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Notes on *Dr. Q* and *Ryan*

Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law

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The decisions in *Dr. Q.* and *Ryan* were issued by the Court on 3 April 2003. Both cases involved statutory appeals to the court. In both, the court decided that reasonableness *simpliciter* was the applicable standard of review.

***Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19**

An Inquiry Committee of the College found that Dr. Q. had taken physical and emotional advantage of one of his female patients and was guilty of infamous conduct. Credibility was a significant issue. On a statutory appeal to the Supreme Court of B.C. "on the merits", the chambers judge reviewed the evidence, found that it was not "clear and cogent", and set aside the decision The B.C. Court of Appeal dismissed the College's appeal because the chambers judge was not "clearly wrong". The Supreme Court of Canada allowed the College's further appeal. McLachlin C.J.C. writing for the unanimous court held that the CA erred in not setting aside the order of the chambers judge, because it should have determined whether the chambers judge had applied the proper standard of review; and, if not, should have applied that standard itself to determine whether the Inquiry Committee's decision should be upheld or set aside. The chambers judge had erred in reweighing the evidence herself. Although there was a statutory right of appeal "on the merits", this was only one of the four facts to be considered under *Pushpanathan*. The other factors indicated deference should be shown to the statutory delegate. Using the reasonableness *simpliciter* standard of review, the chambers judge should have dismissed the doctor's appeal because there was ample evidence to support the Commitee's conclusions.

Comments:

1. The crux of the error made by the chambers judge is identified by the SCC in the following extract:

> [16] ... Koenigsberg J. engaged in a wide-ranging review of the evidence and in effect substituted her views on the credibility of the witnesses for those of the Committee.
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> [17] This approach appears to have been connected to two assumptions. The first was the apparent assumption that since the standard of proof was the intermediate standard of clear and cogent evidence, the reviewing judge was required to review the evidence and make her own evaluation of whether it reached this standard. The second was the assumption that because the Act expressly confers a right of appeal, the review was not to be treated like the usual review of the decision of an administrative tribunal, which requires the reviewing judge to first determine the appropriate standard of review and then apply that standard to the decision. In my view, both of these assumptions are mistaken. As a result of their application, the reviewing judge applied the wrong standard of review and interfered unduly in the Committee's findings of credibility and fact.

2. Echoing *Suresh*, the court repeats that it is necessary to address the applicable standard of review in every case, using the functional and pragmatic approach: paragraph 40.

3. Again echoing *Suresh*, the court notes that there may well be a difference between the standard which must be applied by the statutory delegate ("clear and cogent evidence") and the standard which must be applied by the reviewing court: paragraphs 16 - 19.

4. The choice of standard of review is to be done correctly by the chambers judge, and no deference is to be shown by an appellate court to the standard selected by the chambers judge, and an appellate court can substitute its own view of (i.e., *correct*) the applicable standard: paragraphs 43 - 44. This vindicates the approach taken by the Alberta C.A. in *Telus*.[1] However, it may encourage litigants to appeal.

5. If the Legislature has provided an appeal to the court "on the merits",[2] why is it necessary to look at the other three *Pushpanathan* factors in order to determine the intent of the Legislature about the standard of review? Surely the Legislature can specifically provide an appeal that would allow the court to rehear and redetermine

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1. *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.*, [2002] ABCA 199.

2. Section 73 of the B.C. *Medical Practitioners Act* reads as follows:

> 73. The appeal under section 71 must be determined by the court on the merits, despite any lack of form, but the court may give directions for a proper hearing and adjudication.

a matter decided by an administrative agency–regardless of the relative expertise of the administrative tribunal, the purpose of the statute, or the nature of the problem. How much more specific would the Legislature have to be in wording an appeal provision to make it absolutely clear that the court is entitled to substitute its own decision for that of the statutory delegate (*i.e.*, apply the correctness standard)?

At paragraph 27, McLachlin C.J.C. refers to the first of the four *Pushpanathan* factors (the statutory mechanism of review) in the following terms:

> [27] The first factor focuses generally on the statutory mechanism of review. A statute may afford a broad right of appeal to a superior court or provide for a certified question to be posed to the reviewing court, suggesting a more searching standard of review: see *Southam*, *supra*, at para. 46; *Baker*, *supra*, at para. 58. A statute may be silent on the question of review; silence is neutral, and "does not imply a high standard of scrutiny": *Pushpanathan*, *supra*, at para. 30. Finally, a statute may contain a privative clause, militating in favour of a more deferential posture. The stronger a privative clause, the more deference is generally due.

While it is true that the presence of a privative clause connotes an intention for the court to defer to the decision of the statutory delegate, and the absence of a privative clause may be neutral and not connote an intention for the court to apply a correctness standard,[3] the presence of a statutory provision conferring a right of appeal necessarily indicates the Legislature's intention for the court to have a more active, more searching role. In the context of an appeal, does this mean that the real issue is to determine whether the Legislature intended the court to scrutinize the statutory delegate's decision on a reasonableness *simpliciter* standard or a correctness standard? Will the legislatures have to be more specific in what they mean by appellate clauses, to indicate more clearly what they intend the appellate court to do, going so far as to specify the applicable standard?

6. If the appellate court cannot reweigh the evidence (because reasonableness *simpliciter* is the standard, not correctness?), how did the court manage to do precisely that in *Baker*[4] (on judicial review)?

7. Given that the SCC did not conclude that the provision of an appeal "on the merits" was determinative of the Legislature's intent, precisely how did the SCC weigh the

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3. Which differs from the English law that permits the court on judicial review to correct any error of law on the face of the record: *R. v. Northumberland Compensation Appeals Tribunal; ex parte Shaw.*, [1952] 1 K.B. 338.

4. [1999] 2 S.C.R. 817.

four factors from the functional and pragmatic approach? Two factors (the existence of a broad right of appeal, and no greater expertise in the Committee compared to the court) suggested a low degree of deference, one was ambivalent (the purpose of the statute and the provision in particular), and the fourth (the nature of the problem–credibility) suggested deference. We know the various considerations identified by the court with respect to each of the four factors, and the outcome, but we don't know the weight applied to each of the factors. Why does the fourth factor outweigh all the others?

8. Interestingly, at the end of her discussion about the functional and pragmatic approach, McLachlin CJC says that the category or type of error never definitively determines the standard of review: paragraph 25.[5] Under what circumstances would a clearly "jurisdictional" matter or a "jurisdictional given" possibly attract a different standard than correctness?

9. Referring to the companion decision in *Ryan*, the SCC makes it clear that there are only three currently recognized standards of review: paragraph 35.

10. Curiously, the SCC 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*, when he talked about "correctness coupled with an appropriate measure of deference"?[6] Or is it the opposite–requiring correctness to be applied even if little deference is called for?

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5. [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.

6. *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] BCCA 141 and *Van Unen v. British Columbia (Workers' Compensation Board)*, [2001] BCCA 262; leave to appeal denied on 4 October 2001 without reasons: [2001] SCCA No. 207 and No. 288.

11. Is it possible that there is a spectrum–a contiuum–of deference, but only three standards of review? See the discussion below on *Ryan*.

Law Society of New Brunswick v. Ryan, **2003 SCC 20**

The Discipline Committee of the Law Society disbarred Ryan for an elaborate web of deceit that included lying to clients about the status of their cases, forging a decision of the Court of Appeal, and falsely telling his clients that a contempt motion had been granted against the defendants and that they had been awarded damages respectively which they could not collect because of invented delays and appeals. On a first appeal[7] to the Court of Appeal, it directed the Discipline Committee to reconsider the matter taking into account various subsequent medical evidence presented by Ryan. The Discipline Committee did this, and reconfirmed its previous decision disbarring Ryan. On a second appeal to the Court of Appeal, it allowed Ryan's appeal and substituted its own sanction of indefinite suspension with conditions for reinstatement. The SCC allowed the Law Society's appeal, and reinstated the disbarment.

Comments:

12. Writing for the unanimous SCC, Justice Iacobucci makes it clear that there are only three standards for judicial review of administrative decisions: correctness, reasonableness *simpliciter*, and patent unreasonableness.

> [24] In the Court's jurisprudence, only three standards of review have been defined for judicial review of administrative action (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, at para. 5, *per* McLachlin C.J.; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 55; see also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 30; *Pushpanathan*, *supra*, at para. 27. The pragmatic and functional

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7. Section 66 of the *Law Society Act 1996*, [1996] S.N.B., c. 89 reads as follows:

> 66. Any respondent who is affected by a decision, determination or order of the Competence or Discipline Committee may appeal to the Court of Appeal on a question of law or fact.

Section 68 provides as follows:

> 68. The Court of Appeal may make such order as may be just, including referral to the Competence or Discipline Committee to act in accordance with its directions.

> approach set out in *Bibeault, supra*, and more recently in *Pushpanathan, supra*, will determine, in each case, which of these three standards is appropriate. I find it difficult, if not impracticable to conceive more than three standards of review. In any case, additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited.
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> [25] To elaborate on this point, in *Southam, supra*, the Court held that an unreasonable decision was one that did not stand up to a somewhat probing analysis. It is not clear that there is helpful language to describe a conceptually distinct fourth standard that would be less deferential than reasonableness *simpliciter* but more deferential than correctness. At this point, the multiplication of standards past the three already identified would force reviewing courts and the parties that appear before them into complex and technical debates at the outset. I am not convinced that the increase in complexity generated by adding a fourth standard would lead to greater precision in achieving the objectives of judicial review of administrative action.
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> [26] A pragmatic and functional approach should not be unworkable or highly technical. Therefore I emphasize that, as presently developed, there are only three standards. Thus a reviewing court must not interfere unless it can explain how the administrative action is incorrect, unreasonable, or patently unreasonable, depending on the appropriate standard.

Compare this to his comments in the Queen's Law Journal where he contemplated the possibility of more standards on the spectrum.[8]

13. The selection of the applicable standard of review must be done after applying the four-factor contextual and pragmatic analysis from *Pushpanathan.*

14. The presence of a statutory right of appeal–the first factor–may not be determinative of the standard:

> [29] The existence of a broad statutory right of appeal indicates that less deference may be due to decisions of the Discipline Committee. However, as Bastarache J. noted in *Pushpanathan, supra*, at para. 30: "The absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard." The specialization of duties intended by the legislature may warrant deference notwithstanding the absence of a privative clause (*Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1746-47; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37, at para. 49; *United*

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8. "Articulating a Rational Standard of Review Doctring: A Tribute to John Willis", (2002) Queen's L.J. 809 at paragraph 31.

Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at p. 335; *Pezim*, *supra*, at p. 591).

As noted in the comments on *Dr. Q.*, the fact that the absence of a privative clause may not automatically engage the correctness standard of review does not really explain why the Legislature would not have intended the court to use the correctness standard when the Legislature specifically granted a right of appeal to the court. Where there is an appeal, why is it necessary to go beyond the first of the *Pushpanathan* factors? Is it just–in cases of doubt–to distinguish between correctness and reasonableness *simpliciter*?

15. Taking into account the other three *Pushpanathan* factors, the Discipline Committee had greater expertise relative to the Courts,[9] the purpose of the statute and the disciplinary process suggests that the Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members,[10] and the nature of the question in dispute was fact-intensive–all of which imply a more deferential standard of review than correctness (even though there was a statutory right of appeal).

16. While there may be a spectrum of deference, that does not mean that there is a spectrum of standards:

> [45] It is true that the Court has resorted to the metaphor of a spectrum in order to explain the relative ordering of the three recognized standards of review. The idea is that the standards could be arranged from least deferential to most deferential with reasonableness as the intermediate standard of review. The metaphor suggests standards arranged along a gradient of deference but it was never meant to suggest an infinite number of possible standards. That the metaphor relates to a spectrum of deference and not a spectrum of standards has become increasingly clear since the use of the term "spectrum" in *Pezim*, *supra*, at p. 590 (see *Baker*, *supra* at para. 55, *per* L'Heureux-Dubé J.; *Pushpanathan*, *supra*, at para. 27, *per* Bastarache J.). As Major J. recently wrote: "[T]he various standards of review are properly viewed

9. It had greater expertise with respect to choice of sanction; it included current members of the profession who are uniquely positioned to identify professional misconduct and to appreciate its severity; it included members of the public who may be in a better position to understand how the misconduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice; it had relative expertise generated by repeated application of the objectives of the professional regulation set out in the Act. Therefore, while the Discipline Committee's expertise is not in a specialized area outside the general knowledge of most judges, its composition and familiarity with misconduct and sanction in a variety of settings arguably means that it has more expertise than the courts on the sanction to apply to the misconduct. See paragraphs 30 - 34.

10. Paragraph 40.

> as points occurring on a spectrum of curial deference. They range from patent unreasonableness at the more deferential end of the spectrum, through reasonableness *simpliciter*, to correctness at the more exacting end of the spectrum" (*Mattel, supra*, at para. 24).

17. The reasonableness standard does not have variable content: it is a discrete point, with constant content, which requires the court to determine whether "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"[11] While the answer to this question must bear careful relation to the context of the decision, the question (or standard or test) remains the same:[12]

> The suggestion that reasonableness is an "area" allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard.

18. Justice Iacobucci states[13] that applying the reasonableness *simpliciter* standard is fundamentally different from applying the correctness standard; does not involve the court at any point asking itself what the correct decision would have been; does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes would be the correct result; indeed, there may often be no single right answer, and even if there were it is not the court's role to seek this out when deciding if the decision was unreasonable.

This implies that the determination of what is "reasonable" bears no relationship whatever to any conception of what the correct result might be, that "reasonableness" is determined solely by looking to the reasons given by the tribunal.[14]

Further:

> [55] A decision will be unreasonable only 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. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be

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11. Paragraph 47.

12. Paragarph 47.

13. Paragraphs 50 and 51.

14. Paragraph 54.

> unreasonable and a reviewing court must not interfere (see *Southam, supra*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam, supra*, at para. 79).
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> [56] This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
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> [Emphasis added.]

19. Does this explanation of what "reasonableness" means restrict either the court or the parties to a mere examination of the statutory delegate's reasons without more? Clearly not, because Justice Iacobucci clearly contemplates that applying the reasonableness standard may involve "significant searching or testing", and explaining the defect in the reasons "may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did".[15]

20. Justice Iacobucci again emphasizes that the standard of "reasonableness" differs from the standard of "patent unreasonableness":

> [52] The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84 at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

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15. Paragraph 53.

If "patently unreasonable" means that there is no real possibility of doubting that the decision is defective, does that mean that the decision is *wrong* ("incorrect")? Must whatever it is that makes the decision "patently unreasonable" appear on the face of the record? (That is the source of the English courts' ability to correct a non-jurisdictional error of law on the face of the record: *Shaw's* case.) Or can one go beyond the record to demonstrate–"identify"--why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

Why do we need three standards? Why wouldn't correctness and reasonableness suffice?

21. In any event, while the Court of Appeal purported to apply the reasonableness standard, in the SCC's view it did so incorrectly when it found fault with the Discipline Committee's choice of analogous cases on the issue of penalty, and with the weight the Committee gave to mitigating factors. Because the standard of review was not correctness, the Court of Appeal should not have reweighed the evidence and imposed a different penalty. Applying the "somewhat probing examination" involved in the "reasonableness" standard, Justice Iacobucci found that the Committee's reasons were tenable, grounded in the evidence, and supported disbarment as the choice of sanction–in short, not unreasonable.

Note that the SCC is asserting its right to substitute its own view about how the applicable standard should have been applied (in other words, correctness is the standard for reviewing the application of the appropriate standard).

Query: even applying the SCC's description of "unreasonableness", is the reality that different judges will inevitably have different perceptions of what is "unreasonable"–just like different Chancellors had different lengths of feet?

Does this encourage losing litigants to appeal?

How does one reconcile this decision with what the Court did in *Baker*?

Summary

Is the lesson that the Legislature needs to specifically articulate the standard of review it expects courts to use, not only when providing for appeals but also on applications for judicial review?