondent: Rule 303(2).
- In the Federal Courts, the tribunal whose decision is being reviewed is not named as a party. See, generally, *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2013 FCA 236, 450 N.R. 166 [*Forest Ethics*].
- The principles governing public interest standing to institute a proceeding are set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524.
- The latest Supreme Court authority on the standing of a tribunal to participate in a judicial review application brought in respect of one of its decisions is *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147.
- The test for intervention in the Federal Courts is set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 74 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.), which was recently affirmed, with a slight nuance, in *Sport Maska Inc. v. Bauer Hockey Corp.,* 2016 FCA 44, 480 N.R. 387.

b. <u>Compliance with applicable procedural rules and deadlines</u>

- Deadlines and applicable procedural rules will typically be set out in the statutes governing judicial review and the Rules of Court.

- In the federal sector, where deadlines apply, the time to commence a judicial review application is short: where review is sought with respect to a decision or order of a tribunal, the application must be commenced within 30 days of the date the decision or order was first communicated to the applicant: s.18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

- The case law sets a relatively high bar for an extension of the applicable timeline: *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263, 63 N.R. 106 (C.A.); *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184.

c. <u>The extent of the Court's jurisdiction over the matters raised and over the parties to the application</u>

- The statutes governing judicial review typically list what sorts of issues are reviewable.

- In the Federal Courts, judicial review applications may be brought with respect to several sorts of determinations made by federal authorities, including:

  - Decisions or orders of federal boards, commissions or tribunals (*Federal Courts Act*, ss. 18, 18.1 and 28);

  - Policies of federal boards, commissions or tribunals: *May v. CBC/Radio Canada*, 2011 FCA 130, 420 N.R. 23; *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 194, 475 N.R. 362;

  - Many decisions of federal Ministers or ministerial delegates, which constitute reviewable "matters" within the scope of ss. 18 and 18.1 of the Federal Courts Act; see, generally, *Air Canada*;

  - Exercises of the prerogative power if they are unconstitutional: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44;

  - Other exercises of the prerogative power: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 469 N.R. 258, but, see to opposite effect, *Black v. Canada (Prime Minister)*, 54 O.R. (3d) 215, 199 D.L.R. (4th) 228 (C.A.).

- Challenges to the validity of regulations as being *ultra vires* their enabling statutes*: Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 [*Strickland*].

d. Justiciability of the issues

- The concept of justiciability is linked to the notion of appropriate judicial restraint: *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525, 127 N.R. 161).

- In *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604, Chief Justice Dickson noted that the question of justiciability is "a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity" (at pp 90-91).

- The principles applicable to justiciability are discussed in *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 59 N.R. 1;

Relatively few matters are non-justiciable, even if they involve issues of political significance;

e. Mootness, prematurity and declining to exercise jurisdiction

- The principles applicable to the assessment of mootness are set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 92 N.R. 110.

- A court may decline to hear a judicial review application if it is premature, which may be the case if the parties have not exhausted their administrative remedies*: Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 [*Halifax v. Nova Scotia (Human Rights Commission)*]; *Canada (Border Services Agency) v. C.B. Powell Ltd*., 2010 FCA 61, 400 N.R. 367*; Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68, 165 A.C.W.S. (3d) 401.

- A Court may also decline to hear a case in favour of the matter being pursued before another forum if it is requested to stay its proceedings. Factors relevant to the court's exercise of discretion include: the convenience of the alternate remedy, the nature of the alternate forum, including its remedial capacity, expeditiousness, the expertise of the court relative to that of the alternate

forum and concerns around the economical use of judicial resources: *Strickland*.

f. Timing of motions to strike portions of the application or evidence

- In the Federal Courts, the default approach is that these sorts of issues should be raised at the same time as the case is argued on the merits to avoid delay in what is meant to be an expeditious remedy, although in very clear cases the Court may entertain a motion to strike an application in its entirety brought shortly after the application is filed: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, 450 N.R. 91; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.* (1994), [1995] 1 F.C. 588 at page 600, 176 N.R. 48 (C.A.).

g. Content of the record and requests for access to additional materials in the hands of the tribunal

- The general rule is that the record is limited to the materials that were before the decision-maker.
- However, there are exceptions to this rule, the most notable being where the additional evidence that is sought to be tendered:
  - is of a background nature that is of assistance to the Court;
  - is relevant to an alleged denial of procedural fairness by the decision-maker that is not evident in the record before the decision-maker; or
  - demonstrates the complete lack of evidence before a decision-maker for an impugned finding.
  - See, generally, *Association of Universities and Colleges of Canada v. Canadian Copyright Licencing Agency (Access Copyright*), 2012 FCA 22 at paras. 18-20, 428 N.R. 297; *International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013 FCA 178 at para. 10, 449 N.R. 95; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263, 479 N.R. 189.
- In the Federal Courts, Rules 317-319 govern the procedure applicable to obtaining materials in the possession of a tribunal. Requests for disclosure are

often made in the Notice of Application. If the tribunal objects to disclosure, the matter is referred to the Court for directions, often by way of motion.

h. Confidentiality issues

- The basis for the exception to the open courts principle is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R 522.
- On limited occasions, the court may seal all or part of the court record.
- See Rules 151-152 of the *Federal Courts Rules*.

III. Selecting the standard of review

- There has doubtless been more ink spilled on this issue than any other in administrative law. The case law struggles with achieving equilibrium between the need for uniformity and effecting what a judge believes is the fair result, which often tend to militate in favour of intervention, on one hand, and with respecting tribunals' autonomy and the legislator's wish for economy and finality, which tends to militate in favour of deference, on the other hand.
- Since the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*], at least in theory, a unified approach is meant to be taken to determining the appropriate standard of review, applicable to all types of decisions and decision-makers. There are now only two standards of review: correctness and reasonableness.
- In this section, I attempt to outline the analytical approach I believe that the Supreme Court of Canada has generally mandated in several of its decisions, post-*Dunsmuir*, for discerning the applicable standard of review. For a fuller discussion of my views, see *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2014 FC 1243, 470 F.T.R. 204, which, however, has been appealed and is currently pending before the Federal Court of Appeal.
- The **first step** involves discerning the nature of the errors alleged: do they involve an alleged breach of procedural fairness / denial of natural justice or another type of error?
- There may be different standards of review applied to different parts of an administrative decision-maker's treatment of a case: *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161.

- The **second step** involves consideration of whether there is legislation that governs the standard to be applied to the alleged errors, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58-59. Since the decision of the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*], the *Federal Courts Act* can no longer be viewed as indicating the appropriate standard of review.

- **Correctness** is generally accepted as the standard to be applied to procedural fairness or natural justice issues: see, e.g., *Khosa* at para. 43. However, some judges have suggested this ought to be re-thought and that reasonableness should be applied to these sorts of issues: see, for example, the minority reasons of Stratas, J.A. in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 455 N.R. 115, and his reasons in *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 245, 465 N.R. 152 and in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras 67-71, 474 N.R. 366.

- If the error does not involve an allegation of breach of procedural fairness or violation of natural justice, the **third step** involves asking whether the case law has satisfactorily settled the standard of review.

    - Binding authority decided post-*Dunsmuir* that sets the standard of review applicable to a similar determination of the tribunal in question should be viewed as settling the standard of review satisfactorily.

    - Given the sea change in the law brought about by *Dunsmuir*, cases which pre-date *Dunsmuir* must be approached with caution. In my view, they can only be viewed as satisfactorily establishing the applicable standard of review if they mandate reasonableness or patent unreasonableness, given the preference for the deferential standard set out in *Dunsmuir* and subsequent cases from the Supreme Court.

- If the case law has not satisfactorily settled the applicable standard of review, the **fourth step** in the analysis involves asking if one of the presumptions set out in *Dunsmuir* applies to the alleged error.

    - Errors alleged in respect of the following sorts of issues will presumptively engage the **correctness** standard:

        - 1. Constitutional determinations

- Note, however, that if the decision is a discretionary one and the issue concerns whether the exercise of discretion violates the *Canadian Charter of Rights and Freedoms* or does not respect "*Charter* values", the reasonableness standard is applicable: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 (majority reasons *per* Abella J.);

▪ 2. <u>Questions of general importance to the legal system as a whole that are outside the administrative decision-maker's specialized expertise</u>

- The bounds of this category have not yet been firmly set by the jurisprudence. From the decisions of the Supreme Court of Canada, the following may be discerned:

    - Substantive human rights issues *may* be questions of general importance to the legal system as a whole that are outside the expertise of the tribunal, especially if more than one tribunal might be called upon to interpret the provision in the human rights legislation in issue, see, for example, *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 [*Saguenay*] and *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789;

    - The application by labour tribunals of common or civil law concepts, however, does not give rise to a question of general importance to the legal system as a whole that merits review on a correctness basis, see, for example, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, and *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, 263 A.C.W.S. (3d) 396.

- Application by an immigration tribunal of a provision in the Refugee Convention may involve such an issue, see *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, where the SCC applied correctness to such a question, but did not discuss standard of review. However, other immigration issues, even where a question is certified as being one of general importance under section 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, are subject to reasonableness review, see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*], *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, and *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, [*Kanthasamy*];

- 3. <u>Questions that involve the determination of the respective jurisdiction of two or more administrative decision-makers</u>

  - These sorts of issues arise infrequently.

- <u>4 True questions of *vires* concerning the scope of the decision-maker's jurisdiction</u>

  - It may be debatable whether this category actually exists, given the rejection in the pre-*Dunsmuir* case law of the notion of "preliminary questions". See in this regard the comments in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 33-34 [*Alberta Teachers*] and *Halifax v. Nova Scotia (Human Rights Commission)* at para. 34.

  - However, see *Saguenay* at paras. 53-62 where Gascon, J. views the conduct of an investigation by the Human Rights Commission as being a necessary condition precedent to the exercise of the Quebec Human Rights Tribunal's jurisdiction, thereby intimating that this is a "true" question of jurisdiction.

- Errors alleged in respect of the following sorts of issues will presumptively engage the **reasonableness** standard:

    - 1. Questions involving a factual determination, a determination of mixed fact and law from which a pure legal question cannot be extricated, the exercise of a statutorily-conferred discretion or the making of a policy decision that the decision-maker is mandated to make

        - See e.g. *Khosa* at paras. 46-47, *per* Binnie J. and at para. 89, *per* Rothstein J., concurring; *Agraira* at para. 50; and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 26.

    - 2. Questions involving the interpretation of the decision-maker's constituent statute or a statute or regulation closely related to its function

        - Most of the post-*Dunsmuir* case law of the Supreme Court of Canada applies the reasonableness standard pursuant to this presumption.

        - This presumption may be rebutted by a contextual analysis if it demonstrates that the issue in question is not one that the legislature intended to leave to the decision-maker to determine because it falls more appropriately within the expertise of a reviewing court. In conducting the contextual analysis, the reviewing court may have regard to such factors as the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue, and the expertise of the tribunal (*Smith* at paras. 28, 37; *Alberta Teachers* at para. 30; *Dunsmuir* at paras. 54-55).

- The **final step** involves asking if the presumption is rebutted by looking at the contextual factors.

- While the presence of a privative clause may well be an indicator of the legislator's intent that an administrative decision-maker should be accorded deference, the absence of such a clause is far less relevant as in many cases the reasonableness standard is applicable even in the absence of a privative clause (see e.g. *Khosa* at paras. 25-26; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 17 [*Mowat*]; and the non-labour decisions of the Supreme Court post-*Dunsmuir* applying the reasonableness standard of review, in many of which the relevant statutes lacked privative clauses).

- The other three contextual factors identified in the case law, involving the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal, are interrelated and are aimed at discerning whether the nature of the question being considered is such that the legislator intended it be answered by the administrative decision-maker as opposed to the Court.

- Indicia of such an intention include the role assigned to the administrative decision-maker under the legislation, and the relationship between the question decided and the institutional expertise of the decision-maker as opposed to the institutional expertise of a court.

- Where there is overlap between the two, correctness will apply: see, for example, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, *and Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615.

- Similarly, where the legislator has indicated that an appeal from a tribunal's decision lies to the Federal Court of Appeal as if the decision were a decision of the Federal Court, the legislative intention is that correctness should apply and the presumption of reasonableness is rebutted: *Tervita*.

- In most cases, the applicable standard of review will be reasonableness.

IV. Applying the standard of review to the questions that arise

- Where the standard is correctness, the court reviews the question and decides if the administrative decision-maker was correct or erred.

- One area where complexity often arises involves determining the bounds of the requirements of procedural fairness. The factors to be considered in this assessment are set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 243 N.R. 22.

- In terms of reasonableness, the case law is developing and one could argue that conflicting directions are given in it as to how "reasonableness" is to be interpreted.

- The starting point for the discussion should be *Dunsmuir*. There, at paras. 46-50, Bastarache and Lebel, JJ. defined reasonableness as follows:

> Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?
>
> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: **certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.** A court conducting a review for reasonableness inquires into the **qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes**. In judicial review, reasonableness is concerned **mostly** with the existence of **justification, transparency and intelligibility within the decision-making process**. But it is also concerned with **whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.**
>
> The move towards a single reasonableness standard does **not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism**. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context**? Deference is both an attitude of the court and a requirement of the law of judicial review.** It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference

imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada (Attorney General) v. Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. **When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view** and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(My emphasis)

- Based on the foregoing, the following may be said about the concept of reasonableness:

    - Reasonableness requires restraint on the part of the reviewing court, which must respect the institutional role and presumed expertise of the administrative decision-maker;

- Reasonableness looks to assessing both the reasons given (or perhaps which could have been given) for a decision and the result reached;

- The inquiry should start from the point of view of the administrative decision-maker's reasons and not the views of the court;

- The hallmarks of a reasonable decision are that it is transparent, intelligible and justifiable, and that the result reached is within the range of possible acceptable outcomes that are defensible in respect of the facts and law;

- The requisite inquiry is therefore contextual and, as some of the case law has said, involves discerning the breadth of what is defensible – or the "margin of appreciation" to be afforded to the decision-maker.

* While it is difficult to generalize, I think it safe to say that fact-based determinations are difficult to upset under the reasonableness standard.

* Pre-*Kanthasamy*, one would also have said that decisions involving an exercise of discretion were also difficult to upset. It remains to be seen if the law has significantly changed in this regard.

* Perhaps the toughest area in deciding what reasonableness means involves review of statutory interpretations carried out by administrative decision-makers in respect of their constituent statutes or statutes closely connected to their functions.

* The margin of appreciation varies widely from court to court and case to case. It seems, though, that the Supreme Court has strayed quite a bit from *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 26 N.R. 341 and *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 SCR 382, 41 D.L.R. (3d) 6, where a reviewable interpretation was defined as being one that is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review".

- The most useful guidance from the Supreme Court on the issue is probably contained in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895*.* There, Moldaver, J. writing for the majority stated at para. 38:

> Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.

- In addition, if a tribunal departs from an accepted interpretation of a provision, its decision will probably be unreasonable: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34, [2013] 2 S.C.R. 458 at paras. 6, 16 (*per* Abella J.), 75 (*per* Rothstein and Moldaver JJ. dissenting, but not on this point); *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 [*Bahniuk*].

- A text I find very useful in this area and consult frequently, especially for references and to answer the question "is there a case which says X" is Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf, 2nd ed. (Toronto: Carswell, 2009).

- Helpful discussions are also contained in *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 474 N.R. 121; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 [*Delios*]; and *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, 455 N.R. 157.

V. Remedial Issues

- The typical remedy is to quash the decision and remit the matter back to the administrative decision-maker for re-determination.

- However, orders may also be issued in the nature of *mandamus*, to require an administrative actor to carry out a public legal duty when it has failed to do so.

Generally speaking, the following must be established to give rise to an entitlement to an order of this nature as held in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742, 162 N.R. 177 (C.A.):

1. there must be a public legal duty to act;

2. the duty must be owed to the applicant;

3. there must be a clear right to performance of that duty;

4. no other adequate remedy is available to the applicant;

5. the order sought will be of some practical value or effect;

6. the Court in the exercise of its discretion finds no equitable bar to the relief sought; and

7. the balance of convenience favours granting *mandamus*.

   - See also *Delios* and *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 18 for a discussion of the other circumstances in which *mandamus* and mandatory directions can be given.

- Additionally, orders in the nature of prohibition may be issued, to prevent an administrative decision-maker from undertaking an action; however, generally speaking, a court cannot restrain the Crown or a Minister of the Crown by injunction.

- Before the Federal Courts, declarations may be made in the context of a judicial review application, including declarations of constitutional invalidity.

- As judicial review is a discretionary remedy, where there is no point in remitting a matter back to the administrative decision-maker for re-determination, a court need

not do so and may substitute its views for those of the decision-maker: see, for example *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 163 N.R. 27; *Bahniuk*.