The Standard of Review: The Common Sense Evolution

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Introduction: Deference and the Standard of Review

The standard of review is one of the main analytical means by which courts apply the concept or theory of judicial deference to public decision-making. As the Supreme Court of Canada indicated in 1993, the purpose of the now threshold determination of the appropriate standard of review is, in essence, to ensure that judicial scrutiny of an administrative (as opposed to court) decision "does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of administrative justice".[1]

In Canadian administrative law, the theory of curial deference is well known, and much discussed, since the decision of the Supreme Court of Canada in *C.U.P.E., Local 963* v. *New Brunswick Liquor Corp.*[2] Stripped to its core, the essence of the "pragmatic and functional" analysis of a decision-maker's statutory jurisdiction, first articulated in *Bibeault*[3], is "'who should answer the question, the administrative tribunal or a court of law?' It thus involves determining who is in the best position to rule on the impugned decisions".[4]

By the mid 1990's, while the concept of deference was firmly entrenched in the judicial mind set, a debate emerged as to the judicial

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1 *Domtar Inc.* v. *Quebec (Commission d'appel en matière des lésions professionnelles)*, [1993] 2 S.C.R. 756 at 775.

2 [1979] 2 S.C.R. 227.

3 *Union des Employés de Service, Local 298* v. *Bibeault* [1988] 2 S.C.R. 1048 at 1088-1089.

4 *Domtar Inc.* v. *Quebec (C.A.L.P.), supra* note 1, at 772.

philosophy that underlay this development.[5] Optimists suggested that deference reflected progress away from the restricted, unitary "rule of law" model of administrative law so favoured by Dicey over 100 years ago,[6] adopted by Chief Justice McRuer in his Report of the Royal Commission Inquiry into Civil Rights in 1968, and embedded both before and since in our jurisprudence, towards an "authentic, indigenous, functional and pluralistic" model of administrative law articulated by Professors Willis and Arthurs, among others.[7] Madame Justice Wilson of the Supreme Court of Canada expressed this general feeling in *Nat' Corn Growers Ass'n* v. *Canadian Import Tribunal* when she wrote:

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state.[8]

Pessimists argued that the Dicean rule of law ideology still prevailed, creating ongoing contradictions in the law of judicial review despite protestations of a new era of curial deference. They posited that such deference is, upon analysis, one of "submissive" deference to a positivist view of prior legislative intent, of which only the courts are the true interpreters, and not deference as respect for the functional legitimacy

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5 See Cowan, Hancock "Administrative Remedies: Tribunal Creativity and Judicial Control" in Special Lectures of the Law Society of Upper Canada Law of Remedies (Carswell, 1995) at 341-343.

6 Dicey, *The Law of the Constitution* (London: MacMillan, 1885).

7 See Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual and the Functional" (1935), 1 U.T.L.J. 53; "Administrative Law in Canada" (1961), 39 C.B.R. 251, "the McRuer Report: Lawyers Values and Civil Servants' Values" (1969), 18 U.T.I.J. 351, "Canadian Administrative Law in Retrospect" (1974), 24 U.T.L.J. 225, and Arthurs, "Rethinking Administrative Law" A Slightly Dicey Business" (1979), 17 O.H.L.J. 1, and *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto: University of Toronto Press, 1985); MacLauchlan, "Judicial Review of Administrative Interpreation of Law: How Much Formalism Can we Reasonably Bear" (1986) 136 U of T L.J. 313. See also Craig, *Administrative Law*, 2nd ed. (London: Sweet & Maxwell, 1989) at 4-17. For a concise and simple description of these two competing concepts, see Macaulay, *Directions: Review of Ontario's Regulatory Agencies* (Toronto, Ontario Queen's Printer, 1988), at 4-3 to 4-12. See also Iacobucci, J. "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 Queens h.J. 859.

8 [1990] 2 S.C.R. 1324 at 1366, (hereinafter *Nat'l Corn Growers Ass'n*). See generally her comments in this regard at 1332-35.

of administrative tribunals' decisions.[9] Indeed, a central stated focus of the functional and pragmatic analysis is to ascertain the legislative intent as to the amount of deference that is appropriate.[10]

Since then a lot more judicial and academic ink has been utilized in developing and articulating the standard of review.[11] On balance, the

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[9] See particularly the three articles by Dyzenhaus, "Developments in Administrative Law: The 1991-92 Term" (1993), 4 Supreme Court L.R. (2d), 177 at 987-988, and "Developments in Administrative Law: The 1992-93 Term" (1994), 5 Supreme Court L.R. 189 at 207-215, 240-244 and "The Politics of Deference: Judicial Review and Democracy" in Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing (1997) at 279. Such pessimism on this subject is not new. See Willis, "Canadian Administrative Law in Retrospect", *supra* note 7, at 244. For a similar but slightly more optimistic view see also Evans, "Judicial Review in the Supreme Court: Realism, Romance and Recidivism" (1991), 48 Admin. J.R. 255 at 272-73. Professor Mullan has recently assessed the expressed influence of Dicey in Canadian administrative law in his article "The Supreme Court of Canada and Tribunals - Deference to the Administrative Process: A Recent Phenomenon or a Return to Basics" (2001), 80 C.B.R. 399 at 425-429. Generally, see the articles listed in Cowan & Hancock, *supra* note 5 at 352.

[10] Starting with *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1040, emphasized in and continuing through to *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R.982 at para.26; *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 55 and *Suresh* v. *Canada (Minister of Citenship and Immigration*, 2002 SCC 1 at para. 30. In a recent background paper for the B.C. Administrative Justice Project, "Standard of Review on Judicial Review or Appeal", December, 2001 at 18, Fauzon states that "the pragmatic and functional approach" did not originate as a general test applicable to jucial review and appeal. Rather, it was an effort to provide courts with a less "formalistic" method for identifying "jurisdictional" issues in their ongoing attempt to reconcile legislative efforts to completely insulate certain tribunals from judicial review with the court's constitutional role, as expressed in *Crévier* v. *Quebec (Att. Gen.)*, [1981] 2 S.C.R. 220 at 235.

[11] For more recent articles, see Jones, "The Concept of a Spectrum of Standards of Review: Is there a Different Standard of Review for Appeals?" (1997), 50 Admin. L.R. (2d) 260, Mullan, Recent Developments in Administrative Law - the Apparent Triumph of Deference! (1998), 12 C.J.A.L.P. 191 [cited as Mullan (1998)]; Krever, J. "Judicial Review", Canadian Institute for the Administration of Justice Judges Seminar, March 1999; Mullan, "*Baker* v. *Canada (Minister of Citizenship and Immigration)*; A Defining Moment in Canadian Administrative Law" (1999), 7 R.A.L. 121; McLachlin, J. (as she then was), "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171; Mullan, "Revisiting the Standard of Review for Municipal Decisions - When is a Pile of Soil an "Erection"?" (2000) , 13 C.J.A.L.P. 319; Mullan, "Recent Developments in The Standard of Review" Ontario Bar Association; Taking the Tribunal to Court, October 20,2000 [cited as Mullan (2000)]; MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2000), 80 C.B.R. 281;

optimists have more to cheer and the pessimists less to fear.[12] Chief Justice McLachlin, in a 1998 speech, articulated the concept of a "new Rule of Law", one that "makes it possible for institutions other than courts to play key roles in maintaining it. It opens the door to the idea that courts do not necessarily have a monopoly on the values of reasons and fairness ...[C]ontrary to Dicey's view that the courts' primary role is to constrain, limit and, if possible eliminate administrative power, the new Rule of Law allows courts to respect and advance the roles of administrative tribunals. The courts' role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner ..."[13]

As with the development of the doctrine of procedural fairness, no longer is the focus on whether the concept of deference is applicable; instead, it is on fitting the appropriate level of deference to the particular factual and statutory contexts in keeping with the mandated "pragmatic and functional" analysis. In extremely simplistic terms, and to regress to children's literature, the role of the practitioner in discerning the appropriate standard of review (and in explaining it to the court and the

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Sossin, "Developments in Administrative Law" (2000), 11 S.C.L.R. (2d) 37; Sossin, "Developments in Administrative Law" (2000), 13 S.C.L.R. (2d) 45; Lovett "Deference Within a Standard of Review of Correctness" (2001), 59 The Advocate 703; Sossin, "Developments in Administrative Law" (2001), 15 S.C.L.R. (2d) 32; Dyzenhaus & Fox-Decent, "Rethinking the Process/Substantive Distinction: *Baker* v. *Canada*" (2001), 51 U.T.L.J. 193; Mullan, "Annual Update on Judicial Review", Ontario Bar Association, Institute of Continuing Legal Education, January 25, 2002 [cited as Mullan (2002)].

[12] As one small example, in *Baker* v. *Canada (Minister of Citizenship)* [1999]*supra*, note 10 at para. 45, the Court explicitly recognized the fundamental role of the administrative justice system when it noted that "administrative tribunals can have a more immediate and profound impact on people's lives than the decision of the courts". Professor David Mullan characterized the S.C.C. decision in *Pasiechynk* v. *Saskatchewan (W.C.B.)*, [1997] 2 S.C.R. 890 as a highwater mark of deference, wherein the Court concluded that by application of the patently unreasonable standard, the tribunal was "best to decide" the question of the extent to which there was any surviving court jurisdiction for common law causes of action within the statutory workers' compensation scheme. See Mullan (1998), *supra* note 11 at 193-194. However, the pessimist would note that Sopinka, J., for the Court, placed the analysis in the context of determining the legislature's intention.

[13] *Supra* note 11 at 174-175. Her approach is to be contrasted with the scepticism of Lamer, C.J. in his judgment in *Cooper Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R. 854. See also MacLauchlan, *supra* note 11 at 284, 289-290, 293, 297; Mullan, *supra*, note 9 at 401, 403; Sossin, *supra* note 11, 13 S.C.R. (2d) at 76 for expressions of optimism.

client) is to ensure that it is "not too much and not too little, but just ...right".[14]

This paper will attempt to give an overview of recent developments in the standard of review. In so doing, it is important to note the general context of public law in which the issue of the standard of review arises: namely, the merits and substantive content of "government" decision-making that do not raise the application of the *Charter of Rights and Freedoms*, or involve breaches of procedural requirements (statute, natural justice, fairness).

The Analysis: Application

For the uninitiated, the evolution of the articulation of the functional and pragmatic analysis by the Supreme Court of Canada can basically be traced from *Bibeault* (1988) mentioned earlier, through *Pezim*[15] (1994) to *Pushpanathan*, a 1998 decision of the Court.[16] It tends still to be framed within the context of the jurisdiction of the decision-maker, such that if the issue or question of law goes to the jurisdiction of the tribunal, then no deference is applicable regardless of privative clauses, and a standard of "correctness" is applied. Put in other words, a public decision-maker has no jurisdiction to make a patently unreasonable decision, even if protected by a privative clause. Concern first emerged, following *Bibeault* and its reference to statutory provisions that "confer" or "limit" jurisdiction not attracting deference in their interpretation, that Courts would focus on characterizing issues as "jurisdictional" to avoid the need for functional analysis and deference.

In *Pushpanathan*, the Court not only gave its most thorough synthesis of the factors to be anlayzed in determining the standard of review, but it also attempted to put to rest inappropriate reliance on the concept of jurisdiction and to anchor the application of deference firmly

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[14] Professor Mullan's basic thesis in 1998 *supra* note 11 was that in some areas, the courts were still unwilling to defer, while in others, too much deference was given.

[15] *Pezim* v. *British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at 598-599.

[16] *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, *supra* note 10. This was confirmed by the Court recently in *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at para. 17, and *Chamberlain* v. *Surrey School District No. 36*, 2002 SCC 86 at para. 7.

to the functional analysis. Bastarache, J., writing for the Court, expressly noted that jurisdictional characterization was:

> "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".[17]

As to the factors to be considered and their contribution to the final determination of the appropriate standard of review, the Court approached them by a relative or sliding scale, in that their individual presence or absence would indicate more or less deference to the decision in issue. In the order outlined by the Court[18], they are:

(i) <u>Privative Clauses and Statutory Appeals</u>

"Full" privative clauses rendering decisions final and conclusive, unless other factors strongly indicate to the contrary, warrant a high level deference, while appeal rights suggest "a more searching" standard of review. Partial or equivocal privative clauses are one factor to be considered, and do not have the "preclusive" effect of a full privative clause.

(ii) <u>Expertise</u>

Generally this is the most important factor to be considered, and embraces several considerations. If a tribunal has been constituted with specialized expertise related to the objectives of the legislation, then a greater degree of deference will be accorded. However, expertise is a relative concept, with three dimensions: the expertise of the tribunal, the courts' own expertise relative to that of the tribunal, and the nature of the specific issues involved relative to this expertise. Once a broad relative expertise is established, the patently unreasonable standard will generally be accorded even to highly generalized statutory interpretations of the

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[17] *Ibid* at 1005.

[18] *Ibid* at 1005-1012.

tribunal's constituent legislation (including, in that case, related instruments such as treaties the legislation is to implement).

(iii) Legislative Purpose

This encompasses the purposes both of the legislation in general, and the specific provision(s) in issue. Purpose (and overlapping need for expertise) may be indicated as much by the specialized nature of the legislative structure and decision-making mechanisms as by the specific qualification of members. Where these purposes are not so much to establish rights between individual parties, but involve "delicate balancing" between "different constituencies", greater deference is necessary. Also relevant are the range of remedial powers, any public interest protection mandate, and the role in policy development of the decision-makers, which likewise warrant more rather than less deference. Similarly, if the applicable legal principles are open-textured or involve a multi-factored balancing of a large number of interlocking and interacting interests and considerations (a.k.a. "polycentric"), then courts must exercise restraint.

(iv) The Nature of the Problem

The more the issue involves "pure determinations" of highly generalized propositions of law removed from the core expertise of the tribunal, then absent clear legislative intent to defer to the public decision-maker, the relative expertise of the courts warrants less deference (although there is no clear line) and the correctness standard will be applicable. On the other hand, the legislative scheme, a highly specialized decision-maker, and a strong privative clause may be sufficient to require a different, more deferential standard. Generally, considerable deference is given to questions of fact unless there is "no evidence", or more generally, where the evidence viewed reasonably, is incapable of supporting the decision-makers's factual determination.[19]

This four-fold synthesis encompasses the general factors to be considered. In *Pezim*, additional factors expressly mentioned, but which

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[19] See *Toronto (City) Board of Education* v. *O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 42-43; Brown & Evans, "Judicial Review of Administrative Action in Canada" (Toronto: Canvasback Publishing), pp. 15-24 to 15-25 and cases cited therein.

would be caught within the general rubric of *Pushpanathan*, include the extent to which the Courts have shown deference to similar decision-makers in the past and the nature and the extent of the investigative, enforcement and review powers of the tribunal.

The Analysis: Results of Application

Generally: The "Spectrum"

In the beginning, the theory of deference, in simple terms, was a function of the existence of a statutory right of appeal or a privative clause purporting to exclude judicial review, resulting respectively in a standard of review of "correctness" or "patent unreasonableness". However, in *Pezim*, a review of the appropriate factors led the Supreme Court of Canada to conclude that a securities commission was entitled to "considerable deference" in its determination of what constituted a material change for purposes of public disclosure, notwithstanding that the decision was the subject of a statutory right of appeal.

In *Southam*,[20] the application of the mandated analysis, despite the existence of a statutory right of appeal, resulted in the intermediate standard of "reasonableness *simpliciter*" being applicable. As noted in *Pushpanathan*,[21] the range of standards was described as a "spectrum" with a "more exacting end" and a "more deferential end". Others have described this development in a different but enlightening metaphor: "we have moved from an off/on toggle switch to a dimmer switch".[22]

As others have pointed out, the concept of a spectrum of deference and reference to appeal rights and privative clauses may give rise to additional standards of review, for example, where there is an expert tribunal's decision that is neither subject to an appeal nor protected by a privative clause.[23] Such a "fourth" standard was articulated by the

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

21 *Supra* note 15 at 1005.

22 Jones & deVillars, Principles of Administrative Law (3d) (Scarborough: Carswell, 1999), cited in *Nova Scotia (Minister of Education & Culture* v. *Nova Scotia Teachers' Union*, [2000] N.S.J. No. 36 (T.D.).

23 Jones, *ibid*, especially at 269, discussed in Mullan (2000), *supra* note 11 at 15.

Federal Court of Appeal in a 1997 decision,[24] but has garnered no approval by other appellate courts of which I am aware. The Ontario Court of Appeal in *Ontario (Workers' Compensation Board)* v. *Ontario (Ass't Information and Privacy Commissioner)*[25] in which there was neither a right of appeal nor a privative clause, applied the intermediate *Southam* standard of reasonableness. Similarly, although in more ambiguous language, the Alberta Court of Appeal has stated that all other factors being equal, the absence of a right of appeal would make the standard of review fall closer to that of reasonableness.[26]

Practically speaking, I believe the three existing standards will continue to be applied to the exclusion of any others. The theoretical and logical argument that there are degrees of deference between each standard may engage a particular judge well-versed on the nuances of this subject, but it is fraught with the potential for more confusion in a sufficiently complicated area of judicial review.[27] The difficulties in articulating the meaning or the "standard of the standard" for the existing ones, and the differences between them (a later subject in this paper) will continue to engage the judicial energy devoted to this topic. The recent Supreme Court of Canada decision in *Committee for Equal Treatment of Asbestos Minority Shareholders* v. *Ontario (Securities Commission)* implies that the Court is comfortable with such a tripartite analysis. There the Court reviewed the relevant factors and, consistent with *Pezim*, found they warranted a "high degree" of deference. However, the fact that there was a statutory right of appeal ultimately led the Court to determine that "when this factor is considered with the other factors, an intermediate

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[24] *British Columbia (Vegetable Marketing Commission)* v. *Washington Potato and Onion Association*, [1997] F.C.J. No. 1543 (F.C.A.), cited in Mullan (2000), *supra* note 11 at 16.

[25] (1999), 41 O.R. (3d) 464. Where, however, the Commissioner is interpreting exclusionary provisions, the test is correctness:*Ontario (Solicitor General)* v. *Ontario (Asst. Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 455 at 364-367; leave to appeal to S.C.C. denied. For a complete review of the standard of review in this area see Challis & Pratt, "Judicial Review of Information and Privacy Commissioner/Ontario Orders: Process and Standard of Review", Ontario Bar Association, May 10, 2002.

[26] *Rikard Realty Advisors Inc.* v. *Calgary (City)* (1998), 216 A.R. 271.

[27] This point is made by Lovett, *supra* note 11, discussing the B.C.C.A. decision in *Northwood Inc.* v. *British Columbia (Forest Practices Board)*, [2001] B.C.J. No. 305, wherein the Court introduced the concept of deference to a tribunal's arguments in support of a liberal interpretation of its own jurisdiction, usually the subject of a standard of correctness.

standard of review is indicated. Accordingly, the standard of review in this case is one of reasonableness".[28] Indeed, as Professor Mullan has pointed out, this decision signals that if there is a statutory right of appeal involved, it will take an "exceptional case" to justify a departure from the only two effectively applicable standards: those of correctness or unreasonableness.[29] Finally, in its most recent decision on the subject[29a] the Supreme Court of Canada by way of an introductory summary paragraph stated that the pragmatic and functional approach applicable to judicial review "allows for three standards of review: correctness, patent unreasonableness and an intermediate standard of reasonableness".

A final element of the general analysis is the extent of the decision to which the standard is applied: that is, does the reviewing court look to the individual interpretation(s) at issue, or to the more general conclusions of the tribunal? This revives the debate that was a focal point in *National Corn Growers Association* v. *Canada (Import Tribunal)*.[30] Gonthier, J., speaking for a majority, felt that the general inquiry of the court was to determine if the decision-maker had "acted outside the scope of its mandate by reason of its conclusions being patently unreasonable".[31] This is turn, required a detailed review of the reasoning process, and the application of the standard to individual elements of it.

Justice Wilson (with two justices concurring) in turn returned to the *C.U.P.E.* principles that focussed upon the interpretation of the statutory language in issue, expressing concern that extensive review of each stage of the decision-making, as well as the factual record, departed from the appropriate level of deference to be accorded to the decision-

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[28] [2001] 2 S.C.R. 132 at para. 49 (emphasis added) [hereinafter "*Asbestos Shareholders*"]. See also *International Forest Products Ltd.* v. *British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.) at para. 39: "One concludes that the number of "standards" on the spectrum is theoretically infinite but that, practically, we require major sign posts marking credibly distinctive standards." Justice Iacobucci, *supra* note 7, at 868-869, speaks in terms of three standards being encompassed within the spectrum. At page 873, he does not absolutely foreclose the possibility of a fourth standard but notes that at present "the existing standards provide the necessary flexibility and sophistication for courts to exercise their reviewing functions responsibly".

[29] Mullan (2002), *supra* note 11 at p. 27.

[29a] *Chamberlain* v. *Surrey School District No. 36*, *supra*, note 16 at para. 5.

[30] [1990] 2 S.C.R. 1324.

[31] *Ibid* at 1370.

maker, particularly in light of their expertise in the subject matter. To draw a simple analogy, from a practitioner's perspective, Wilson, J.'s concern was that such an approach could convert an otherwise deferential, discretionary judicial review into a de novo appeal based on the tribunal's record.

A similar tension existed between the majority (for which McLachlin, J. wrote) and minority in *Lester*[32] over the extent to which the patently unreasonable test permitted intervention where the evidence was not "sufficient" to support the tribunal's conclusion on the application of the statute in question.

Jurisprudence since this dichotomy was identified suggests that microscopic review of all aspects of the reasoning process and factual record is by no means necessarily the norm. However, the contextualized basis of the functional analysis suggests that different degrees of scrutiny will be required, depending upon the issue(s) involved and the extent to which the decision-maker's reasoning is articulated.[33] On the other hand, there may be cases where the decision turns on the interpretation of a statute or collective agreement and the court can discern whether there is a rational basis for the decision or not.[34] The interpretation of specific provisions may not be central to the main issue(s) and overall jurisdiction of the tribunal, and may only affect the reasonableness of the decision as opposed to determining it.[35] Other cases, particularly where the factual record is devoid of support for a central conclusion will require review of the facts (or lack of them).[36] Perhaps the most that can be said by way of overview is that the general agreement on the analytical approach and the relative expansion of the scope of deference that has evolved since *National Corn Growers Association* has not resulted in the need for the

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[32] *W.W. Lester (1978) Ltd.* v. *U.A.J.A.P.P., Local 740*, [1990] 3 S.C.R. 644. See also the judgment of Cory, J. in *Canada (A.G.)* v. *P.S.A.C. (#1)*, [1991] 1 S.C.R. 614.

[33] This point is made by Mullan (2000), *supra* note 11 at 21. He suggests that Gonthier, J.'s position will prevail in most situations.

[34] See eg. *Canada Safeway Ltd.* v. *R.W.D.S.U. (Local 454)*, [1998] 1 S.C.R. 1079; *Ivanhoe Inc.* v. *UFCW, Local 500*, [2001] 2 S.C.R. 566; *Sept-Îles (City)* v. *Quebec (Labour Court)*, [2001] 2 S.C.R. 670; and *Asbestos Shareholders supra* note 28.

[35] See *Canadian Broadcasting Corp.* v. *Canada (Labour Relations Board)* [1995], 1 S.C.R. 157, (interpretation of "external statute" not part of tribunal's constituting legislation) discussed infra.

[36] See for example *Toronto Board of Education* v. *O.S.S.T.F., supra*, note 19 (lack of evidence to support arbitral conclusions and contradictory facts resulted in patently unreasonable factual conclusion).

Court to debate internally the exact parameters of its analytical methodology.

Specific Applications

The evolution of the pragmatic and functional analysis and the spectrum of standards resulting from its application has resulted in some identifiable changes to the extent of curial deference paid to public law decision-making. A number of these can be highlighted briefly, and in no particular order.

(i) Remedies

In a paper written in 1995,[37] this writer suggested that the "Dicean view of the rule of law" still prevailed as the applicable approach to the issue of the extent of deference to be given to the tribunal's interpretation of the extent and choice of remedies available to it. This was as a result of the decision of the Supreme Court of Canada in the *L'Acadie* case, and Beetz, J.'s characterization of the remedial powers as jurisdictional in that they related:

> "generally to a provision which confers jurisdiction that is one which describes, lists and limits the power of an administrative tribunal, or which is [translation] intended to circumscribe the authority of that tribunal".[38]

A similar approach was manifested by the Supreme Court in *Canadian Pacific Airlines*[39] where the power to order production during an investigation (as opposed to the context of a hearing) was determined to be a jurisdictional issue; the difference between majority and minority being the scope of the powers.

Since then, however, the Supreme Court has provided considerably more deference to remedial powers, particularly when involving discretion and protected by privative clause, by the application

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37 Cowan & Hancock, *supra* note 5 at 368ff.

38 *Syndicat des Employes de Production du Quebec de L'Acadie* v. *C.L.R.B.*, [1984] 2 S.C.R. 412 at 420.

39 [1993] 3 S.C.R. 724. See also *O.H.R.C.* v. *Dofasco Inc.*(2001), 57 O.R. (3d) 693 (C.A), discussed *infra* at note 53.

of a standard of patent unreasonableness.[40] Indeed, even in the context of a statutory appeal, where a broad public interest jurisdiction was involved, the intermediate unreasonableness standard was applied to a securities commission's decision not to order removal of trading exemptions.[41] These developments are consistent with the recognition of expanded remedial powers of arbitrators and their exclusive jurisdiction to resolve disputes arising out of collective agreements.[42]

External Legislation

Traditionally little deference was accorded to a tribunal's interpretation of "external legislation" other than its constituting statute, and the standard of review was one of correctness.[43] The development of the pragmatic and functional approach to the standard of review resulted in a reconsideration of this principle in the *Goldhawk* decision. There, the majority reviewed the Courts earlier jurisprudence, and a number of subsquent Ontario decisions, and concluded:

> "As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. However,

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40 *Royal Oaks Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *C.U.P.E., Local 301* v. *Montreal (City)*, [1997] 1 S.C.R. 793. See also *International Longshoremen's Warehousemen's Union, Local 514* v. *Prince Rupert Grain Ltd.*, [1996] 2 S.C.R. 432 at 447-448 for a stern caution by Cory, J., for the Court, about characterizing empowering legislation as jurisdictional, else "the whole concept of administrative tribunals may be jeopardized."

41 *Asbestos Shareholders*, *supra* note 5 at para. 27.

42 *St. Anne Nackawic Pulp & Paper Co. Ltd.* v. *Canadian Paperworkers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber* v. *Ontario Hydro*, [1995] 2 S.C.R. 929; *New Brunswick* v. *O'Leary*, [1996] 2 S.C.R. 967; *Regina Police Association Inc.* v. *Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360; *Noel* v. *Société d'Energie de la Baie James*, [2001] 2 S.C.R. 207. See also *Public Service Alliance of Canada* v. *NAV Canada* (2002), 59 O.R. (3d) 284 (C.A.).

43 See *McLeod* v. *Egan*, [1995] 1 S.C.R. 517, *United Brotherhood of Carpenters & Joiners of America, Local 579* v. *Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 336.

> this does not mean that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would substantially expand the scope of reviewability of administrative decisions and unjustifiably so. Moreover, it should be noted that the privative clause did not incorporate the error of law grounds ... This tends to indicate some level of deference would be provided.
>
> While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole."[44]

L'Heureux-Dubé J. (Gonthier J. concurring) disagreed with the majority only on this point, on the basis that *McLeod* v. *Egan* was not a case of a decision protected by a broad privative clause. In her view, but without giving reasons, the interpretation of an external statute cannot be characterized as a jurisdictional question, and the fact that the tribunal interpreted such legislation "has absolutely no effect on the appropriate standard of judicial review".[45]

McLachlin J., in dissent, also disagreed with the majority, but on another basis. She was critical of the majority's reasoning that applied the functional test to the question of interpretation of external legislation, and concluded the standard was correctness. She stated that the majority then effectively ignored this by applying a standard of patent unreasonableness to the conclusion or decision as a whole. This, she felt, downgraded the standard on an important component part, and on questions of law outside a tribunal's jurisdiction, to the more "global" test of patent unreasonableness. Ironically, she appears to be echoing a concern similar

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[44] *Canadian Broadcasting Corp.* v. *Canada (Labour Relations Board)*, *supra* note 35 at para. 48-49.

[45] *Ibid*, at 205.

to that raised by Wilson J. in her dissent in *Nat'l Corn Growers Ass'n*[46] (in which McLachlin J. was part of the majority), to the effect that the process of judicial review should end when it was decided that a tribunal's interpretation of its constitutive legislation was not patently unreasonable, and ought not to extend to the general conclusion of the tribunal, including a detailed review of the evidence.

In addition, as a matter of logic, she could not contemplate how an incorrect interpretation of external legislation would not make the decision within jurisdiction patently unreasonable. In the circumstances of the case, she could not see how it would be reasonable to determine an employer was guilty of an unfair labour practice under the *Canada Labour Code* if its conduct was justified under the *Broadcasting Act*. If the conclusion was based on a false premise (incorrect interpretation of external statute) it would be "unprincipled and irrational".[47]

How the courts now will approach external referents probably will be guided by their assessment of the comparative expertise of the decision-maker, as well as the nature of the question of law/interpretation involved and the centrality or marginality of the external legislation to the determination in question. In *National Corn Growers Ass'n*[48] deference was accorded to the tribunal's interpretation of a treaty, the implementation of which was within the tribunal's jurisdiction. On the other the hand, the Supreme Court of Canada has recently reiterated the more traditional approach dealing with that tribunal's successor's interpretation of its own legislation upon an appeal. In *Mattel Canada Inc.*[49], the Court indicated that the interpretation of provisions of the *Customs Act* by the Canadian International Trade Tribunal ("CITT") constituted:

> ... pure questions of law that require the principles of statutory interpretation and other concepts which are intrinsic to commercial law. Such matters are traditionally the province of the Courts and there is nothing to suggest that the CITT has any particular expertise in respect of

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46 *Supra* note 30 at 1348-1349.

47 *Canadian Broadcasting Corp.* v. *Canada (Labour Relations Board)*, *supra* note 35 at 221-222.

48 *Supra* note 30, per Gonthier J.

49 *Canada (Deputy Minister of National Revenue)* v. *Mattel Canada Inc.*, [2001] 2 S.C.R. 100.

> these matters. If, as in this case, the CITT's relative expertise does not speak to the nature of the questions at issue in an appeal, the appropriate standard of review for questions of law will be correctness.[50]

Procedural Decisions

The pragmatic and functional analysis primarily has been directed at judicial review of substantive decision-making. Issues of natural justice and fairness traditionally have been regarded as "jurisdictional", given the court's historical and "constitutional" role in enforcing basis procedural norms.[51] More room for its application exists when discretionary decisions as to procedural choices are at issue.[52] For a variety of practical reasons, interlocutory procedural rulings generally receive deference, at least until the final decision of the tribunal has been made.[53]

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[50] *Ibid* at para. 33. For a discussion of the possibility that this decision represents a start "down a slippery slope", see Mullan (2002), *supra* note 11, at 24-25, contrasting this case with the Courts approach in the chronologically related cases of *Ivanhoe Inc.* and *Sept-Îles*, *supra* note 34.

[51] For a more extensive discussion, see Mullan (1998), *supra* note 11 at 196-198; and Fauzon, *supra* note 10 at 6.

[52] See the *dicta* of LaForest, J., in *C.A.I.M.A.W.* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 explaining that the decision in *McCaffrey* v. *Bibeault*, [1994] 1 S.C.R. 176 (decision on standing subject to patently unreasonable standard) was based on the specific statutory discretion exercised by the tribunal.

[53] See eg. *Hughes* v. *College of Physicians & Surgeons of Ontario* (1994), 112 D.L.R. (4th) 253 (Div.Ct.); *Howe* v. *Institute of Chartered Accounts of Ontario* (1994), 19 O.R. (3d) 403 (C.A.), leave to appeal to S.C.C. refused 119 D.L.R. (4th) vi. Judicial review of procedural decisions is more likely when at issue is the jurisdiction to make a procedural order. For recent decisions, see *Ontario Human Rights Commission* v. *Dofasco Inc.*, *supra* note 39 (order for discovery and production), and *Metropolitan Housing Authority* v. *Godwin* (2000), 50 O.R. (3d) 207 (Div.Ct.) revers'd on jurisdictional issue June 25, 2002, C.A. Docket C36729. In *Dofasco* the court recognized that the tribunal should have wider latitude in making procedural orders, but by reason of its interpretation of the order made did not consider the appropriate standard of review, instead deciding aspects of the order were either within or exceed the board's authority, "whether the standard be reasonableness or correctness"; *ibid* at 711, 715. For a discussion of a case where a court intervened in the middle of a hearing on a decision involving the qualification of an expert, see Engell, "Expert Witnesses and Expert Tribunals: Natural Justice or Curial Deference?" (2001), 4 Reg.Bd. and Admin. Law Litigation 242.

Recent cases in the Supreme Court of Canada suggest that deference is related explicitly to the extent of discretion, and implicitly to the relative expertise of the decision-maker. In upholding rulings on procedural choices made by commissioners of inquiry[54] the Court emphasized the ambit of the procedural discretion accorded the commissioners, both of whom were judges. In *Baker*[55] the possibility of comparative expertise in procedural matters was finally explicitly recognized as a factor in according deference, in addition to the statutory discretion involved. Professor Mullan has noted this as a potentially significant change in the standard of procedural review.[56]

In a more general sense, judicial deference has also been accorded to administrative decision-making processes in cases dealing with prematurity and adequate alternative remedies,[57] collateral attacks,[58] interlocutory injunctions in aid of tribunal powers,[59] collective decision-making[60] and consistency in tribunal jurisprudence.[61]

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54 *Canada (Att.Gen)* v. *Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 [*Krever Commission*]. *Consortium Developments (Clearwater) Ltd.* v. *Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 56 [*Consortium Developments*].

55 *Supra* note 10 at para. 27.

56 Mullan (2000), *supra* note 11 at 4-5. See also Mullan, *supra* note 9 at 402.

57 See eg. *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Krever Commission*, *supra* note 55 at 474; *Consortium Developments*, *supra*, note 55 at para. 30. For a decision of this aspect of deference, see Cowan & Hancock, *supra*, note 5 at 359-365 and articles referred to; Mullan (1998), *supra* note 11 at 198-201.

58 See eg. *R.* v. *Consolidated Mayburn Mines Ltd.*, [1998] 1 S.C.R. 706; *R.* v. *Al Klippert Ltd.*, [1998] 1 S.C.R. 737. For a brief discussion, see Mullan (1998), *supra* note 11 at 201-202.

59 See *B.M.W.E.* v. *Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495; *Canada (Human Rights Commission)* v. *Canadian Liberty Net*, [1998] 1 S.C.R. 626, discussed in Mullan (1998), *supra* note 11 at 202.

60 *I.W.A., Local 269* v. *Consolidated-Bathurst Packaging Ltd.*, 1[990] 1 S.C.R. 282; *Ellis-Don Ltd.* v. *Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221. In *Ellis-Don* the Court rejected a challenge to a change in decision that resulted from a collective consultation (and reflected in the draft and final decisions) by reliance on principles of deliberative secrecy and the presumption of regularity. As to when and to what extent the courts will permit examination of a tribunal's internal decision-making, see *Tremblay* v. *Quebec (Commision des affaire sociales)*, [1992] 1 S.C.R. 952 at 966; *Payne* v. *Ontario Human Rights Commission* (2000), 192 D.L.R. (4th) 316 (Ont. C.A.). For a discussion of *Ellis-Don* and related cases on this topic and other issues, see Mullan (2002), *supra* note 11 at 7-14. As to the unwillingness of the Courts to permit examination of the motivation of municipal decision-makers, see *Consortium Developments*, *supra* note 55.

Discretionary Decisions

The pragmatic and functional analysis originally was developed and applied in the context of decision-makers' interpretation of their governing legislation and its application to the facts. At the same time, judicial review of the exercise of discretion by public decision-makers focussed on a jurisdictional approach, and thus an implicit standard of correctness, similar to that relating to procedural fairness. Thus, if a decision-maker acted on the basis of improper purposes, relied on irrelevant considerations or failed to consider relevant ones, fettered their discretion, or acted in bad faith, the courts would intervene. As a residual ground of review, but not as a standard of review, a discretionary decision could be set aside on the basis of unreasonableness, incorporating the *Wednesbury* [62] standard. Within this analytical context, deference was accorded through a broad and purposive approach to the scope of the tribunal's authority.

In *Baker* v. *Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada extended the pragmatic and functional analysis to discretionary decision-making in what has been described by many as one of the most recent significant administrative law decisions of the Court.[63] In that case, at issue was the discretion of an immigration official to exempt a person from deportation on humanitarian and compassionate grounds. Unlike *Pushpanathan*, where the "interpretative" decision of the immigration official was assessed against the correctness standard, the Court adopted a standard of reasonableness, basically because of the breadth of the discretion involved in an exemption from deportation decision.

In writing the unanimous decision of the Court, L'Huereux-Dubé synthesized the two existing approaches, eschewing the distinction

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61 See eg. *Domtar Inc.*, *supra* note 1 at 795-797; *Windsor Essex Catholic School Board* v. *Ontario English Catholic Teachers Association*, [2001] O.J. No. 3602 (C.A.).

62 *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Nest Corp.*, [1948] 1 KB 223 (C.A.) For a Canadian example, see *Bell* v. *The Queen*, [1979] 2 S.C.R. 212 at 223. There the Court quashed a zoning bylaw restricting joint residential use to blood-related "family", which was found to constitute "such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men".

63 *Supra* note 10. See Mullan (1999), 7 R.A.L. 121, *supra* note 11 at 146; Sossin, 11 S.C.L.R. (2d), *supra* note 11 at 57 citing Brown and Evans.

between discretionary and non-discretionary decisions as a "trigger" for the application of the pragmatic and functional analysis:

> Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations ... A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions ... In my opinion, these doctrines incorporate two central ideas - that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by the courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction ... However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli* v. *Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038) ...
>
> It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise if implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options As stated by Brown and Evans, ...

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom on choice, sometimes referred to as a "structured" discretion.
>
> The "pragmatic and functional" approach recognizes the standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less ... In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions.[64]

In *Baker*, the intermediate *Southam* standard was applied, given that the decision was not protected by a privative clause (an appeal, with leave, was the basis of review), the official involved (not the Minister), and the focus of the decision involved a specific individual and her circumstances (not a polycentric, wider "public interest" issue). In subsequent cases, involving Ministerial decisions affecting a broader public policy interest, the standard that has been applied is one of patent unreasonableness.[65] However, the "public interest" aspect of a decision-maker's discretion is not determinative, as the existence of relative expertise and statutory rights of appeal may result in a reasonableness

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64 *Ibid* at para. 53-55.

65 *Suresh* v. *Canada (Minister of Immigration and Citizenship)*, [2001] (deportation on national security grounds). In the concurring minority decision in *Mt. Sinai Hospital Centre* v. *Quebec (Minister of Health and Social Services*, [2001] 2 S.C.R. 281, this was the standard applied. The majority did not approach the case as one of an exercise of discretion; it held the discretion in issue (grant of hospital licence had been "exhausted" based on undertakings by the Minister's predecessors. However, the majority did state (at para. 58):"Decisions of Ministers of the Crown in the exercise of discretionarypowers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness". See also *Ontario (Minister of Municipal Affairs and Housing)* v. *Transcanada Pipelines Ltd.* (2001), 186 D.L.R. (4th) 403 (C.A.) (municipal restructuring), discussed in Mullan (2000), *supra*, note 11 at 7-9; and *Pembroke Civic Hospital* v. *Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 at 40 (Div.Ct.).

standard.[66] In other cases that lack privative clauses and involve *Charter* values, the standard is one of correctness.[67] Indeed, the invocation of the "rule of law" in *Baker* as a limit on any discretionary decision-maker of necessity incorporates the unwritten constitutional values embodied in the Court's *Quebec Secession Reference* decision.[68] This construct was utilized by the Ontario courts to invalidate a ministerial equivalent hospital restructuring order that failed to accord proper consideration to the linguistic and cultural significance of a francophone hospital to the survival of the Franco-Ontario minority.[69] While the Commissioner generally was to be accorded deference, the Court of Appeal did not decide what the applicable standard was; the order could not survive even the most deferential standard because of the

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66 *Asbestos Shareholders*, *supra* note 28. See also *Deloitte & Touche LLP* v. *Ontario Securities Commission* (2002), 159 O.A.C. 25 (at para. 25-30) (C.A.). For recent other cases of the Ontario Court of Appeal where expert tribunals subject to rights of appeal have had their decisions on questions of law that engage their expertise, such as the interpretation of their own statute, reviewed on a standard of reasonableness. See *Monsanto Canada In*v. v. *Ontario (Superintendent of Financial Services)*, [2002] O.J. No. 4407 (Financial Services Tribunal) and *City of London* v. *Ayerswood Development Corp.*, (Ont. C.A. Dec. 13, 2002)

67 *Trinity Western University* v. *British Columbia College of Teachers*, *supra* note 16. In her dissent, L'Heureux-Dubé applied a standard of patent unreasonableness, based on the need for deference to self- governing professions and their specialized expertise on public policy issues within their purview. As for self-governing professions, see the recent Saskatchewan Court of Appeal decision in *Merchant* v. *Law Society of Saskatchewan* (2002), 213 D.L.R. (4th) 457 (Discipline Committee finding of "conduct unbecoming" reviewable on standard of reasonableness despite broad right of appeal). See also *Law Society of New Brunswick* v. *Ryan*, [2001] N.B.J. No. 117 (C.A.); appeal to S.C.C. argued October 1,2002 (reasonableness standard applied to penalty of disbarment). In *Moreau-Bérubé* v. *New Brunswick (Judicial Council)* 2002 SCC 11 at 69, the decision of the Judicial Council to recommend removal of a judge for misconduct was reviewed on a standard of patent unreasonableness. In *Canadian Civil Liberties Association* v. *Ontario (Civilian Commission on Police Services*, [2002] O.J. No. 3737 (C.A.), the Commission's decision upholding a decision of the Chief of Police not to order a hearing into a complaint of police misconduct was reviewed on a standard of patent unreasonableness (application of wrong evidentiary standard was patently unreasonable).

68 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

69 *Lalonde* v. *Ontario (Health Services Restructuring Commission)* (1999), 48 O.R. (3d) 50 (Div.Ct.), aff'd (2001), 56 O.R. (3d) 505 (C.A.). The literature on the interplay between this aspect of the rule of law and the exercise of discretion is reviewed by the Court of Appeal at pp. 549-552, 562-567. See also Sossin, *supra* note 11, 11 S.C.L.R. (2d) at 39, and Mullan (2000), *supra* note 11 at 12-14.

refusal of the Commission "to take into account or give any weight" to the hospital's broader institutional role, contrary to the constitutional principle of respect for minorities.[70]

A final area of discretionary decision-making of a political nature that has engaged the standard of review analysis in recent years is that involving municipalities. Prior to *Baker*, the Supreme Court of Canada had approached the review of municipal discretion on a jurisdictional basis of correctness in *Shell Canada Products Ltd.* v. *Vancouver*[71] Notably in that decision McLachlin, J. (as she then was), writing for the dissenting minority of four, advocated a deferential approach based on the pragmatic and functional analysis.

However, the influence of *Baker* was felt in the Court's decision in *Nanaimo (City)* v. *Rascal Trucking Ltd.*[72] wherein the standard applicable to a council's decision that a mound of soil was a statutory "erection" was determined on a correctness basis (a jurisdiction-conferring question of law for which politicians had no relative expertise), while its decision on whether the same mound then constituted a nuisance, and all other related determinations, were assessed against the patently unreasonable standard, given their elected nature and their need to "balance complex and divergent interests ... in the public interest"[73] As one commentator has noted, this decision appears to "split the difference" between the majority and minority position in the *Shell* case, and it is not clear the extent to which *Shell* will be applicable in the future, and whether a standard of reasonableness might not be appropriate in some cases.[74] In its most recent decision, the Supreme Court of Canada

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70 *Ibid* at p.568 (C.A.).

71 [1994] 1 S.C.R. 23. Professor Mullan characterized the approach as one that treated municipalities as a "lower species" in the political order, contrasting the "kid glove" treatment given to Ministers, with the "fine tooth comb" scrutiny of municipal decision-making: Mullan (2000), *supra* note 11 at 10.

72 [2000] 1 S.C.R. 342. *Baker* was not cited in this decision.

73 *Ibid* at para. 36. The Court also referred to the classic standard of patent unreasonableness in quashing municipal bylaws first articulated in *Kruse* v. *Johnson*, [1898] 2 Q.B. 91. This is similar to the Courts reference to *Wednesbury Corp*, (*supra* note 62) in *Baker*.

74 Sossin, *supra* note 11 13 S.C.L. (2d), at 72-73. See also Mullan (2000), *supra* note 11 at 11-12; Mullan 13 C.J.A.L.P., *supra* note 11, who views the decision as "ambivalent and ambigious" on the continued relevance of *Shell*.

74a *Chamberlain* v. *Surrey School District No. 36*, *supra* note 16 at para. 10-11.

balanced an elected school board's expertise in considering competing community interests with the courts' expertise in human rights to determine that a reasonableness standard applied to the board's decision not to approve for elementary school use books depicting same-sex parented families.[74a] What is also unclear is the extent to which deference is applied even when a correctness standard is engaged, in that the court will frequently give a broad and purposive interpretation to municipal jurisdiction-conferrring provisions. This is indicated by recent decisions in which such a deferential approach was accorded to the legislative discretion to pass bylaws in the public interest despite prior contractual agreements with developers,[75] and the power to restrict the use of pesticides under a "general welfare" provision in the enabling statute.[76]

The extension of the pragmatic and functional analysis to discretionary decision-making is seen by some as an attempt to articulate a more unified theory of judicial review which has been "muddied" by the very broad framework of the rule of law, principles of administrative law, fundamental values and *Charter* principles in which it is placed, serving as a judicial version of a "Potemkin Village" and providing little substantive guidance as to how the factors involved in the analytical exercise are to be balanced or given priority.[77] For example, in both *Baker* and *Lalonde*,[78] there is little explanation of how review for reasonableness and the deference implicit in this standard is different from the traditional correctness standard for failing to take into account relevant considerations, which was at the heart of the reason for intervention in each case.[79]

Indeed, the most recent decision of the Supreme Court on the issue (*Suresh)* ironically implicitly equates the patently unreasonable standard for discretionary decisions with the traditional "jurisdictional" grounds that import the correctness standard. The Minister's decision as to what constituted a danger to the security of Canada was reviewed on the

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75 *Pacific National Investments Ltd.* v. *Victoria (City)*, [2002] 2 S.C.R. 919.

76 *114957 Canada Lteé (Spraytech, Societé d'arrosage)* v. *Hudson (Town)*, [2001] 2 S.C.R. 241. For a discussion of these two cases see Sossin, 15 S.C.L.R. (2d) *supra* note 11 at 74-83.

77 Sossin, *supra* note 11, 11 S.C.L.R. (2d) at 63-64. See Mullan, Administrative Law (Toronto: Irwin Law, 2001 at 108) for reference to such a unifying or overarching theory of review of discretion.

78 *Supra* notes 10 and 70.

79 Mullan, *supra* note 11, (1999) 7 R.A.L. at 156.

patently unreasonable standard, "in the sense that it was made arbitrarily or in bad faith, or cannot be supported on the evidence or the Minister failed to consider the appropriate factors".[80] In this light, one must reconsider whether *Baker* really did extend the ambit of judicial review of discretionary decisions, or simply translated traditional jurisdictional language into the current idiom of the pragmatic and functional analysis, with no consequential difference in substance.

In the end, such a sweeping approach suggested by *Baker* may simply "justify disparate perspectives on substantially similar cases decided by different judges at different time", and has "added further uncertainty to the question of how judicial discretion itself should be structured".[81]

The Analysis: Difficulties Presented

In his introduction to his background paper on the standard of review for the British Columbia Administrative Justice Project, Frank Fauzon cites Justice Scalia of the United States Supreme Court for the proposition: "Administrative law is not for sissies".[82]

A review of the commentary cited in this paper on the evolving standards of review suggests that while progress has been made, there still exists a considerable level of complexity and a lack of clarity and predictability in the jurisprudence. The now highly contextualized analysis means that different standards of review may be applicable to the same tribunal depending upon the question involved, such that time and expense must still be expended in those cases where the standard has not been authoritatively determined for the issue in point, particularly when those engaged can still take "a what have we got to lose" approach when assessing the prospects of success on judicial review".[83] This is because, within the analytical framework articulated by the Supreme Court, there are concepts that are by their nature flexible and elastic (relative expertise,

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[80] 2002 S.C.C. 1 at para. 29. See also para. 34 (courts not to disburb broad discretion unless "error in principle" or exercised in a "capricious or vexatious manner").

[81] Sossin, *supra* note 11, 11 S.C.L.R. (2d) at 65.

[82] Fauzon, *supra* note 10 at 1 citing Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) Duke L.J. 511. The Fauzon paper also provides a brief but useful overview of the English and American approaches to the standard of review, as well as the standard of appellate review of judicial decision-making.

[83] MacLauchlan, *supra* note 11 at 292.

nature of the question, polycentricity) or which are not capable of precise definition (reasonableness vs. patent reasonableness, "true" privative clauses), resulting in the possibility of highly subjective decisions.[84] While some uncertainty is to be expected in such a multi-dimensional construct that requires, in essence, a judgment on rationality that cannot be predetermined, [85] from a practitioner's view point, the result today is one which still encourages litigation, "putting a premium on the creativity and advocacy skills of counsel".[86]

One such area where it is hard to determine in advance what standard is to be employed is that which involves characterization of the question or issue involved. This can be a "chicken or egg" matter, as while this would normally be one factor in determining the appropriate standard, other factors may in turn determine it, so as to be consistent with the general theory. As Professor Sossin has pointed out, "[a]s the layers of the pragmatic and functional approach multiply and interact, it may well become too cumbersome to apply coherently".[87]

For example, in the *Pasiechnyk* case,[88] the majority characterized the issue as one involving the determination by the tribunal of eligibility for workers' compensation, thereby engaging a patently unreasonable standard in the face of a privative clause. The minority felt the issue was one of the extent of common law tort causes of action, an area of judicial expertise. The problem is that either characterization was not wrong, but the standard of review analysis, as Professor Sossin notes, does not "embrace such multi-dimensional decision-making either inside or outside the exclusive jurisdiction of the Board. This is ironic given that the purpose of this approach is to be more inclusive of the contexts and dynamics of actual administrative decision-making".[89]

Another area of difficulty is discerning what is meant by, and what is the difference between, "reasonableness" and "patent unreasonableness" in reality, as opposed to their definitions in the

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84 Fauzon, *supra* note 11 at 30, citing Chaplin, "Who is Best Suited to Decide?" (1994), 26 Ott.L.R. 321 at 129.

85 Brown & Evans, *supra* note 19 at 14-42.

86 Jones, "A Year 2000 Review of Standard of Review", Canadian Bar Association (B.C.), cited in Fauzon, *supra* note 10 at 31.

87 Sossin *supra* note 11, 11 S.C.L.R. (2d) at 57.

88 *Supra* note 12.

89 Sossin *ibid* at 46.

jurisprudence, an arguably more difficult task than discerning what further factors may be involved in the pragmatic and functional approach.[90]

The "definition" of patent unreasonableness, since its first articulation in *C.U.P.E.* v. *New Brunswick Liquor* has been one based upon the notion of rationality. In *C.U.P.E.*, the test was whether the tribunal's interpretation was one that could be "rationally supported by the relevant legislature".[91] This was then morphed into the off-cited concept of "clearly irrational, that is to say evidently not in accordance with reason ... This is clearly a very strict test.[92] Variants on this theme include "unprincipled and irrational",[93] "arbitrary and discriminatory"[94], "capricious or vexatious",[95] and more recent references to "clearly absurd" and resultant "absurdity".[96]

Distinguishing reasonableness from patent unreasonableness was first articulated in *Southam* by use of the concept of "reasonableness simpliciter", and its analogy to the judicial "clearly wrong" standard.[97] The tautological difficulty of distinguishing standards of rationality on the basis of the term "clearly" has been commented upon by others,[98] yet adopted by the Ontario Court of Appeal in 1998 when it stated:

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[90] These problematic and confusing topics are reviewed in Mullan (2000), *supra* note 11 at 18-26.

[91] *Supra* note 2 at 237.

[92] *Canada (Att Gen)* v. *Public Service Association of Canada*, [1993] 1 S.C.R. 941 at 963-964.

[93] McLachlin, J. (dissenting) in *Goldhawk*, *supra* note 35 at 221-222.

[94] *Transcanada Pipelines Ltd.*, *supra* note 65 at para. 105.

[95] *Pezim*, *supra* note 15 at 607; *Suresh*, *supra* note 10 at para. 34.

[96] *Ivanhoe Inc.*, *supra* note 34, at para 60; *Sept-Îles*, *supra* note 34 at para 25. The dissent in *Ivanhoe* (para. 154) held that a "forced or artificial" interpretation of the section in question was patently unreasonable.

[97] *Supra* note 20 at para. 60.

[98] Mullan (2000), *supra* note 11 at 24-25; Reed, J. in *Hao* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 296 (T.D.) at para. 9. Incorporation of the *Wednesbury Corp.* standard, *supra* note 63 at 230, in *Baker*, *supra* note 10 at para. 53, does not help. It provides that an unreasonable decision is one that "... is so unreasonable that no reasonable authority could ever have come to it ..," proof of which "would require something overwhelming". In *Council of Civil ServiceUnions* v. *Minister for Civil Service*, [1985] A.C. 374 at 410, Lord Diplock equated "irrationality" (a separate ground of judicial review) with *Wednesbury* unreasonableness, which applied to a decision "which is so outrageous in its defiance

> "to conclude that a decision is unreasonable the court must find that it is irrational or not in accordance with reason. It need not find that the decision is clearly irrational or patently unreasonable."[99]

This epistemological confusion is why in both *Southam* and subsequently, the point of distinction has been on the reasoning process and to some degree, an examination of the factual basis for it. An unreasonable decision is one

> "that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of of the defect. If the defect is obvious on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. ...This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. ...But one the lines of the problem have come into focus, if the decision is patently unreasonable, the unreasonableness will be evident."[100]

What is lacking to date, however, are the standards or general indicators necessary to identify when the "more probing" scrutiny for

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of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it".

[99] *Ontario (W.C.B.)* v. *Ontario (Assistant Information Privacy Commissioner)*, *supra*, note 25 at 142, cited in *Ontario I.P.C.)* v. *Ontario (Minister of Labour)* (1999), 46 O.R. (3d) 395 at para. 20. Mullan notes, *ibid*, at p. 24 that the Supreme Court of Canada has used the terms "clearly irrational" and "irrational" interchangeably on at least two occasions: *Goldhawk*, *supra* note 35, and *Pointe-Claire (City)* v. *Quebec (Labour Council)*, [1997] 1 S.C.R. 1015.

[100] *Southam*, *supra* note 20 at 777. See also *Ontario (I.P.C.)* v. *Ontario (Minister of Labour)*, *ibid* at para. 28.

unreasonableness is applicable to the detection of patent unreasonableness.[101]

It is only in the area of remedies that the Supreme Court has articulated in more specific terms what is patently unreasonable: punitive in nature; no rational connection between the breach, its consequences, and the remedy; inconsistency with statutory objects and purposes; and infringement of the *Charter*.[102] Ironically, the latter example compounds the confusion, or at least completes the circle in this complicated area: breach of the *Charter* would not only be patently unreasonable, it would be unreasonable and incorrect, as would be the grounds for review stated in *Suresh*, discussed earlier. This is one reason, no doubt, that many judges will "hedge" their decisions, finding a decision to be not only reasonable but correct.[103]

Adding fuel to this fire is the decision of the New Brunswick Court of Appeal in *Law Society of New Brunswick* v. *Ryan*, involving the standard of review of a discipline decision to disbar. Whereas in *Southam* the focus of the definitional exercise was to distinguish unreasonableness from patent unreasonableness, in this case the Court, while holding that the standard of review was reasonableness, stated that "on the spectrum this standard is closer to correctness than patently unreasonable".[104] An appeal from this decision was heard by the Supreme Court of Canada on October 1, 2002, after release of its decision on *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*[104a] wherein the Judicial Council's decision on sanction (removal from office) was reviewed on a standard of patent unreasonableness.

Finally, even when a court can agree on the applicable standard, different members can disagree on the application to the issue at hand. In

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101 Mullan (2002), *supra* note 11 at 26.

102 *Royal Oak Mines*, *supra* note 40; cited in *C.U.P.E. Local 301* v. *Montreal (City)*, *supra* note 40 at para. 55.

103 See Blake, "Administrative Law in Canada" (Butterworths, Toronto), 1997 (2d) at 166. In *Toronto Area Transit Operating Authority* v. *Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, the Court first concluded that the decision of the Ontario Municipal Board was correct; it then, in *obiter*, determined that the standard of review of the legal interpretation of the Ontario *Expropriations Act* was that of correctness.

104 *Supra* note 68 at para. 21.

104a *Supra* note 67.

Paccar[105], for example, although all agreed that the standard was patent unreasonableness, the Court split three ways, determining the decision was patently unreasonable, was not patently reasonable, or was correct. In *Chamberlain*, [105a] six members of the Court decided the school board's decision on same-sex parent books was unreasonable, two determined it was reasonable, and one found that it was patently unreasonable.

In *Canada Safeway Ltd.*,[106] the majority held that a board of arbitration's decision that a reduction in work hours constituted a "constructive layoff" was patently unreasonable, while the dissent did not. As pointed out by others, while the majority clearly indicated why it disagreed with the decision, it was less clear why it was "clearly irrational", there being little apparent evidence of deference to the board's interpretation within this standard, given the exacting analysis of the reasoning conducted by the majority.[107]

Similarly the "inherent plasticity"[108] of the patently unreasonable standard was evident in the Court's split in *Ajax (Town)* v. *C.A.W., Local 222*[109] involving the interpretation of successor rights legislation. The majority, adopting a broad and purposive interpretation of the statutory provision found the decision not to be clearly irrational. The dissenting minority, utilizing a "plain meaning" approach to the legislation, found that the decision was patently unreasonable, in that it utilized a meaning that the statute could not reasonably bear. A similar difference, based on the approach to statutory interpretation is found in *Macdonell* v. *Quebec (Commission d'access à la information)*,[109a] where the Court split 5-4 on whether the decision that documents about expenses of legislators were created "for" the legislators was a reasonable one or not.

These cases underscore that both the determination and the application of the appropriate standard of review are highly contextualized and complex tasks. One of the more problematic

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105 *C.A.I.M.W.* v. *Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.

105a *Supra* note 16.

106 *Supra* note 34.

107 Sossin, 11 S.C.L.R. (2d) *supra* note 11 at 49.

108 Sossin, 13 S.C.L.R. (2d) *supra* note 11 at 75.

109 [2000] 1 S.C.R. 538.

109a 2002 SCC 71.

contextual factors is that of comparative expertise between the courts and the public decision-maker whose decision is subject to review.

The relationship of comparative expertise to the standard of review is of necessity contextual. In some cases, it is stated to be the most important factor, such as in *Pezim*.[110] In many others, however, it is related to the nature of the issue involved.

This has been most notable in cases involving human rights, where the Courts have utilized their *Charter* jurisdiction and expertise as the basis for utilizing a standard of correctness upon appeals,[111] as opposed to the reasonableness standard for other tribunals. More ambiguity exists when the tribunal is considered expert in its specialized field. The expertise of the Competition Tribunal contributed to a standard of reasonableness for its interpretation in *Southam*. However, the Canadian International Trade Tribunal's expertise in trade and economic issues warranted no deference on its interpretation of sections of the *Customs Act* which were not "scientific or technical" but "pure questions of law".[112] As with the case in *Pasiechnyk*, discussed above, much will be determined by the judicial characterization of the question.

Added to this difficulty is the comparative exercise itself. Is deference to be accorded only when the tribunal possesses superior expertise, or when the tribunal "is at least as well placed as the court to resolve the issue in dispute"?[113] Is the scope of tribunal expertise to be

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[110] *Supra* note 15 at 591. See also *Asbestos Shareholders*, *supra* note 28 at para. 49.

[111] *Canada (Att.Gen)* v. *Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia* v. *Berg* [1993], 2 S.C.R. 353; *Gould* v. *Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Ross* v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 24; *Trinity Western University*, *supra* note 67 at para. 17; *Pushpanathan*, *supra* note 10; *Chamberlain* v. *Surrey School District No. 36*, *supra* note 16 at para. 11.

[112] *Mattel Canada Inc.*, *supra* note 50 at para. 33. A similar contrast can be made between *Moreau-Bérubé* v. *New Brunswick (Judicial Council)*, *supra* note 67 (standard of reasonableness for interpretation of statute by Judicial Council - requirement to make decision "based on findings contained in the [lower] panel's report") and *Chieu* v. *Canada (Min. of Citizenship and Immigration)* 2002 SCC 3 (standard of correctness for interpretation of statute by Immigration Appeal Division that "having regard to all the circumstances of the case" did not permit consideration of potential foreign hardship when reviewing a removal order. See Leclerc "A wrench in the 'reasonableness analysis'" Ontario Bar Association, Administrative Law Newsletter (December 2002, Vol. 11, No. 1).

[113] Brown & Evans, *supra* note 19 at 15-41 to 15-42 favour such an approach.

garnered from analysis of statutory provisions that speak to this issue[114] or are more subjective and impressionistic elements at play?[115] This in turn leads to questions about the need for empirical evidence about the actual experience and expertise of the decision-makers who are subject to review in order to determine if deference is justified.[116] Finally, as Professor Mullan notes, reliance upon an analysis that is based on comparative expertise creates its own problems when one factors in the underlying assumptions of the administrative justice system:

> "In many instances, the whole purpose of assigning tasks to an administrative tribunal is to create a more appropriate environment than the courts for the resolution of certain issues. That allocative decision may depend not simply on considerations of expertise but also on factors such as efficiency and costs. In such circumstances for the court to simply assert that they are better located to decide certain questions than the designated decision-maker smacks of a rearguard action against a legislative statement which is sometimes to effect that, irrespective of the courts' claims or pretensions to expertise, we want the matter dealt with by a tribunal. In such cases and absent other considerations, it is wrong-headed for the courts to withhold deference."[117]

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[114] *Mattel Canada Inc.*, *ibid*, at para 28-31. See also *Southam*, *supra* note 10 at para. 51 and *Pushpanathan*, *supra* note 10 at para. 32.

[115] See eg. Hawkins, "Reputational Review I: Expertise, Bias and Delay", (1998), 21 Dal.L.J. 5 at 24: "... the degree of judicial scrutiny ... appears to depend on little more than judicial preference for certain tribunals and certain outcomes. However, this is only the court's announced theory of expertise and rationale for deference. The board's public reputation for competence will influence a judge when this comparison is made. This link is made possible because expertise is a vague and impressionistic concept". Professor Sossin feels the Court's exacting analysis of the board of arbitrations's reasoning in *Canada Safeway*, *supra*, note 34, suggests "at best, skepticism regarding the expertise of the Board on filling the gap left by the collective agreement": *supra*, note 11, 11 S.C.L.R. (2d) at 49. Mullan (2000), *supra*, note 11 at 208, questions if there is "unarticulated" or "informal judicial notice being taken of or assessments being made of the actual quality of tribunals, with deference being parcelled out accordingly".

[116] See MacLauchlan, *supra* note 11 at pp. 290, 292; Mullan (2002), *supra* note 11 at 23.

[117] *Ibid* at 24.

Conclusion

The development and application of the pragmatic and functional analysis, and the spectrum of standards of review applicable on an issue-specific basis, indicate that the development is certainly one of evolution and not revolution. Current issues centre on the coherence, consistency, complexity and predictability of result of this analytical framework.

Given the inherent evolutionary nature of jurisprudence in general, and absent legislative reform, I suggest the judicial answer to these ongoing issues is a matter of refinement of the current status quo. The constitutional status of superior court judicial review; the inherent "bias" of judges in terms of their comparative expertise in deciding "pure" questions of law, and particular areas of law (eg. human rights); the element of subjectivity that lies at the heart of balancing the contextual factors, determining individual ones (eg. nature of the question), or articulating the real differences between unreasonableness and patent unreasonableness; and the general lack of a specialized branch of the bench on an ongoing basis, as opposed to individual judges, means that a true partnership between the judicial world and the administrative justice system, as envisaged by Chief Justice McLachlin in 1998, has not yet fully arrived.

In the meantime, the courts can strive to articulate in real terms the actual standards and criteria by which the nuances and interstitial gaps between functional theory and practical result can be clarified and reduced.[118] The empirical, contextual and policy issues that justify intervention, rather than deference, need to be spelled out in greater detail, particularly where the courts claim comparative or even superior expertise.[119] As Professor MacLauchlan points out in his recent review of the "didactic" function of judicial review, wherein courts and tribunals are co-operative players in improving the quality of administrative justice, the

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[118] This need for admitting and expressing the subjective elements that underlie the application of the analysis, and its result, is not new. In *Re Hughes Boat Works Inc.* v. *U.A.W., Local 1620* (1979), 26 O.R. (2d) 420 at 422, Mr. Justice Reid stated: "I would thus prefer that the subjective nature of the process be acknowledged and that we attempt to state the considerations that should be borne in mind ... I think we should try to illustrate what will lead a court to interfere or to refrain from interfering with what a tribunal has done or decided notwithstanding a privative clause. See also Evans, "Judicial Review in the Supreme Court: Realism, Romance and Recidivism", *supra* note 9 at 260-261.

[119] MacLauchlin, *supra* note 11 at 293.

bench and bar have a role to play in developing a "better-informed and a better-informing practice of judicial review of administrative action"[120]. He notes, correctly from my experience, that it

> "is more difficult to spot widespread evidence, especially at the trial level, that courts truly engage in a functional assessment of the interpretative capacity of administrative decision-makers. The analysis remains largely at the level of application of labels, most of them related to the intention of the legislature. It is rare to see a sophisticated assessment of the reasoning process and expertise of the decision-maker in question."[121]

The achievement of greater coherence, consistency and hence predictability in the application of the analysis will be assisted by greater emphasis on improving the quality of tribunal reasons, emphasized in *Baker*[122], and counsel providing the courts with better insight into the reality of institutional and policy implications and priorities within the administrative justice system, whether by affidavit evidence, "legislative fact" documentation, or greater participation by tribunals in judicial review applications and appeals beyond the constraints of their jurisdiction.[123]

On the other hand, given the constant emphasis of the courts on the central role of legislative intent in determining the appropriate degree of deference, it would be paradoxical indeed if clearer legislative intent did not reduce the complexity and improve the predictability of the application of the pragmatic and functional analysis.[124] It is clear from

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120 *Ibid* at 297.

121 *Ibid* at 292. There are exceptions, as noted in Mullan (2000), *supra* note 11 at 15, citing Evans, J. (as he then was) in *McTague* v. *Canada (Att. Gen.)*, [2000] 1 F.C. 647 (T.D). Given Justice Evans distinguished academic career in administrative law, this is not surprising. Professor Mullan's sense was that this was "becoming increasingly the norm".

122 *Supra* note 10 at para. 35-43. See also Mullan *supra* note 11, 7 R.A.L., MacLauchlan, *ibid*, at 293, 297, and Fauzon, *supra* note 10 at 39. See also the recent decision of the Ontario Court of Appeal regarding the quality of reasons in *Gray* v. *Ontario (Director of Ontario Disability Support Program)*, April 25, 2002.

123 MacLauchlan, *ibid* at 294, 297-298.

124 This is a basic theme of Fauzon, *supra* note 10. Justice Iacobucci, *supra* note 7 at 872 makes the point that the complexity of the issues lies not in the conceptual framework of a spectrum of standards, but in its application to the myriad delegated powers of decision. "The complexity was created not by the courts but by the

the Supreme Court of Canada case law referred to in this paper that the Court has consistently applied the patent unreasonableness standard in cases where there is a "full" or "true" privative clause. What is not clear is whether the legislature expressly did turn its mind to the degree of deference in enacting partial privative clauses, partial appeal rights (eg. questions of law alone, leave required), full appeal rights, or more particularly where there is neither a right of appeal or a privative clause. Similarly, the degree of expertise required of decision-makers could be more explicitly set out in the legislation.

The various options for legislative reform have been canvassed by the British Columbia Administrative Justice Project[125] and range from legislating generally against deference on any question of law, or questions of mixed law and fact, or on any appeal (with the legislature and not the courts deciding upon exceptions after a tribunal by tribunal review, with express privative clauses), to legislating deference, subject to constitutional limitations, in all matters, or just on judicial review applications. The recommendations[126] attempt to simplify what are seen as the "mixed and confusing" result of courts struggling to ascertain legislative intent:

(a) statutory appeals where intra-jurisdictional questions are to be reviewed on a correctness standard, this being clearly reflected in the legislation;

(b) clear and consistent privative clauses where intra-jurisdictional questions are to be reviewed only for jurisdictional error; this being clearly reflected in the legislation;

(c) the legislature should develop policy guidelines governing the criteria for deciding between (a) and (b);

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legislators, who wisely decided that not all administrative agencies would operate in the same way. It is a complexity that the courts must attempt to deal with and it would be irresponsible simply for judges to wish it away". Justice Iacobucci also feels it would be "very helpful" if statutes set out the standard of review applicable to individual tribunals and in which circumstances it applied, *supra* note 7 at 877.

125 Fauzon, *ibid* at 45-56.

126 "On Balance: Guiding Principles for Administrative Justice Reform in British Columbia", Attorney General of British Columbia, Administrative Justice Project White Paper, July 2002 at 23-26.

(d) the government application of these guidelines on a tribunal by tribunal review to determine which standard should apply; and

(e) uniform legislation to govern statutory appeals, eg. a *Statutory Appeal Procedure Act*.

There seems little current movement in Ontario under the initiative of "Agency Reform" that would lead one to conclude a similar approach is being either brewed or mulled. Ontario administrative law practitioners need not worry about Justice Scalia's moniker of "sissies" yet, and must be prepared to understand and advance the pragmatic and functional analysis in all cases where on the specific issue before the particular decision-maker the standard of review has not yet been authoritatively determined. To borrow a favourite phrase from our current Prime Minister: "we have work to do".