

Standards of Review in Administrative Law

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I. Introduction

The purposes of this paper are to: (a) provide an overview of the development of the concept of “standards of review” as the organizing vehicle for determining if, and the extent to which, courts should defer to decisions by statutory delegates; (b) highlight problems with the pragmatic and functional approach for determining and applying the appropriate standard of review in a particular case; and (c) consider where the law might go from here.

Questions which will come out of the paper include:

1. Why has Canadian administrative law developed the concept of standards of review, which does not appear to exist or be necessary in English administrative law?
2. Does the pragmatic and functional approach apply to all grounds for judicial review? Is it the sole organizing conceptual framework for Canadian administrative law?
3. Does the pragmatic and functional approach adequately identify and take into account the various justifications for curial deference to administrative decisions?
4. What do we mean by “expertise,” and when does it provide a justification for deference?
5. Is there any value in retaining (or resurrecting) the concept of “jurisdiction” in contemporary administrative law?
6. Assuming that Justice LeBel’s *cri de coeur* about the complexity of contemporary Canadian administrative law will somehow be acted on, will one of the deferential standards disappear? Which one will be kept? Is “patently unreasonable” dead?
7. How would the Supreme Court of Canada go about simplifying the standards of review analysis, and reducing the number of standards from three to two?

8. Given that the point of standards of review analysis is to identify the intention of the legislature about what the court is supposed to do when reviewing a decision of a statutory delegate (whether on appeal or judicial review), is there merit in the British Columbia approach of specifying the applicable standard of review in legislation? Would this pose any dangers to the ability of administrative law to continue to develop in the future?

II. Setting the Stage: Development of the Concept of Standards of Review

It is important to remember that the concept of standards of review did not develop out of thin air, but is the result of many years of struggling with difficult constitutional and organizational questions about the role of statutory delegates and their relationship to the courts.¹

A. The constitutional and conceptual basis for different standards of review

Administrative law raises fundamental questions about the constitutional relationship between the legislature, the courts and statutory delegates—which in turn provide the clue to the constitutional and conceptual basis for different standards of judicial review. Do the courts have a general power to overturn *all* administrative decisions with which they do not agree? If not, why not? Even when the courts do have the power to review decisions of other statutory delegates, when (if ever) should they consciously defer to the delegate's decision? Why?

The traditional—or Diceyan²—view of judicial review explains this constitutional relationship of the courts to the legislature and the administration as follows:

- With certain constitutional limitations, the legislature can confer virtually any power on a statutory delegate, and not on the court. The *Canadian Constitution*³ does not require all executive or administrative powers to be exercised by the courts.
- Apart from the constitutional authority of the courts to decide cases involving the allocation of legislative powers in the Canadian federation or limitation on those powers

under the *Canadian Charter*,⁴ the superior court's own power to review decisions by statutory delegates derives either directly or indirectly from the legislature. The court possesses *direct* authority to review the decisions of other statutory delegates when legislation contains a specific right of appeal to the court.⁵ The court possesses *indirect* or *inherent* authority to review decisions of other statutory delegates as a result of the constitutional presumption that all "inferior" tribunals have limited jurisdiction, and the superior courts themselves have jurisdiction to see that the inferior bodies stay within their limited jurisdictions.

- With certain constitutional limitations, the legislature can provide that the court must not interfere with the decision of the statutory delegate. The *Canadian Constitution* does not give the courts *carte blanche* to sit in appeal or review of the decisions of all statutory delegates with which it does not agree. The courts must obey the legislature's directions limiting the courts' own jurisdiction.⁶
- The legislature can confer a wide spectrum of powers on its delegates. At the one end, it can clearly indicate its intention to limit the statutory delegate's jurisdiction, so that the delegate's decision on a matter must be correct (in the court's eyes). At the other end, the legislature can clearly indicate that a particular matter lies completely within the jurisdiction of the statutory delegate, and shall not be interfered with by the courts for any reason whatever.

Unfortunately, the legislature frequently does not articulate its intentions about what powers it intends to grant to the statutory delegate, or the relationship it wants between the statutory delegate and the court's superintending power.⁷ Further, the meaning of language is frequently imprecise, so controversies often arise about whether a particular statutory provision does or does not limit a particular delegate's jurisdiction, or whether the legislature intended the court to be able to review the delegate's decision and if so, in what circumstances.

In each case, the court must determine what powers the legislature intended to give to the statutory delegate and to the court itself. The answer to those questions inexorably dictates what standard of review the court should apply in reviewing the administrative decision in question.

B. The high water mark for judicial review: *Anisminic*

The high water mark for intensive judicial review is epitomized by the 1968 decision of the House of Lords in *Anisminic v. Foreign Compensation Commission*.⁸ Because the legislation in question contained a strong privative clause, the court could only review the administrative agency's decision if a jurisdictional defect was involved. To achieve this end, the House of Lords effectively magnified the number of ways in which an administrative agency may fail to acquire jurisdiction, or lose jurisdiction:

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving its power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg. v. Governor of Brixton Prison, Ex parte Armah*, [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law. I think that, if these views are correct, the only case cited which was plainly wrongly decided is *Davies v. Price*, [1958] 1 W.L.R. 434. But in a number of other cases some of the grounds of judgment are questionable.⁹

In effect, the *Anisminic* approach allows the courts to use a microscopic examination of the delegate's actions in order to find jurisdictional defects which the courts can correct.¹⁰

Justice Cory has described these decisions in *Econosult* as follows:

All of these decisions relied upon the principle set out in *Anisminic*. ... They all took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal. In each case, this Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal. These cases appear to expand, in a significant manner, a court's role upon an application for judicial review.¹¹

The English extension to make all errors of law reviewable

Subsequently, the English courts extended *Anisminic* to the point where it is now simply assumed in England that *all* errors of law can be reviewed and corrected by the courts: *Re Racal Communications Ltd.*:

[W]here Parliament confers on an administrative tribunal or authority, as distinct from a court of law, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined, and if there has been any doubt as to what that question is this is a matter for the courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So, if the administrative tribunal or authority have asked themselves the wrong question and answered that, they have done something that the act does not empower them to do and their decision is a nullity. ... The breakthrough made by *Anisminic* [[1969] 2 A.C. 147] was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.¹²

Curiously, the English Parliament had abandoned the use of privative clauses¹³ almost entirely after *Anisminic* and long before *Re Racal* and *O'Reilly*. As a result, it was not actually necessary for the House of Lords to treat all errors of law as going to jurisdiction in order

for the courts to have the power to review, because, in fact, there were no privative clauses to prevent the historical and anomalous use of *certiorari* to correct intra-jurisdictional errors on the face of the record.¹⁴

Indeed, it may be that the English approach will permit the courts to correct *any* error of law, whether or not it is apparent on the face of the record. As Lord Diplock said:

Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.¹⁵

Is there only one right interpretation of the law?

The implication is that there is only one right interpretation of the law—the courts’ interpretation—and there is little effective room for administrative agencies to adopt differing meanings or applications of legal concepts.¹⁶ Accordingly, the standard for judicial review in England appears to be “correctness,” at least as far as any question of law is concerned.

One of the consequences of the absence of privative clauses in England—and the English courts’ assumption that any interpretation by an administrative agency of legal concepts which differs from the courts’ interpretation will take the administrators outside their jurisdiction—is that English law does not contain our Canadian erudition on “patent unreasonableness,” “curial deference,” the “pragmatic and functional approach” to determining which matters are jurisdictional and which lie within the jurisdiction of the statutory delegate, or the concept of a spectrum of standards of review (or deference). As will be seen below, the law of Canada now differs from the law of England because our courts will not necessarily correct all errors of law.

C. The low water mark: *New Brunswick Liquor Corp.*

The decision of the Supreme Court of Canada in *C.U.P.E. Local 963 v. New Brunswick Liquor Corporation*¹⁷ marked a significant turning point in the Canadian courts’ attitude towards statutory delegates, greatly minimizing the circumstances in which the courts would review administrative decisions. In effect, the courts applied the “not patently

unreasonable test” to shield an enormous range of alleged administrative errors from judicial review.

New Brunswick Liquor Corp. involved a decision of the New Brunswick Public Service Labour Relations Board which interpreted a provision in its Act that specified that an “employer shall not replace... striking employees or fill their positions with any other employee.” The question was whether the Board had jurisdiction to interpret “other employee” to include management personnel, or whether the Court should impose its interpretation on the Board. Justice Cory has described the Court’s approach in *New Brunswick Liquor Corp.* as follows:

Dickson J. (as he then was), writing for the court, noted that the section in question was replete with ambiguity. He then set out with compelling force the rationale for protecting decisions of administrative tribunals which were made within their jurisdiction. He wrote at pp. 235-36:

The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers—broader than those typically vested in a labour board—to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met.

He went on to stress that judicial restraint should be exercised in reviewing the P.S.L.R.B.’s interpretation of the words in issue, since an interpretation of the provision in question was a function that “would seem to lie logically at the heart of the specialized jurisdiction confided to the board” (p. 236). From this, it followed that “not only would the Board not be required to be ‘correct’ in its interpretation but one would

think that the Board was entitled to err and any such error would be protected from review by the privative clause.” He then defined the appropriate standard for judicial review in these words at p. 237:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?¹⁸

The euphoric (but ultimately incorrect) reaction by many administrative law observers¹⁹ to *New Brunswick Liquor Corp.* was that the “patent unreasonableness” test should be applied in *all* circumstances—jurisdictional or not, with or without a privative clause—to protect *all* decisions of *all* statutory delegates from *all* forms of judicial review. As Cory J. described it:

The immediate effect of the *C.U.P.E.* decision has been charted by Wilson J. in her reasons in *National Corn Growers Assn...* Legal writers hailed the decision as setting out a “restricted and unified theory of judicial review.” The *C.U.P.E.* test of reasonableness was applied in situations where labour boards were protected by a privative clause[,] in cases of consensual arbitrators, statutory arbitrators and, as well, to labour relations board decisions not protected by a privative clause [though perhaps by a privative “gloss”].²⁰ Generally, these cases preclude judicial interference with interpretations made by a board as long as they are not patently unreasonable....

The principle adopted in *C.U.P.E.* reached its zenith when it was applied in *Teamsters Union, Local 938 v. Massicotte*, [1982] 1 S.C.R. 710. In that case Laskin C.J., at p. 724, stated that: “*mere doubt as to correctness of labour board interpretation of its statutory power is no ground for finding jurisdictional error*, especially when the labour board is exercising powers confided to it in wide terms to resolve competing contentions.”

C.U.P.E., and the decisions referred to above, make it clear that an administrative tribunal will, in ordinary circumstances, lose jurisdiction only if it acts in a patently unreasonable manner.²¹

Thus, the immediate reaction to *New Brunswick Liquor Corp.* was the assertion that reasonableness was a complete shield against judicial review on *all* grounds. This minimalist standard for judicial review was subsequently eloquently re-stated in Wilson J.’s dissents in *National Corn Growers*²² and *Lester*²³—although the majority of the Supreme Court

subsequently clearly recognized that this was not an accurate statement of either the law or the Court's own constitutional role.

D. The pragmatic and functional test for identifying jurisdictional versus intra-jurisdictional matters: *Bibeault*

In a long line of cases, the Supreme Court subsequently clarified *New Brunswick Liquor Corp.* and restricted the application of the patently unreasonable test to a broad—but nevertheless limited—range of circumstances. The “patently unreasonable” test had no application to matters that clearly involved jurisdictional givens, including constitutional questions.²⁴ In at least those circumstances, the correctness test applied.

The difficulty, however, was to have some method of determining whether a particular matter was a jurisdictional given or not. While some matters may clearly be jurisdictional, and other questions may clearly not be jurisdictional, there may be a large grey area of uncertainty about whether the delegate has jurisdiction to decide other matters. What test was to be applied to determine whether the delegate had jurisdiction to deal with a particular matter or not?

In *Union des employés de service, Local 298 v. Bibeault*,²⁵ Beetz J. observed:

The idea of the preliminary or collateral question is based on the principle that the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and that such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator. The theoretical basis of this idea is therefore unimpeachable—which may explain why it has never been squarely repudiated: any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions. The principle itself presents no difficulty, but its application is another matter.

The theory of the preliminary or collateral question does not appear to recognize that the legislator may intend to give an administrative tribunal, expressly or by implication, the power to determine whether certain conditions of law or fact placed on the exercise of its power do exist. It is not always true that each of these conditions limits the tribunal's authority; but except where the legislator is explicit, how can one distinguish a condition which the legislator intended to leave to the exclusive determination of the administrative tribunal from a condition which limits its authority and as to which it may not err? One can make

the distinction only by means of a more or less formalistic categorization. Such a categorization often runs the risk of being arbitrary and which may in particular unduly extend the superintending and reforming power of the superior courts by transforming it into a disguised right of appeal.

The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question “Is this a preliminary or collateral question to the exercise of the tribunal’s power?” for the only question which should be asked, “Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?”

Then Beetz J. articulated his method for determining whether an alleged error is jurisdictional or not:

The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error. At first sight it may appear that the functional analysis applied to cases of patently unreasonable error is not suitable for cases in which an error is alleged in respect of a legislative provision limiting a tribunal’s jurisdiction. The difference between these two types of error is clear: only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal’s jurisdiction, whereas in the case of a legislative provision limiting the tribunal’s jurisdiction, a simple error will result in a loss of jurisdiction. It is nevertheless true that the first step in the analysis necessary in the concept of a “patently unreasonable” error involves determining the jurisdiction of the administrative tribunal. At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. At this initial stage a pragmatic or functional analysis is just as suited to a case in which an error is alleged in the interpretation of a provision limiting the administrative tribunal’s jurisdiction: in a case where a patently unreasonable error is alleged on a question within the jurisdiction of the tribunal, as in a case where simple error is alleged regarding a provision limiting that jurisdiction, the first step involves determining the tribunal’s jurisdiction.²⁶

In *Bibeault* then, the Supreme Court of Canada indicated that a pragmatic and functional approach was to be used for determining the legislature’s intention about whether a particular error was jurisdictional or intra-jurisdictional in nature. If this approach determined that Parliament had confided the matter to the delegate,²⁷ then the “patently

unreasonable” test should be applied to determine whether the delegate had exceeded its jurisdiction. If this approach determined that Parliament intended the matter to be a “jurisdictional given” as far as the statutory delegate was concerned, then the “correctness” test should be applied. Up to this point, there were only two standards—“correctness” and “not patently unreasonable”—which operated rather like an “on/off” switch, with nothing in between.

E. The development of the concept of a spectrum of standards, the articulation of the reasonableness *simpliciter* standard, and using the pragmatic and functional approach to determine the applicable standard of review

Although credit for articulating the concept of different standards of review belongs to Roger Kerans J.A. of the Court of Appeal of Alberta,²⁸ three decisions of the Supreme Court of Canada solidified the analysis into administrative law parlance.

*Pezim*²⁹ is the first instance in which the Supreme Court of Canada referred to the concept of a spectrum of standards of review in the context of a statutory appeal.

Subsequently, however, the Court in *Southam*³⁰—another appeal case—not only reiterated the concept of a spectrum of standards of review, but actually applied a new intermediate standard of review (“reasonableness *simpliciter*”) which was found along the spectrum.

Curiously, almost immediately after *Southam*, the Supreme Court issued two *judicial review* decisions (both from Quebec) which (a) did not refer to *Pezim* or *Southam* at all, (b) did not refer to the concept of a spectrum of possible standards of review, (c) did not refer to the standard of “reasonableness *simpliciter*,” and (d) simply applied the “not patently unreasonable” test without any conceptual discussion at all. These decisions are: *Pointe-Claire (City) v. Quebec (Labour Court)*³¹ and *Canadian Union of Public Employees, Local 301 v. Montreal (City)*.³² This raised a doubt about whether the law with respect to standards of review differed for appeals compared with applications for judicial review. Were there any circumstances in which the court—on an application for judicial review—should apply a more stringent standard than “not patently unreasonable,” but less stringent than “correctness”? For example, if the legislation did not contain a privative clause? Or if the statutory delegate did not have any particular expertise about the

matter? Would it depend on the nature and wording of the power being exercised?³³ Certainly, the constellation of factors involved in the pragmatic and functional analysis developed in *Bibeault* to determine whether a matter is a jurisdictional given or lies within jurisdiction had been applied to both applications for judicial review and appeals—why would the concept of a spectrum of standards not also apply?³⁴

In *Pushpanathan*,³⁵ the Supreme Court of Canada made it clear that the spectrum *does* apply both to applications for judicial review and to appeals. The Court converted the pragmatic and functional analysis for determining the nature of an alleged error into a more general method for determining the legislature’s intention about the appropriate standard of review to be applied by the courts to any particular question, whether in an application for judicial review or a statutory appeal. The Court also emphasized that the appropriate standard of review is the first step in the review process, and must be determined in every case.³⁶ Finally, the Court identified the four factors to be taken into account in the pragmatic and functional approach for determining the applicable standard of review.³⁷

F. Post-*Pushpanathan* developments refining the standard of review analysis

Although *Pushpanathan* might have suggested a potentially infinite array of possible standards of review, the Supreme Court of Canada in *Dr. Q.* and *Ryan* made it clear that the spectrum of standards of review is actually a *spectrum of deference* having only three currently recognized standards of review: correctness, reasonableness *simpliciter*, and patent unreasonableness.³⁸ Further, the “reasonableness *simpliciter*” standard is not a range, but rather a discrete point, with constant content, requiring the court to determine whether “after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision” of the statutory delegate?

In addition, *Dr. Q.* and *Ryan* established that: it is necessary to address the applicable standard of review in every case, using the pragmatic and functional approach; the mere existence of a statutory appeal does not necessarily engage the correctness standard; the same approach for determining the applicable standard of review applies to both applications for judicial review and appeals; the standard of review is not necessarily the same standard which was applied by the statutory

delegate in the first instance and that there may well be a difference between the standard which must be applied by the statutory delegate in doing its job (“clear and cogent evidence”) and the standard which must be applied by the reviewing court; a court of appeal will apply the correctness standard (that is, may substitute its own opinion) in determining whether the reviewing court properly identified the appropriate standard of review, and properly applied it;³⁹ and the category of error does not definitively determine the applicable standard of review. There is no one-to-one relationship between any particular ground of review and any particular standard of review; different courts may select different standards, and may apply the same standard differently.

In *Toronto v. C.U.P.E.*,⁴⁰ Justice LeBel expressed a *cri de coeur* about the complexity and logic-chopping nature of modern standards of review analysis, suggesting that the courts may need to take the lead to simplify this area of the law by reducing the current three standards to two. Problems with the pragmatic and functional approach to determining and applying the applicable standard of proof will be considered more thoroughly below.

Most recently, *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*⁴¹ makes it clear that the actual wording of a particular privative provision may have an important effect on identifying whether reasonableness *simpliciter* or patently unreasonable is the appropriate standard of review. In doing so, Justice Major makes it plain that the use of the patently unreasonable standard will be “rare.”⁴²

G. Applying the pragmatic and functional approach in reviewing exercises of discretion

The Supreme Court of Canada has also used the pragmatic and functional approach in reviewing a statutory delegate’s exercise of discretion: *Baker*.⁴³

Conceptually, the review of a discretionary decision involves at least two separate inquiries:

- First, did the statutory delegate act within the ambit of the discretion granted to it by considering relevant factors and not considering irrelevant factors? Answering this question involves a determination of what is or is not a relevant factor. Sometimes, the legislation explicitly indicates at least some of the factors that

it intends the decision-maker to take into account in exercising the discretion. However, questions may arise about whether other non-enumerated factors can be taken into account. Ultimately, the courts must determine who the legislature intended to make the determination about whether a particular factor is or is not relevant—the courts, or the statutory delegate. Using the pragmatic and functional approach and the four factors identified in *Pushpanathan*, this analysis will identify the standard of review to be applied in reviewing statutory delegate's determination of what factors are or are not relevant to the exercise of the discretion.⁴⁴

- Second, assuming the statutory delegate did act within the ambit of the discretion granted to it (however that is determined), was the way the statutory delegate exercised the discretion unreasonable (or patently unreasonable, depending upon the standard of review to be applied)?⁴⁵

Although not always sharply delineating these two separate concepts, the Supreme Court has spent considerable effort applying the pragmatic and functional approach to reviewing the exercise of discretionary powers. Following on from its seminal decision in *Baker* there have been four other recent important Supreme Court decisions involving the review of discretionary decisions: *Suresh*,⁴⁶ *Chieu*,⁴⁷ *Moreau-Bérubé*,⁴⁸ and the *Retired Judges Case*.

III. Problems with the Pragmatic and Functional Approach to Determining and Applying the Applicable Standard of Review

The purpose of this Part is to identify various problems with using the pragmatic and functional approach to determine and apply the applicable standard of review.

A. Is it always necessary to determine the standard of review at the outset of every case?

As Justice Bastarache observed in *Pushpanathan*,⁴⁹ the determination of the applicable standard of review is necessary in every case:

One of the elements necessary for the disposition of an application for judicial review is the standard of review of the decision of the administrative tribunal whose decision is being reviewed, and that question is clearly in issue in this case. Reluctant as this Court is to decide issues not fully argued before it, determining the standard of review is a prerequisite to the disposition of this case.

The reason for this, of course, is that the standard of review has constitutional implications about what the legislature intended the court to do, and the application of the different standards may well result in different outcomes. It is not surprising, therefore, that the court has repeatedly articulated the need to determine the standard of review at the outset.⁵⁰

1. Justice Sopinka's view—no need to do the analysis if the court agrees with the statutory delegate's decision.

The current emphasis on the *preliminary* need to determine the applicable standard of review contrasts sharply with an earlier approach articulated by Justice Sopinka in *C.A.I.M.A.W. v. Paccar of Canada Ltd.*,⁵¹ which effectively applied the correctness standard and only dealt with the issue of deference in the event that the court disagreed with the decision of the statutory delegate:

While I agree generally with La Forest J. on the principles underlying the scope and standard of review of labour board decisions, I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is “reasonable” or “patently unreasonable” it is making a statement about the logical relationship between the grounds of a decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.

I share La Forest J.'s opinion of the importance of curial deference in the review of specialist tribunals' decisions. But, in my view, curial

deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness. ... So long as the Court is satisfied with the correctness of the tribunals' decision, any reference to reasonableness is superfluous.

2. *Ryan and Voice*—the analysis must be done in every case.

In *Ryan*,⁵² the unanimous Supreme Court made it very clear that the application of the reasonableness standard of review does not involve any consideration whatever by the court of what might be the “correct” decision:

50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision maker is merely afforded a “margin of error” around what the court believes is the correct result.

51 There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was unreasonable.

Given the Supreme Court’s repeated direction on the necessity of applying the pragmatic and functional analysis to determine the applicable standard of review in every case, it is not surprising that it sharply criticized both the reviewing judge and the Court of Appeal of Alberta for failing to do so in *Voice Construction*.⁵³

20 Rather than determining the appropriate standard of review and then assessing the arbitrator's decision on that basis, the reviewing judge in this appeal appears to have reversed these steps. He first concluded that the labour arbitrator's interpretation of the collective agreement amounted to an amendment of the agreement and therefore exceeded her jurisdiction.

21 In a manner of speaking, the cart was put before the horse. The reviewing judge should have determined the standard of review before assessing the arbitrator's reasons. In *Pushpanathan*, at para. 28, Bastarache J. explained the error in the reviewing judge's approach:

Although the language and approach of the "preliminary," "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the [four] factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. *But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.*

22 Neither the reviewing judge nor the Court of Appeal conducted the analysis mandated by the pragmatic and functional approach. In a number of appeals this Court has applied a standard of patent unreasonableness to the decisions of labour arbitrators relative to the interpretation and application of collective agreements: see *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Alberta Union of Provincial Employees, Branch 63 v. Board of Governors of Olds College*, [1982] 1 S.C.R. 923, at p. 935; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco*

Construction Ltd., [1993] 2 S.C.R. 316, at pp. 337-39; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, at paras. 58-60. However, when the pragmatic and functional approach is applied here, the result mandates the less deferential standard of reasonableness.⁵⁴

Apart from the fact that Justice Major ultimately applied a different standard of review than the lower courts (reasonableness, rather than correctness), it is important to note that the lower courts' failure to do the pragmatic and functional analysis to determine the applicable standard of review was itself an appealable error.⁵⁵ The proper approach is to use the pragmatic and functional analysis to determine the appropriate standard of review; if it is correctness, then it might make sense to characterize the issue as "jurisdictional." The reverse process is not acceptable—the court cannot simply label something as being "jurisdictional" (however that is determined) and then automatically conclude that the correctness standard must apply. In short, the Supreme Court expects each reviewing court as the first step in every case, to use the pragmatic and functional approach to determine the applicable standard of review. And, as it said in the *Retired Judges Case*,⁵⁶ it expects that analysis to be done in a contextual, purposive and principled manner:

The examination of these four factors [from *Pushpanathan*] and the "weighing up" of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

3. **Maybe not—if the outcome of all of the standards of review would be identical in any event?**

Query: Is it still open to a reviewing court to avoid doing the pragmatic and functional analysis to identify *the* appropriate standard of review, if it can accurately conclude that the outcome of the case would be the same regardless of which standard of review is applied?⁵⁷ The danger, of course, is that a higher court may not agree with the reviewing court's appraisal that the application of all of the standards of review would yield the same result.

Similarly, can a court simply accept counsels' agreement about the applicable standard of review? Again, the danger is that a higher court

may not agree that the pragmatic and functional approach would yield the agreed-to standard: *Monsanto*.⁵⁸ If counsels have not addressed their mind to this possibility, they might not have the appropriate material in front of the higher court in order to allow it to apply its selected standard in a way that would be favourable to their clients.

4. The Supreme Court itself has not always done the pragmatic and functional analysis before identifying the appropriate standard of review

Notwithstanding its own repeated admonitions about the necessity for a reviewing court to always perform the pragmatic and functional analysis as a preliminary step in every case in order to determine the appropriate standard of review, the Supreme Court of Canada itself has sometimes not explicitly performed this analysis—perhaps because the outcome of the analysis is obvious.

(a) Constitutional issues always engage the correctness standard of review

The Supreme Court has recognized that the application of the pragmatic and functional approach to a question of constitutional law will always yield a correctness standard of review. As Justice Bastarache (dissenting, but not on this point) noted in *Barrie Public Utilities*:⁵⁹

66 The pragmatic and functional approach applies to this question, as it does to all matters of judicial review and all appeals from administrative tribunals: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. It is settled law, however, that application of the pragmatic and functional approach to a question of constitutional law will yield a correctness standard. As Iacobucci and Major JJ. wrote in *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at para. 40, “[i]t seems reasonable to accept the proposition that courts are in a better position than administrative tribunals to adjudicate constitutional questions.” That appeal addressed the degree of deference due a decision by a specialized agency, the National Energy Board. That agency had determined that certain gathering pipeline and processing plant facilities were not federal works or undertakings under s. 92(10)(a) of the

Constitution Act, 1867. As a division of powers question, the issue in *Westcoast* thus resembles that in the present appeal. The same point is also made frequently when a tribunal answers a question relating to the *Canadian Charter of Rights and Freedoms*.... The CRTC's constitutional determination is therefore reviewable by a correctness standard.

If a detailed pragmatic and functional analysis were done in a constitutional case, one would almost certainly always conclude that the important, general and precedential nature of the issue (the fourth *Pushpanathan* factor) would trump any and all other of the *Pushpanathan* factors that might indicate less stringent scrutiny. Indeed, there could never be an effective privative clause preventing the court from making its own determination of a constitutional issue, so the first *Pushpanathan* factor probably could never come into play. Further, it would be difficult to conceive any circumstance in which a statutory delegate would have greater relative expertise than the court on a constitutional issue. Nevertheless, why would the court not simply state this type of analysis very quickly, rather than merely asserting the outcome of it?

In passing, note that Justice Bastarache in *Barrie Public Utilities*⁶⁰ emphasized the importance of not assuming that the correctness standard applicable to a constitutional issue (as the necessary and inescapable result of applying the pragmatic and functional analysis) necessarily applies to other issues which might attract a different standard of review:

II. Determination of the Standard of Review

59 Judicial review of the CRTC's order requires a separation of that decision into two main questions. One is the constitutional question. The constitutional question is whether any interpretation argued for s. 43(5) of the Act would make that provision *ultra vires* the Parliament of Canada. The other is the more general question of the CRTC's interpretation of s. 43(5) and exercise of its power in issuing Telecom Decision CRTC 99-13.

60 Separating the two main questions is crucial. Failure to distinguish and resolve separately the two questions frustrates the appropriate process of judicial review in at least two ways. It may also, consequently, frustrate Parliament's intent.

61 First, combining a constitutional question and a statutory interpretation question may skew the standard of review for an agency's decision. As I shall develop below, a question with constitutional overtones will inevitably drive towards the

correctness standard. Yet, where the constitutional argument is without merit, the agency's decision should not be viewed globally as a constitutional matter.

- 62 Second, where a constitutional question is raised, reviewing the agency's ordinary statutory interpretation without isolating the constitutional question can limit the agency's ability to give the legislation at issue the full import intended by the legislature. The mere unproven argument that one reading of a statute is unconstitutional may impel the decision maker erroneously to eliminate that reading by applying the interpretive doctrine of the presumption of constitutionality.

(b) The relationship between the *Canadian Charter* and administrative law standards of review analysis

The decision of the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeoys*⁶¹ raises a number of very interesting questions about the role of the standards of review analysis in a case where the allegation is that a statutory delegate has breached an individual's *Canadian Charter* rights, including:

- Because of the constitutional nature of the case, is it necessary to refer to the standards of review analysis at all?
- Alternatively, is the standard of review of the *constitutionality* of a statutory delegate's decision automatically correctness—so that the reviewing court may (indeed, must) substitute its own appreciation about whether *Canadian Charter* rights have been violated?
- If not, is the entire matter to be determined by the standards of review analysis from administrative law, without any recourse to a constitutional analysis?
- If so, under what circumstances would a court ever defer to a statutory delegate's decision that a matter is or is not constitutional?
- And—as a separate issue—what is meant by “law” for the purposes of section 1 of the *Canadian Charter*?
- Is it possible to streamline the *Oakes* analysis under section 1 of the *Canadian Charter*?

Background

The appellant was an orthodox Sikh who believed that his religion required him to wear a kirpan—a ceremonial dagger—at all times. He accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending. The school board sent the appellant’s parents a letter in which, as a reasonable accommodation, it authorized their son to wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. The appellant and his parents agreed to this arrangement. However, the governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated Article 5 of the school’s code of conduct, which prohibited the carrying of weapons. The school board’s council of commissioners upheld that decision, but allowed the appellant to wear a symbolic kirpan made of material rendering it harmless in the place of a real kirpan.

The appellant’s father then filed a motion in the Superior Court for a declaratory judgment to the effect that the commissioners’ decision was of no force or effect because it breached the appellant’s freedom of religion. The Superior Court granted the motion, declared the decision to be null, and authorized the appellant to wear his kirpan under certain conditions.

The Court of Appeal reversed. After deciding that the applicable standard of review was reasonableness *simpliciter*, the Court of Appeal decided that the commissioners’ decision was not unreasonable. Although it concluded that the decision in question infringed the appellant’s freedom of religion under section 2(a) of the *Canadian Charter* and section 3 of Quebec’s *Charter of Human Rights and Freedoms*,⁶² it also concluded that the infringement was justified for the purposes of section 1 of the *Canadian Charter* and section 9.1 of the *Quebec Charter*.

The Supreme Court of Canada allowed the appellants’ appeal. Though unanimous about the result, the members of the court disagreed fundamentally on whether the case was governed by a constitutional law analysis or an administrative law analysis or a mixture of both.

The majority judgment by Charron J.

Writing for the majority, Justice Charron⁶³ concluded that the administrative law standard of review analysis was not applicable—or at least not determinative—because reliance on administrative law principles “could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two.”⁶⁴ Although judicial review may involve both a constitutional law component and an administrative law component,⁶⁵ Justice Charron concluded that the central issue in the appeal was whether the commissioners’ decision complied with the requirements of the *Canadian Charter*, not whether their decision was valid from the point of view of administrative law.⁶⁶ Justice Charron states:⁶⁷

19 There is no suggestion that the council of commissioners did not have jurisdiction, from an administrative law standpoint, to approve the *Code de vie*. Nor, it should be noted, is the administrative and constitutional validity of the *rule* against carrying weapons and dangerous objects in issue. It would appear that the *Code de vie* was never even introduced into evidence by the parties. Rather, the appellant argues that it was in applying the rule, that is, in categorically denying Gurbaj Singh the right to wear his kirpan, that the governing board, and subsequently the council of commissioners when it upheld the original decision, infringed Gurbaj Singh’s freedom of religion under the *Canadian Charter*.

20 The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard (*Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31).

Justice Charron then addressed whether a section 1 *Canadian Charter* analysis was appropriate to resolve the central issue in this case:

21 Thus, it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted. The reasons of Deschamps and Abella JJ. raise

another issue relating to the application of s. 1 of the *Canadian Charter*. My colleagues believe that the Court should address the issue of justification under s. 1 only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule. With respect, it is of little importance to Gurbaj Singh—who wants to exercise his freedom of religion—whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule. In either case, any limit on his freedom of religion must meet the same requirements if it is to be found to be constitutional. In my opinion, consistency in the law can be maintained only by addressing the issue of justification under s. 1 regardless of whether what is in issue is the wording of the statute itself or its application. I will explain this.

- 22 There is no question that the *Canadian Charter* applies to the decision of the council of commissioners, despite the decision's individual nature. The council is a creature of statute and derives all its powers from statute. Since the legislature cannot pass a statute that infringes the *Canadian Charter*, it cannot, through enabling legislation, do the same thing by delegating a power to act to an administrative decision maker: see *Slaight Communications*, at pp. 1077-78. As was explained in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 20, the *Canadian Charter* can apply in two ways:

First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by s. 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s. 24(1) of the *Charter*.

Deschamps and Abella JJ. take the view that the Court must apply s. 1 of the *Canadian Charter* only in the first case. I myself believe that the same analysis is necessary in the second case, where the decision maker has acted pursuant to an enabling statute, since any infringement of a guaranteed right that results from the decision maker's actions is also a limit "prescribed by law" within the meaning of s. 1. On the other

hand, as illustrated by *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 141, when the delegated power is not exercised in accordance with the enabling legislation, a decision not authorized by statute is not a limit “prescribed by law” and therefore cannot be justified under s. 1.

- 23 In the case at bar, no one is suggesting that the council of commissioners failed to act in accordance with its enabling legislation. It is thus necessary to determine, as the Court did in *Slaight Communications*, whether the council of commissioners’ decision infringes, as alleged, Gurbaj Singh’s freedom of religion. As Lamer J. explained (at pp. 1079-80), where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the *Canadian Charter*, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the *Canadian Charter* to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision.

Justice Charron concludes that a section 1 *Charter* analysis is appropriate to resolve the central issue in this case:

- 30 This Court has frequently stated, and rightly so, that freedom of religion is not absolute and that it can conflict with other constitutional rights. However, since the test governing limits on rights was developed in *Oakes*, the Court has never called into question the principle that rights are reconciled through the constitutional justification required by s. 1 of the *Canadian Charter*. In this regard, the significance of *Big M Drug Mart*, which predated *Oakes*, was considered in *B. (R.)*, at paras. 110-11; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733-34. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the Court, in formulating the common law test applicable to publication bans, was concerned with the need to “develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution” (at p. 878). For this purpose, since the media’s freedom of expression had to be reconciled with the accused’s right to a fair trial, the Court held that a common law standard

that “clearly reflects the substance of the *Oakes* test” was the most appropriate one (at p. 878).

- 31 Thus, the central issue in the instant case is best suited to a s. 1 analysis. But before proceeding with this analysis, I will explain why the contested decision clearly infringes freedom of religion.

Justice Charron concludes that the appellant’s right to freedom of religion has been infringed. As regards to the section 1 *Oakes* analysis, Justice Charron states that the decision prohibiting the wearing of a kirpan at the school is a discretionary decision afforded to the commissioners pursuant to section 12 of the *Education Act*.⁶⁸ The decision, therefore, constitutes a limit prescribed by law within the meaning of section 1 of the *Charter* and must accordingly be justified in accordance with that section.

Justice Charron concludes that the decision to ban the kirpan was motivated by a pressing and substantial objective, namely, to ensure safety in schools, and further that the decision was rationally connected to that objective. As regards the minimal impairment stage of the proportionality analysis, Justice Charron observes that the same approach must be taken regardless of whether legislation is at issue or whether a decision rendered pursuant to statutory discretion is at issue:

- 51 The approach to the question must be the same where what is in issue is not legislation, but a decision rendered pursuant to a statutory discretion. Thus, it must be determined whether the decision to establish an absolute prohibition against wearing a kirpan “falls within a range of reasonable alternatives.”

In that regard, Justice Charron notes the similarity between the minimal impairment stage of the proportionality analysis and the duty of reasonable accommodation:

- 52 In considering this aspect of the proportionality analysis, Lemelin J. expressed the view that [TRANSLATION] “[t]he duty to accommodate this student is a corollary of the minimal impairment [test]” (para. 92). In other words, she could not conceive of the possibility of a justification being sufficient for the purposes of s. 1 if reasonable accommodation is possible (para. 75). This correspondence of the concept of reasonable accommodation with the proportionality analysis is not without precedent. In *Eldridge*, at para. 79, this Court stated that, in cases concerning s. 15(1) of the *Canadian Charter*, “reasonable accommodation” was equivalent to the concept of “reasonable limits” provided for in s. 1 of the *Canadian Charter*.

53 In my view, this correspondence between the legal principles is logical. In relation to discrimination, the courts have held that there is a duty to make reasonable accommodation for individuals who are adversely affected by a policy or rule that is neutral on its face, and that this duty extends only to the point at which it causes undue hardship to the party who must perform it. Although it is not necessary to review all the cases on the subject, the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar. In my view, Professor José Woehrling correctly explained the relationship between the duty to accommodate or adapt and the *Oakes* analysis in the following passage:

[TRANSLATION] Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important legislative objective, to apply the standard in its entirety, without the exceptions sought by the claimant. More specifically, in the context of s. 1 of the *Canadian Charter*, it is necessary, in applying the test from *R. v. Oakes*, to show, in succession, that applying the standard in its entirety constitutes a rational means of achieving the legislative objective, that no other means are available that would be less intrusive in relation to the rights in question (minimal impairment test), and that there is proportionality between the measure's salutary and limiting effects. At a conceptual level, the minimal impairment test, which is central to the section 1 analysis, corresponds in large part with the undue hardship defence against the duty of reasonable accommodation in the context of human rights legislation. This is clear from the Supreme Court's judgment in *Edwards Books*, in which the application of the minimal impairment test led the Court to ask whether the Ontario legislature, in prohibiting stores from opening on Sundays and allowing certain exceptions for stores that were closed on Saturdays, had done enough to accommodate merchants who, for religious reasons, had to observe a day of rest on a day other than Sunday.

Having regard to the evidence in the record, Justice Charron concluded that an absolute prohibition against wearing a kirpan did not

minimally impair the appellant's freedom of religion. The respondent's argument in support of an absolute prohibition—namely that kirpans are inherently dangerous—was rejected.

The judgment of Deschamps and Abella JJ.

Although they prefaced their separate but concurring judgment with a recognition that administrative law does not exclude but rather incorporates *Canadian Charter* arguments, Justices Deschamps and Abella saw no reason to depart from the purely administrative law approach adopted by the Court of Appeal.⁶⁹

- 86 In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56, the Court recognized that an administrative law analysis does not exclude, but incorporates, arguments relating to the *Canadian Charter of Rights and Freedoms* (“*Canadian Charter*”):

The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

Simply put, it is difficult to conceive of an administrative decision being permitted to stand if it violates the *Canadian Charter*. The administrative body's decisions can, indeed must, be judicially reviewed in accordance with the principles of administrative law where they do not have the normative import usually associated with a law. For the reasons that follow, we accordingly believe that it is preferable to adhere to an administrative law analysis where resorting to constitutional justification is neither necessary nor appropriate.

Justices Deschamps and Abella disagreed that *Nova Scotia (Workers' Compensation Board) v. Martin* requires the court to reject administrative law standard of review analysis in favour of a constitutional analysis:

- 93 Our colleague Charron J. (at para. 20), relying on *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31, finds that since the dispute concerns the compliance of the school board's decision with the requirements of the *Canadian Charter*, an analysis of the standard of review is unnecessary and that this analysis led the Court of Appeal to an erroneous decision. With respect, we do not believe that *Martin* established a rule that simply raising an argument based on human rights makes administrative law inapplicable, or that all decisions contested under the *Canadian Charter* or provincial human rights legislation are subject to the correctness standard. In *Martin*, the correctness standard applied because the decision concerned the Workers' Compensation Board's authority to determine the validity of a provision of its enabling statute under the *Canadian Charter*.
- 94 Moreover, it should be noted that an administrative law approach was adopted in reviewing decisions made by, respectively, university and school authorities in *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 ("*T.W.U.*"), and *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86. In those cases, the Court had to determine what standard applied to decisions on issues that unquestionably concerned values protected by the *Canadian Charter*.⁷⁰

Justices Deschamps and Abella perceive several problems with the approach taken by the majority:

- 111 In addition to the fact that we believe the question was not settled definitively by *Slaight* and *Ross*, there are several incongruities that prompt us to reflect upon the approach proposed in those cases. First, there is the bifurcated obligation imposed on an administrative body to justify certain aspects of its decision pursuant to an administrative law analysis while other aspects are subject to s. 1 of the *Canadian Charter*. There are also problems related to the attribution of the burden of proof and to the nature of the evidence that an administrative body with quasi-judicial functions would have to adduce to justify its decision under s. 1 in light of the fact that it is supposed to be independent of the government. However, these practical problems obscure more important legal problems, which we will now discuss. The first is the equating of a decision with a law within the meaning of s. 1 of the *Canadian Charter*, and the second is the undermining of the integrity of

the tools of administrative law and the resulting further confusion in the principles of judicial review.

As regards equating a decision of an administrative tribunal with a “law” within the meaning of section 1, Justices Deschamps and Abella emphasize the practical difficulties with such an approach:

- 120 To suggest that the decisions of administrative bodies must be justifiable under the *Oakes* test implies that the decision makers in question must incorporate this analysis into their decision-making process. This requirement makes the decision making process formalistic and distracts the reviewing court from the objective of the analysis, which relates instead to the substance of the decision and consists of determining whether it is correct (*T.W.U.*) or reasonable (*Chamberlain*).
- 121 An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of “prescribed by law.” That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed—conceptually and in practice—on the legislative and executive branches is not easily applied to administrative tribunals.

They conclude that an administrative law analysis has the tools necessary to respond to a case such as the one at bar:

- 128 Our comments do not mean that we believe the Court must always exclude the s. 1 approach. That approach remains the only one available to demonstrate that an infringement of a right resulting from a law, in the normative sense of that expression, is consistent with the values of a free and democratic society. However, where the issue concerns the validity or merits of an administrative body’s decision, resorting to this justification process is unnecessary because of the specific tools that have been developed in administrative law. The standard of review is one of those tools. If an administrative body makes a decision or order that is said to conflict with fundamental values, the mechanisms of administrative law are readily available to meet the needs of individuals whose rights have been violated. Such individuals can have the decision quashed by obtaining a declaration that it is unreasonable or incorrect.⁷¹

Justices Deschamps and Abella conclude that, because the appellants were not challenging the *Education Act*⁷² nor the school's *Code de vie* passed thereunder, a *Canadian Charter* analysis was unnecessary. A total prohibition, and disregard to the accommodation measures proposed by the appellants, was held to be unreasonable—and therefore struck down on purely administrative law grounds.

The judgment of LeBel J.

The minority judgment of Justice LeBel appears to fall between the other two judgments. It is clear that he is not comfortable with the “decision vs. law” dichotomy suggested by Justices Deschamps and Abella:

151 This flexibility also makes it possible to apply the *Canadian Charter* and its values to a wide range of administrative acts without necessarily being confined by the norm-decision duality. Although appealing from the standpoint of legal theory, this dualism underestimates the problems that arise in applying the classifications it invites. It also entails a risk of narrowing the scope of constitutional review of compliance with the *Canadian Charter* and its underlying values. In this regard, I share the concerns expressed by my colleague Charron J. in her reasons.

Nor, however, is he convinced that the traditional section 1—*Oakes* analysis applies without reformulation:

155 Moving on now to the application of s. 1, it must be asked whether the analytical approach established in *Oakes* need be followed in its entirety. In the case of an individualized decision made pursuant to statutory authority, it may be possible to dispense with certain steps of the analysis. The existence of a statutory authority that is not itself challenged makes it pointless to review the objectives of the act. The issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right, having regard to the context in which the right has been infringed. Reasonable accommodation that would meet the requirements of the constitutional standard must be considered at this stage and in this context. In the case at bar, I must conclude that the respondent school board has not shown that its prohibition was justified and met the constitutional standard. I therefore agree with the conclusion proposed by my colleagues.

Disposition of the appeal

In the result, all of the judges in the Supreme Court allowed the appeal. Given that the appellant no longer attended the school, the majority concluded that it would be inappropriate to restore the judgment of the Superior Court, concluding that a declaration that the decision of the commissioners prohibiting the appellant from wearing his kirpan to be null.

Discussion

The different decisions in *Multani* raise a number of troubling questions.

- (a) Justice Charron's initial suggestion that the constitutional focus of the case means that "the administrative law standard of review was not relevant" must be inaccurate. Whenever the action of a statutory delegate is being reviewed by a court, the court must determine the standard which it will use to review that action. Surely her second observation was more accurate: namely, that the appeal did concern the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, and therefore it was necessary to apply the correctness standard—that is, for the court to make its own determination about whether the impugned action by the statutory delegate did or did not breach the *Canadian Charter*.
- (b) Similarly, Justices Deschamps and Abella surely cannot be suggesting that the issue of whether the statutory delegate's action breached the *Canadian Charter* could be determined solely by reference to the administrative law standards of review analysis without any consideration of how the *Canadian Charter* might or might not have been breached. It is one thing to suggest that a statutory delegate's decision or action which breached the *Canadian Charter* could never survive any possible standard of review—whether correctness, reasonableness *simpliciter*, or patent unreasonableness—the mere fact of the breach

would render the statutory delegate's decision incorrect, unreasonable, and patently unreasonable. But it seems elementary and inescapable that a determination that a *Canadian Charter* right has been breached must necessarily involve a consideration of what the *Canadian Charter* requires.

- (c) To the extent that their purely administrative law standards of review analysis caused Justices Deschamps and Abella to invalidate the commissioners' decision because it was *unreasonable*, under what circumstances would it ever be appropriate to defer to a statutory delegate's decision about a constitutional issue?⁷³ By definition, applying a deferential standard of review necessarily means that the reviewing court might disagree with the correctness of the statutory delegate's decision—why would a court ever allow an unconstitutional decision to be left uncorrected?
- (d) I am greatly troubled by the distinction made by Justices Deschamps and Abella between “normative law” and “administrative decisions.”

In the first place, it appears that they do not appreciate that the decisions of statutory delegates have the force of law. In my view, it does not matter whether a particular subject is dealt with in exhaustive detail in a statute (like the *Criminal Code* or the *Income Tax Act*), or whether the statute delegates decision-making authority in either peremptory or discretionary terms (like the *Securities Act*). In either event, the state-sanctioned actions must comply with the constitution—whether it is with those parts which are similar to that of the United Kingdom in 1867, or the division of powers, or the *Charter*.

Second, it appears that Justices Deschamps and Abella conceive that all actions of statutory delegates are adjudicative in nature, and do not appreciate the wide range of differing functions performed by statutory delegates.

Third, Justices Deschamps and Abella appear to conceive of statutory delegates as an order entirely different from the legislative or executive branches of government. This

is contrary to the clear statement in *Ocean Port*⁷⁴ that statutory delegates are part of the executive. To the extent that Justices Deschamps and Abella recognize that the actions of the executive must comply with the *Canadian Charter* (and other constitutional limitations), can it possibly be suggested that the actions of statutory delegates do not have to comply as well?

- (e) I am also troubled by the suggestion of Justices Deschamps and Abella that a statutory delegate should never have to justify its decision under the *Oakes* test in section 1 of the *Canadian Charter*:

An administrative decision maker should not have to justify its decision under the *Oakes* test, which is based on an analysis of societal interests and is better suited, conceptually and literally, to the concept of “prescribed by law.” That test is based on the duty of the executive and legislative branches of government to account to the courts for any rules they establish that infringe protected rights. The *Oakes* test was developed to assess legislative policies. The duty to account imposed—conceptually and in practice—on the legislative and executive branches is not easily applied to administrative tribunals.⁷⁵

Their analysis suggests that section 1 of the *Canadian Charter* only applies to restrictions on a *Canadian Charter* right which are prescribed by law—that is, *in legislation*. The implication is that a restriction which arises out of a statutory delegate’s decision or action can never be justified under section 1 of the *Canadian Charter*, because in their view such a decision or action is not “prescribed by law.” But why would it make a principled difference whether the restriction on the *Canadian Charter* right is found in parent legislation, delegated legislation, or the action or decision of a statutory delegate?

I am equally troubled by their suggestion that the administrative law concepts of standards of review can perform precisely the same function with respect to actions or decisions of statutory delegates, without needing to refer to section 1 of the *Canadian Charter*:

Our comments do not mean that we believe the Court must always exclude the s. 1 approach. That approach remains the only one available to demonstrate that an infringement of a right resulting from a law, in the normative sense of that expression, is consistent with the values of a free and democratic society. However, where the issue concerns the validity or merits of an administrative body's decision, resorting to this justification process is unnecessary because of the specific tools that have been developed in administrative law. The standard of review is one of those tools. If an administrative body makes a decision or order that is said to conflict with fundamental values, the mechanisms of administrative law are readily available to meet the needs of individuals whose rights have been violated. Such individuals can have the decision quashed by obtaining a declaration that it is unreasonable or incorrect.⁷⁶

On the one hand, if one seeks to have the statutory delegate's decision quashed by obtaining a declaration that it is "incorrect," what is the point of reference for determining "correctness"? Surely it is section 1 of the *Canadian Charter*.

On the other hand, if one seeks a declaration that the decision is "unreasonable," is it possible that the court could ever determine that something which does not meet the requirements of section 1 of the *Canadian Charter* could nevertheless be "reasonable"? Again, is it not the *Canadian Charter* that serves as the benchmark for determining reasonableness (at least for constitutional purposes)?

- (f) The case does point to some of the difficulties which will be experienced by statutory delegates who are empowered to determine constitutional questions (or whose actions must comply with the constitution). Are they all to be experts on the intricacies of section 1 of the *Canadian Charter*? What sort of evidence will they need to hear in order to provide the evidentiary base for *Charter* arguments?

Query: would this case have been dealt with differently under those provisions of the British Columbia and Alberta legislation which prevent certain statutory delegates from considering some or all constitutional issues? Would the school board have just

made the decision it made, and then all of the constitutional arguments would have been dealt with in court? Would the court proceedings take place before or after the school board dealt with its part of the issue?

- (g) Is it possible to streamline the *Oakes* analysis under section 1 of the *Charter*, as suggested by Justice LeBel? I leave that to our constitutional experts!⁷⁷

(c) *Ultra vires* issues involving the acquisition of jurisdiction

Similarly, in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,⁷⁸ Justice Bastarache disavowed any need to perform a detailed pragmatic and functional analysis where the only question was whether the statutory delegate's decision was *ultra vires* (in the sense of having ever acquired jurisdiction to make the decision in question):

- 5 The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised.

To the extent that this passage states a conclusion that the pragmatic and functional analysis would inevitably determine that the correctness standard would apply to any issue about whether the statutory delegate acquired jurisdiction to make a particular type of decision, it is perhaps unremarkable. After all, there is a constitutional dimension to the court's supervisory authority to determine whether the legislature conferred a particular jurisdiction on a particular statutory delegate.

On the other hand, it may not always be obvious whether a particular matter does or does not lie within the jurisdiction of a statutory delegate (*New Brunswick Liquor Corp.*), or that the legislature intended the question to be determined by the courts rather than by the statutory delegate.⁷⁹ That is why the Court developed the initial (half-formed) iteration of the pragmatic and functional approach in *Bibeault*. Without

doing the pragmatic and functional analysis, it is difficult to know whether an alleged error should be characterized as being “jurisdictional.”

Further, merely characterizing an issue as “jurisdictional” does not necessarily engage the correctness standard of review. Indeed, labelling an error as “jurisdictional” is inconsistent with Justice Bastarache’s own analysis in *Pushpanathan*⁸⁰ that the only way one knows whether a “jurisdictional” error is involved is because the pragmatic and functional analysis determines that the correctness standard is to be applied:

28 Although the language and approach of the “preliminary,” “collateral” or “jurisdictional” question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the [four] factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of “jurisdictional questions” which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which “goes to jurisdiction” is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, “jurisdictional error” is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

In other words, the ability to characterize an error as being a “jurisdictional error” is the end product of performing the pragmatic and functional analysis—the analysis cannot be avoided simply by an *a priori* characterization of the nature of the alleged error.

(d) There may be other types of cases where the result of the pragmatic and functional approach obviously engages the correctness standard

In *Toronto v. C.U.P.E.*,⁸¹ Justice LeBel points out that in some cases the result of the pragmatic and functional analysis so clearly results in the adoption of the correctness standard that there is no need to spend much (if any) time on that process:

- 61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.
- 62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

Apart from questioning whether the pragmatic and functional methodology applies to all grounds of substantive judicial review,⁸² Justice LeBel effectively concluded that the outcome of the pragmatic and functional analysis obviously resulted in the applicability of the correctness standard because the issue is “so clearly a question of law that is both of central importance to the legal system as a whole” *and* is “outside the adjudicator’s specialized area of expertise.”

Notwithstanding the obviousness of the outcome to Justice LeBel, how does one know if a particular question of law is “of central importance to the legal system as a whole”? Isn’t some sort of analysis, justification or explanation required to reach such a conclusion? Isn’t this precisely what the third and fourth factors in *Pushpanathan* are designed to address?

Similarly, how does one know that a particular question of law is outside the statutory delegate’s specialized area of expertise? Isn’t some sort of analysis, justification or explanation required to reach such a conclusion? Isn’t this precisely what the second factor in *Pushpanathan* is designed to address?

Finally, are there other types of issues which so obviously and inevitably engage the correctness standard that there is no need to perform a detailed pragmatic and functional analysis? If so, what might these issues be?

(e) Are there cases where a standard *other than correctness* would be so obvious that there is no need to perform the pragmatic and functional analysis?

The three examples above all involve cases where the Supreme Court of Canada found it so obvious that “correctness” was the appropriate standard of view that it did not need to perform a detailed pragmatic and functional analysis.

Is it likely that there would ever be a case where either “reasonableness *simpliciter*” or “patently unreasonable” would so obviously be the applicable standard that it would not be necessary to undertake a detailed pragmatic and functional analysis?⁸³ Although such a circumstance must be rare, Justice LeBel found one in *Chamberlain*.⁸⁴

188 I have had the advantage of reading the reasons of the Chief Justice, and I concur with her disposition of the case. I agree with her that it can be dealt with on the basis of administrative law principles. I also agree with much of the substance of her analysis of those principles and their application here. I part company with her approach, however, on the characterization of the problem with the Board’s resolution, and on the methodology that should be employed in reviewing it. In my view, the Board’s decision could not be upheld even on the most deferential standard of review, because it was patently

unreasonable. It is therefore unnecessary to go through the full analysis of the various factors used to determine the appropriate standard of judicial review.

- 189 The Board reached its decision in a way that was so clearly contrary to an obligation set out in its constitutive statute as to be not just unreasonable but illegal. The *School Act*, R.S.B.C. 1996, c. 412, directs the Board to conduct all schools on strictly secular and non-sectarian principles. The overarching concern motivating the Board to decide as it did was accommodation of the moral and religious belief of some parents that homosexuality is wrong, which led them to object to their children being exposed to story books in which same-sex parented families appear. The Board allowed itself to be decisively influenced by certain parents' unwillingness to countenance an opposed point of view and a different way of life. The question then becomes whether the trustees were faithful to the mandate spelled out in the statute. A decision taken on such a basis, whether reasonable or not, cannot be called secular or non-sectarian within the meaning of the statute, on any plausible interpretation. As a result, the decision amounts to a breach of statute, is patently unreasonable, and should be quashed.

Similarly, in *Parry Sound*,⁸⁵ no detailed analysis was required for all of the members of the Supreme Court to assert that the patently unreasonable standard applied when reviewing the overall award of a labour arbitrator (assuming the arbitrator had correctly considered human rights and obligations in construing and applying the collective agreement).

In summary, there may be cases that are so obvious that one could short-circuit doing a detailed pragmatic and functional analysis in order to determine the appropriate standard of review, but one would expect them to be rare.

B. Is it accurate to say that there is no one-to-one relationship between any particular ground of review and any particular standard of review?

This takes us to a reconsideration of the accuracy of Chief Justice McLachlin's observation in *Dr. Q*.⁸⁶ that the pragmatic and functional analysis means that there is no necessary one-to-one relationship between any particular ground of review and any particular standard of review:

- 21 In a case of judicial review such as this, the Court applies the pragmatic and functional approach that was established by this Court in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and gained ascendancy in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. The term “judicial review” embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In *Pushpanathan*, this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions. Bastarache J. affirmed that “[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed” (para. 26). However, this approach also gives due regard to “the consequences that flow from a grant of powers” (*Bibeault*, at p. 1089) and, while safeguarding “[t]he role of the superior courts in maintaining the rule of law” (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts’ constitutional duty to protect the rule of law.
- 22 To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review [that is, a privative clause or a right of appeal]. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo “significant searching or testing” (*Southam, supra*, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

- 23 Much as the principled approach to hearsay articulated in *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, eclipsed the traditional categorical exceptions to the hearsay rule (*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40), the pragmatic and functional approach represents a principled conceptual model which the Court has used consistently in judicial review.
- 24 Just as the categorical exceptions to the hearsay rule may converge with the result reached by the *Smith* analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. invoked the old *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.), categorical approach to discretionary decisions as a reflection that ministerial decisions have classically been afforded a high degree of deference (see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.R. 3, 2002 SCC 1, at paras. 29-30), but acknowledged that the principled approach must now prevail. Similarly, as Binnie J. recognized in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 54, that under the pragmatic and functional approach, even “the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness.” The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.
- 25 For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court’s interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27. The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an administrative body. As Professor D.J. Mullan states in *Administrative Law* (2001), at p. 108, with the pragmatic and functional approach, “the Court has provided an overarching or

unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers.” Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.

As noted above, it would be inconceivable to apply any standard other than correctness to a constitutional question. Similarly, it would seem that correctness must also always be the standard of review applicable to truly jurisdictional issues⁸⁷—whether preliminary or collateral issues upon which the jurisdiction of the statutory delegate depends, a straight issue of *vires* (as in *Calgary Taxi Cab*), or something that was clearly intended to be a “given” that is not within the authority of the statutory delegate at all (such as whether a person was or was not an “employee” under the *Public Service Act*).⁸⁸

What is clear is that no particular standard of review is necessarily engaged merely because there is an alleged error of law (whether in the interpretation of the statutory delegate’s constituting statute, or some other legal question). Although an error of law is a *ground* for judicial review, the mere fact that an error of law is alleged does not automatically engage the correctness standard of review.⁸⁹ Similarly, the correctness standard is not automatically engaged merely where there is a statutory right of appeal on a question of law.⁹⁰ Further, if the pragmatic and functional analysis leads the reviewing court to conclude that correctness is not the appropriate standard to be applied to review a question of law, it will then be necessary to determine whether the appropriate standard is reasonableness *simpliciter* or patent unreasonableness. In short, it will almost always be necessary to perform the pragmatic and functional analysis of the four *Pushpanathan* factors to determine the legislature’s intention about the standard of review to be adopted and applied by the court when reviewing an alleged error of law.

C. Justice LeBel’s doubt about whether the pragmatic and functional approach is the overarching analytical framework for all types of substantive judicial review

Although there has been a tendency to suggest that the pragmatic and functional approach can be generalized to apply in all cases of judicial review,⁹¹ it is important to note Justice LeBel’s repeated concerns that the four-factor methodology from *Pushpanathan* may not provide a single overarching analytical framework for all types of substantive judicial review.

1. *Chamberlain v. Surrey School Board*

Justice LeBel first articulated his concern about the general applicability of the *Pushpanathan* analysis to all types of substantive judicial review in *Chamberlain*⁹²—a case which involved an elected body making policy rather than an adjudicative decision.

The *School Act* of British Columbia⁹³ confers on the Minister of Education the power to approve basic educational resource materials to be used in teaching the curriculum in public schools, and confers on school boards the authority to approve supplementary educational resource material, subject to Ministerial direction. The School Board passed a resolution denying a teacher's request to approve three books which depicted same-sex parented families. The trial judge found that: the School Board's overarching concern was that the books would engender controversy in light of some parents' religious objections to the morality of same-sex relationships; K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents given that children of this age were too young to learn about same-sex parented families; and the material was not necessary to achieve the learning outcomes in the curriculum.

The trial judge quashed the School Board's resolution on the basis that it offended section 76 of the *School Act*, because members of the School Board who had voted in favour of the resolution were significantly influenced by religious considerations.

The Court of Appeal set aside the decision on the basis that the resolution was within the Board's jurisdiction.

Chief Justice McLachlin wrote the majority decision for the Supreme Court of Canada, applied the reasonableness *simpliciter* standard of review, and determined that the School Board's decision was not reasonable.

Although concurring in the result, Justice LeBel disagreed with the majority's selection of the reasonableness standard of review (holding that the School Board's decision was patently unreasonable and therefore outside its jurisdiction), as well as expressing a number of concerns about both the general applicability of the four-factor *Pushpanathan* analysis to all types of substantive judicial review and raising some initial concerns

about the reasonableness *simpliciter* standard (which he subsequently developed more fully in his *cri de coeur* in *Toronto v. C.U.P.E.*).

Justice LeBel's first concern was whether it was necessary to go through a detailed pragmatic and functional analysis in a case which focused solely on whether the School Board had jurisdiction to make the particular decision in question, where it was clear that the decision was patently unreasonable:

188 I have had the advantage of reading the reasons of the Chief Justice, and I concur with her disposition of the case. I agree with her that it can be dealt with on the basis of administrative law principles. I also agree with much of the substance of her analysis of those principles and their application here. I part company with her approach, however, on the characterization of the problem with the Board's resolution, and on the methodology that should be employed in reviewing it. In my view, the Board's decision could not be upheld even on the most deferential standard of review, because it was patently unreasonable. It is therefore unnecessary to go through the full analysis of the various factors used to determine the appropriate standard of judicial review.⁹⁴

Secondly, Justice LeBel questioned whether the pragmatic and functional methodology was restricted to reviewing adjudicative decisions, and was not applicable in non-adjudicative contexts:

190 Interesting as it may be, a discussion on the applicable standard of review seems to me to be a digression from the real issue presented by this appeal. The pragmatic and functional approach has proven a useful tool in reviewing adjudicative or quasi-judicial decisions made by administrative tribunals. There are, however, limits to the usefulness of applying this framework to its full extent in a different context.

191 When the administrative body whose decision is challenged is not a tribunal, but an elected body with delegated power to make policy decisions, the primary function of judicial review is to determine whether that body acted within the bounds of the authority conferred on it... The decisions or actions of an administrative body of this kind will be invalidated if they are plainly contrary to the express or implied limitations on its powers. The mechanical application, in this context, of a test which was developed with a quite different kind of administrative body in mind is not only unnecessary, but may

also lead both to practical difficulties and to uncertainties about the proper basis of judicial review.

- 192 When courts are called upon to review adjudicative decisions of administrative tribunals, the key question is the basis on which the legislature intended review by the courts to be available. This inquiry must be undertaken bearing in mind the fact that the legislature has decided to take the matter out of the hands of the courts and to give the tribunal primary authority over it, as well as the axiom that no administrative body has untrammelled discretion. Evidence of the degree of discretion granted to the tribunal is to be found in its constitutive statute and a variety of other contextual factors. Questions such as the presence or absence of a privative clause in the legislation, the specialized nature of the subject matter, the expertise of the tribunal, the legislature's reasons for entrusting this decision to the tribunal, and the nature of the question compared to the kinds of questions courts are accustomed to considering, are relevant to the inquiry because they shed light on the ultimate question: what standard of review the legislature intended.⁹⁵

At one point, Justice LeBel appeared to accept the pragmatic and functional approach for determining the legislature's intention, but not necessarily that all four of the *Pushpanathan* factors would apply to a non-adjudicative function:

- 193 The decision under review here is different [from an adjudicative decision]. Our Court is reviewing a policy decision made by an elected body whose function is to run local schools with the input of the local community. The full set of factors included in the standard-of-review formula does not translate well into this context. Consider, for example, the presence or absence of a privative clause. One would not expect to find a privative clause in connection with the Board's decisions, and the absence of one in the statute in no way signals that the legislature expected intervention by the courts in the Board's day-to-day business to be possible. Expertise is another factor which is more apposite in the adjudicative context than it is here. Trustees are authorized to make decisions not because they have any special expertise, but because they represent the community. Their level of expertise does not indicate anything about the extent of their discretion.
- 194 The ultimate question remains the legislature's intention. Going through the various factors in the "pragmatic and functional method" is not always the best path to that intention. In the

context of this appeal, we should look instead to the statutory grant of power to the Board and the conditions attached to it. The courts are responsible for ensuring that the Board acts within the scope of its power. In my opinion, interference in the Board's functions on any other basis would generally be unwarranted.

- 195 I do not intend to cast any doubt on the validity of the pragmatic and functional approach. On the contrary, I suggest that it is more consistent with the philosophy underlying that approach to adapt the framework of judicial review to varying circumstances and different kinds of administrative actors than it is to go through the same checklist of factors in every case, whether or not they are pertinent—a methodology which, I would suggest, is neither pragmatic nor functional.

Even if not all four of the *Pushpanathan* factors would always be relevant for determining the legality of a non-adjudicative decision, presumably the principal point of reference for such an inquiry would be the purpose of the legislation as a whole, and the provision in question in particular—in other words, the third *Pushpanathan* factor. On the other hand, it is difficult to think of some additional factor—beyond the four *Pushpanathan* factors—that might be relevant to determining the legislature's intention about the statutory delegate's jurisdiction.

However, later in the judgment, he casts some doubt on whether the pragmatic and functional approach has any application to the case, regardless of whether one takes some of the four *Pushpanathan* factors, or any other factors into account:

- 202 I alluded above to the practical difficulties and the problems of legitimacy that can ensue if the pragmatic and functional approach is applied to the Board, and other bodies like it, in a formulaic way. Attention will be diverted from the real issue of legality to an unnecessary exploration of tangential questions. This needlessly drains the resources of courts, particularly trial courts, which must often devote a great deal of time to intricate arguments on the applicable standard of review before they can get to the heart of the matter.

While the real issue is indeed the legality of the School Board's decision, precisely how does one go about determining whether the School Board's decision was "legal"? Is that conclusion just the impression of a particular judge (or the majority of the judges of the highest court which deals with the matter)? Or does the pragmatic and

functional approach provide a method for making such a determination, even if the particular nature of the impugned decision is non-adjudicative and therefore not all four of the *Pushpanathan* factors may be applicable?

Justice LeBel focuses on the legislature's intention regarding the jurisdiction of the non-adjudicative decision-maker. This does not address the related question of the legislature's intention regarding the standard of review which a court is to apply in answering the first question. *Bibeault* determined that a pragmatic and functional approach was to be used to determine whether a particular matter was or was not within the jurisdiction of any statutory delegate. The more advanced application of the pragmatic and functional approach in *Pushpanathan* addresses how to determine the legislature's intention about what the courts are to do when reviewing the statutory delegate's decision—what standard of review to apply.

2. *Toronto v. C.U.P.E.*

Toronto v. C.U.P.E. dealt with a labour arbitrator's decision that he had authority to independently determine whether the criminal activities of the grievor constituted just cause for dismissal, notwithstanding the fact that the grievor had been convicted in a criminal court. Applying the correctness standard, the Supreme Court of Canada unanimously upheld the lower courts' quashing of the arbitrator's decision to permit this type of relitigation because it would be an abuse of process (rather than *res judicata* or issue estoppel).

In addition to containing his *cri de coeur* about the complexity and difficulty involved in distinguishing the three standards of review (discussed below), Justice LeBel's decision⁶¹ reiterated his concern about the generalized applicability of the *Pushpanathan* analysis to all substantive judicial review:

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain*

itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

3. *Macaulay and Sprague's criticisms of the pragmatic and functional approach.*

The learned editor of *Macaulay and Sprague* also fundamentally disagrees with trying to justify the result of judicial review applications by reference to the pragmatic and functional approach:

Decision after decision by the Supreme Court of Canada and the lower courts, put forward arcane and convoluted discussions respecting the meaning and application of the functional and pragmatic approach which, in the final analysis, often have little consistency and, I suggest, ultimately very little to do with the actual outcome of any decision. ...

The practical lawyer will recognize that, in light of the broad spectrum of non-conclusive factors to be considered in the functional and pragmatic approach and the Supreme Court of Canada's willingness to depart from that approach when it feels appropriate is that there are in fact only two real factors behind the court's willingness to intervene on any particular question brought before it: the court's perception of the correctness of the decision; and the court's perceived ability to deal with the question both procedurally in light of the other demands on the court, and substantively in light of its ability to understand the issue.⁹⁷

Returning to this theme, it is further argued:

As I argue in the main text, the functional and pragmatic test has devolved into "chancellor's foot" justice. Aside from the fact that it sets no real parameters but permits a court to act or not to act as may be, the logical underpinnings of the test are questionable. If a court feels that an issue is sufficiently important to intervene in a matter without Parliamentary sanction then the court should not be speaking of a "deference." Similarly, where Parliament has provided a broad based appeal to a court, that court should not duck its responsibility through the invocation of the alleged expertise of the original decision-maker.⁹⁸

In defence of the pragmatic and functional approach, one might ask precisely how a court (or anyone else) is to know whether an issue is "sufficiently important to intervene in"? Even though it is highly contextual (and thus fertile ground for excellent advocacy), the strength of the pragmatic and functional approach is that it tries to make this determination in a principled way. One might then adapt and generalize

Justice Binnie’s direction in *C.U.P.E. v. Ontario (Minister of Labour)*⁹⁹ as follows:

The [identification] and examination of ... [relevant factors] ... and the “weighing up” of contextual elements [in judicially reviewing the decisions of a statutory delegate] ... is not a mechanical exercise. Given the immense range of [delegated powers], discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

4. The four *Pushpanathan* factors are not applicable to procedural issues.

Note that Justice LeBel’s concern about the universal applicability of the pragmatic and functional methodology is restricted to substantive judicial review.

As discussed below, there is now no question that the four *Pushpanathan* factors do not apply to questions of natural justice or procedural fairness.¹⁰⁰

D. Different judges may select different standards, and may apply the same standard to get different results

The highly contextual nature of the pragmatic and functional analysis means that (1) appellate courts (or different judges thereon) may conclude that a different standard of review is applicable than the one identified by the reviewing judge, and (2) appellate courts (or different judges thereon) may conclude that the same standard should be applied differently than was done by the reviewing judge.

1. Examples of judges disagreeing about the appropriate standard of review

- In *Voice Construction*, the reviewing judge and both the majority and dissenting judges in the Court of Appeal of Alberta applied the correctness standard to the arbitrator’s decision (and struck it down), while the Supreme Court of Canada applied the standard of reasonableness *simpliciter* (and reinstated it).

- In *Monsanto*, the Ontario Divisional Court and the Ontario Court of Appeal all concluded that the applicable standard of review was reasonableness *simpliciter*. The Supreme Court of Canada, after conducting the pragmatic and functional analysis, concluded that correctness is the applicable standard of review.
- In *Lethbridge Community College*,¹⁰¹ the reviewing judge applied the reasonableness *simpliciter* standard of review for the statutory interpretation issue, and patently unreasonable for the application of the statutory provision to the facts of the case. The Court of Appeal of Alberta applied correctness to the statutory interpretation, but patently unreasonable to the application to the facts. The Supreme Court of Canada applied reasonableness *simpliciter* to both issues.
- In *Barrie Public Utilities*, the majority of the Supreme Court used the correctness standard of review and set aside the CRTC's decision, but Justice Bastarache would have applied the reasonableness standard (and would have held that the CRTC's decision was reasonable).¹⁰²

2. Examples of judges applying the same standard differently in the same case

- In *Re Cartaway Resources Corporation*,¹⁰³ both the British Columbia Court of Appeal and the Supreme Court of Canada agreed that the applicable standard of review for a Securities Commission's decision regarding sanction was reasonableness. The British Columbia Court of Appeal, however, held that the imposition of the maximum penalty was unreasonable in the circumstances, while the Supreme Court of Canada held that it was reasonable in the circumstances.
- In *Macdonell v. Quebec (Commission d'accès à l'information)*,¹⁰⁴ where the court split 5 to 4 in holding that the Commissioner's decision was reasonable.

- In the *Retired Judges Case*, the 6 members of the majority held that the Minister's appointment of retired judges was patently unreasonable, but the 3 members of the minority perceived that it was not.
- In *Starson v. Swayze*,¹⁰⁵ the majority and minority differed about whether the decision of the Capacity and Consent Board was reasonable.
- All three judges of the Alberta Court of Appeal in *Voice Construction* applied the correctness standard, with the majority holding that the arbitrator had erred and the dissenting judge (Justice Berger) holding that she had been correct.

E. The applicable standard may change over time

Further, the court's appreciation about which standard of review is appropriate may change over time. The fact that the Supreme Court of Canada has identified the applicable standard of review for a particular matter does not mean that it might not reach a different result when it performs the detailed pragmatic and functional analysis in a subsequent case involving precisely the same matter—in other words, there is a possibility that the applicable standard of review may change over time. There have been at least two examples of this phenomenon—in one case decreasing the level of scrutiny from correctness to reasonableness *simpliciter*, and in the other case increasing it from patently unreasonable to reasonableness *simpliciter*.

1. *Ivanhoe Inc. v. UFCW, Local 500* and *City of Sept-Îles v. CUPE, Local 2589*

In *Ivanhoe*¹⁰⁶ and *Sept-Îles*,¹⁰⁷ the Supreme Court of Canada applied the patent unreasonableness standard to the Quebec Labour Court's interpretation of the very same statutory provision to which the Court had previously applied the correctness standard in *Bibeault*.¹⁰⁸ In the interval between the two decisions, the Quebec legislature had amended the legislation, and slightly strengthened the privative clause, and the Labour Court had acquired greater expertise, with the result that greater deference was now called for.

2. *Voice Construction*

A similar phenomenon occurred in the Supreme Court of Canada's recent decision in *Voice Construction Ltd.*—although in the opposite direction. Whereas the Court had for the 24 previous years applied the patently unreasonable test to review an arbitrator's interpretation of a collective agreement because of the “privative gloss” in the legislation,¹⁰⁹ it unanimously determined that the application of the subsequently developed pragmatic and functional approach mandated the less deferential standard of reasonableness (which had not existed when the earlier case was decided).

(a) **Justice Major's decision for the majority**

Justice Major, writing for the majority,¹¹⁰ considered the four contextual factors as follows:

- (1) Sections 142 and 143 of the Alberta *Labour Relations Code* and Article 15.04 of the collective agreement, taken together, constituted a partial privative clause because they explicitly permitted judicial review within a 30-day “window period,” after which there was a strong privative clause.¹¹¹ By itself, a partial privative clause “does not bestow the greatest degree of deference,” but rather “simply requires a careful assessment of the arbitrator's role.”¹¹²
- (2) While interpreting contracts—which are similar to collective agreements—falls squarely within the expertise of courts, arbitrators (who function within the special sphere of labour relations) have more experience and expertise in interpreting collective agreements and, consequently, a certain degree of curial deference to arbitrators' interpretation and application of collective agreements ought to be afforded.¹¹³
- (3) While the purpose of the *Labour Relations Code* is to “regulate and resolve labour disputes in the most efficacious and least disruptive way,” proceedings before an arbitrator are not “polycentric” in nature (as might be the case in some matters before the Labour Relations Board), but rather simply require an arbitrator to resolve a two-party dispute.¹¹⁴
- (4) Although the interpretation of a collective agreement is a question of law, and generally speaking questions of law are subjected to a more searching review than are other questions, the nature of the question is only one factor. Other factors (such

as, in the case at hand, an arbitrator's relative expertise in interpreting collective agreements)¹¹⁵ can point to a more deferential standard.

As a result of this pragmatic and functional analysis, Justice Major concluded that the appropriate standard of review of an arbitrator's interpretation of a collective agreement is reasonableness:

30 Taking into account all these factors, the arbitrator's decision in this appeal is entitled to a measure of deference, the appropriate standard of which is reasonableness.

Applying this standard, the Supreme Court held that the arbitrator's interpretation was reasonable, and therefore reinstated her decision.

(b) Justice LeBel's concurring decision

Justice LeBel (writing for himself and Justice Deschamps) agreed that reasonableness was the appropriate standard, and that the arbitrator's "interpretation of the hiring provisions was rational globally," which fell "within the range of reasonable interpretations, and therefore should not be disturbed by a reviewing court."¹¹⁶ As noted below,¹¹⁷ he also took the opportunity to reiterate his concern that the courts should jettison the patently unreasonable standard (although, as discussed below, several provincial courts of appeal have subsequently decided that they do not have the authority to do this, and the legislation they were considering indicated that their legislatures intended them to apply the patently unreasonable standard).

F. The first *Pushpanathan* factor—the increasing importance of the wording of privative clauses

In *Pushpanathan*,¹¹⁸ Justice Bastarache identified the presence or absence of a privative clause (or a right of appeal) as the first factor to be considered in determining the legislature's intention about the standard of review:

30 The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as

regards the particular determination in question. A full privative clause is “one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded” (*Pasiechnyk, supra*, at para. 17, *per* Sopinka J.). Unless there is some contrary indication in the privative clause itself, actually using the words “final and conclusive” is sufficient, but other words might suffice if equally explicit (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 331 and 333). At the other end of the spectrum is a clause in an Act permitting appeals, which is a factor suggesting a more searching standard of review.

Some Acts will be silent or equivocal as to the intended standard of review. The Court found in *Bradco* that the submission of a dispute to a “final settlement” of an arbitrator was “somewhere between a full privative clause and a clause providing for full review by way of appeal” (pp. 331 and 333). Sopinka J. went on to examine other factors to determine that some degree of deference was owed to the arbitrator’s ruling. In essence, a partial or equivocal privative clause is one which fits into the overall process of evaluation of factors to determine the legislator’s intended level of deference, and does not have the preclusive effect of a full privative clause.

It was generally assumed (at least by this author) that this passage meant that the mere presence of even the mildest form of privative clause (“final and binding”) would be sufficient to indicate that the legislature intended the courts to adopt a deferential standard of review (*i.e.*, less than correctness)¹¹⁹ unless the *other* three factors indicated a more stringent standard should be employed. In other words, it was no longer necessary to parse the actual wording of the privative provision¹²⁰—its mere presence (however worded) connoted deference. However, *Voice Construction* makes it clear that the actual wording of the privative provision itself is a relevant factor (along with the other three factors) for determining the degree of deference to be shown to the statutory delegate’s decision.

1. *Voice Construction*

The Supreme Court of Canada’s recent decision in *Voice Construction* makes it clear that the actual wording of a particular privative provision will have an important effect on identifying whether

reasonableness *simpliciter* or patently unreasonable is the appropriate standard of review. Rather than being a “full privative clause,” the Alberta labour legislation specifically permits unrestricted judicial review during a 30-day window period—thereby not by itself automatically bestowing the greatest degree of deference on either the Labour Relations Board or arbitrators. Taking this factor into account along with the other three *Pushpanathan* factors,¹²¹ the Supreme Court of Canada decided in *Voice Construction* that the legislature intended the court to use reasonableness *simpliciter* rather than the patently unreasonable standard of review—even though this result departed from 24 years of prior jurisprudence (and reversed *Olds College* which had precisely the same statutory language).

This outcome is consistent with the observable general tendency in all courts since Justice LeBel’s *cri de coeur* in *Toronto v. C.U.P.E.* to minimize the use of the patently unreasonable standard. Indeed, Justice Major makes it plain in *Voice Construction*¹²² that the use of the patently unreasonable standard will be “rare”:

... A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd.

Query: While it might be rare that the *application* of the patently unreasonable standard will cause a court to overturn a decision of a statutory delegate having the attributes described by Justice Major, why would one assume that the *selection* of the patently unreasonable standard would necessarily be rare? How many decisions are made by specialized tribunals who are empowered by a policy-laden statute, involve questions which fall within their relative expertise, and are protected by a full privative clause? Surely, there must be quite a few!

2. *Southern Alberta Institute of Technology*

In *Southern Alberta Institute of Technology Academic Faculty Association v. Southern Alberta Institute of Technology*,¹²³ the Court of Appeal of Alberta subsequently gave effect to the reasoning in *Voice Construction* to change the standard of review under the *Technical*

*Institutes Act*¹²⁴ (which contained the same partial privative provision) from patently unreasonable to reasonableness *simpliciter*.

3. *Doucet-Jones v. New Brunswick* and other subsequent cases

However, the unanimous New Brunswick Court of Appeal¹²⁵ subsequently determined that the reasoning in *Voice Construction* did not change the applicability of the traditional patently unreasonable standard of review for adjudicators' interpretations of collective agreements under that province's *Public Service Labour Relations Act*.¹²⁶ Unlike the Alberta privative provision which has a 30-day window period permitting full judicial review, the relevant New Brunswick legislation contains a full privative clause.¹²⁷ This effectively connotes the New Brunswick Legislature's intention for the courts to bestow the greatest degree of deference on adjudicators—namely, by continuing to apply the patently unreasonable standard of review.

G. The second *Pushpanathan* factor—problems with the concept of “expertise”

In *Pushpanathan*,¹²⁸ Justice Bastarache described both the importance and possible different types of “expertise” as follows:

Described by Iacobucci J. in *Southam, supra*, at para. 50 as “the most important of the factors that a court must consider in settling on a standard of review,” this category includes several considerations. If a tribunal has been constituted with a particular expertise with respect to achieving the aims of an Act, whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act, then a greater degree of deference will be accorded. In *Southam*, the Court considered of strong importance the special make-up and knowledge of the Competition Act tribunal relative to a court of law in determining questions concerning competitiveness in general, and the definition of the relevant product market in particular.

Nevertheless, expertise must be understood as a relative, not an absolute concept. As Sopinka J. explained in *Bradco, supra*, at p. 335: “On the other side of the coin, a lack of *relative expertise* on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference” (emphasis added). Making an evaluation of relative expertise has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the

tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise. Many cases have found that the legislature has intended to grant a wide margin for decision-making with respect to some issues....

Once a broad relative expertise has been established, however, the Court is sometimes prepared to show considerable deference ...

“Expertise” is a chameleon-like concept that has many possible manifestations. As the quotation above indicates, Justice Bastarache recognized the following forms of expertise in *Pushpanathan*: (a) the specialized knowledge of the statutory delegate, (b) the use of a special procedure, and (c) the non-judicial means of implementing an Act.¹²⁹

Other cases have recognized other forms of expertise: (d) expertise arising from the specialization of function, such as the use of a judicial council for disciplining judges;¹³⁰ (e) expertise in the choice of sanctions;¹³¹ (f) the expertise of lay persons about the general public’s perception;¹³² (g) expertise from experience in the repeated application of the statute, regulations, guidelines or policy in question;¹³³ (h) expertise as a result of the independent nature of the statutory delegate;¹³⁴ (i) the expertise of a Minister with respect to the matters in his portfolio;¹³⁵ (j) a Minister exercising a discretionary power;¹³⁶ (k) a specialized administrative tribunal which possesses considerable expertise over the subject matter of its jurisdiction;¹³⁷ (l) the expertise of a statutory delegate charged with developing policy;¹³⁸ and (m) the expertise of fact-finders with respect to findings of fact.¹³⁹

Even if a statutory delegate has some form of expertise, it will only command deference if it has greater relative expertise than the court on the matter at hand. In other words, expertise is a relative—not an absolute—concept. As Sopinka J. put it in *Bradco*:¹⁴⁰

On the other side of the coin, a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

Note that it is not sufficient for the statutory delegate to have some form of *general* expertise,¹⁴¹ perhaps arising from the fact that it deals with a specialized subject or was set up as a separate regulatory agency. Rather, it is necessary to determine the *particular issue* that is before the court, and then determine whether the statutory delegate has greater relative expertise with respect to that issue.

The courts continue to be troubled both by what constitutes “expertise,” and the weight to be given to it in determining the appropriate standard of review. This difficulty is demonstrated in the following recent cases:

1. ***Macdonell v. Quebec (Commission d'accès à l'information)***

Expertise—in the form of an independent decision-maker—was one of the factors identified by Justice Gonthier in *Macdonell*¹⁴² for adopting the reasonableness standard of review of the Commissioner’s decision, even though it involved a question of statutory interpretation which might otherwise engage a higher standard of review:

7 Finally, the Commission d'accès à l'information has relative expertise in respect of protecting privacy and promoting access to information held by a public body. That expertise is apparent from the powers conferred on the Commissioner to achieve the objectives of the Act, and from the Commission’s exclusive power to hear requests for review made under the *Access Act* (s. 122). Sections 124 to 133 give the Commission broad powers to enable it to carry out its investigations. For example, the Commission has the power to prescribe conditions applicable to a personal information file (s. 124), to conduct investigations on its own initiative or when a complaint is filed (s. 127), to make appropriate recommendations, and to submit a special report to the National Assembly (s. 133). The Commission also takes part in policy making. In s. 123, para. 3, the legislature has provided that it is the Commission’s function to give its opinion on the draft regulations submitted to it under the Act, on draft agreements on the transfer of information and on draft orders authorizing the establishment of confidential files. Plainly, the legislature treats the Commission as being expert in certain matters.

8 Unlike the federal *Access to Information Act*, the Quebec legislature has provided for an exclusive review by the Quebec Commission d'accès à l'information, a separate body, as Evans J. of the Federal Court quite accurately observed in *3430901 Canada Inc. v. Canada*, [2002] 1 F.C. 421, 2001 FCA 254, at para. 30:

Counsel argued that the Judge had erred by relying for her conclusion almost exclusively on *Canadian Council of Christian Charities v. Canada (Minister of Finance)*,

[1999] 4 F.C. 245 (T.D.). I had held in that case (at paragraphs 12-13) that correctness was the applicable standard of review because, unlike the situation under many provincial access to information statutes, the administrative action typically reviewed in the federal scheme is the refusal of a head of a government institution to disclose a document, not of the Information Commissioner, an officer of Parliament who is independent of the Executive. Heads of government institutions are not disinterested in the interpretation and application of the *Access to Information Act* and are likely to have an institutional predisposition towards restricting the public right of access and construing the exemptions broadly. [Emphasis added.]

The Quebec Commission d'accès à l'information has no special interest in the decision it must make, and so it is able to play its role independently. By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.

By comparison, the dissenting minority (Justices Bastarache and LeBel)—even though they ultimately also applied the reasonableness *simpliciter* standard of review—did not agree that the Commissioner had any particular expertise about the issue in question:

56 Before analysing ss. 34 and 57, it is important to recall that this appeal deals with an application for judicial review and that the decision in question is in fact the decision of the information Commissioner, not the decisions of the judges who ruled on that decision. Barbeau J., applying the most stringent standard of review, the patently unreasonable decision standard, nonetheless allowed the application for judicial review. On appeal, the two majority judges and the minority judge all applied the intermediate standard of reasonableness *simpliciter*; the parties accepted that standard in relation to s. 34. There is no need to examine the analysis of the Court of Appeal in detail. We would however note that, in this case, the privative clause is only partial since it provides for an appeal on any question of law or jurisdiction (s. 147). Furthermore, the Commissioner's special expertise is needed, for the actual interpretation of s. 34, only when findings of fact are involved. The protection of

privacy and of the fundamental values of democracy is essentially a judicial function, as is the contextual interpretation of legislation involving the public interest. In *Southam, supra*, at paras. 35-37, Iacobucci J. points out that even though a question of fact is simply about what actually took place between the parties, determining whether those facts satisfy a legal test is a question of mixed law and fact. The more widely the rule will apply, the more the courts will tend to characterize a question as one of mixed law and fact. In our view, the decision concerning the application of s. 34 is a question of mixed law and fact because the Commissioner had to decide whether the document which was supposedly produced for a Member was produced exclusively for the Member or at the Member's request, and these are questions of law. This is also not a case in which different interests must be weighed, as is often the case in administrative law. It is therefore clear that the most stringent standard was not appropriate.

- 57 As noted earlier, the appellant has changed his mind with respect to the standard that is appropriate in respect of the interpretation of s. 57 and is now asking that the standard of correctness be applied. It could indeed be argued that the question of whether a Member of the National Assembly must be considered to constitute a public body is a pure question of law that goes to the actual jurisdiction of the Commission. The privative clause indicates that the legislature did not intend to leave this type of question to the sole discretion of the Commissioner. In fact, this is a question that falls outside the Commissioner's expertise. As Iacobucci J. said in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591:

Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

- 58 We know that the different decisions that an administrative tribunal makes in a single case may necessitate the application of different standards of review, depending on the nature of the decisions (*Pushpanathan, supra*, at para. 49). Some decisions relate to the facts, and others to questions of law or to questions of mixed fact and law. La Forest J. had addressed this issue earlier, in *Ross v. New Brunswick School District No. 15*, [1996]

1 S.C.R. 825, and applied the decision of this Court in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. In *Pezim*, Iacobucci J. analyzed the decision of a highly specialized tribunal that had interpreted an Act which fell squarely within its mandate. In the present case, the issue is the interpretation of a provision that limits the Commission's jurisdiction, a matter in which the Commission has no special expertise. The nature of the problem submitted to the Commissioner is also relevant in determining the intent of the legislature (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para 18; *Commission de la santé et de la sécurité du travail v. Autobus Jacquart inc.*). With regard to the above discussion, it is not really necessary to examine the standard of review that was adopted by the judges of the Court of Appeal since, as will be seen later, we find that the Commissioner's interpretation of s. 57 was unreasonable.¹⁴³

2. *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*

Writing for the unanimous Supreme Court of Canada, Justice Gonthier returned to the lack of institutional independence of the decision-maker as a relevant factor for determining the standard of review in the *RCMP Case*.¹⁴⁴

- 15 Applying this approach to the case at hand, it must be noted at the outset that the *Access Act* does not contain a privative clause. Rather, s. 41 provides a process by which a person who has been refused access to a record may apply to the Federal Court for a review of that decision. Section 42 provides a mechanism by which the Information Commissioner may apply to the court, with the consent of the applicant, for a review of that decision, and s. 49 provides that the Federal Court may order the head of the institution to disclose the record requested, "if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof" (emphasis added). It also is noteworthy that s. 2(1) indicates that it is a purpose of the *Access Act* to ensure that "decisions on the disclosure of government information should be reviewed independently of government." The absence of a privative clause is not determinative by itself (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748). However, that factor, in conjunction with the explicit provision for the court to review refusals, and the importance ascribed by the *Access Act*

to independent review, are indicative of a Parliamentary intention that the court have broad powers of review.

- 16 Also indicative of the appropriate standard of review is the fact that the finding under review is the Commissioner of the RCMP's interpretation of the *Access Act* and the *Privacy Act*. Relative to a reviewing judge, the Commissioner has no expertise in statutory interpretation. This fact further invites the application of broad powers of review.
- 17 The purpose of the *Access Act* is set out in s. 2(1) in the following terms:

2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

In my opinion, this purpose is advanced by adopting a less deferential standard of review. Under the federal scheme, those responsible for answering access to information requests are agents of a government institution. This is unlike the situation under many provincial access to information statutes, where information requests are reviewed by an administrative tribunal independent from the executive (*Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71). A less deferential standard of review thus advances the stated objective that decisions on the disclosure of government information be reviewed independently of government. Further, those charged with responding to requests under the federal *Access Act* might be inclined to interpret the exceptions to information disclosure in a liberal manner so as to favour their institution (*3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, 2001 FCA 254, at para. 30). As such, the exercise of broad powers of review would also advance the stated purpose of providing a right of access to information in records under the control of a government institution in accordance with the principle that necessary exceptions to the right of access should be limited and specific.

- 18 Finally, the nature of the issue before the Court also militates in favour of providing broad powers of review. The dispute requires the RCMP Commissioner to interpret s. 3(j), and in particular, the statement that personal information does not include “information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual...” Thus, the Commissioner is called upon to interpret the *Access Act* and the *Privacy Act*, taking into account the general principles underlying them. This is a question of law that does not turn on any finding of fact. It is also a question of a highly generalized nature, owing to the fact that the *Access Act* and the *Privacy Act* determine the disclosure obligations for each of the many institutions governed by the *Access Act*. These factors further indicate that courts ought not to be restrained in reviewing the Commissioner’s decisions.
- 19 Considering the factors discussed above, and particularly the nature of the issue before the RCMP Commissioner and the absence of a privative clause, I am of the view that Parliament did not intend to leave the interpretation of s. 3(j) to the RCMP Commissioner.

3. *Moreau-Bérubé v. New Brunswick*

In *Moreau-Bérubé*, Justice Arbour recognized that the Judicial Council has comparative expertise as a result of the specialization of its function, the fact that it was composed of numerous judges, and the nature of its function.

4. *Dr. Q*

Although Chief Justice McLachlin discussed the concept of relative expertise in *Dr. Q*,¹⁴⁵ she did not make any conclusion about whether the Inquiry Committee had any expertise with respect to the credibility issue involved in that case.

5. *Ryan*

In *Ryan*,¹⁴⁶ Justice Iacobucci found that the Discipline Committee did have greater expertise than the courts:

(b) The Expertise of the Discipline Committee

30 As the Chief Justice notes in *Dr. Q, supra*, at para. 28, the question at this stage of the pragmatic and functional analysis is whether the decision-making body has greater expertise than the reviewing court with respect to the question under review. This expertise may be derived from specialized knowledge about a topic or from experience and skill in the determination of particular issues. At first glance, it may appear that the discipline committee of a law society has no relative expertise since it is composed of lawyers and lay appointees. Generally, judges will have been members of a provincial law society and will know about the ethical and other standards of practice to which those societies hold lawyers. That said, there is nevertheless reason to expect that the Discipline Committee has superior expertise relative to courts.

31 First, the Discipline Committee has greater expertise than courts in the choice of sanction for breaches of professional standards. By s. 55(1)(a) of the Act, the Discipline Committee is composed of a majority of members of the Law Society who are subject to the same standards of professional practice as the lawyers who come before them. Current members of the Law Society may be more intimately acquainted with the ways that these standards play out in the everyday practice of law than judges who no longer take part in the solicitor-client relationship. Practising lawyers are uniquely positioned to identify professional misconduct and to appreciate its severity (see *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 890; *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.), at pp. 292-93); on the matter of expertise, see also *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 43-53.

32 Second, members of the public are appointed to the Discipline Committee pursuant to s. 55(1)(b) of the Act. There will always be one lay person on a panel of the Committee by operation of s. 55(4). Although they will presumably have less knowledge of legal practice than judges or the members of the Law Society, lay persons may be in a better position to understand how particular forms of conduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice. Since these are central concerns in the Act, the lay member of a Discipline Committee provides an important perspective for the tribunal in carrying out its duties.

- 33 Third, the Discipline Committee has relative expertise generated by repeated application of the objectives of professional regulation set out in the Act to specific cases in which misconduct is alleged. In each case, the Committee will be called on to interpret those objectives in the factual context. This, we can assume, will tend to generate a relatively superior capacity to draw inferences from facts related to professional practice and also to assess the frequency and level of threat to the public and to the legal profession posed by certain forms of behaviour.
- 34 The Discipline Committee’s expertise is not in a specialized area outside the general knowledge of most judges (such as securities regulation in *Pezim, supra*, or competition regulation in *Southam, supra*). However, owing to its composition and its familiarity with the particular issue of imposing a sanction for professional misconduct in a variety of settings, the Discipline Committee arguably has more expertise than courts on the sanction to apply to the misconduct.

6. *Canadian Union of Public Employees v. Ontario (Minister of Labour)*

In selecting the patently unreasonable standard of review, Justice Binnie¹⁴⁷ recognized the expertise of the Minister with respect to labour relations:

- 150 The Court has also affirmed that the “pragmatic and functional approach” applies to the judicial review not only of administrative tribunals but of decisions of Ministers: *Baker, supra*; *Mount Sinai, supra*, at para. 54; *Dr. Q., supra*, at para. 21; *Ryan, supra*, at para. 21.
- 151 I would affirm at the outset that the precise wording of the power of appointment “of a person who is, in the opinion of the Minister, qualified to act” (s. 6(5)) is a strong legislative signal, coupled with the privative clause (s. 7), that the Minister is to be afforded a broad latitude in making his selection.
- 152 The Minister, with the assistance of his officials, knows more about labour relations and its practitioners (including potential arbitrators) than do the courts. The question before him was one of selection amongst candidates he regarded as qualified. These factors call for considerable deference. The Minister says his appointments should be upheld unless they can be shown to be

patently unreasonable. As was said in *Mount Sinai, supra*, in the concurring reasons, at para. 58:

Decisions of Ministers of the Crown in the exercise of discretionary powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness. This case shows why. The broad regulatory purpose of the ministerial permit is to regulate the provision of health services “in the public interest.” This favours a high degree of deference, as does the expertise of the Minister and his advisors, not to mention the position of the Minister in the upper echelon of decision makers under statutory and prerogative powers. The exercise of the power turns on the Minister’s appreciation of the public interest, which is a function of public policy in its fullest sense.

In his dissenting reasons (in which he agreed with the use of the patently unreasonable standard of review, but disagreed that the Minister’s decision was patently unreasonable), Justice Bastarache¹⁴⁸ says the following about expertise:

- 16 As Iacobucci J. noted in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50, the second and third factors, expertise and the purpose of the provision and the Act as a whole, often overlap. I will discuss them together. I agree with Binnie J. that the Minister and his officials know more about labour relations than do the courts. This Court has recently confirmed in a labour context that courts owe deference to the expert decision makers designated by the legislature: *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 566, 2001 SCC 47; *Ajax (Town) v. CAW, Local 222*, [2000] 1 S.C.R. 538, 2000 SCC 23. Although, as Binnie J. notes, the Minister is asked to make an appointment on behalf of the parties, the particular provision at issue does not simply refer to a “qualified” person. Rather, s. 6(5) states that an appointee is to be qualified “in the opinion of the Minister.” I shall return to this important distinction in my discussion below of the relevant considerations. This specific language in the enabling provision demands deference: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 30, where the legislation at issue referred, as in the present appeal, to the opinion of the Minister. See also *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 57, *per* Binnie J.

- 17 I wish to emphasize the importance of expertise in determining the standard of review. Iacobucci J. has stated that expertise “is the most important of the factors that a court must consider in settling on a standard of review”: *Southam, supra*, at para. 50. Expertise is the “substantive rationale for deference” (D. Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy,” in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 290). The concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters falling within their expertise: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591, *per* Iacobucci J.; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46, *per* Gonthier J. This concept obviously applies to full-time tribunals composed of members possessing special qualifications or who presumptively acquire expertise during their lengthy terms (*Southam, supra*; *Pezim, supra*; *National Corn Growers, supra*; *New Brunswick Liquor Corp., supra*). Yet other decision makers are also to be accorded deference on the basis of an expertise superior to that of the reviewing court. In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at paras. 50-53, this Court held that the collegial composition of the New Brunswick Judicial Council, among other factors, amounted to some expertise deserving deference, even though no member of the Council necessarily had qualifications any different from those of the reviewing judge. In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 32, the Court noted that the fact of being a lay person could, in the context of a lawyers’ Discipline Committee, amount to a certain expertise distinct from that of a court in the sense that a lay person may better understand how particular forms of conduct and choice of sanctions would affect the general public’s perception of the legal profession and confidence in the administration of justice. As for Ministers exercising discretion, this Court’s jurisprudence makes clear that they will be taken to have expertise, by virtue of their position, their ability to weigh policy concerns, and their access to information: *Suresh, supra*, at para. 31; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 59. In this case, in particular, the labour relations context is one more appropriately left to management by the legislatures and the executive than by the courts. As LeBel J. recently noted, “[t]he management of labour relations requires a delicate exercise in reconciling

conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts”: *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 239. In the present case, then, the formal rationale for deference provided by the legislative text “in the opinion of the Minister” overlaps with the substantive rationale for deference, the fact that the Minister actually is better positioned to make the assessment than any reviewing court.

So “expertise”—or at least a justification for deference, if not actually expertise in the usual sense of that word—may be presumed to exist (a) because of who the decision-maker is (a Minister, who is politically accountable); and (b) because the legislature has conferred a discretionary power in strongly subjective terms (“in the opinion of the decision-maker”).

7. *Barrie Public Utilities v. Canadian Cable Television Association*

Barrie Public Utilities is perhaps the sharpest example of a disagreement between members of the Supreme Court of Canada about not only expertise, but also about what standard of review should be applied and what should be the outcome of the Court’s scrutiny of the statutory delegate’s decision.

The issue arose out of an application by the Canadian Cable Television Association for access to the power poles of provincially-regulated power companies for the purpose of supporting cable television transmission lines.¹⁴⁹ The CRTC granted the application on the basis that “the supporting structure of a transmission line” in paragraph 43(5) of the *Telecommunications Act*, read in context and in light of telecommunications and broadcasting policy objectives, was broad enough to grant it authority over the utilities’ power poles. On appeal, the Federal Court of Appeal held that the CRTC did not have jurisdiction over the power poles of provincially-regulated power companies.

Writing for the six-member majority of the Supreme Court of Canada, Justice Gonthier¹⁵⁰ characterized the issue at hand as one of statutory interpretation with respect to which the CRTC had no relative expertise:

- (2) Relative Expertise

- 12 The proper concern of the reviewing court is not the expertise of the decision maker in general, but its expertise relative to that of the court itself *vis-à-vis* the particular issue (*Pushpanathan*, at para. 33). The reviewing court must also bear in mind that in determining the standard of review, the focus of the inquiry is on the particular provision being invoked and interpreted by the tribunal; some provisions within the same Act may require greater curial deference than others (*Pushpanathan*, at para. 28).
- 13 These points are illustrated by L’Heureux-Dubé J.’s discussion of the standard of review in *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739. There, L’Heureux-Dubé J. aptly described the CRTC as “a specialized administrative tribunal... which possesses considerable expertise over the subject matter of its jurisdiction” yet found that it was reviewable on a correctness standard “as regards jurisdictional questions and questions of law outside the CRTC’s area of expertise” (paras. 30-31). To ascertain the CRTC’s relative expertise for the purpose of this appeal, I must consider the particular provision at issue and the nature of the CRTC’s expertise.
- 14 The provision at issue is s. 43(5). More particularly, the question before the Court in this appeal is whether the phrase “the supporting structure of a transmission line” in s. 43(5) includes the Utilities’ power poles. This phrase has no technical meaning beyond the ken of a reviewing court. Indeed, it appears to have no stand-alone meaning at all, but only the meaning given to it by the Act itself. In short, we are faced with a question of statutory interpretation.
- 15 The CRTC’s expertise lies in the regulation and supervision of Canadian broadcasting and telecommunications. In particular, the CRTC is charged with the implementation of Canada’s telecommunications policy as enunciated in s. 7 of the Act.
- 16 Deference to the decision maker is called for only when it is in some way more expert than the court and the question under consideration is one that falls within the scope of its greater expertise (*Dr. Q.*, at para. 28). In my view, this is not such a case. The proper interpretation of the phrase “the supporting structure of a transmission line” in s. 43(5) is not a question that engages the CRTC’s special expertise in the regulation and supervision of Canadian broadcasting and telecommunications. This is not a question of telecommunications policy, or one which requires an understanding of technical language. Rather, it is a purely legal question and is therefore, in the words of La

Forest J., “ultimately within the province of the judiciary” (Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825, at para. 28). This Court’s expertise in matters of pure statutory interpretation is superior to that of the CRTC. This factor suggests a less deferential approach.

In a lengthy and vigorous dissent, Justice Bastarache¹⁵¹ strongly disagreed with the majority’s failure to acknowledge the CRTC’s expertise with respect to the issue in this case, for the following reasons:

- Although the Court had previously recognized the CRTC as an expert body with respect to the regulation and supervision of Canadian broadcasting and telecommunications, the issue was the extent to which its expertise extends generally to the interpretation of its enabling legislation. Justice Bastarache was inclined to think that this task is more akin to administration of that statute, which is a core part of the tribunal’s mandate.
- The statutory phrase in question (“the supporting structure of a transmission line”) was not a legal term of wide usage. The CRTC had statutory authority to make all necessary determinations of law or fact in carrying out its mandate. To the extent that the meaning of this phrase fell within the CRTC’s expertise, deference should be shown to its interpretation. The broad policy context of a specialized agency infuses the exercise of statutory interpretation so that application of the enabling statute is not a matter of “pure statutory interpretation.”
- The specific issue in this case draws heavily on the CRTC’s specialized expertise.

Justice Bastarache makes several pointed observations about the task of determining whether a particular matter lies within a tribunal’s specialized expertise. First, with respect to questions of statutory construction, it may take expertise to be able to meaningfully choose between different possible interpretations. The fact that the reviewing court perceives that one particular meaning is the *correct* meaning is not relevant to determining the appropriate standard of review (which is an anterior question), and the standard of review cannot depend upon what the court determines to be the correct interpretation. Secondly, merely to note that the issue at hand involves “a purely legal question” does not determine whether the issue is a matter within the expertise of the

statutory delegate.¹⁵² After all, the courts have clearly held that at least some statutory delegates are empowered to answer legal questions, and are entitled to deference if that legal question is within their expertise.¹⁵³ “The analytical work... arises when determining whether the particular legal question is within the agency’s expertise.”¹⁵⁴ Too quickly characterising the words as having an ordinary, rather than technical, meaning will substantially reduce the likelihood that the pragmatic and functional approach will indicate deference to decision-makers, even if they are experts. In any event, the distinction between transmission lines and distribution lines is not one to which any lawyer or judge (not having previously litigated or adjudicated in the telecommunications or energy sectors) would ever have turned their minds—but is precisely the sort of technical issue which the CRTC would regularly have dealt with.

8. Determining whether a statutory delegate has expertise with respect to the particular issue

Unfortunately, none of the recent cases address how one determines whether a particular statutory delegate has expertise with respect to the particular issue in question. Is this determined by simply reading the statute? Does it derive from the qualifications or experience of the particular members of the tribunal making the decision—or the tribunal as a whole? Does the fact that a tribunal has a long history necessarily give it expertise about all matters? Does it depend upon how independent the tribunal is? Or how comprehensively and credibly it writes the reasons for its decisions?

Is evidence admissible on this point? If so, when and how does one get this evidence on to the record—during the tribunal’s proceedings, or somehow during the appeal or application for judicial review? Can members of a tribunal be compelled to describe their training, skills and experience?

Even if there is expertise with respect to the particular issue in question, how is that factor weighed against the other three factors from *Pushpanathan*? As Justice Binnie puts it in the *Retired Judges Case*,¹⁵⁵ this is clearly not a mathematical formula:

The examination of these four factors, and the “weighing up” of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily

flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.

9. Expertise only has meaning in the context of determining legislative intent

With respect, it is very easy to be so blinded by the gleam of “expertise” that one forgets that the whole purpose of the pragmatic and functional approach from *Pushpanathan* is to determine the intent of Parliament. Did Parliament intend the court to have the final say about the meaning of the particular statutory phrase, or did it intend the statutory delegate to have some discretion to determine that meaning?

By itself, unrooted from legislative intent, expertise (however it is defined) does not provide a justification for judicial deference. The accuracy of this statement can be demonstrated by the very possibility that the legislature could specifically provide that the courts are to employ the correctness standard when reviewing an expert tribunal’s decision.¹⁵⁶ In these circumstances, the fact that the tribunal is expert would simply be irrelevant to the standard of review to be employed by the court. It is only when the legislature has not stated its intention clearly that one must resort to the four *Pushpanathan* factors—including expertise—in order to determine “the polar star of legislative intent.” The mere fact that a statutory delegate is expert does not necessarily or definitively determine the legislature’s intent about the degree of scrutiny to be employed by the courts in reviewing the statutory delegate’s decisions.

There has been very little conceptual discussion about what constitutes “expertise,” how “expertise” is established, and whether a statutory delegate can obtain “expertise” by repeated (but wrong)¹⁵⁷ interpretations of its own (or other) statutory provisions.¹⁵⁸ However, one should note that section 58(1) of the British Columbia *Administrative Tribunals Act*¹⁵⁹ has provided at least one additional definition of “expertise”—namely, anything covered by a privative clause:

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

10. Cases involving deference to expertise.

In the following recent cases, the Supreme Court of Canada deferred to the statutory delegate's expertise:

- In *Voice Construction*, even though the interpretation of contracts falls within the purview of the courts, the Supreme Court accorded some deference to arbitrators where the interpretation and application of collective agreements was at issue.
- Similarly, in *Lethbridge Community College*,¹⁶⁰ the expertise of the arbitration board resulted in deferential standards of review being adopted for both the interpretation of its constitutive legislation as well as in relation to the award itself. Iacobucci J. states:

The relative expertise of the board also militates in favour of some deference. Arbitrators function as labour relations gatekeepers, and the core of their expertise lies in the interpretation and application of collective agreements in light of the governing labour legislation. In this case, the arbitration board was called upon to interpret the Code, legislation intimately connected with its mandate; see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48, and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Moreover, where the provisions at issue have been incorporated into the collective agreement, as in these circumstances, deference to the board is further justified. In this regard, see D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration* (3rd ed. 2003), at § 2:2120.

- In *Re Cartaway Resources Corp.*,¹⁶¹ the Supreme Court adopted reasonableness as the standard of review, deferring to the British Columbia Securities Commission's determination of what is in the public interest in the regulation of financial markets, and therefore the appropriate penalty for violations thereof. The Commission was also held to have greater expertise than the courts in interpreting its constituent legislation given the "broad policy context within which securities commissions operate."

11. Cases where expertise did not displace the correctness standard

In the following cases, the Supreme Court of Canada found that the expertise of the statutory delegate did not displace the correctness standard of review:

- In both *Toronto v. C.U.P.E. Local 79* and *Ontario v. O.P.S.E.U.*¹⁶² the Supreme Court found that the arbitrator's relative expertise does not extend to complex common law rules and conflicting jurisprudence regarding the relitigation of issues (in these cases, criminal convictions).

Justice Arbour dealt with this point in *Toronto v. C.U.P.E.*¹⁶³ as follows:

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Arbitration Board v.*

O.P.S.E.U., Local 324, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

Query: Having held that the arbitrator must correctly answer the question of law raised, why does Justice Arbour then go on to refer to “a patently unreasonable outcome”? What is the relationship between an incorrect legal analysis and the reasonableness (or lack thereof) of the outcome?

- In *Parry Sound*, the arbitration board’s expertise did not extend to whether the substantive rights and obligations of human rights legislation were incorporated into a collective agreement. Justice Iacobucci (writing for the majority of the Supreme Court of Canada) held that the determination of this question was not within the core area of the arbitration board’s expertise, and therefore the correctness standard applied to this issue. [See the additional discussion of this case in part J below.]
- In *Monsanto*,¹⁶⁴ the Supreme Court of Canada held that the Ontario Financial Services Tribunal did not have any particular expertise relative either to pension plans in Ontario, or to interpreting its constitutive legislation, and therefore applied the correctness standard to a pure question of law having no technical meaning. As Justice Deschamps noted:

On the other hand, the Tribunal does not have specific expertise in this area. The Tribunal is a general body that was created under the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28 (“*FSCOA*”), s. 20, to replace the specialized Pension Services Commission. It is responsible for adjudication in a variety of “regulated sectors” (*FSCOA*, s. 1), including co-operatives, credit unions, insurance, mortgage brokers, loans and trusts, and pensions (*FSCOA*, s. 1). In addition, the nature of the Tribunal’s expertise is primarily adjudicative. Unlike the former Pension Services Commission or the current Financial Services Commission, the Tribunal has no policy functions as part of its pensions mandate (see *FSCOA*, s. 22). As noted in *Mattel Canada, supra*, and in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, involvement in policy development will be an important consideration in

evaluating a tribunal's expertise. Lastly, in appointing members to the Tribunal and assigning panels for hearings, the statute advises that, to the extent practicable, expertise and experience in the regulated sectors should be taken into account (*FSCOA*, ss. 6(4), 7(2)). However, there is no requirement that members necessarily have special expertise in the subject matter of pensions. The Tribunal is a small entity of 6 to 12 members which further reduces the likelihood that any particular panel would have expertise in the matter being adjudicated (*FSCOA*, s. 6(3)).

- In *United Taxi Cabs*,¹⁶⁵ the City of Calgary, like other municipalities, was held not to possess any greater institutional competence or expertise than the courts in “delineating their jurisdiction.”

H. Weighing the *Pushpanathan* factors

Each of the four *Pushpanathan* factors may provide an indication of the legislature's intention about the standard of review to be applied by the courts. However, the indicators may not all point the same way, so it will become necessary to determine which factor has greater weight.

For example, Justice Bastarache recognized¹⁶⁶ that considerations about “expertise” overlap with the fourth factor, the “nature of the problem”—even though the nature of the problem may be a purely legal issue (which would incline one to the correctness standard), the statutory delegate may have greater relative expertise with respect to that very issue (which would incline one to at least some deference):

Many cases have found that the legislature has intended to grant a wide margin for decision-making with respect to some issues, while others are properly subject to a correctness standard. Those cases are discussed in the fourth section below, the “*Nature of the Problem*.” The criteria of expertise and the nature of the problem are closely interrelated.

Once a broad relative expertise has been established..., the Court is sometimes prepared to show considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation.

Similarly, “expertise” and the “purpose” of the legislation and the specific provision in question will also frequently overlap. As Justice Bastarache noted in discussing the third factor in *Pushpanathan*.¹⁶⁷

As Iacobucci J. noted in *Southam, supra*, at para. 50, purpose and expertise often overlap. The purpose of a statute is often indicated by the specialized nature of the legislative structure and dispute-settlement mechanism, and the need for expertise is often manifested as much by the requirements of the statute as by the specific qualifications of its members. Where the purposes of the statute and of the decision-maker are conceived not primarily in terms of establishing rights as between parties, or as entitlements, but rather as a delicate balancing between different constituencies, then the appropriateness of court supervision diminishes.... These considerations [whether the function involves questions of “management”; a range of possible remedies; economic rather than legal issues; the creation of a special tribunal with expert members; the development of policy or the protection of the public interest; or involves legal principles that are vague, open-textured or multi-factored balancing] are all specific articulations of the broad principle of “polycentricity” well known to academic commentators who suggest that it provides the best rationale for judicial deference to non-judicial agencies.... The polycentricity principle is a helpful way of understanding the variety of criteria developed under the rubric of the “statutory purpose.”

In some cases, it might be that all four of the *Pushpanathan* factors point in the same direction—either to the correctness standard or to total deference. However, to the extent that the factors contra-indicate each other, how do the courts weigh them and decide which ones govern (and why)? Is the mere fact that some factors point one way and other factors point the opposite way sufficient to engage the reasonableness *simpliciter* standard? Justice LeBel expressed this concern in *Chamberlain*:¹⁶⁸

203 In any dispute about the standard of review, some combination of factors will almost always indicate more deference while others point to less deference. Indeed, at times a single factor will raise competing considerations, as the second factor of expertise is said to do in this case. As a result, it can be expected that the most frequent outcome of balancing the factors on both sides will be a conclusion that review should be on the compromise standard of reasonableness.

However, in other cases, the courts have not selected the middle standard, but have concluded that either the correctness standard or the patently unreasonable standard must apply, notwithstanding the contrary factors. Several examples of this phenomenon are referred to in the cases cited above about expertise. However, the courts have not given much guidance on how they are weighing up the competing factors in order to

determine why a particular standard of review is appropriate in a particular case.

I. Justice LeBel’s *cri de coeur* about the complexity of the standards-of-review analysis, and the desirability of consolidating the three existing standards into two

For some time, Justice LeBel has been expressing concern about the general applicability of the pragmatic and functional methodology to all parts of administrative law, the complexity of the standards of review analysis, and the desirability of consolidating the three existing standards into two. The clearest statement is contained in his concurring judgment in *Toronto v. C.U.P.E.*, which builds on his earlier misgivings in *Chamberlain*, and is reiterated in *Voice Construction*. While there may now be a trend for courts to avoid identifying patently unreasonable as the applicable standard of review, some other cases make it clear that this standard has not been abandoned—and, indeed, British Columbia has now statutorily enshrined the patently unreasonable standard in their recent administrative law reforms.

1. Justice LeBel’s *cri de coeur* in *Toronto (City) v. C.U.P.E., Local 79*

The concurring *obiter* reasons issued by Justice LeBel (and Justice Deschamps) in *Toronto v. C.U.P.E.* are a startling and refreshing curial *cri de coeur* about the complexity of modern standards of review analysis. Although the parties had made no submissions about the need for a fundamental re-thinking of this area (because they would necessarily be trying to fit their clients’ cases within the framework of the existing law),¹⁶⁹ Justice LeBel noted the growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied; and the need for the law governing the standards of review to be predictable, workable and coherent.

Justice LeBel particularly focused on (a) the interplay between correctness and patent unreasonableness, and (b) the distinction between patent unreasonableness and reasonableness.

With respect to the former, he noted:

At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the standards of reasonableness and correctness.¹⁷⁰

With respect to the latter, Justice LeBel noted that the patent unreasonableness standard was used in contradistinction to the correctness standard, and was developed prior to the birth of the pragmatic and functional approach and prior to (and not in conjunction with) the formulation of the concept of reasonableness *simpliciter*.¹⁷¹ Current attempts to distinguish between the two reasonableness standards are problematic both conceptually and practically:

- 103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle [that there is not only one acceptable solution], it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror ... two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the “immediacy or obviousness” of the defect, and thus the relative invasiveness of the review necessary to find it. Both approaches raise their own problems.¹⁷²

Justice LeBel queried whether the theoretical effort necessary to keep these two reasonableness standards conceptually distinct is productive¹⁷³ or consistent with the legislature's intent or the rule of law:

- 133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (*i.e.*, irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under

review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such intent.... As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.¹⁷⁴

Finally, Justice LeBel concluded that the courts may need to rethink some of the fundamentals in the standards of review analysis:

134 Administrative law has developed considerably over the last 25 years since *CUPE [v. New Brunswick Liquor Board]*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.¹⁷⁵

2. Justice LeBel repeats the concern in *Voice Construction*:

39 I have considered the reasons of Major J. and, subject to the following comments, I concur with his disposition of the appeal. I also agree that the appropriate standard of review is reasonableness and that the arbitrator's interpretation of the hiring provisions in the collective agreement was reasonable. I do not feel the need to inquire more deeply into the degree of reasonableness of the arbitral award.

- 40 This Court has a history of applying the patent unreasonableness standard in reviewing the decisions of labour arbitrators, as can be seen from the reasons of my colleague (para. 22). However, my colleague has now concluded that the reasonableness *simpliciter* standard would be more appropriate in reviewing the decision of the arbitrator in the present case. This again raises the point I discussed in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, namely that it is time for this Court to reevaluate the appropriateness of using the patent unreasonableness and reasonableness *simpliciter* standards. Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness *simpliciter*. This difficulty persists despite the many permutations it has gone through (*C.U.P.E., Local 79*, at paras. 78-83). With respect, adding yet another definition of patent unreasonableness would not make its application any easier nor its conceptual validity more obvious.
- 41 It is illuminating in this respect to consider the definition of patent unreasonableness by Dickson J. (as he then was) in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 237, which is the seminal judgment of our Court in the development of a modern law of judicial review. Rather than contemplating the metaphysical obviousness of the defect, he explained that a decision will only be patently unreasonable if it “cannot be rationally supported by the relevant legislation.” This is consistent with what Iacobucci J. observed in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, in discussing what the reasonableness standard of review entails, at para. 49: “the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and ‘look to see’ whether any of those reasons adequately support the decision.” The “rationally supported by the relevant legislation” standard is one that not only signals that great deference is merited where discretion has been exercised, but also makes clear that a reviewing court cannot let an irrational decision stand. As I observed in *C.U.P.E., Local 79, supra*, at para. 108, this approach should apply to judicial review on any reasonableness standard.
- 42 On the facts of this appeal, the arbitrator’s interpretation of the hiring provisions was rational globally. It falls within the range of reasonable interpretations, and therefore should not be disturbed by a reviewing court. Thus, I conclude that the courts

below erred in quashing the award. I agree with Major J. that the appeal should be allowed, the arbitrator's award restored, and costs granted to the union throughout.¹⁷⁶

3. Is patently unreasonable dead?

Since the decision in *Toronto v. C.U.P.E.*, there has been such a tendency for the courts to simply select reasonableness as the standard of review that one might ask whether patently unreasonable is dead—or at least so rare that it will virtually never be applied (let alone be tripped).¹⁷⁷

(a) Subsequent cases using the pragmatic and functional approach to select the patently unreasonable standard of review

Notwithstanding the convenience of moving to two standards of review, it appears that this result has not been achieved. As Justice Robertson noted in *Jones v. New Brunswick*,¹⁷⁸ although it is very attractive to move to a two-standard system which would unify the two reasonableness standards, that is not yet the law, and lower courts at least must apply the existing law.

In addition to *Jones v. New Brunswick*, there are other recent examples where courts have thoughtfully applied the pragmatic and functional analysis and concluded that the appropriate standard of review is patently unreasonable. For example, the Court of Appeal of Alberta reached this result in *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*¹⁷⁹ with respect to one issue—the Board's method of calculating the 2001 and 2002 carrying costs:

60 While the same statutory right of appeal [which implies less than the greatest degree of deference] applies to the methodology the Board used to calculate 2001 Carrying Costs and 2002 Carrying Costs as to the interpretation of the Negotiated Settlements, a consideration of the other *Pushpanathan* factors suggests that the applicable standard of review on this issue is patent unreasonableness. This presupposes that a question of law or jurisdiction lies embedded in the methodology the Board selected.

61 On this issue, the stated question of law on which leave was granted is whether, in calculating the 2001 Carrying Costs and the 2002 Carrying Costs on the Deferral Accounts, the Board

erred in applying a weighted average cost of capital for a notional deferral account business with an 85% debt and 15% equity structure. I would characterize the possible question of law this way: Did the Board err in treating a discrete function of an integrated utility as a separate stand-alone business unit for purposes of calculating costs of financing that function and in determining an appropriate notional capital structure for it?

- 62 Regardless of how the Board's determination of the proper method of calculating 2001 Carrying Costs and 2002 Carrying Costs on the Deferral Accounts is characterized—whether point of law or not—I am satisfied that it falls within the Board's expertise. Both the nature of the question and the expertise required to resolve it make it well suited for determination by the Board. One of the Board's principal roles is to review and assess costs and expenses of utilities in setting rates for those utilities still regulated by the Board. This requires knowledge in a wide range of areas: economics, financial markets, financing techniques and the operation of regulated utilities generally. Thus, the Board enjoys expertise superior to this Court in determining the appropriate methodology for calculating prudent costs of financing a particular segment of a utility's operations.
- 63 In addition, the nature of the disputed issue makes a more deferential standard appropriate. With restructuring of the electric energy industry, and the widespread use of deferral accounts, determining the appropriate methodology to be used in calculating prudent costs of financing these deferral accounts engages the Board's specialized expertise. This requires in turn an understanding of the interrelationship between regulated and deregulated business functions of an integrated utility, and the risks, business and financial, attached to each. Further, both the *1998 Act* (and *EU Act*) as well as the *Deferral Accounts Regulation* place the assessment of prudent carrying costs squarely before the Board, reflecting the intent of the Legislature to leave this issue to the Board's determination.
- 64 For these reasons, I have concluded that the methodology used by the Board in calculating 2001 Carrying Costs and 2002 Carrying Costs is a matter within the Board's discretion and expertise. Following a consideration of the *Pushpanathan* factors, I am satisfied that the appropriate standard to apply to this Board decision is patent unreasonableness.

The second issue involved the Board's methodology in calculating costs of financing:

A. Standard of Review

165 This then takes me to the final ground of appeal. ATCO challenges the methodology the Board used in calculating 2001 Carrying Costs and 2002 Carrying Costs. Since this decision of the Board is subject to the patently unreasonable standard of review, the decision must be clearly wrong. A patently unreasonable decision is one that is so flawed, no amount of deference can justify letting it stand. A patently unreasonable decision has also been described as “clearly irrational” or “evidently not in accordance with reason”: See *Law Society (newbrunswick) [Ryan]* at para. 52 citing *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) at 963-64, per Cory J.; *Centre communautaire juridique de l'Estrie c. Sherbrooke (Ville)*, [1996] 3 S.C.R. 84 (S.C.C.) at 91-93, per Gonthier J. Having carefully reviewed the Board's decision on this issue, there is no basis for finding that it is patently unreasonable. Indeed, the Board's decision is well-reasoned and amply supported.

Note that both of these examples fall outside of the rare circumstances in which Justice Major in *Voice Construction* thought the patently unreasonable standard would be applied—in *ATCO*, far from there being a full privative clause, there was actually a statutory right of appeal to the Court of Appeal on a question of law.

(b) British Columbia has legislated the patently unreasonable standard

Finally, it is interesting to consider the recent statutory amendments in British Columbia, which make it clear that “patently unreasonable” is alive and well and thriving in that province. After defining a tribunal's greater relative expertise as something that comes within the scope of an exclusive jurisdiction clause, the *Administrative Tribunals Act*¹⁸⁰ prohibits a court from interfering with a finding of fact or law or an exercise of discretion by a tribunal in respect of a matter over which the tribunal has exclusive jurisdiction unless it is patently unreasonable. Further, the Act also defines “patently unreasonable” as follows:

- 58(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

Because the Legislature of British Columbia has statutorily enshrined the patently unreasonable test, it will not be possible to jettison the test in that province. Indeed, because British Columbia has explicitly specified virtually all of the standards of review,¹⁸¹ it will be interesting to see if and how its standards of review analysis departs in the future from what happens in the rest of the country.

J. Is reasonableness assessed against the reasons or the outcome of the decision?

There is an interesting issue about whether reasonableness is assessed against the *reasons* or the *outcome* of the decision, and whether after assessing the robustness of the statutory delegate's reasons it is also necessary to determine whether the actual decision itself is patently unreasonable.

Prior to *Pushpanathan*, there were only two types of issues and two types of standards of review—namely, jurisdictional questions, which had to be answered correctly by the statutory delegate; and intra-jurisdictional issues, which would only involve judicial interference if the *decision* (that is, the *outcome*) was patently unreasonable. It was only with the development of the reasonableness *simpliciter* standard in *Pezim*, *Southam* and other cases (initially involving statutory appeals, later generalized to all applications for judicial review) that the focus shifted to whether “after a somewhat probing examination, can the *reasons* given, when taken as a whole, support the decision?”¹⁸² It is only recently that courts have started to work out the relationship (and possible difference) between the robustness of the *reasons given* and the reasonableness of the *outcome*.

1. *Parry Sound*

In *Parry Sound*, Justice Iacobucci (writing for the majority of the Supreme Court of Canada) held that the issue of whether the substantive rights and obligations of human rights legislation were incorporated into a collective agreement was not something within the core area of the arbitration board's expertise. Therefore there was no justification for deferring to the arbitration board's decision on this issue and the correctness standard of review applied to this issue.

However, having determined that the arbitration board answered this question of law correctly, Justice Iacobucci then went on to determine that the arbitrators' decision that the matter was arbitrable (the outcome) was not patently unreasonable. What is the significance of referring to these two different standards? Does it lie in the possibility that a statutory delegate might make an error in law or reasoning, but that error did not make the outcome unreasonable? If so, then the reviewing court would presumably correct the error in law or reasoning but would decline to set aside the decision.

Query: could the reverse situation occur—correct statements of the law, but an unreasonable (or patently unreasonable) outcome?

2. *Toronto v. C.U.P.E. and Ontario v. O.P.S.E.U.*

In both of these cases, the Supreme Court of Canada found that an arbitrator's relative expertise did not extend to complex common law rules and of conflicting jurisprudence regarding the relitigation of issues (in these cases, criminal convictions). Justice Arbour dealt with this legal point in *Toronto v. C.U.P.E.* as follows:

In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case,

he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Arbitration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.¹⁸³

However, as this quotation indicates, Justice Arbour not only held that the arbitrator must correctly answer the question of law raised (and did not do so), but also went on to refer to a “a patently unreasonable outcome”? Why wasn’t the legal error sufficient by itself for the court to quash the arbitrator’s decision? What is the relationship between an incorrect legal analysis and the reasonableness (or lack thereof) of the outcome?

There are several possible answers to the last question:

- First, if the correctness standard of review applies and the statutory delegate made a legal error, correcting that error might not affect the reasonableness of the actual decision. In other words, it might not be a material error, or the result might be the same but for different legal reasoning.

Justice Iacobucci addressed this possibility in *Parry Sound*:¹⁸⁴

60 In reviewing a decision on a standard of patent unreasonableness, the reviewing court must consider the decision-making process in its entirety, including the failure of the tribunal to consider all of the relevant factors and legal principles. This reflects the fact that a decision will be patently unreasonable if the tribunal reaches a particular conclusion on account of its failure to take into account legal principles or statutory provisions that clearly are relevant to the issue that must be resolved: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 29. Consequently, the mere fact that a board of arbitration has determined that a grievance is arbitrable on grounds that have no basis in law will not lead inexorably to the conclusion that the arbitration award must be quashed. If there are alternative and legally correct grounds that lead to the conclusion that the grievance is arbitrable, quashing the award without considering those grounds would be perverse.

- Secondly, if the statutory delegate did not make an error on a question which has to be answered correctly, it is possible that the statutory delegate's actual decision might still be (patently)¹⁸⁵ unreasonable. *C.U.P.E. v. Ontario (Minister of Labour)*¹⁸⁶ provides a good example—even if the Minister had correctly considered all of the relevant factors (and not considered any irrelevant factors), his (discretionary) decision to appoint only retired judges as interest arbitrators might have been patently unreasonable. Similarly, in *Roncarelli v. Duplessis*,¹⁸⁷ even if it had not been an error of law for the licensing body to consider the fact that Roncarelli had posted bail for certain religious people, the decision to revoke the liquor licence for this reason was patently unreasonable.
- Thirdly, if the reasonableness *simpliciter* standard of review applies and the delegate did not give reasons, (or “if there is no line of analysis within the *given* reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”¹⁸⁸), it will still be necessary for the court to make its own determination about whether the actual decision was or was not (patently?) unreasonable. After all, the actual decision might be perfectly reasonable, even though the statutory delegate did not give any reasons.
- Finally, if the appropriate standard of review is patently unreasonable, does one look only at the *outcome* (the decision itself), not at the *reasoning* process used by the statutory delegate? Of course, the reasoning process in some cases shines some light on the reasonableness of the decision (or lack thereof), but the question is whether one focuses on the *reasons* at all in this case).

3. *Jones v. New Brunswick*

In *Jones v. New Brunswick*, Justice Robertson makes a distinction between the *reasons* for interpreting a contract or statute in a particular way, and an appraisal of the *result* in cases involving the exercise of discretion.

With respect to interpretation issues, Justice Robertson¹⁸⁹ had this to say:

- 26 Leaving aside for the moment the diverse formulations of the patent unreasonableness standard of review, it seems to me that the true issue can be narrowed down to one fundamental question: How much latitude do administrative decision-makers possess when it comes to interpreting a contract or a statute? In my view, they are in the same position as reviewing courts when it comes to the task of interpreting a contractual or statutory provision. The objective is to identify the intent of the contracting parties or the legislature by reference to accepted principles or rules of construction. Thus, every decision-maker must ask whether the construction it wishes to place on a provision is rationally supported from an interpretative viewpoint as opposed to a policy perspective. No decision-maker is given *carte blanche* to render an interpretative decision that accords with his or her individualistic sense of fairness or justice. Both the common law and interpretation statutes impose restrictions on those entrusted with the task of interpretation. Otherwise, the line between interpretation and policy making will disappear altogether. This is why the rationality of an interpretative decision must be measured, at least initially, against the decision-maker's approach to the interpretative task at hand and not simply the result.
- 27 Succinctly stated, if a decision-maker arrives at an interpretation in a manner that is inconsistent with accepted principles of interpretation, the interpretative decision is not rationally supported. The defect should be obvious and the decision must be declared patently unreasonable. If, on the other hand, the application of interpretative principles does not resolve an apparent ambiguity, such that the provision is open to two linguistically permissible interpretations, the decision-maker is free to choose one interpretation over the other. Moreover, the decision-maker is entitled to favour one interpretation for policy reasons that the decision-maker believes are of paramount significance, provided they are related to the objectives of the contract or statute. I shall deal separately with those cases in which the wording of the provision is not ambiguous, but rather deliberately vague.

.....

- 29 When measuring the rationality of an interpretative decision, the starting point of the analysis is to focus on the interpretative approach adopted by the decision-maker and not the result.

By contrast, where the issue involves the exercise of discretion, Justice Robertson¹⁹⁰ recognized that it is the reasonableness of the *result* which will interest the reviewing court:

- 38 The above analysis proceeds on the assumption that it is not the role of reviewing courts to assess the reasonableness of an interpretative decision in terms of the result. Rather, the defect must be found in the interpretative or reasoning process followed. In my opinion, a reviewing court must be wary of approaching the deference issue in terms of the reasonableness of the result when applying the review standard of patent unreasonableness. For example, intuition and experience, the hallmarks of common sense, tell us that if a labour board were to proclaim the jurisdiction to issue and revoke building permits, the competency of its members would have to be questioned under the guise that its decision must be patently unreasonable. However, our legal training requires us to go one step further and examine the reasoning process that would lead an administrative decision-maker to adopt such a bizarre interpretation. The analysis would focus on the enabling legislation and those provisions being relied on to support such a broad mandate. That said, the question remains whether an interpretative decision could be deemed patently unreasonable simply because of the result. The simple answer is “yes.” This is true of cases in which the interpretative issue involves a provision that is inherently vague and, therefore, it is virtually impossible to isolate a defect in the application of interpretative principles or the decision-maker’s reasoning process. The classic example is *National Bank of Canada v. R.C.I.U.*, [1984] 1 S.C.R. 269 (S.C.C.).

.....

- 40 In my view, cases such as *National Bank of Canada* can be distinguished on the basis that they involve the application of provisions that are inherently and deliberately vague. In truth, an administrative tribunal that is authorized to right a wrong by imposing an equitable remedy is not being asked to interpret a provision, but rather to exercise a broad discretion that is capable of responding to diverse factual circumstances that the drafter of the legislation could not possibly anticipate. The situation is no different than one in which a tribunal is

authorized to act “reasonably” or in the “public interest.” At the end of the day, the ultimate decision is a question of personal judgment on which reasonable people may disagree. For example, a tribunal that is responsible for regulating the conduct of its professional members may conclude that a member is guilty of professional misconduct and impose what it regards as an appropriate sanction. Invariably, the reviewing court will grant deference to the tribunal’s findings and, in particular, to the finding of misconduct. However, when it comes to the imposition of an appropriate sanction, the reviewing court may be unwilling to defer to the tribunal in circumstances where there is a breach of the proportionality principle: the punishment does not fit the wrong. But, the general rule is that deference must be accorded to the tribunal’s decision to impose one sanction rather than another: see *Ryan*.

41 The notion that an administrative decision can be assessed according to the result and not the decision-maker’s reasoning process is encapsulated in those Supreme Court decisions dealing with “successor rights.” Suffice it to say that labour boards possess considerable latitude when it comes to determining whether the collective agreement entered into between a union and an employer may be imposed on a successor employer (*e.g.* what constitutes a “disposition”). Invariably, the labour tribunal finds in favour of the union and the question is whether the tribunal’s application of the relevant statutory provisions in the circumstances of a particular case falls into the category of patent unreasonableness. In reality, the legal issue is one of mixed law and fact, the resolution of which invites opposing views as to whether the tribunal’s holding is patently unreasonable. ...

42 In brief, there will be cases where the reviewing court is called on to assess the reasonableness of a tribunal decision in terms of the result, as opposed to the tribunal’s reasoning process. These are the cases where the issue involves the interpretation of an inherently vague term or the exercise of informed discretion on the part of the tribunal. This is not one of those cases.

K. Identifying the issue with respect to which deference might be owed

Two recent cases emphasize the importance of clarity about which decision is being reviewed—and whether *that* decision is entitled to deference.

1. I.A.T.S.E.

In *I.A.T.S.E., Stage Local 56 v. Société de la Place des Arts de Montréal*,¹⁹¹ the collective agreement between Place des Arts (“P.D.A.”) and I.A.T.S.E. provided that P.D.A. would only employ union stage technicians. Although P.D.A. had previously required its tenants to use its technicians (who were union members), it abandoned this requirement during a period of labour strife, so that its tenants thereafter needed to provide their own technicians. I.A.T.S.E. successfully complained to the Quebec Labour Tribunal that this amounted to a breach of the prohibition contained in paragraph 109.1(b) of the *Labour Code*¹⁹² prohibiting the use of replacement workers. Notwithstanding the fine imposed by the Labour Court, P.D.A. continued its practice, and I.A.T.S.E. successfully applied to the Superior Court for an injunction, which was upheld by the Court of Appeal.

However, Justice Gonthier, writing for the unanimous Supreme Court of Canada, reversed the lower courts. It noted that the Superior Court was not sitting in judicial or appellate review from the Labour Tribunal’s decision, but was rather sitting as a court of first instance when it heard the injunction application (a remedy which the Labour Tribunal could not give). As a result, there was no basis for the Superior Court to show any deference to the Labour Tribunal’s decision about the interpretation of paragraph 109.1(b) or its application to the present facts. Nor was it an abuse of process for the P.D.A. to defend itself in the Superior Court by denying that it had breached this provision of the *Labour Code*. As a result, the Superior Court was correct to determine for itself whether the P.D.A. had violated paragraph 109.1(b) of the Code, independently of the finding of the Labour Tribunal.

Further, Justice Gonthier made it clear that the relevant question on an appeal to the higher courts is to determine the correct meaning of paragraph 109.1(b). In other words, the higher courts are to use the correctness standard when hearing an appeal from all legal determinations by lower courts.

2. *Provincial Court Judges' Association of New Brunswick*

A similar issue arose in *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*.¹⁹³

Justice Robertson first noted that the “simple rationality” standard¹⁹⁴ for evaluating a government’s reasons for not accepting a judicial commission’s recommendations for judicial salary increases was not the same as the reasonableness *simpliciter* standard in administrative law.¹⁹⁵

Then Justice Robertson considered whether the reviewing court owes deference to the *government’s* decision or to the *commission’s* recommendation. In *Bodner v. Alberta*,¹⁹⁶ the majority of the Court of Appeal of Alberta held that the scrutiny of the government’s decision to reject a commission recommendation involved a two-fold test—first, the government had to establish the existence of exceptional circumstances; and, secondly, the government had to establish that its reasons passed the simple rationality test. In effect, the Alberta case treats the *commission’s* recommendation as presumptively definitive, entitled to deference. By contrast, Justice Robertson held that:

... the understanding that a government cannot depart from a salary recommendation without first satisfying an “exceptional circumstances” test has, in my respectful view, no foundation in law. If the law were otherwise it would be difficult to appreciate why the Supreme Court framed the constitutional role of remuneration commissions in terms of a recommendatory mandate. If the Supreme Court intended that deference belongs to the commissions, it is difficult to appreciate why the Supreme Court imposed a less demanding review standard on a government decision, at least when compared to the more exacting standard available under s. 1 of the *Charter*. In my respectful view, to grant deference to the commission rather than the government comes perilously close to adopting a constitutional process that resembles binding arbitration. This is not to deny that such an option is available, provided the commission meets the other constitutional requirements, namely, objectivity and independence. In my view, a process of binding arbitration is consistent with the constitutional requirement that the commission be effective. However, the *Provincial Court Act* does not presently provide for binding arbitration and, thus, we are required to review the Government’s rejection decision on the standard of simple rationality.¹⁹⁷

3. No deference to first instance selection or application of standard of review

Of course, these examples are reminiscent of the point in *Dr. Q.* that appellate courts are not to defer to the decisions of lower courts on the selection or application of the applicable standard of review. In other words, the higher courts will themselves determine the correct selection and application of the applicable standard of review. To the extent that deference is relevant, it must be deference to the original decision-maker.

L. Summary on problems with the pragmatic and functional approach to determining the applicable standard of review

Although there have not been earth-shaking developments in standards of review analysis since *Dr. Q.* and *Ryan*, there has been a continuing evolution and refinement of the application of this analysis. We have not reached “administrative law nirvana” by somehow magically reducing the three standards of review to two, and we have not found a foolproof formula for predicting how the courts will perform the pragmatic and functional analysis mandated by *Pushpanathan*. To the extent that there is a robust scepticism about the existence, scope and mesmerizing qualities of expertise, it may signal a greater willingness of courts to perform their historic, constitutional and legitimate responsibility of supervising the legality of governmental actions. At the end of the day, however, there is quite a bit more work to be done in rationalizing all the parts of the pragmatic and functional analysis and its application to the myriad variety of administrative functions. But this provides good work for good advocates, and some excitement at trying to figure out better ways to go.

IV. Where Do We Go From Here?

Given the considerable conceptual and practical difficulties in using the pragmatic and functional approach to identify and apply the applicable standard of review—and the realization that this approach is not applicable to all issues in administrative law—the question is: Where do we go from here? And what mechanisms do we use to get there?

A. Possible Destinations

Possibility #1: Do nothing

One possibility would be to do nothing.

This, of course, begs the question about why one would willingly choose to continue to live with the current complexities (and cost) of identifying, differentiating, and applying the three hitherto-recognized standards of review described in Justice LeBel's *cri de coeur*.

Possibility #2: Consolidate the two deferential standards

Justice LeBel's *cri de coeur* strongly suggests that there should be only one deferential standard of review. This would significantly simplify the standard of review analysis, because it would no longer be necessary to try to articulate the conceptual differences between reasonableness *simpliciter* and patent unreasonableness, or the differences in how these two standards are to be applied. This would get us back to the simpler situation that existed in the days of *New Brunswick Liquor Corp.* and *Bibeault*—where there were only two standards, instead of three—although the modern deferential standard might be reasonableness *simpliciter* rather than patent unreasonableness.

Consolidating the two deferential standards raises the difficult question of which deferential standard should be abandoned, and why that should be the one to be abandoned.

On the one hand, Justice LeBel's *cri de coeur* in *Toronto v. C.U.P.E.* and Justice Major's subsequent judgment in *Voice Construction* clearly speak in favour of retaining reasonableness *simpliciter* and letting patent unreasonableness wither away. In my view, there is considerable merit in this course of action. After all, unreasonableness is a *ground* for judicial review. Why would a court ever decline to interfere with an unreasonable decision? Why would one ever object to the court setting aside an unreasonable decision? As Justice LeBel observed, it simply isn't convincing or satisfying to decline to interfere with an unreasonable decision on the basis that it isn't *patently* unreasonable (whatever "patently" means).

On the other hand, there has been a discernible "push back" against the suggestion in *Voice Construction* that the application of the patently unreasonable standard will be rare. Numerous players in the

administrative law community—particularly those involved in the area of labour relations—feel very strongly that the patently unreasonable standard should continue to apply to some (their!) tribunals. They perceive that the patently unreasonable standard sends a stronger—and necessary—message to the courts not to interfere when reviewing the decisions of those bodies. Some of these commentators may be indifferent to the existence of the other deferential standard—reasonableness *simpliciter*—and its application to *other* administrative tribunals, just so long as “super-deference” applies to their particular tribunal. Other proponents of keeping the patently unreasonable standard may agree with Justice LeBel’s desire to reduce the number of standards from three to two—provided the deferential standard is patently unreasonable, and not reasonableness *simpliciter*. The latter group would appear to include the Legislature of British Columbia, which has specified its intention in the new *Administrative Tribunals Act* that patent unreasonableness shall be the deferential standard of review.

Instead of choosing between the two existing deferential standards, is it possible that they could somehow be merged to create one, new and different deferential standard? What would be the content of that new deferential standard, and how would it differ from the two existing deferential standards of review?

Possibility #3: Abolish the reasonableness simpliciter standard

Notwithstanding the attractive symmetry of unreasonableness as a ground for judicial review and reasonableness *simpliciter* as the only deferential standard of review, one might question whether the Supreme Court of Canada made a mistake in developing the concept of reasonableness *simpliciter* as an intermediate standard of review. After all, it was developed in *Pezim* and *Southam* in the context of a statutory right of appeal on a question of law. Why should the courts ever defer to the decision of a statutory delegate—any statutory delegate, no matter how expert (whatever “expertise” means)—on a question of law? Why wouldn’t the correctness standard apply in this case? Why do Canadian courts refuse to correct errors of law on the face of the record, which English courts correct as a matter of course?

Assuming that one wishes to reduce the number of standards of review, what mechanisms would one use to achieve this result?

B. Possible Mechanisms

Mechanism #1: Legislation

Given that the purpose of the pragmatic and functional approach is to discern the intention of the legislature about how intensely the courts are to scrutinize particular decisions of particular statutory delegates, the most obvious mechanism to achieve clarity would be for the legislature to explicitly state the standard of review it intends the court to use. Such a statement of legislative intent could either be contained in each piece of legislation (or conceivably with respect to each provision in each piece of legislation). Privative clauses are an example of this approach. Although traditionally they have not specifically referred to the applicable standard of review (and therefore are only one of the four *Pushpanathan* factors to be considered), their wording could specifically do so (in which case they would theoretically be determinative of the standard of review, without any need to refer to the other *Pushpanathan* factors, which would then be irrelevant). Alternatively, the legislature could state its intention about the applicable standard of review more globally (as British Columbia has recently done in its new *Administrative Tribunal Act*).

A number of issues arise from specific legislation about the applicable standards of review.

First, what if different jurisdictions legislate differently? This would result in different standards of review being applicable to the same matter, depending upon which jurisdiction was involved. This phenomenon is already exemplified by the different standards which have been identified by the courts of different jurisdictions interpreting privative clauses which are differently worded than the one in *Voice Construction*. Apart from any constitutionally imposed standard of review (such as correctness as the standard of review for constitutional questions), there would be no ability for the court to override the specifically articulated intention of the legislature.

Secondly, legislating the standard of review runs the risk of casting this area of the law into historical concrete, cutting the statutory standard off from any subsequent development of the common law. An example of this phenomenon is what happened under the original versions of sections 18 and 28 of the *Federal Courts Act*.

Mechanism #2: Judicial solution

Alternatively, how would the courts go about simplifying this area?

In the first place, the decision of the New Brunswick Court of Appeal in *Jones v. New Brunswick* makes it clear that the simplification would have to be done by the Supreme Court of Canada—no lower court can ignore the current pre-existing law.

How and in what circumstances would the Supreme Court go about doing this? Would it choose 3 or 5 cases, tell people that is what they are looking at doing, hear submissions, and then come out with a decision selecting one of the deferential standards? Or would the Court simply do it—as occurred in *Pushpanathan*, but did not occur in *Toronto*.

What justification would the Court use to reduce the number of standards of review? Remember that the whole exercise of identifying the applicable standard of review has been under the rubric of discerning the legislature's intention. Having spent this much effort in getting to three standards, how does the court now say it should have discerned that the legislature only intended there to be two standards (and which two)?

Further, what does the Court do if the legislature indicates a different intention—such as having three (or more) standards, or a different deferential standard than the one preferred by the Court? Because (apart from constitutional considerations) the Court must give effect to the expressed intention of the legislature, would it be able to override that intention by redefining some court-developed common law doctrine?

Appendix 1

Extracts from BC's *Administrative Tribunals Act*, S.B.C. 2004, c. 45

Standards of Review

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

- 58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
- (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
 - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
 - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
- (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.

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

- 59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
- (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
- (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.
- (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Endnotes

- * Q.C., deVillars Jones, Edmonton, Alberta. This is a revised version of a paper originally delivered at the national roundtable for judges and tribunal chairs: *Standard of Review, Mediation & Dispute Resolution in the Context of Administrative Agencies* (Ottawa, June 17, 2005), hosted by the Canadian Institute for the Administration of Justice. I gratefully acknowledge the very capable assistance of Richard Bruyer, LL.M. from our office in the preparation of this paper. EDITORS' NOTE: David Phillip Jones' essay, "Standards of Review in Administrative Law" provides a comprehensive, critical overview of the evolution of the standard of review doctrine. It foreshadows the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, issued subsequent to the completion of the essay, which introduced significant modification to the law of standard of review.
- ¹ For a more detailed discussion, see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Scarborough: Carswell, 2004) c. 12.
- ² Named after the description of the British constitution by Albert Venn Dicey, *Introduction to the Study of the Law of Constitution*, 10th ed. by E.C.S. Wade (London: Macmillan Papermac, 1967); see H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osg. Hall L.J. 1; and the dissenting judgment by Wilson J. in *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644.
- ³ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Constitution*].
- ⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].
- ⁵ Sometimes legislation specifically grants a right to judicial review, rather than providing for an appeal; for examples, see the Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, ss. 19, 127, 145, 204; or the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 74 (these are examples of *direct* or *explicit*, not *indirect* or *inherent*, authority for the courts to review the decisions of statutory delegates).
- ⁶ Unless the legislature attempts to prevent all forms of judicial review, which would be unconstitutional: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 [*Crevier*]. Similar constitutional considerations might prevent a legislature from specifying a standard of review less than correctness for constitutional questions. Query: Could the legislature provide that the standard of review to be applied is patently unreasonable for all questions, issues or grounds? *I.e.* The Central Canadian Anti Judicial Review Establishment view of *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [*New Brunswick Liquor Corp.*]. While there would still be jurisdictional issues, that characterization would be irrelevant because the applicable standard of review would be patent

unreasonableness. This would echo *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 [*Dr. Q.*] and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 [*Ryan*] which held that there is no one-to-one relationship between any grounds of review and the applicable standard.

⁷ The British Columbia's Administrative Justice Project had recommended that legislation should specify the different standards of review which are to be applied by the courts; this culminated in the passage of sections 58 and 59 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45.

⁸ [1969] 2 A.C. 147 (H.L.) [*Anisminic*]; see the interesting discussion of this case by Lord Cooke of Thordon, *Turning Points in English Law*, The Hamlyn lectures (London: Sweet and Maxwell, 1997) at 63ff.

⁹ *Anisminic*, *ibid.* at 171.

¹⁰ The Supreme Court of Canada adopted the *Anisminic* approach in three notable cases: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 (dealing with a preliminary or collateral question); and *Blanco v. Québec (Rental Commission)*, [1980] 2 S.C.R. 827.

¹¹ *Canada (Attorney-General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 at 650 [*Econosult*].

¹² [1980] 2 All E.R. 634 (H.L.) at 638–39, Diplock J. [*Re Racal*] [emphasis added]. See also *O'Reilly v. Mackman*, [1983] 2 A.C. 237 (H.L.) [*O'Reilly*]; *Millbanks v. Secretary of State for Home Dept.*, [1983] A.C. 120 (H.L.); and Lord Diplock, "Administrative Law: Judicial Review Reviewed" (1974) Cambridge L.J. 233. But compare the decision of the Privy Council in *South East Asia Firebricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union*, [1981] A.C. 363, rendered ten days before *Re Racal*.

¹³ Privative clauses are discussed in more detail below.

¹⁴ See Jones & de Villars, *supra* note 1 at c. 11.

¹⁵ *Ibid.* at 639 [emphasis added].

¹⁶ The meaning of a particular legal term may differ from one context to another: *Re Cormier and Alberta Human Rights Commission* (1984), 14 D.L.R. (4th) 55 (Alta. Q.B.). However, this observation does not determine who should have final say about the meaning of the legal term in that context—the courts, or the statutory delegate.

The legislature could of course specifically (and clearly) give a statutory delegate discretion to determine its own meaning for a particular legal phrase. An example would be the ability of labour relations boards to determine who is an "employee," regardless of whether that person fits within the common law definition of an employee. The legislature's intention to permit the statutory delegate to reach a different result from the common law definition is reinforced by the strong privative clause found in most labour legislation. But compare *Econosult*, *supra* note 11, where the Supreme Court of Canada

found that the legislation did not give the statutory delegate any discretion to determine who was a public servant that was a “jurisdictional given.”

¹⁷ *Supra* note 6.

¹⁸ In *Econosult*, *supra* note 11 at 650–51 [underlined emphasis added; italicized emphasis in original].

¹⁹ Members of the “Central Canadian Anti-Judicial Review Establishment”!

²⁰ The concept of a “privative gloss” comes from *Alberta Union of Provincial Employees, Branch 63 v. Olds College*, [1982] 1 S.C.R. 923, where the privative clause specifically permitted applications for judicial review within a certain window of time [*Olds College*].

²¹ *Econosult*, *supra* note 11 at 651–652 [emphasis added]. The cases cited by Cory J. are: *Volvo Canada Ltd. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720*, [1980] 1 S.C.R. 178 [*Volvo Canada*]; *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245; *Olds College, ibid.* (which assimilates the “privative gloss” of a final and binding clause to a “privative clause” ousting judicial review); *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1003–04 [*Paccar*]; and *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Teamsters Union Local 938 v. Massicotte*, [1982] 1 S.C.R. 710.

²² *National Corn Growers Association v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324.

²³ *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644.

²⁴ And perhaps also to questions involving the interpretation of “external” statutes (as opposed to the “constituent” statute of the tribunal). Depending upon how important the construction of the external statute is to the mandate of the statutory delegate, the courts may show some deference to its interpretation: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 [*Canadian Broadcasting Corp.*]; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 [the *Retired Judges* case].

²⁵ [1988] 2 S.C.R. 1048 at 1086–87 [*Bibeault*] [emphasis added].

²⁶ *Ibid.* at 1088–89 [emphasis added].

²⁷ How does one identify the “matter” in question? Is the “matter” to be defined broadly or narrowly? See the decision of the Supreme Court of Canada in *Canadian Broadcasting Corp.*, *supra* note 24. McLachlin J. (dissenting) held that the functional test is question-specific and must be applied to each question which the Board considered, and the appropriate standard of review must then be applied to its answer to that specific question. She held that this requirement is not obviated by the fact that the question is part of the substance of the dispute, or is preliminary or jurisdictional. The majority used a broader approach to characterize the “matter” in question. See the recent

decisions in the *Retired Judges* case, *supra* note 24 at para. 97, Binnie J., and paras. 6–13, Bastarache J.; and *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] 1 S.C.R. 476 at paras. 59–66, 125, Bastarache J. [*Barrie Public Utilities*]. On jurisdiction and appropriate forum, see also Aloke Chatterjee, “Analyzing Problems of Exclusive and Concurrent Jurisdiction,” in this volume at 333.

²⁸ See his judgment in *Penny v. Alberta (Workers’ Compensation Appeals Commission)* (1993), 12 Alta. L.R. (3d) 238 (C.A.); and his subsequent book on this topic: *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994).

²⁹ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (notwithstanding the reference to a *spectrum* of standards of review, at the end of the day the Court settled on the patent unreasonableness standard one of the end points on the spectrum) [*Pezim*].

³⁰ *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748 [*Southam*].

³¹ [1997] 1 S.C.R. 1015.

³² [1997] 1 S.C.R. 793.

³³ For example, in *Miller v. Newfoundland (Workers’ Compensation Commission)* (1997), 2 Admin. L.R. (3d) 178 (Nfld. S.C.T.D.) at 183–84, the reviewing judge applied the reasonableness standard, in light of the fact that the statute authorized the original decision-maker (the Chief Review Commissioner) to draw *reasonable* inferences from the facts:

But often, as in the present case, the alleged error is one of fact in the inferences drawn from the evidence or one of mixed law and fact. The standard of review would then normally be that of patent unreasonableness, because of the strong privative clause in the legislation. At worst, from the Commission’s perspective, the standard of review for s. 60(1), as opposed to other provisions, would be the standard of reasonableness incorporated into s. 60(1) by the reference to “reasonable inferences.” This “reasonableness” standard has recently been adopted as a third standard by the Supreme Court of Canada (in *Southam*, *supra* note 30).

³⁴ For further discussion see D. P. Jones, “The Concept of a Spectrum of Standards of Review: Is There a Different Standard of Review for Appeals?” (1997) 6 R.A.L. 169.

³⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, reasons modified [1998] 1 S.C.R. 1222 [*Pushpanathan*].

³⁶ Although none of the lower decisions nor the written submissions addressed the standard of review.

³⁷ (1) Whether there is a privative clause which would speak in favour of a more deferential standard (although absence of a privative clause does not necessarily invoke the correctness standard); (2) Whether the statutory delegate has greater expertise on the matter in question; (3) The purpose of the Act as a whole, and the provision at issue in particular; (4) The “nature of the problem” whether a question of law or fact.

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- ³⁸ Referring to the companion decision in *Ryan*, *supra* note 6, Chief Justice McLachlin makes it clear at para. 35 in *Dr. Q.*, *supra* note 6, that there are only three currently recognized standards of review. Curiously, however, she states that a correctness standard will suffice “where little or no deference is called for.” Is there a difference between “little deference” and “no deference”? Is this what Lambert J.A. was trying to get at in *Northwood Inc. v. British Columbia (Forest Practices Board)* (2001), 31 Admin. L.R. (3d) 1, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 207 (Q.L.), and *Van Unen v. British Columbia (Workers’ Compensation Board)* (2001), 87 B.C.L.R. (3d) 277, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 288 (QL), when he talked about “correctness coupled with an appropriate measure of deference”? Or is it the opposite requiring correctness to be applied even if little deference is called for?
- ³⁹ This vindicates the approach taken earlier by the Court of Appeal of Alberta in *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.* (2002), 45 Admin. L.R. (3d) 1 which also noted that an appellate court may substitute its own view for (*i.e.*, correct) the way a lower court has applied the applicable standard.
- ⁴⁰ *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 [*Toronto v. C.U.P.E.*].
- ⁴¹ [2004] 1 S.C.R. 609 [*Voice Construction*].
- ⁴² *Ibid.* at para. 18 (although the Court had for the 24 previous years applied the patently unreasonable test to review an arbitrator’s interpretation of a collective agreement, in *Voice Construction* it unanimously determined that the pragmatic and functional approach mandated the less deferential standard of reasonableness).
- ⁴³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].
- ⁴⁴ See, for example the *Retired Judges* case, *supra* note 24, where the Court reviewed those factors considered by the Minister in appointing the chair of various interest arbitration boards. Justice Bastarache in dissent emphasizes that the issue at this stage is whether a particular *additional* factor, not specified in the statute, is to be inferred as being relevant to the exercise of the discretion in question. This issue is conceptually anterior to the later question about whether the Minister’s actual exercise of the discretion was patently unreasonable. If one concludes that it is not patently unreasonable not to take into account this additional factor, then that would be the end of the matter; there would be no need to go on to make a determination about whether the actual exercise of the discretion is also patently unreasonable.
- ⁴⁵ Presumably, the correctness standard of review would never be applied to this second question, precisely because the power being exercised is discretionary in nature, which means that there is more than one possible right outcome.
- ⁴⁶ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 [*Suresh*].

⁴⁷ *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 [*Chieu*].

⁴⁸ *Moreau-Bérubé v. New Brunswick*, [2002] 1 S.C.R. 249 [*Moreau-Bérubé*].

⁴⁹ *Supra* note 35 at para. 25.

⁵⁰ For examples, see *Moreau-Bérubé*, *supra* note 48 at para. 36, Arbour J.; *Chieu*, *supra* note 47 at para. 20, Iacobucci J.; *Suresh*, *supra* note 46. In *Dr. Q.*, *supra* note 6 at para. 21, McLachlin C. J. said:

In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach.

⁵¹ *Supra* note 21 at para 43 [emphasis added]. Chief Justice Dickson concurred with Justice La Forest's judgment. Justice Lamer concurred with Justice Sopinka's judgment, which concurred with the disposition of the appeal by Justice La Forest. Justices Wilson and L'Heureux-Dubé wrote separate dissenting judgments.

⁵² *Supra* note 6.

⁵³ *Supra* note 41.

⁵⁴ Justice Dea was the chambers judge, Justices McClung and Russell were the majority in the Court of Appeal; and Justice Berger dissented, but on the application of the correctness standard, not whether it was the appropriate standard of review [underlined emphasis added; italicized emphasis in original].

⁵⁵ It may not be necessary to spend much or any time determining the applicable standard of review if there is a previous binding case in which this has been done with respect to the very issue at hand: *Foster v. Alberta (Transportation and Safety Board)* (2006), 276 D.L.R. (4th) 233 (Alta. C.A.), Berger J.A.; *White v. Workers' Compensation Board, Appeals Commission* (2006), 41 Admin. L.R. (4th) 141 (Alta. Q.B.), Slatter J.

⁵⁶ *Supra* note 24 at para. 149, Binnie J.

⁵⁷ Of course, if the outcome of the proper application of all three standards of review would not be identical, it would obviously be necessary to select which is the appropriate standard.

⁵⁸ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 [*Monsanto*].

⁵⁹ *Supra* note 27 [emphasis added].

⁶⁰ *Ibid.*

⁶¹ [2006] 1 S.C.R. 256 [*Multani*].

⁶² R.S.Q. c. C-12 [*Quebec Charter*].

⁶³ McLachlin C.J.C., Bastarache, Binnie and Fish JJ. concurring.

⁶⁴ *Multani*, *supra* note 61 at para. 16, Charron J.

⁶⁵ Citing *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

⁶⁶ *Multani*, *supra* note 61 at para. 18.

⁶⁷ *Ibid.* at paras. 19–20 [emphasis added].

⁶⁸ R.S.Q. c. I-13.3, s.12: “The council of commissioners may, if it considers that the request is founded, overturn, entirely or in part, the decision contemplated by the request and make the decision which, in its opinion, ought to have been made in the first instance.”

⁶⁹ *Multani*, *supra* note 61 at para. 86 [emphasis added].

⁷⁰ *Ibid.* at para. 93 [emphasis added].

⁷¹ *Ibid.* at para. 128 [emphasis added].

⁷² R.S.Q., c. I-13.3.

⁷³ It may be that factual assessments or factual underpinnings against which constitutional or *Canadian Charter* questions are decided are entitled to a measure of deference: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Suresh*, *supra* note 46; *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72; *Pinet v. St. Thomas Psychiatric Hospital*, [2004] 1 S.C.R. 528; and *Barrie Public Utilities*, *supra* note 27.

⁷⁴ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

⁷⁵ *Multani*, *supra* note 61 at para. 121.

⁷⁶ *Ibid.* at para. 128 [emphasis added].

⁷⁷ *Multani*, *supra* note 61 at para. 121.

⁷⁸ [2004] 1 S.C.R. 485 at para. 5 [emphasis added] [*United Taxi Cabs*].

⁷⁹ For example, in *Alberta v. Alberta (Labour Relations Board)* (2002), 40 Admin. L.R. (3rd) 115 (Alta. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 100 (QL), the issue was whether the Board had jurisdiction to determine whether the collective agreement continued to bind the Crown employees who had been transferred to the newly created municipalities. This depended upon whether they were “employees” within the meaning of the legislation. If so, then the Board had jurisdiction to deal with the matter; if not, then it had no jurisdiction. However, the legislation made it clear that this was a matter which was to be determined by the Board (not the courts), and that decision was protected by multiple privative clauses. So the fact that there were jurisdictional *consequences* from the Board’s decision did not mean that there was any issue about whether the Board had jurisdiction to make that decision. Accordingly, the appropriate standard of review was patent unreasonableness, and not correctness.

⁸⁰ *Pushpanathan*, *supra* note 35.

⁸¹ *Supra* note 40 at paras. 61–62 [emphasis added].

⁸² See the discussion of this point in part C below.

⁸³ One might have thought that the fact that the Supreme Court of Canada had previously identified the applicable standard of review for a particular issue

would mean that it would not be necessary to do the pragmatic and functional analysis ever again with respect to that issue. However, the decisions in *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, [2001] 2 S.C.R. 565 [*Ivanhoe*] and *Voice Construction*, *supra* note 41, make it clear that the applicable standard of review may change over time. See the discussion in part E below.

⁸⁴ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at paras. 188–189 [*Chamberlain*] [emphasis added].

⁸⁵ *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 S.C.R. 157 [*Parry Sound*]. Although Justice Major dissented on the outcome of the main issue (whether substantive rights and obligations under human rights legislation were incorporated into collective agreements and are to be taken into account by labour arbitrators), he expressly agreed with Justice Iacobucci's statement that the overall decision was subject to the patently unreasonable standard. The Court also had virtually no analysis about why the correctness standard applied to the main issue at para. 21:

If the critical question which the tribunal must answer is a question of law that is outside its area of expertise and that the Legislature did not intend to leave to the tribunal, the tribunal must answer that question correctly.

⁸⁶ *Supra* note 6 at paras. 21–25 [emphasis added].

⁸⁷ It is important to remember that the adoption of the pragmatic and functional approach has not abolished the concept of a “jurisdictional” error. As Justice Bastarache observed in *Pushpanathan*, *supra* note 35 at para. 28:

Although the language and approach of the “preliminary,” “collateral” or “jurisdictional” question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the [four] factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of “jurisdictional questions” which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which “goes to jurisdiction” is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, “jurisdictional error” is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

⁸⁸ An exception might be where the legislature has used subjective or discretionary language to define the statutory delegate's jurisdiction: *Econosult*, *supra* note 11. A different standard than correctness might apply where the legislature confers authority on the statutory delegate in subjective or elastic terms, making it clear that it intends the statutory delegate to make that determination rather than the court: *Alberta v. Alberta (Labour Relations Board)*, *supra* note 79. At some point, there might be a constitutional

limitation on applying a standard of review other than correctness: *Crevier*, *supra* note 6.

- ⁸⁹ For example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 [*Mattel*]. Although Major J. concludes that the CITT's expertise did not extend to this particular question of law—and therefore applied correctness as the standard of review—he emphasizes, at para. 27, that other questions of law which justify a more deferential standard of review may be within the Tribunal's expertise.
- ⁹⁰ *Pezim*, *supra* note 29; *Southam*, *supra* note 30. The presence of an appeal provision probably indicates that the Legislature intended the court to apply the former, more stringent reasonableness standard: *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)*, (2004) 18 Admin. L.R. (4th) 243 (Alta. C.A.).
- ⁹¹ For example, in *Baker*, *supra* note 43, Justice L'Heureux-Dubé applied the pragmatic and functional approach to determine the applicable standard of review for reviewing discretionary decisions, and this decision was followed in the *Retired Judges* case, *supra* note 24.
- ⁹² *Supra* note 84.
- ⁹³ R.S.B.C. 1996, c. 412, s. 168.
- ⁹⁴ *Chamberlain*, *supra* note 84 [emphasis added]. Compare the similar reasoning by Justice Bastarache in *United Taxi Cabs*, *supra* note 78, which however applied the correctness test.
- ⁹⁵ *Chamberlain*, *ibid.* [emphasis added].
- ⁹⁶ *Toronto v. C.U.P.E.*, *supra* note 40 at para. 61 [emphasis added].
- ⁹⁷ Robert W. Macaulay & James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, vol. 1, looseleaf (Toronto: Carswell, 1991) at 2004–1.
- ⁹⁸ *Ibid.* at 2004–2.
- ⁹⁹ The *Retired Judges* case, *supra* note 24 at para. 149.
- ¹⁰⁰ See *Jones & de Villars*, *supra* note 1 at 518ff; see also *Moreau-Bérubé*, *supra* note 48 at para. 74; and the *Retired Judges* case, *ibid.*
- ¹⁰¹ *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 [*Lethbridge Community College*].
- ¹⁰² There was no privative clause in the legislation, but there was a statutory right of appeal, so the patently unreasonable standard of review was virtually excluded.
- ¹⁰³ [2004] 1 S.C.R. 672.
- ¹⁰⁴ [2002] 3 S.C.R. 661. By contrast, the Quebec Superior Court had adopted the patently unreasonable test (and held that the Commissioner's decision was patently unreasonable!). The Court of Appeal adopted the reasonableness standard, and held that the Commissioner's decision was not unreasonable.
- ¹⁰⁵ [2003] 1 S.C.R. 722.

¹⁰⁶ *Supra* note 83.

¹⁰⁷ *Sept-Îles (City) v. Quebec (Labour Court)*, [2001] 2 S.C.R. 670.

¹⁰⁸ *Supra* note 25.

¹⁰⁹ *Volvo Canada*, *supra* note 21 at 214; *Olds College*, *supra* note 20 at 935; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 337–39 [*Bradco*]; *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079 at paras. 58–60. In *Olds College*, the language of the privative clause was identical to the language in *Voice Construction*. To be fair, all of these cases predate *Pushpanathan*, *supra* note 35.

¹¹⁰ Writing for himself, McLachlin C.J.C., and Iacobucci, Bastarache, Binnie, Arbour and Fish JJ.

¹¹¹ Sections 142 and 143 of the Alberta *Labour Relations Code*, R.S.A. 2000, c. L-1, provide as follows:

142 The award of an arbitrator, arbitration board or other body is binding

- (a) on the employers and the bargaining agent,
- (b) in the case of a collective agreement between a bargaining agent and an employers' organization, on the bargaining agent, the employers' organization and employers bound by the agreement who are affected by the award, and
- (c) on the employees bound by the agreement who are affected by the award,

and the employers, employers' organization, bargaining agent and employees shall do or abstain from doing anything, as required of them by the award.

143 (1) Subject to subsection (2), no award or proceeding of an arbitrator, arbitration board or other body shall be questioned or reviewed in any court by application for judicial review or otherwise, and no order shall be made or process entered or proceedings taken in any court, whether by way of injunction, declaratory judgment, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the arbitrator, arbitration board or other body in any of his or its proceedings.

(2) A decision, order, directive, declaration, ruling or proceeding of an arbitrator, arbitration board or other body may be questioned or reviewed by way of an application for judicial review seeking an order in the nature of *certiorari* or *mandamus* if the originating notice is filed with the Court no later than 30 days after the date of the proceeding, decision, order, directive, declaration or ruling or reasons in respect thereof, whichever is later.

(3) The Court may, in respect of an application pursuant to subsection (2), determine the issues to be resolved on the application, and limit the contents of the return from the arbitrator or arbitration board to those materials necessary for the disposition of those issues.

¹¹² *Voice Construction*, *supra* note 41 at para. 26.

¹¹³ *Ibid.* at para. 27.

¹¹⁴ *Ibid.* at para. 28.

¹¹⁵ *Ibid.* at para. 29.

¹¹⁶ *Ibid.* at para. 42.

¹¹⁷ See the discussion in part I below.

¹¹⁸ *Supra* note 35 [emphasis added].

¹¹⁹ Of course, there are examples of cases where the courts have applied the correctness standard even where there was a privative clause for example, where the nature of the issue was central to the legal system, or involved something which the Legislature clearly would not have intended to be determined definitively by the statutory delegate. *Parry Sound*, *supra* note 85, and *Toronto v. C.U.P.E.*, *supra* note 40, are good examples.

¹²⁰ For a discussion of different types of privative clauses, see Jones & de Villars, *supra* note 1 at 488ff; Roger Carter, “The Privative Clause in Canadian Administrative Law, 1944–1985: A Doctrinal Examination” (1986) 64 *Can. Bar Rev.* 241.

¹²¹ Note that there has been no change in the other three *Pushpanathan* factors that could explain the choice of a different standard of review.

¹²² *Supra* note 41 at para. 18 [emphasis added].

¹²³ (2004), 13 *Admin. L.R.* (4th) 188 (Alta. C.A.).

¹²⁴ R.S.A. 2000, c. T-3.

¹²⁵ *Jones v. New Brunswick (Board of Management)* (2004), 18 *Admin. L.R.* (4th) 222 (N.B. C.A.).

¹²⁶ R.S.N.B. 1973, c. P-25.

¹²⁷ Although some other New Brunswick labour legislation has less-strongly-worded privative provisions: see ss. 55(2) and 77(1) of the New Brunswick *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 which merely makes the decisions of arbitrators “final and binding,” although s. 131(2) of the same legislation provides full privative protection to decisions of the Labour and Employment Board. Do different standards of review apply?

¹²⁸ *Supra* note 35 at paras. 32–33 [emphasis added].

¹²⁹ By definition, whenever legislation confers powers on a statutory delegate who is not a judge, there is a “non-judicial means of implementing the Act.” This covers virtually all of administrative law. But surely that fact alone does not in any meaningful sense force one to conclude that the statutory delegate is an “expert” or has “expertise.”

¹³⁰ *Moreau-Bérubé*, *supra* note 48.

¹³¹ *Ryan*, *supra* note 6 at para. 31.

¹³² *Ibid.* at para. 32.

¹³³ *Ibid.* at para. 33. There is considerable difference of opinion in the courts about whether they should defer to a statutory delegate’s experience in interpreting legislation—whether the statutory delegate’s constitutive legislation, or other legislation which it is required to interpret in the course of

its duties. See *Macdonell v. Quebec (Commission d'accès à l'information)*, *supra* note 104 at para. 8; the *Retired Judges* case, *supra* note 24 at para. 17 (*per* Bastarache J. dissenting as to outcome, but not about the expertise of the Minister); *Barrie Public Utilities*, *supra* note 27 at paras. 73–91, Bastarache J. (dissenting); *National Corn Growers Association v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (*per* Wilson J. dissenting). By contrast, the courts have not recognized human rights commissions to have expertise about what constitutes a breach of their legislation, even though they have repeated experience in applying their statutes: see the cases discussed in the section dealing with appeals where the correctness standard of review has been applied.

¹³⁴ See *Macdonell v. Quebec (Commission d'accès à l'information)*, *supra* note 104 at paras. 7–8; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 at paras. 15–19 [the *RCMP Case*]; *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 at para. 30 (F.C.A.).

¹³⁵ The *Retired Judges* case, *supra* note 24 at paras. 150–152, Binnie J., and at paras. 16–17, Bastarache J. (dissenting as to outcome, but not on this point).

¹³⁶ *Ibid.* at para. 17, Bastarache J. See also *Suresh*, *supra* note 46 at para. 30; *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281 at para. 57; *Baker*, *supra* note 43 at para. 59.

¹³⁷ *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739 at paras. 30–31.

¹³⁸ *Mattel*, *supra* note 89 at para. 16, Major J.

¹³⁹ *Dr. Q.*, *supra* note 6 (findings of credibility). Although a statutory delegate may have expertise in fact-finding, the factual nature of an issue may also be relevant to the fourth *Pushpanathan* factor, namely, the “nature of the problem.” Problems which involve findings of fact or mixed fact and law attract more deference, even if the statutory delegate is not an expert at fact-finding. By contrast, note that the Supreme Court of Canada has not deferred to facts found by human rights tribunals, at least in cases where the evidence was all in written form: *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at 14–15, Iacobucci J.; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at 1124–26, Dickson C.J.C. See Hon. Robert F. Reid, Q.C.’s comment on *Dickason* in (1992) R.A.L. 2 at 4 indicating “[queasiness] about equating fact-finding by trial judges who have training and experience in the art to fact-finding by administrative decision-makers who in the human rights field could be moonlighting professors having neither, and who are moreover not even bound by the rules of evidence.”

¹⁴⁰ *Supra* note 109 at 335 [emphasis added], quoted by Bastarache J. in *Pushpanathan*, *supra* note 37 at para. 33.

¹⁴¹ But see the dissent by Bastarache J. in *Barrie Public Utilities*, *supra* note 27 at paras. 73–91.

¹⁴² *Supra* note 104 [emphasis in original].

¹⁴³ *Ibid.* [emphasis added].

¹⁴⁴ *Supra* note 134 [emphasis added].

¹⁴⁵ *Dr. Q.*, *supra* note 6 at paras. 28–29.

¹⁴⁶ *Ryan*, *supra* note 6 [emphasis added].

¹⁴⁷ The *Retired Judges* case, *supra* note 24 [emphasis added].

¹⁴⁸ *Ibid.* [emphasis added].

¹⁴⁹ S. 43(5) of the *Telecommunications Act*, S.C. 1993, c. 38 reads as follows:

Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.

¹⁵⁰ *Barrie Public Utilities*, *supra* note 27 [emphasis added].

¹⁵¹ *Ibid.* at paras. 73–91.

¹⁵² This is analogous to Chief Justice McLachlin’s point in *Dr. Q.*, *supra* note 6 at para. 25: merely identifying something as “a purely legal question” does not automatically engage any particular standard of review.

¹⁵³ For example, see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at 33. On the other hand, “[...] in the case of tribunals or administrative decision makers not empowered to make determinations of law, for example, or lacking expertise, the fact that a question is purely legal will of course be more significant” (*Barrie Public Utilities*, *supra* note 27 at para 88).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Supra* note 24 at para. 149.

¹⁵⁶ See Frank A.V. Falzon, *Standard of Review on Judicial Review or Appeal*, Background Paper (Victoria, B.C.: Ministry of Attorney General, 2001), online: Administrative Justice Project Status Report <http://www.gov.bc.ca/ajo/popt/archives/admin_justice_report.htm> (proposal that legislation could specify the standard of review). See also British Columbia, *Model Statutory Powers for Administrative Tribunals*, Position Paper (Victoria, B.C.: Administrative Justice Office, Ministry of Attorney General, 2003), online: Administrative Justice Project – Archives <<http://www.gov.bc.ca/ajo/popt/archives.htm>>.

¹⁵⁷ “Practice makes permanent not perfect!”

¹⁵⁸ For such a discussion of the concept of expertise see Laverne A. Jacobs & Thomas S. Kuttner, “The Expert Tribunal,” in this volume at 67.

¹⁵⁹ *Supra* note 7.

¹⁶⁰ *Supra* note 101 at para. 17.

¹⁶¹ *Supra* note 103 at para. 46.

¹⁶² [2003] 3 S.C.R. 149.

¹⁶³ *Supra* note 40 [emphasis added].

¹⁶⁴ *Supra* note 58 at para 11.

¹⁶⁵ *Supra* note 78 at para. 5, Bastarache J.

¹⁶⁶ *Supra* note 35 at paras. 33–34.

¹⁶⁷ *Ibid.* at para. 36 [emphasis added].

¹⁶⁸ *Supra* note 84.

¹⁶⁹ Because the matter had not been raised at the hearing, the majority of the Court was not prepared to deal with the issues raised by Justices LeBel and Deschamps. Note, however, that the absence of submissions did not prevent the Court from embarking on the standard of review analysis in *Pushpanathan*, *supra* note 35.

¹⁷⁰ *Toronto v. C.U.P.E.*, *supra* note 40 at paras. 99–100.

¹⁷¹ *Ibid.* at para. 101.

¹⁷² *Ibid.*

¹⁷³ *Ibid.* at para. 121; in paragraph 127, Justice LeBel suggests that the distinction between the two reasonableness standards is about as unproductive as differentiating between “illegible” and “patently illegible.”

¹⁷⁴ *Ibid.* [emphasis in original].

¹⁷⁵ *Ibid.*

¹⁷⁶ *Supra* note 41 [emphasis added].

¹⁷⁷ Justice Major in *Voice Construction*, *ibid* at para. 18, noted that the patently unreasonable standard would only be applied in “rare” cases:

... A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd. [Emphasis added.]

The Court of Appeal of Alberta took note of this admonition in *Southern Alberta Institute of Technology Academic Faculty Association v. Southern Alberta Institute of Technology* (2004), 13 Admin. L.R. (4th) 188 at para. 9:

The Supreme Court has stated that patent unreasonableness is likely to be rare and reserved for situations in which “considerable deference is directed.”

¹⁷⁸ *Supra* note 125 at para. 17.

¹⁷⁹ *Supra* note 90 (although it applied reasonableness *simpliciter* with respect to the other issue).

¹⁸⁰ *Supra* note 7 (Reproduced in Appendix 1 below).

¹⁸¹ See Appendix 1 below for all of the standards. In particular, the B.C. legislation specifies that the correctness standard applies to questions of law which are not protected by an exclusive jurisdiction provision. Accordingly,

where there is no exclusive jurisdiction clause, there would appear to be no justification (or even ability) to defer to a statutory delegate's decision on a question of law, even if the statutory delegate might otherwise be considered to have "expertise" within one or more of the categories previously described by the courts.

¹⁸² *Ryan*, *supra* note 6 at para. 47.

¹⁸³ *Supra* note 40 at para. 15 [emphasis added].

¹⁸⁴ *Supra* note 85 [emphasis added].

¹⁸⁵ Is it clear that the relevant question would always be "patently" unreasonable? Or would there be circumstances where "unreasonableness" by itself would be sufficient? After all, unreasonableness is a *ground* for judicial review.

¹⁸⁶ The *Retired Judges* case, *supra* note 24.

¹⁸⁷ [1959] S.C.R. 121.

¹⁸⁸ *Ryan*, *supra* note 6 at para. 55.

¹⁸⁹ *Supra* note 125 [emphasis added].

¹⁹⁰ *Ibid.* [emphasis added].

¹⁹¹ [2004] 1 S.C.R. 43.

¹⁹² R.S.Q. c. C-27.

¹⁹³ (2003), 5 Admin. L.R. (4th) 45 at paras. 96ff (N.B. C.A.) [*Provincial Court Judges' Association*].

¹⁹⁴ From the Supreme Court decision in *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373.

¹⁹⁵ Because "simple rationality" does not require the court to engage in a searching analysis of the government's decision, as (for example) would be required under section 1 of the *Canadian Charter*. As Justice Robertson put it in *Provincial Court Judges' Association supra* note 193 at para. 111:

Parenthetically, care should be taken not to confuse the administrative law standard of reasonableness *simpliciter* with the notion of reasonableness employed by Chief Justice Lamer (in the *Anti-Inflation Act Reference, ibid.*). When one looks at the reasons and facts of the *Anti-Inflation Case*, it is clear that the Supreme Court did not subject the government's assertion, that a national emergency existed, to a probing review as is required when the review standard is reasonableness *simpliciter*.

¹⁹⁶ (2002), 222 D.L.R. (4th) 284 (Alta. C.A.) (involving remuneration for justices of the peace).

¹⁹⁷ See *Provincial Court Judges' Association supra* note 193 at para. 119.