Judicial Review of Administrative Legislation in a Pragmatic and Functional Framework

Professor Philip Bryden
Dean of Law, University of New Brunswick

> When the administrative body whose decision is challenged is not a tribunal, but an elected body with delegated power to make policy decisions, the primary function of judicial review is to determine whether that body acted within the bounds of the authority conferred on it. Courts must respect the responsibility of such bodies to serve those who elected them, and will, as a rule, interpret their statutory powers generously . . . The decisions or actions of an administrative body of this kind will be invalidated if they are plainly contrary to the express or implied limitations on its powers. The mechanical application, in this context, of a test which was developed with a quite different kind of administrative body in mind is not only unnecessary, but may also lead both to practical difficulties and to uncertainties about the proper basis of judicial review. [1]

Introduction

When the Supreme Court of Canada released its decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [2] in 1998, it could have been argued that the four-part standard of review test designed by Mr. Justice Bastarache was simply an attempt to bring coherence to the law governing substantive review of the decisions of administrative tribunals. It was not long, however, before the test was understood to serve a much more ambitious purpose, one Professor David Mullan has described as the creation of "an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision-makers." [3] In 2003, this assessment of

---

[1] *Chamberlain v. Surrey School District No. 36* [2002] 4 S.C.R. 710, 2002 SCC 86 at para. 191 (per LeBel, J.). (hereafter "*Chamberlain*").

[2] [1998] 1 S.C.R. 982 (hereafter "*Pushpanathan*").

[3] David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at p. 108.

the *Pushpanathan* test was explicitly endorsed by Chief Justice Beverly McLachlin, writing for a unanimous Court in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*. [4]

One does not have to spend too much time searching the case law or commentary on the standard of review in administrative law to find expressions of doubt concerning how successful the Supreme Court of Canada has been in achieving this ambitious goal. Such concerns tend to take one of two forms. The first is a criticism of some aspect of the basic standard of review methodology: either it is too cumbersome, too unpredictable, too subject to manipulation, or the effort put into determining the standard of review is wasted because the choice of standard has limited influence on the actual outcome of cases. The second type of criticism accepts the basic logic of the test in some situations, but suggests that that it is either inapplicable to other situations or has to be modified in those situations. The passage from Mr. Justice LeBel's reasons in *Chamberlain* quoted above is an example of the second line of criticism.

Although there are signs that this may be changing as a result of the Supreme Court of Canada's decision in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [5] on the whole the Supreme Court of Canada seems to be more receptive to the second line of criticism than the first. This development is particularly noteworthy in the area of

---

[4] [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 25 (hereafter "*Dr. Q.*)

[5] 2007 SCC 15, released on March 23, 2007 (hereafter "*VIA Rail*"), discussed in Part 2 below.

review substantive review of municipal by-laws, [6] and by implication more generally in the review of administrative legislation. This paper is designed explore the application of standard of review principles in cases where a substantive challenge is being made to a piece of administrative legislation. It does so in three parts. The first defines administrative legislation, offers a classification of the different types of administrative legislation, and briefly discusses the amenability of administrative legislation to judicial review. The second provides a brief overview of the four-part standard of review test as set out in the leading Supreme Court of Canada decisions, and discusses the possible implications of the *VIA Rail* case for this line of authority. The third part explores the extent to which current standard of review doctrine governing administrative legislation deviates from this framework, with particular attention to the implications of the Supreme Court of Canada's decision in *United Taxi*.

This analysis will be neither comprehensive nor deeply theoretical. More specifically, I will not be addressing in any detail questions concerning the principles governing legal challenges to the procedures used to create administrative legislation, the principles for properly interpreting administrative legislation, particularly in the municipal law context, or the relationship between administrative law and constitutional review of administrative action. This is not because these subjects are unimportant to the development of a comprehensive understanding of the review of administrative legislation, but simply because they deserve more extended treatment than the time and space available to me allows. Likewise, my goal is to offer some practical advice to judges who are attempting

[6] See *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (hereafter "*United Taxi*") discussed in Part 3 below.

to navigate the relevant jurisprudence rather than to provide a critique or an alternative framework to govern this area of the law.

1. The Reviewability of Different Types of Administrative Legislation

For purposes of this paper I will use the term "administrative legislation" to describe any formal rule or statement generated by an administrative body to control or guide the making of administrative decisions. This definition contains three key elements. The first is that I am concerned only with rules or explicit statements of policy, as distinct from more general norms, practices or precedents that may influence the outcome of decisions. The second is that I will be confining my observations to the realm of administrative action rather than laws enacted by Parliament or a provincial legislature. Of course, the administrative bodies that enact these rules themselves may be composed of elected officials, but they are exercising delegated rather than primary legislative authority. And the third element is that I am concerned with statements of general applicability that are designed to control, or at least guide, decisions rather than the decisions themselves. The definition is deliberately broader than delegated legislation that has the force of law, but not so broad as to break down the fundamental distinction between rules and adjudicative decisions.

The definition of administrative legislation that I have employed encompasses instruments that are known by a variety of names, including regulations, by-laws, rules, orders-in-council, codes, guidelines, directives, manuals and some types of resolutions

and policy statements. [7] The important distinction for present purposes is that some of these instruments have the force of law and others do not. [8] As a general proposition, instruments that are called regulations, by-laws, rules, and orders-in-council are delegated legislation and, if valid, they have the force of law. Instruments that are called guidelines, directives, manuals and policy statements normally are official guidance about how an administrative body intends to exercise discretion, and they do not have the force of law in the same sense as valid delegated legislation.

It is important to recognize that the use of a particular term to describe a piece of administrative legislation does not control its legal status. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [9] the Supreme Court of Canada held that environmental "guidelines" issued pursuant to section 6 of the *Department of the Environment Act* [10] had the status of delegated legislation and therefore the force of law. Similarly, some municipal "resolutions" are intended to be binding on municipal officials making decisions and may therefore have the same legal status as by-laws, [11] whereas others "may be little more than the expression of an opinion" [12] and therefore do

---

[7] See Donald Brown, Q.C. and Hon. John Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback Publishing, 1998, loose-leaf updated 2006) (hereafter "Brown and Evans") at 14:3000 – 14:4000 for a description of the different types of administrative legislation and a discussion of their legal status.

[8] See *Martineau v. Matsqui Institution*, [1978] 1 S.C.R. 118.

[9] [1992] 1 S.C.R. 3.

[10] R.S.C. 1985, c. E-10

[11] See, for example, *Shell Canada Products, Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Chamberlain*, *supra* note 1.

[12] Brown and Evans, *op. cit.* note 7, at 14:3240.

not have the force of law. Indeed, resolutions that merely express the opinion of a municipal council on some issue do not even fit into my definition of administrative legislation.

For present purposes, the important point is that, as a general rule, administrative legislation that has the force of law is subject to substantive judicial review, either directly as a result of an application challenging the validity of the regulation, by-law or rule, or indirectly in the context of an attack on a decision that relies on the regulation, by-law or rule. [13] In either setting, the court typically must engage in some form of standard of review analysis in order to determine the standard against which it should assess the validity of the regulation, by-law or rule. [14]

The law governing the reviewability of administrative legislation that does not have the force of law is more complex. In writing for the Supreme Court of Canada majority in *Little Sisters Book & Art Emporium v. Canada (Minister of Justice),*[15] Mr. Justice Binnie observed:

> It is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated. [16]

---

[13] There may, however, be circumstances in which principles governing the economic use of judicial resources may dictate that a party does not have complete freedom of choice in whether to pursue a challenge by way of collateral attack as distinct from judicial review or appeal. See, for example, *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *Grenier c. Canada (Procureur général*) (2005), [2006] 2 F.C.R. 287, 2005 FCA 348 (hereafter "*Grenier*").

[14] See *Grenier*, *ibid.* at para. 62. But see the exceptions discussed in Part 3 below.

[15] [2000] 2 S.C.R. 1120, 2000 SCC 69.

A superficial reading of this passage might lead one to the conclusion that guidelines, directives or policy statements are never reviewable in and of themselves, but are only subject to judicial review indirectly in the context of review of decisions that rely on them. There are, however, several situations in which the validity of a guideline is subject to direct attack in the courts. The first is where the guideline is being attacked on the basis that it is not a mere guide to the exercise of discretion but an attempt to make a legally binding rule or otherwise fetter discretion in a manner that goes beyond the authority of the administrative body making the guideline. [17] The second is where the guideline is being attacked on the basis that it is inconsistent with statutory provisions that govern the area addressed by the guidelines. [18] The third situation is where the administrative body has failed to comply with binding procedural obligations in the course of creating the guidelines or directives. [19] Finally, there is a suggestion in the jurisprudence that guidelines that are made in bad faith, for improper purposes or based

---

[16] *Ibid.* at para. 85.

[17] See, for example, *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104, 121 D.L.R. (4th) 79, (Ont. C.A.); *Fairhaven Billiards Inc. v. Saskatchewan (Liquor & Gaming Authority)* (1999), 177 Sask. R. 23717 Admin. L.R. (3d) 167 (Sask. C.A.). A related argument, currently being addressed by the Federal Court of Appeal in the appeals of the Federal Court of Canada decisions in *Benitez v. Canada (Minister of Citizenship & Immigration)*, [2007] 1 F.C.R. 107, 2006 FC 461, 40 Admin. L.R. (4th) 159 (F.C.C.), (hereafter "*Benitez*") especially at paras. 173-188, and *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, [2006] 3 F.C.R. 168, 2006 FC 16, 40 Admin. L.R. (4th) 221, (F.C.C.) (hereafter "*Thamotharem*") is whether an administrative body that has the power to issue both regulations and guidelines has the obligation, in certain circumstances, to use the regulation-making power in order to give certain types of guidance.

[18] See, for example, *Independent Contractors & Business Assn. (British Columbia) v. British Columbia*, (1995), 6 B.C.L.R. (3d) 177, 31 Admin. L.R. (2d) 95 (B.C. S.C.); *Timberwest Forest Corp. v. Canada*, 2007 FC 148, 2007 CarswellNat 307 (F.C.C.) at paras. 89-100.

[19] See *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (Fed. C.A.) at paras. 17-20.

on irrelevant considerations can be invalidated by the courts. [20] The fourth type of situation is potentially troubling since it reflects traditional grounds for review of the exercise of discretion that appear to have been superseded by modern standard of review analysis. [21] I will address the relationship between the traditional principles governing the review of discretion and contemporary standard of review analysis in Parts 2 and 3 below.

2. The *Pushpanathan* Standard of Review Test

Although the four-part standard of review test has been refined considerably since it was set out in the *Pushpanathan* case, the same basic elements still form the core of the test. The first is that the objective of the test is to determine "the legislative intent of the statute creating the tribunal [or other administrative body] whose decision is being reviewed." [22] Although the inquiry is into the legislature's intention with respect to the scope of judicial review, it is made "against the backdrop of the courts' constitutional duty to protect the rule of law." [23] The inquiry itself requires the consideration of four factors:

---

[20] See *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at p. 9; *Carpenter Fishing Corp. v. Canada*, [1998] 2 F.C. 548 (Fed. C.A.) at para. 28.

[21] See, for example, *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999] 2 S.C.R. 817 (hereafter "*Baker*"); *Dr. Q.*, *supra* note 4, at paras. 22-24.

[22] *Pushpanathan*, *supra* note 2, at para. 26.

[23] *Dr. Q*, *supra* note 4, at para. 21.

(1) the presence a privative clause, on the one hand, or a right of appeal on the other, which can be taken as indicators of a legislative preference for more or less restricted scope of judicial supervision; [24]

(2) the relative expertise of the decision-maker and the reviewing court in respect of the specific issue under review; [25]

(3) the general purpose of the legislation and any particular provision that may be at issue, with legislation involving economic management or poly-centric interest balancing militating in favour of judicial deference; [26] and

(4) the nature of the legal question at issue, with questions of statutory interpretation presumptively attracting greater judicial scrutiny and questions involving review of factual determinations demanding greater deference. [27]

Although the *VIA Rail* decision could be seen to call this principle into question, the mainstream view is that this analysis should be undertaken separately with respect to each issue that is in dispute, since different standards of review may be applicable to distinct elements of the same case. [28]

---

[24] *Pushpanathan*, *supra* note 2, at paras. 30-31.

[25] *Ibid.* at paras. 32-35.

[26] *Ibid.* at para. 36

[27] *Ibid.* at paras. 37-38.

The outcome of the standard of review analysis will be a determination that one of three possible standards of review will be applied: "correctness", "reasonableness" or the "patently unreasonable" standard. [29] There have been various criticisms of the "three standard" approach, [30] and once again the *VIA Rail* decision raises questions about whether we are seeing an evolution in this aspect of the jurisprudence. [31] The Supreme Court of Canada has offered various descriptions of what is meant by each of these standards. Two of the more successful efforts, in my respectful opinion, are those provided by Chief Justice McLachlin in *Dr. Q.* and *Chamberlain.* In *Dr. Q.*, she wrote:

> . . . [T]he pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before an administrative body should receive exacting review by a court, undergo "significant searching or testing" . . ., or be left to the near exclusive determination of the decision-maker. These postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness. [32] (citations omitted)

And in *Chamberlain* she observed:

> The standard of "correctness" involves minimal deference: where it applies, there is only one right answer and the administrative body's decision must reflect it. "Patent unreasonableness", the most deferential standard, permits the decision to stand unless it suffers from a defect that is immediately apparent or is so obvious

---

[28] See, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27 and other cases referred to in the dissenting judgment of Deschamps and Rothstein, JJ. in *VIA Rail*, *supra* note 5, at para. 278.

[29] *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at paras. 24-26.

[30] See, for example, the comments of Mr. Justice LeBel in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, at paras. 120-134 and in *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23, at paras. 40-41, as well as the comments of Mr. Justice Robertson in *New Brunswick (Board of Management) v. Doucet-Jones*, 2004 NBCA 65, 18 Admin.L.R. (4th) 222 (N.B.C.A.), at paras. 15-17.

[31] See the dissenting judgment of Deschamps and Rothstein, JJ. in *VIA Rail*, *supra* note 5, at para. 279.

[32] *Dr. Q.*, *supra* note 4, at para. 22.

> that it "demands intervention by the court upon review": . . . The intermediate standard of "reasonableness" allows for somewhat more deference: the decision will not be set aside unless it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination" . . . . [33] (citations omitted)

In my respectful view, some of the less successful formulations of the distinction between the "reasonableness" test and the "patent unreasonableness" test focus on the characterization of "patently unreasonable" decisions as ones that are "clearly irrational". [34] As Mr. Justice Robertson of the New Brunswick Court of Appeal observed in *New Brunswick (Board of Management) v. Doucet-Jones*: [35]

> . . . [F]ormulating a review standard in terms of a decision being absurd or clearly irrational does little to advance the interests of justice. In truth, such standards unnecessarily demean the individual whose personal judgment is called into question by the unsuccessful party. No decision-maker wants to be labeled "clearly irrational" or the author of a "silly" decision.

I have put forward elsewhere my view that it is important for courts to attempt to draw distinctions among the recognized standards of review that are sufficiently sharp that the types of arguments that form the basis for a successful challenge using each standard are different in kind and not merely in degree. [36] I will not rehearse here the arguments I used to explain how this might be done, but it does seem to me that the success of the type of sophisticated standard of review that the *Pushpanathan* line of authority calls for

---

[33] *Chamberlain*, *supra* note 1, at para. 6.

[34] See, for example, *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-964.

[35] *Supra* note 30 at para. 23.

[36] See Philip Bryden, "Understanding the Standard of Review in Administrative Law" (2005), 54 *U.N.B.L.J.* 75; Philip Bryden, "Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191.

depends very much on our ability to convince lawyers and judges that the effort that goes into the choice of standard of review is rewarded by the way the choice helps to further the objectives of judicial review of administrative action.

Three other general observations about the standard of review framework may be helpful before I consider the possible impact of the *VIA Rail* decision on the model I have just described. The first concerns the relationship between the standard of review analysis and procedural challenges to administrative action. It is sometimes said that procedural challenges automatically attract the "correctness" standard of review. [37] In my respectful view, however, the more accurate way of describing the situation is that standard of review analysis is not required in assessing whether an administrative body has met the standards of procedural fairness. [38] This does not mean that no deference is owed to administrative agency choices in the assessment of the degree of fairness owed in any particular situation, since the factors identified by the Supreme Court of Canada in *Baker* for making that determination include respect for procedural choices made by the agency itself. [39] While procedural and substantive review are conceptually distinct and serve different purposes, sometimes the factors relevant to each analysis will overlap. As Mr. Justice Binnie observed in *C.U.P.E. v. Ontario (Minister of Labour)*: [40]

> On occasion, a measure of confusion may arise in attempting to keep separate these different lines of enquiry. Inevitably some of the same "factors" that are

---

[37] See, for example, *British Columbia (Securities Commission) v. Pacific International Securities Inc.*(2002), 2 B.C.L.R. (4th) 114, 2002 BCCA 421 (B.C.C.A.) at para. 5.

[38] See *Thamotharem*, *supra* note 17, at para. 15; *Benitez*, *supra* note 17, at para. 44.

[39] *Baker*, *supra* note 21, at para. 27; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at paras. 115 and 120.

[40] [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 103.

> looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself. Thus in *Baker*, *supra*, a case involving the judicial review of a Minister's rejection of an application for permanent residence in Canada on human and compassionate grounds, the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para.60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with "the importance of the decision to the individual or individuals affected" (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common "factors", the object of the court's inquiry in each case is different. (emphasis in original)

The second general point concerns the question of whether review of "jurisdictional" questions is automatically exempted from the standard of review analysis on the basis that questions going to jurisdiction are automatically reviewed using the "correctness" standard. Mr. Justice Bastarache in *Pushpanathan* clearly rejected the idea that a categorical statement that a particular issue was "jurisdictional" could supplant the four-part standard of review analysis. He wrote:

> Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown. [41]

[41] *Pushpanathan*, *supra* note 2, at para. 28.

One might have thought that this statement was sufficient to dispose of the question, but certain passages in the Supreme Court of Canada's decisions in *United Taxi* [42] and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* [43] have had the effect of reviving this issue. I will deal with *United Taxi* in more detail below in Part 3. In *ATCO*, Mr. Justice Bastarche, writing for the majority, affirmed the conclusion of the Alberta Court of Appeal that the Alberta Energy & Utilities Board's conclusions with respect to its jurisdiction with respect to the allocation of net gain on a sale of assets should be reviewed using the standard of correctness. [44] While Justice Bastarache stated that "An inquiry into the factors enunciated by this Court in *Pushpanathan* . . . confirms this conclusion" [45] he also indicated that this result was consistent with the Court's reasoning in *United Taxi*. Since the Court in *United Taxi* had concluded that "There is no need to engage in the pragmatic and functional approach" [46] where the issue is whether a municipal by-law is *ultra vires*, since the "correctness" standard of review applies automatically, it might be argued that the *ATCO* decision extended this reasoning to the review of alleged jurisdictional errors committed by administrative tribunals. In a post-*ATCO* decision in *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, [47] the Nova

---

[42] *Supra* note 2.

[43] [2006] 1 S.C.R. 140, 2006 SCC 4

[44] *Ibid.* at para. 21.

[45] *Ibid*.

[46] *United Taxi*, *supra* note 2, at para. 5.

[47] 2006 NSCA 74, 245 N.S.R. (2d) 206, 268 D.L.R. (4th) 408 (N.S.C.A.) at para. 16. See also, *Saint John (City) Pension Board v. New Brunswick (Superintendent of Pensions)*, 2006 NBCA 70, 301 N.B.R. (2d) 1, 268 D.L.R. (4th) 620 (N.B.C.A.), at para. 76; *A.L. Stuckless & Sons Ltd. v. Newfoundland & Labrador (Minister of Forest Resources & Agrifoods)*, 2005 NLCA 11, 244 Nfld. & P.E.I.R. 298, 33 Admin. L.R. (4th) 210 (Nfld. C.A.) (hereafter "*Stuckless*") at para. 42. For a contrary view, see *O'Malley v. Calgary*

Scotia Court of Appeal expressly rejected the argument that questions labeled as "jurisdictional" automatically attract the "correctness" standard of review, and it seems to me that the use of the four-part standard of review analysis continues to be the proper approach to the review of a challenge to an aspects of a tribunal's decision that could be said to go to its jurisdiction.

Finally, it is worthwhile to explore the relationship between the traditional grounds of review of the exercise of discretion and the *Pushpanathan* standard of review test. It is clear that the mere fact that a court is engaged in the review of the exercise of discretion by an administrative body does not relieve the court from engaging in the standard of review analysis. [48] On the contrary, Chief Justice McLachlin quite forcefully asserted the primacy of the *Pushpanathan* standard of review framework over earlier lines of authority in the following passage from her reasons for decision in *Dr. Q*: [49]

> To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. . . .
>
> Much as the principled approach to hearsay articulated in *R. v. Khan*, [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, eclipsed the traditional categorical exceptions to the hearsay rule (*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40), the pragmatic and functional approach represents a principled conceptual model which the Court has used consistently in judicial review.

Roman Catholic Separate School District No. 1, 2006 ABQB 126, 58 Alta. L.R. (4th) 110, 38 Admin. L.R. (4th) 274 (Alta. Q.B.) at paras. 57-58.

[48] See, for example, *Baker*, *supra* note 21.

[49] *Supra* note 4 at paras. 22-24.

> Just as the categorical exceptions to the hearsay rule may converge with the result reached by the *Smith* analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J. invoked the old *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.), categorical approach to discretionary decisions as a reflection that ministerial decisions have classically been afforded a high degree of deference (see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at paras. 29-30), but acknowledged that the principled approach must now prevail. Similarly, as Binnie J. recognized in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 54, under the pragmatic and functional approach, even "the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness". The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.

As David Mullan has observed:

> While there can be no doubt as to the thrust of the Chief Justice's analysis, it is not without its difficulties. Put bluntly, there are in fact a number of nominate grounds of judicial review (including some of the abuse of discretion grounds) which do not fit comfortably within the rubric of the pragmatic and functional approach or perhaps, more accurately, as subject to any basis of judicial review save correctness. . . . [B]ad faith is obviously one, as also are acting under dictation and exercising power when the purported holder of the office to which the power attaches is a usurper (the historic domain of quo warranto). Bad faith constitutes a state of mind or motivation that either exists or does not exist. Nor is it a standard that has varied with context. Similarly, acting under dictation or acting without warrant involves a factual inquiry as to whether someone not authorized to exercise a power has in fact imposed his or her will on the genuine holder of that power or simply arrogated power to himself or herself without legal authority. There simply seems to be no room for any theory of deference in dealing with allegations of this kind. However, given the relative infrequency of these particular grounds of review, it may well be that this will not be a source of great problems in the domain of abuse of discretion review. [50]

---

[50] David Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59 at p. 66.

Professor Mullan's comments may help to explain the otherwise cryptic observation that a discretionary decision can be reviewed using the standard of correctness. It had always seemed to me that, if there was only one "correct" decision, then by definition the matter was not one in which the decision-maker has any discretion. I now realize that this represents an over-simplification of the proper exercise of discretion. In some situations, as Professor Mullan suggests, administrative bodies have to "correctly" identify, and comply with, certain types of legal constraints on discretionary decision-making. On the other hand, some of the traditional grounds for review of exercise of discretion, such as the relevant considerations doctrine or the proper purposes doctrine, may be most helpful when they are used to explain why a particular exercise of discretion ought to be characterized as unreasonable or patently unreasonable.

This brings us to the Supreme Court of Canada recent decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [51] and its impact of the standard of review framework I have just described. In *VIA Rail*, Madam Justice Abella, writing for a five-member majority, ruled that the decision of the Canadian Transportation Agency under review should be viewed as a whole and was entitled to deference. [52] Justice Abella did not draw a sharp distinction between the "reasonableness" and the "patently unreasonable" standard, and suggested that "Both . . . speak to whether a tribunal's

---

[51] *Supra* note 5.

[52] *Ibid.* at paras. 83-144.

decision is demonstrably unreasonable, that is, such a marked departure from what is rational, as to be unsustainable." [53]

In a dissenting judgment authored by Madam Justice Deschamps and Mr. Justice Rothstein, four members of the Court held that those aspects of the decision dealing with "the Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context are both to be reviewed on the standard of correctness." [54] Justices Deschamps and Rothstein expressed reservations about Justice Abella's failure to segment the decision under review into different components and engage in a separate standard of review analysis with respect to each component. [55] They also objected to the introduction of the term "demonstrably unreasonable" and suggested that, while the Court may in an appropriate case engage in a review of the distinction between the "unreasonableness" and "patent unreasonableness" standards, until that happens there was no need to add another term to "the lexicon of standard of review terminology". [56]

It seems to me that the debate over whether a particular decision should be broken down into component parts or viewed as a whole is not an entirely novel one, and that its resolution in the specific context of the *VIA Rail* case need not signal a fundamental shift in standard of review jurisprudence. It has always been the case that one of the favourite

---

[53] *Ibid.* at para. 102

[54] *Ibid.* at para. 286.

[55] *Ibid*. at para. 278.

[56] *Ibid.* at para. 279.

techniques of lawyers who are seeking to challenge the validity of an administrative decision is to break it down into a series of component elements and attack the weakest links in the chain of reasoning that led to the decision. Conversely, lawyers who seek to uphold a decision tend to prefer to persuade a reviewing court to view the decision, as much as possible, in global terms rather than as a discrete set of elements. [57] The justification for the majority's preference to apply a single standard of review to the Agency's decision in *VIA Rail* as a whole is that, in the view of the Supreme Court majority, the apparently discrete elements of the decision are in fact closely integrated and each element is only properly appreciated if considered in the context of the others. Certainly the majority decision in *VIA Rail* will make it easier for counsel to argue that the mere fact that a tribunal is drawing on concepts from areas beyond the narrow confines of its own enabling statute does not automatically take it outside the realm of its expertise. [58] Nevertheless, it seems to me that the majority reasons should not be construed as standing for the proposition that it is never appropriate to segment an administrative body's decision into different components, or that it is never appropriate for different standards of review to be applied to these components.

In my view, the more interesting development in *VIA Rail* is the possibility that the Court is signaling its willingness to move away from three standards of review and collapse the "reasonableness *simpliciter*" and "patent unreasonableness" standards into a single

---

[57] For an example of Supreme Court of Canada decision in which the dissenting judges objected to the majority's view that a decision must be segmented into different components, see *C.U.P.E. v. Ontario (Minister of Labour)*, *supra* note 40, at paras. 7-13, per Bastarache, J. dissenting. It should come as no surprise that the majority invalidated the decision in question, whereas the dissenting justices would have upheld it.

[58] See, in particular, *VIA Rail*, *supra* note 5, at paras. 92-100.

standard. At a minimum, Justice Abella's majority opinion indicates that the members of the Court recognize that the distinction between the two standards is not as sharp as the previous jurisprudence has suggested. [59] And it may be that judges in lower courts will feel empowered to believe that their primary focus in standard of review analysis henceforth ought to be whether to use the "correctness" standard or some form of "reasonableness" analysis. On the other hand, the dissenting opinion of Justices Deschamps and Rothstein suggests that this issue is not completely settled, and may have to be addressed on another occasion.

I would be remiss if I did not make one final observation about the majority's reasoning in *VIA Rail*. I realize that the Canadian Transportation Agency's decision in *VIA Rail* was a complicated one, and that the members of the Supreme Court of Canada majority were constrained to explain the basis not only for their disagreement with the dissenting members of their own Court but also with the majority of the Federal Court of Appeal. Nevertheless, it seems to me that the 85 paragraphs the majority devoted to explaining why the Agency's decision was "reasonable" [60] could serve just as easily as an explanation of why the Agency's decision was "correct". [61] This is not a criticism that is unique to this particular decision, and it is obviously undesirable if respect for the limits of the judicial role using the "reasonableness" or "patent unreasonableness" standard translates into a perfunctory form of review that serves no useful purpose. Nevertheless,

---

[59] *Ibid.* at paras. 102-103.

[60] *Ibid.* at paras. 144-229.

[61] Indeed, at para. 111, Justice Abella observed that ". . . far from being unreasonable for the Agency to adopt a frame of reference premised on achieving personal wheelchair-based accessibility in 13 economy coach cars and 17 service cars out of the 139 cars VIA purchased, it may well have been found to be patently unreasonable for the Agency not to do so."

it seems to me that it is important to reinforce the distinction between review using some form of "reasonableness" standard, however it is described, and "correctness" review. With the greatest of respect, it seems to me that the Supreme Court majority in *VIA Rail* missed an opportunity to do so.

3. *United Taxi* and the Modification of the Framework in Respect of Review of Municipal By-laws (and Other Administrative Legislation?)

So far I have been describing the *Pushpanathan* standard of review framework as it is applied to the adjudicative decisions of administrative bodies, primarily tribunals. For present purposes this discussion is useful only to the extent that the same standards are used in the review of administrative legislation. In brief, for reasons that are set out below, standard of review analysis is relevant to the review of some administrative legislation, but it is not applied to where the basis for the challenge to the validity of a municipal by-law (and possible other forms of administrative legislation) is that it is *ultra vires*. Those types of challenges will automatically be reviewed using the "correctness" standard.

Nanaimo (City) v. Rascal Trucking Ltd. [62] was the first case in which the Supreme Court of Canada applied the *Pushpanathan* standard of review framework to the review of a resolution of a municipal council. The issue in *Rascal Trucking* was whether the city of Nanaimo had the authority to declare a pile of soil a nuisance and order its removal. The Court was very clear in characterizing this action of the council as an adjudicative as

---

[62] [2000] 1 S.C.R. 342, 2000 SCC 13 (hereafter "*Rascal Trucking*").

distinct from a legislative act, [63] and as a result it was not a particularly long leap to assimilate the review of this type of decision into the framework for the decisions of tribunals. The Court went through the four-part *Pushpanathan* test and concluded that in determining the scope of its jurisdiction to make the order in question the council had to be "correct". [64] The Court determined that the council was correct in concluding that it had the legislative authority to declare the pile of soil a nuisance. The Court then held that the actual decision to make this particular declaration was reviewable using the "patent unreasonableness" standard, and found no basis for interfering with the council's decision. [65]

The Court returned in *Chamberlain* to the application of standard of review analysis to a resolution, this time a resolution of a school board refusing to authorize the use of books portraying same sex couples in a positive light for use as supplementary materials in a teaching a family life class to kindergarten and grade one students. Since the resolution dealt with a teacher's request concerning three specific books, it might be thought that this was simply another application of the principle articulated in *Rascal Trucking* to adjudication by a different type of local government body. While Chief Justice McLachlin, writing for the majority, referred to the application of the *Pushpananthan* standard of review framework in reviewing the school board's "decision", [66] Mr. Justice

---

[63] *Ibid.* at para. 28.

[64] *Ibid.* at paras. 29-33.

[65] *Ibid.* at paras. 35-39.

[66] *Chamberlain*, *supra* note 1, at para. 4.

LeBel, in the passage quoted at the outset of this paper, commented on the inappropriateness of using this framework in the review of the "decisions or actions" of local government bodies. [67] The implication was that, at least in Justice LeBel's view, the majority was suggesting that the *Pushpanathan* standard of review analysis applied not only to review of the adjudicative decisions of local government bodies but also to the review of by-laws and other forms municipal action.

It was not obvious that the majority's reasons actually carried this implication. For example, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [68] a case decided after *Rascal Trucking* but before *Chamberlain*, the Supreme Court of Canada approached a challenge to the validity of a municipal by-law on traditional *ultra vires* grounds without any reference to the use of the *Puspanathan* standard of review framework. In any event, the Supreme Court took the opportunity presented by the *United Taxi* case to clarify the relationship of the *Pushpanathan* standard of review to challenges to municipal by-laws. The Court did so in the following passage:

> The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised. [69]

---

[67] *Ibid.* at para. 191.

[68] [2001] 2 S.C.R. 241, 2001 SCC 40

[69] *United Taxi*, *supra* note 6, at para. 5.

David Jones, Q.C., has suggested that this passage is not fundamentally at odds with the *Pushpanathan* framework, and is best understood as a shortcut to the inevitable outcome of such an analysis. He observed:

> To the extent that this passage states a conclusion that the pragmatic and functional analysis would inevitably determine that the correctness standard would apply to any issue about whether the statutory delegate acquired jurisdiction to make a particular type of decision, it is perhaps unremarkable. After all, there is a constitutional dimension to the court's supervisory authority to determine whether the legislature conferred a particular jurisdiction on a particular statutory delegate. [70]

Others might argue, of course, that there could be circumstances in which a court would conclude that deference would be owed to a municipal council's assessment of the scope of its own authority in enacting a by-law if the *Pushpanathan* analysis were brought into play. [71] To the extent that this is the case, *United Taxi* is an exception to the framework of analysis put forward in *Pushpanathan*, but to date at least, it appears to remain a relatively limited one.

In a number of cases, decided both before and after *United Taxi*, courts have applied the *Pushpanathan* standard of review analysis to challenges to the validity of administrative legislation other than municipal by-laws. [72] These include a challenge to the validity of an order-in-council exempting timber from a statutory prohibition on timber export, [73]

---

[70] David Jones, "Recent Developments in Administrative Law" in Newfoundland Continuing Legal Education, ed., Focus on Administrative Law, 2004 (St. John's: Law Society of Newfoundland, 2004) at 13, quoted in *Stuckless*, *supra* note 47, at para. 41.

[71] Indeed, Madam Justice McLachlin, as she then was, made this suggestion in her dissenting judgment in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at pp. 247-248.

[72] See cases cited in Brown and Evans, *supra* note 7, at 14:3320, note 451.

challenges to the validity of rules and regulations enacted by economic regulatory agencies, [74] and an attack on a resolution of a college board of governors excluding a class of employees from the definition of academic staff. [75] On the other hand, there are cases in which courts have held that the *United Taxi* principle applies where there was a challenge to the legal authority of a school board [76] and a workers' compensation board [77] to enact particular policies.

It may not be possible to reconcile all of these decisions, but it seems to me that one may be able to extract certain working hypotheses. The first, and most obvious, is that if a litigant is making a challenge, based on an interpretation of a municipality's enabling legislation, that the municipality does not have the authority to enact a by-law, there is no need to go through a standard of review analysis and the standard of review is automatically "correctness". I see no logical basis for exempting other local government bodies from this rule. On the other hand, it seems to me that a case could be made for deference to the expertise of a regulatory body in interpreting the scope of its statutory authority to make rules, regulations or other forms of administrative legislation. Of

---

[73] *David Suzuki Foundation v. British Columbia (Attorney-General)*, 2004 BCSC 620, 17 Admin. L.R. (4th) 85 (B.C.S.C.). See also *Greenisle Environmental Inc. v. Prince Edward Island*, 2005 PESCTD 33, 248 Nfld. & P.E.I.R. 39, 33 Admin. L.R. (4th) 91 (P.E.I.S.C.T.D.), at paras. 29-30.

[74] *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 193 O.A.C. 180, 74 O.R. (3d) 147 (Ont. C.A.); *T.W.U. v. Canada (Radio-Television & Telecommunications Commission)*, 2003 FCA 381, [2004] 2 F.C.R. 3 (F.C.A.).

[75] *S.A.F.A. v. Southern Alberta Institute of Technology*, 2004 ABCA 228, 13 Admin. L.R. (4th) 188 (Alta. C.A.).

[76] *O'Malley v. Calgary Roman Catholic Separate School District No. 1* , 2006 ABQB 126, 58 Alta. L.R. (4th) 110, 38 Admin. L.R. (4th) 274 (Alta. Q.B.), at paras. 51-58.

[77] *White v. Alberta (Workers' Compensation Board Appeals Commission)*, 2006 ABQB 359, 57 Alta. L.R. (4th) 282, 41 Admin. L.R. (4th) 141 (Alta. Q.B.), at para. 17.

course, depending on the circumstances, that line of argument might not be successful, but it seems to me that it would be a mistake to jump directly to the "correctness" standard without going through the *Pushpanathan* analysis.

Review of administrative legislation enacted by the Governor-in-Council or the Lieutenant-Governor-in-Council is a bit more difficult to analyze. On one hand, we have a strong tradition of deference to the authority of Cabinet to enact delegated legislation, and Cabinet is typically given broad scope to take into account a wide range of considerations in exercising this power. [78] On the other hand, this deference flows typically from the respect the judiciary has for the democratic legitimacy of decision-making by elected officials rather than from respect for the specialized knowledge of Cabinet or its members. In this sense, regulations enacted by Cabinet have more in common with municipal by-laws than they do with rules made by sophisticated economic regulatory agencies.

Challenges based on relatively straight-forward questions of statutory interpretation represent the easiest cases to assess in terms of the applicability or non-applicability of the *United Taxi* principle. The more complicated situations involve challenges using the more traditional review of discretion principles, ranging from sub-delegation, dictation and fettering of discretion through bad faith, discrimination, improper purposes and irrelevant considerations. [79] In *Montreal (Ville) v. 2952-1366 Quebec Inc.*, [80] a challenge

---

[78] See *Thorne's Hardware v. The Queen*, [1983] 1 S.C.R. 106, and cases cited in Brown and Evans, *supra* note 7, at 14:3352 and 15:3221.

[79] See Brown and Evans, *ibid.*, at 14:3434-14:4300 and 15:3100-15:3314.

to the validity of a Montreal noise control by-law, the Supreme Court of Canada drew a sharp distinction between review of the existence of a power to enact a particular by-law and review of the exercise of this power. One might have expected the Court to indicate that, even though a challenge to the existence of a power to enact a by-law would not require a modern standard of review analysis, review of the exercise of that power would require such an analysis. Instead, Chief Justice McLachlin and Madam Justice Deschamps, writing for the majority, indicated:

> The rules governing the exercise of regulatory powers are well known (*Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Hamilton (City of) v. Hamilton Distillery Co.* (1907), 38 S.C.R. 239; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231). The intervention of courts in this sphere has been marked by great deference. Only an exercise of power in bad faith or for improper or unreasonable purposes will justify judicial review (*Kruse*; *Montréal (City of) v. Beauvais* (1909), 42 S.C.R. 211; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (C.A.); *Juneau v. Québec (Ville de)*, [1991] R.J.Q. 2781 (C.A.); *Shell Canada Products*; *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368). [81]

This statement suggests that the more traditional review of discretion principles, unaffected by modern standard of review analysis, continue to be relevant to the review of the exercise of municipal authority to enact by-laws. On the other hand, some lower courts have taken the view that once one gets past the stage of whether or not a municipality has the authority to enact a particular by-law, review of the exercise of that authority will follow the modern approach using the *Pushpanathan* standard of review test. [82]

---

[80] [2005] 3 S.C.R. 141, 2005 SCC 62, especially at paras. 41-42.

[81] *Ibid.* at para. 42.

[82] See *Keyland Developments Corp. v. Cochrane (Town)*, 2007 ABQB 160 (Alta. Q.B.) at paras. 9-10.

Conclusion

I suspect that many judges will draw comfort from the retreat that *United Taxi* represents from the possibility that the full *Pushpanathan* standard of review analysis applies to review of all forms of administrative action, including administrative legislation. A relatively "bright line" test to determine the standard of review in some areas undoubtedly makes things easier for both lawyers and judges, and it is not obvious that carving out some areas of clarity is inconsistent with the overall goals of a sophisticated approach to standard of review analysis.

Nevertheless, it seems to me that the introduction of this "exception" to the ambitious role for modern standard of review analysis that the Supreme Court of Canada announced in *Dr. Q.* leaves a number of questions to be answered. The first is how far does the exception extend beyond its heartland in challenges to the statutory authority of local government bodies to enact delegated legislation? The second, and more difficult question, is whether the exception from the requirement to engage in standard of review analysis extends to challenges to the validity of administrative legislation based on the traditional principles governing the review of the exercise of discretion? For the time being, the answer to the second question appears to be yes, in some cases, but it is not clear whether this is an exception that applies only to certain types of administrative legislation, or is part of a broader tension between modern standard of review analysis

and the traditional principles governing the exercise of discretion that remains to be resolved.