

## **Decision-makers under new scrutiny: sufficiency of reasons and timely decision-making**

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When people think about our “justice system,” they often only think about courts and the justice that courts dispense.

As a result, our court system is given much attention and scrutiny. For example, when there is chronic delay and stays of proceedings are issued, there is often a mountain of publicity.<sup>1</sup> Rules are regularly scrutinized by Rules Committees, waiting times for court hearings are monitored, and proposals for reform are regularly advanced and discussed.

Another part of our justice system is the “administrative justice system.” Tribunals, boards, commissions, regulatory officials, and other governmental officers dispense justice under that system. The system is massive, both in terms of the number of administrative decision-makers, and in terms of the number of cases involved.<sup>2</sup> To the individuals involved in administrative proceedings, the matters are extremely important, sometimes life-changing. As far as the public is concerned, issues of great moment can arise, such as a labour board’s determination of the legality of a work-stoppage that causes great inconvenience, a competition bureau’s assessment of whether a massive corporate acquisition can proceed, or a parole board’s decision of whether a convict, said by some to be dangerous, can be paroled. Yet, the attention and scrutiny paid to the “administrative justice system” is far less than that paid to the court system.

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<sup>1</sup> See, e.g., the stay of murder charges on account of unreasonable delay in *R. v. Court and Monaghan* (1997), 36 O.R. (3d) 263 (Gen. Div.), and the subsequent publicity, described in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)*, (2004), 70 O.R. (3d) 332 (Div. Ct.), rev'd (2007), 86 O.R. (3d) 259, leave granted by S.C.C.

<sup>2</sup> For example, in 2006, Ontario’s Workplace Safety and Insurance Appeals Tribunal conducted 3,005 hearings and released 2,849 decisions: *Annual Report 2006, Workplace Safety and Insurance Appeals Tribunal*, p. 35.

Today, the administrative justice system faces significant challenges and, in two respects, is starting to be scrutinized much more closely. This paper examines those two respects.

There has been a veritable explosion of litigation concerning whether the reasons for decision of tribunals are adequate. In this paper, the legal principles in this area, largely borrowed from the court system (specifically criminal courts), are explored. The scrutiny to given this issue is important – there are indications that developments in this area of law are changing tribunal practice, sometimes for the better, but there are real costs and detriments imposed. These need to be identified and the legal principles re-assessed.

Secondly, while the evidence is often anecdotal, it would seem that delays in the administrative justice system are increasingly severe. There are delays that would never be countenanced in the court system and whose effects, both on the parties involved and the public interest, are often massive. This problem has now been given greater prominence by the Supreme Court's decision in *Blencoe*.<sup>3</sup> But the causes remain largely unexplored and the solutions seem elusive. It is the purpose of this paper to begin that exploration of the causes and the solutions and prompt discussion and debate.

#### **A. Sufficiency of reasons**

The legal principles concerning sufficiency of reasons have developed over time. The principles that apply to judicial decisions have affected the development and application of the principles in administrative proceedings. This cross-pollination means that those interested in the sufficiency of administrative reasons for decision must have close regard to what has happened and is happening in the area of sufficiency of judicial reasons.

The development of the principles concerning sufficiency of judicial reasons shows us that the Supreme Court has moved from a relatively liberal, non-interventionist posture, to a far stricter posture, and then, recently, to a slightly more liberal posture aimed

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<sup>3</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

perhaps at reducing the amount of litigation in this area. Of concern, however, is the fact that there is now seldom unanimity in the Supreme Court of Canada on this issue. Reasonable minds, applying the same principles, are reaching different results. This raises the question: are the principles, by their nature, impossible to define with sufficient precision? Should more general principles be developed, or a higher threshold for appellate intervention be adopted, in order to try to reduce the amount of litigation in this area?

(a) *The principles in court proceedings*

(i) *Before Sheppard and Braich*

Although there had been some small and isolated commentary in earlier cases,<sup>4</sup> the Supreme Court's first significant foray into the area of adequacy of reasons took place in 1994 in *R. v. Burns*.<sup>5</sup> In that case, after a very brief review of the evidence, the trial judge gave very brief reasons:

I had the opportunity to hear the evidence of [the complainant] and to observe her demeanour in the witness stand. Although she was not sure of the exact dates of the specific acts and was confused as to some of the continuing events, she did present her evidence in an honest and straightforward manner, without equivocation. She was in my opinion a credible and believable witness. I accept her evidence as to the alleged indecent assaults from 1980 to 1983, and I also accept her evidence as to the sexual assault that occurred in January of 1987.

Based upon that evidence, I am satisfied beyond a reasonable doubt that the accused is guilty on both counts.

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<sup>4</sup> See *R. v. Smith*, [1990] 1 S.C.R. 991 and *Macdonald v. The Queen*, [1977] 2 S.C.R. 665 (a trial judge does not err because he or she did not provide reasons on problematic points). See also the comment in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14: "Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."

<sup>5</sup> [1994] 1 S.C.R. 656.

The B.C. Court of Appeal<sup>6</sup> found that these reasons were inadequate because he failed to disclose that he had considered certain frailties in the evidence of a complainant in this sexual assault case. As well, the brevity of the reasons led the Court of Appeal to have doubt that the trial judge had considered all of the evidence.

The Supreme Court of Canada reversed the Court of Appeal and found that the reasons were adequate. It affirmed the proposition that trial judges do not have to demonstrate that they know the law and have considered all aspects of the evidence. It added that trial judges are not required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. For good measure, it stated that this made “good sense”:

To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

In two cases in 1996, the Supreme Court held that non-existent or inadequate reasons on credibility issues may justify appellate intervention.<sup>7</sup> The reasons in these cases was not particularly long. The line between sparse reasons that require appellate intervention and sparse reasons that do not remained somewhat unclear.

(ii) *Sheppard and Braich*

Six years later, the Supreme Court greatly clarified and extended the law in *R. v. Sheppard*<sup>8</sup> and *R. v. Braich*.<sup>9</sup>

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<sup>6</sup> (1992), 74 C.C.C. (3d) 124 (B.C.C.A.).

<sup>7</sup> *R. v. R. (D.)*, [1996] 2 S.C.R. 291; *R. v. Burke*, [1996] 1 S.C.R. 474.

<sup>8</sup> [2002] 1 S.C.R. 869.

<sup>9</sup> [2002] 1 S.C.R. 903.

In my view, whether intended or not, the effect of this clarification and extension was to cause far stricter standards in judgment-writing to be followed. Further, whether intended or not, for the same reasons, the judgment served as a high profile advertisement to counsel that this was a potentially strong ground of objection. These judgments adopted a rather sweeping, policy-based articulation of the principles, and this probably served to give the case far more prominence and attention. The amount of litigation in this area drastically increased after *Sheppard*.

In *Sheppard*, the Supreme Court clearly recognized a duty on trial judges to give adequate reasons. This was based on several important grounds:

- *Facilitating review.* “Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render.”<sup>10</sup> Losing parties need to know why they lost so informed consideration can be given to grounds for appeal.
- *Transparency.* The public deserves to know the outcomes of cases and why they were decided in the way that they were: “[i]nterested members of the public can satisfy themselves that justice has been done, or not, as the case may be.”<sup>11</sup>
- *Accountability.* “Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.”<sup>12</sup>

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<sup>10</sup> *Ibid.*, at para. 15.

<sup>11</sup> *Ibid.*, at para. 24.

<sup>12</sup> *Ibid.*, at para. 15.

However, review for the adequacy of reasons is not meant to be an exercise in literary criticism: “[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.”<sup>13</sup> The duty goes no further than to render “a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge’s decision.”<sup>14</sup>

To quash a decision on the basis of inadequacy of reasons, an appellate court must find both that the reasons are inadequate and that they prevent appellate review. In the words of the Supreme Court, “The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.”<sup>15</sup> This recognized the possibility that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record.

The holding that sometimes the record can “save” reasons” was an important feature of *Sheppard*. The Supreme Court clearly confirmed that recourse to the record may be had in order to assess whether there has been the necessary level of facilitation of review, transparency and accountability: “[w]here it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene.”<sup>16</sup>

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<sup>13</sup> *Ibid.*, at para. 26.

<sup>14</sup> *Ibid.*, at para. 55(8).

<sup>15</sup> *Ibid.*, at para. 33.

<sup>16</sup> *Ibid.*, at para. 46.

The reasons in *Sheppard* were inadequate. They consisted of this single statement:

Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.<sup>17</sup>

In many respects, the companion case of *R. v. Braich* sheds more light than *Sheppard* does on this area of law because, unlike *Sheppard*, the reasons were found to be adequate.

In *Braich*, the accuseds, who appealed their conviction at trial, knew why they lost. Their argument in the Court of Appeal consisted of “informed disagreement” with the trial judge.<sup>18</sup> The accuseds did not encounter difficulties from the trial judge’s reasons for judgment in formulating grounds of appeal. Instead, their complaint was that the trial judge “did not demonstrate in his reasons sufficient sensitivity to all the factors which [they] consider to be important.”<sup>19</sup> This does not make reasons inadequate. The trial judge was “came to grips with the issues thus defined by the defence” and the fact that “he did not advert to all of the secondary or collateral circumstances that the [accuseds] say had a bearing on the main issue” was not a reason to find the reasons inadequate.<sup>20</sup>

The Supreme Court in *Braich* held that the B.C. Court of Appeal was wrong to insist that the trial judge demonstrate a competent weighing of the frailties in the evidence. It was also wrong to state that if the trial judge had thought harder about the problems in the case and had written a more extensive analysis, he might have reached a different conclusion.. Neither of these have anything to do with the “functional test” that is to be applied when assessing adequacy of reasons. Under that test, the issue is whether the decision is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge’s decision. In this case, the parties received “a set of reasons that permitted meaningful appellate review of the correctness

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<sup>17</sup> *Ibid.*, at para. 2.

<sup>18</sup> *Ibid.*, at para. 21.

<sup>19</sup> *Ibid.*, at para. 22.

<sup>20</sup> *Ibid.*, at para. 25.

of the trial judge’s reasons,” they did not get “boilerplate reasons” or a generic “one size fits all” judicial disposition, and they could see in the reasons “an intelligible pathway...to [the] conclusion.”<sup>21</sup>

***(iii) After Sheppard and Braich***

The Supreme Court’s cases, post-*Sheppard*, emphasize the need for a very practical, functional approach to the review of adequacy of reasons. The sweeping and ringing public policy language in *Sheppard* is gone and is replaced with analysis surrounding a single important question: did the reasons, short as they are, permit meaningful appellate review?

Some retrenchment is evident in these decisions. Many of them seek to clarify and limit what was said in *Sheppard* and *Braich*.

In *R. v. Gagnon*,<sup>22</sup> the Supreme Court dealt with an objection that certain reasons on issues of credibility were inadequate. While rationales for findings of credibility must be present, the Supreme Court emphasized that “[a]ssessing credibility is not a science” and that “[i]t is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.”<sup>23</sup>

The recent case of *R. v. Dinardo*<sup>24</sup> emphasizes the need for reasons to focus on the live issues in the case, not every last issue in the case.

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<sup>21</sup> *Ibid.*, at paras. 40-42.

<sup>22</sup> [2006] 1 S.C.R. 621.

<sup>23</sup> *Ibid.*, at para. 20.

<sup>24</sup> 2008 SCC 24 (May 9, 2008).



*Sheppard* instructs appeal courts to adopt a functional approach to reviewing the sufficiency of reasons (para. 55). The inquiry should not be conducted in the abstract, but should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel (*R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32). An appeal based on insufficient reasons will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review: *Sheppard*, at para. 25.<sup>25</sup>

In this case, the Court noted that reasons “acquire particular importance” where the trial judge must “resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge’s conclusion is apparent from the record”.<sup>26</sup> In this case, the complainant’s evidence was not only confused, but contradicted as well by the accused. The trial judge’s reasons failed to deal with this issue. This deficiency, by itself, is not fatal. If the trial judge’s reasons are deficient, the reviewing court must examine the evidence and determine whether the reasons for conviction are, in fact, patent on the record.<sup>27</sup> The record in this case was of no assistance. A new trial was ordered.

The Supreme Court took the opportunity to clarify further this area of law in *R. v. Walker*.<sup>28</sup> In that case, a trial judge issued very limited reasons in support of a decision to acquit an accused of second degree murder.

The trial judge’s reasons were very brief.<sup>29</sup> The trial judge set out a few reasons suggesting that the accused was properly identified as the killer, and that the accused caused the death of the deceased. However, the trial judge was left with a reasonable doubt as to whether the *mens rea* was present for conviction.

The trial judge’s reasons for having a reasonable doubt – the core of the decision on these very important charges – were very brief indeed:

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<sup>25</sup> *Ibid.*, at para. 25.

<sup>26</sup> *Ibid.*, at para. 27.

<sup>27</sup> *Ibid.*, at para. 32.

<sup>28</sup> 2008 SCC 34 (June 6, 2008).

<sup>29</sup> *R. v. Walker*, [2004] S.J. No. 850 (Q.B.).

Although it's not a specific finding of fact, it is my distinct impression that in part due to the effects of alcohol and in part to his personality, at the time of the shooting Walker was engaged in an act of bravado or machismo. He was showing off his latest toy [the shotgun] in an effort to intimidate Ms. Reynolds and impress her with his disappointment at her failure to embrace his desire to engage in a sexual threesome and her gall at walking away from him at the bar.

As disgusting and as utterly contemptuous as I find that conduct to be, it is not and I cannot find it to be tantamount to an intention to kill or an intention to cause bodily harm likely to cause death. And under the circumstances, I find Walker not guilty of murder, but guilty of manslaughter.

The Crown appealed. The Saskatchewan Court of Appeal reversed, finding that the reasons were inadequate.<sup>30</sup> It found that while the general basis for the decision was disclosed – insufficient mens rea – the foundation for the conclusion reached was not disclosed. Was the acquittal based on the evidence of the accused's intoxication? Was it based on the evidence suggesting that the accused accidentally shot the victim? Was it some combination of the two? Uncertain as to the basis for the trial judge's conclusion, the Saskatchewan Court of Appeal allowed the appeal and ordered a new trial.<sup>31</sup>

The Supreme Court of Canada allowed the appeal and restored the acquittal. It noted that “the trial judge's reasons, delivered orally, fell well short of the ideal” but that was “not the applicable standard.”<sup>32</sup> The standard was whether the Crown's “limited right of appeal” was “impaired.”<sup>33</sup> Based on that criterion – and that criterion alone – the reasons were adequate.

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<sup>30</sup> *R. v. Walker* (2007), 220 C.C.C. (3d) 528 (Sask. C.A.).

<sup>31</sup> The majority reasons were written by Cameron J.A. Jackson J.A. dissented. In her view, the trial judge had clearly concluded that the specific intent for murder had not been made out. As a result, enough detail had been given in the reasons in order to allow for meaningful appellate review.

<sup>32</sup> *Supra*, n. 28, at para. 27.

<sup>33</sup> *Ibid.*

In my view, the fact that, in *Walker*, the Crown only had a limited right of appeal from an acquittal<sup>34</sup> was significant. Since little was really in issue, very little needed to be said in the reasons. Despite that particular feature of *Walker*, the Supreme Court seems to be stressing the point once again that in a particular case brief reasons may be perfectly adequate.

Perhaps of significance in *Walker* is the fact the Supreme Court measured the adequacy of the reasons against only one criterion, the ability of the losing party to appeal. The broader rationales offered in *Sheppard*, such as transparency and accountability, were not used as the yardstick by which the Supreme Court measured the adequacy of reasons. *Walker* may signal the adoption of a more practical approach to the assessment of adequacy of reasons.

Finally, the Supreme Court of Canada has recently taken the opportunity to set out its views concerning the tests to be applied concerning the adequacy of trial judges' reasons in the civil claim context.<sup>35</sup> The principles are essentially those set out in *Sheppard*:

The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.

In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome issues of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is

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<sup>34</sup> *Criminal Code*, R.S.C. 1985, c. C-46 (Crown appeal is on "a question of law alone").

<sup>35</sup> *Hill v. Hamilton-Wentworth Police Services Board* (2007), 285 D.L.R. (4th) 6.

not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself”: *Sheppard*, at para. 26.

Of note is the Court’s recognition of a varying standard of adequacy depending on the context of the case, including the issues involved. Also of note is the emphasis on making the assessment of the adequacy of reasons in part based on the nature of the record before the Court.

A noteworthy development in the post-*Sheppard and Braich* era is the degree to which the adequacy of reasons has been very much in the eye of the beholder in the Supreme Court of Canada. In this era, the Supreme Court of Canada has been unanimous in the majority of its cases generally, most of which are very complicated and difficult. But in the area of adequacy of reasons, there is often a majority decision and a dissenting decision.<sup>36</sup>

**(b) *The principles in administrative proceedings***

At common law, a number of courts held that procedural fairness did not require the provision of reasons,<sup>37</sup> but courts did repeatedly emphasize the desirability of it,<sup>38</sup> and some courts went further and did impose limited requirements to issue reasons.<sup>39</sup>

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<sup>36</sup> See, for example, *R. v. Boucher*, [2005] 3 S.C.R. 499, *R. v. Deschamplain*, [2004] 3 S.C.R. 601 and *R. v. Gagnon*, *supra*, n. 22.

<sup>37</sup> *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (H.C.A.), at pp. 665-66; *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.), at pp. 239-240.

<sup>38</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 180-81; *Northwestern Utilities Ltd.*, *supra*, n. 3737, at p. 706; *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A.), at para. 38; *Boyle v. Workplace Health, Safety and Compensation Commission (N.B.)* (1996), 179 N.B.R. (2d) 43 (C.A.).

<sup>39</sup> *Orlowski v. British Columbia (Attorney-General)* (1992), 94 D.L.R. (4th) 541 (B.C.C.A.), at pp. 551-52; *R.D.R. Construction Ltd. v. Rent Review Commission* (1982), 55 N.S.R. (2d) 71 (C.A.); *Taabaa v. Refugee Status Advisory Committee*, [1980] 2 F.C. 316 (T.D.); *Marques v. Canada (Minister of Citizenship and Immigration) (No. 1)* (1995), 116 F.T.R. 241.

However, some sounded warnings about the imposition of a burdensome duty on administrative tribunals to provide reasons, noting the possibility of cost of delay,<sup>40</sup> and the need for administrative tribunals to be able to dispense just but expeditious decisions.<sup>41</sup>

The Supreme Court resolved the issue in *Baker v. Canada (Minister of Citizenship and Immigration)*.<sup>42</sup> The key portion of the majority reasons of the Court, *per* L'Heureux-Dubé J., is as follows:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.<sup>43</sup>

On the facts of the case, reasons were required. In issue was a decision of the Minister of Citizenship and Immigration under s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. Under that section, the Minister is empowered to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted.

In the view of the majority of the Supreme Court, this was a decision of “profound importance” and it “would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.”<sup>44</sup> However, the requirement to give reasons was fulfilled when the appellant was given certain notes

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<sup>40</sup> *Osmond, supra*, n. 37, at 668.

<sup>41</sup> R. A. Macdonald and D. Lametti, “Reasons for Decision in Administrative Law” (1990), 3 C.J.A.L.P. 123.

<sup>42</sup> [1999] 2 S.C.R. 817.

<sup>43</sup> *Ibid.*, at para. 43.

<sup>44</sup> *Ibid.*

made by a subordinate reviewing official. On the facts of this case, these notes, by inference, were the reasons behind the Minister's decision. In a nod to "flexibility" and "the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured," these documents were accepted as "sufficient reasons."<sup>45</sup> While "individuals are entitled to fair procedures and open decision-making," this fairness and transparency can take place in many ways.<sup>46</sup>

Recently, in *Dunsmuir*,<sup>47</sup> in its discussion of what the revised standard of review of reasonableness means, the Supreme Court of Canada seems to have suggested that the "process of articulating the reasons and to outcomes" are part of the analysis, with "justification, transparency and intelligibility" as the objective:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of

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<sup>45</sup> *Ibid.*, at para. 44.

<sup>46</sup> *Ibid.* However, in some circumstances, where the individual's interests are massively affected by an administrative decision, complete reasons must be delivered. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, persons who argued that they were being deported to a country where there was a risk they might be tortured deserved written reasons that "must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual ... will be subjected to torture, execution or other cruel or unusual treatment" and "why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act" (at para. 126). The reasons must also come from the Minister, rather than take the form of advice or suggestion, such as the memorandum of a public servant. The fact that these high requirements for reasons were not present in a case such as *Baker* suggests that *Suresh* is a very limited exception that applies only to decisions that have a massive impact on the affected individual.

<sup>47</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9.

possible, acceptable outcomes which are defensible in respect of the facts and law.<sup>48</sup>

Recently, in *Lake*, the Supreme Court briefly examined the adequacy of reasons of a Minister's decision to surrender an individual to a foreign state for extradition.<sup>49</sup> The Court confirmed that the Minister does have an obligation to provide reasons, but the reasons need not be comprehensive. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. The Minister is not required to provide a detailed analysis for every factor. The Court noted that an explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether the conclusion reached was reasonable.<sup>50</sup>

It is fair to say that *Baker* unleashed a torrent of litigation in lower courts on the adequacy of reasons. Unlike the situation existing in the court system where the Supreme Court has worked to clarify what *Sheppard* and *Braich* mean and to engage, to some extent, in a retrenchment, the Supreme Court has not revisited the issue of sufficiency of reasons in the administrative justice system.

Some trends and observations found in the jurisprudence in the administrative justice system are as follows:

- By and large, courts correctly state the test for adequacy of reasons: reasons are required so that a claimant may know why his or her claim has failed and be able to decide whether to seek leave for judicial review.<sup>51</sup>

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<sup>48</sup> *Ibid.*, at para. 47.

<sup>49</sup> *Lake v. Canada (Minister of Justice)*, 2008 SCC 23.

<sup>50</sup> *Ibid.*, at para. 46.

<sup>51</sup> See, e.g., *Mendoza v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 846 and *Johnson v. Canada (Attorney General)* (2007), 65 Admin. L.R. (4th) 28 (Fed. C.A.), at para. 6.

But in some cases, fairly demanding requirements for the giving of reasons have been imposed.<sup>52</sup>

- Where a tribunal does not reject the evidence of a party, but then rules in a manner that suggests that that evidence is not accepted, the reasons may be found to be inadequate.<sup>53</sup>
- Where there is conflicting evidence, the tribunal must make clear the path by which the evidence has been accepted or rejected.<sup>54</sup>
- Inadequacy may be found where “[i]t is simply unclear what relevant evidence the Tribunal accepted and what it rejected.”<sup>55</sup>
- The greater the protection from judicial review accorded to a Tribunal, the greater may be the need for reasons.<sup>56</sup>

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<sup>52</sup> *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.). The National Transportation Agency failed to fully explain the meaning of “undue” under its statute or set out the reasoning process followed. The key portion of the decision is in para. 22: “The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.” In *Gray v. Director of the Ontario Disability Support Program* (2002), 59 O.R. (3d) 364 (C.A.), the court cited and adopted *VIA Rail* at para. 22. Most courts across the country have cited either *VIA Rail* or *Gray*. Query whether in doing so, they have adopted a standard far higher than that specified in *Baker*, perhaps approaching the standard required in criminal court cases.

<sup>53</sup> *Gray v. Director of the Ontario Disability Support Program* (2002), 59 O.R. (3d) 364 (C.A.); *Harley v. Employment and Assistance Appeal Tribunal*, 2006 BCSC 1420; *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission*, 2008 CanLII 25052 (Div. Ct.); *Law Society of Upper Canada v. G.N.*, 2005 ONLSAP 0001 (rejected argument that it was “obvious” from the reasons that one party’s evidence was accepted and the other not – necessary to go further and say why credibility was rejected). See also *Vargas v. Canada (Citizenship and Immigration)*, 2008 FC 709 (“The issues of credibility, subjective fear and state protection are conflated. cursory references to delay and failure to approach the Mexican authorities are rolled into a cryptic analysis that purports to constitute a negative credibility finding.”)

<sup>54</sup> *Law Society of Upper Canada v. G.N.*, 2005 ONLSAP 0001 at para. 111; *Harley v. Employment and Assistance Appeal Tribunal*, 2006 BCSC 1420; *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission*, 2008 CanLII 25052 (Div. Ct.); *Vinland Resources Limited v. Mineral Claims Recorder*, 2008 NLCA 12.

<sup>55</sup> *Ibid.* at para. 23; *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission*, 2008 CanLII 25052 (Div. Ct.); *Vinland Resources Limited v. Mineral Claims Recorder*, 2008 NLCA 12; *Johnson v. Canada (Attorney General)*, 2007 FCA 66 at paras. 6-9.



- Seldom do courts use the record that was before the tribunal to supplement the reasons.<sup>57</sup> This sits uneasily with the well-established presumption that an administrative decision-maker has considered all the evidence and so there is no need to mention all the documentary evidence that was before it.<sup>58</sup>
- There are frequent reminders that reasons need not include every last bit of evidence and argumentation raised in the case.<sup>59</sup>
- It is not enough just to give conclusions without the reasons.<sup>60</sup>

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<sup>56</sup> *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), 160 N.S.R. (2d) 241 (N.S.C.A.).

<sup>57</sup> A good exception to this trend is *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 (C.A.), at para. 112-117, where the court was prepared to conclude, from documents sent by the decision-maker to the parties, that the decision-maker was aware of the principles under the Act that he was to follow. The recitation of the principles under the Act would be surplusage. The court also seems to have noted that the decision-maker was aware of a particular test given his reasons in an earlier decision. Another exception is *Hiscock v. Human Rights Commission and CONA*, [2007] 262 Nfld. & P.E.I.R. 102 (Nfld. S.C.) where the Board noted it had reviewed a particular report, which, in the circumstances of the case, was a sufficient indication that the Board had considered all relevant factors. See also *Couillard v. Edmonton (City)* (1979), 103 D.L.R. (3d) 312 at 319-320 (Alta. C.A.) and *Consumers Coalition of Alberta v. Alberta Energy and Utilities Board*, 2000 ABCA 258 at para. 10.

<sup>58</sup> See, e.g., *Simpson v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1224 (QL) at para. 44. But where the decision-maker makes findings that are contrary to what appears in the record, an explanation is called for and should be set out in the reasons: *Castillo v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 43 at para. 9.

<sup>59</sup> *Slawik v. Manitoba (Workers' Compensation Board)* (2006), 205 Man. R. (2d) 124 (Man. C.A.); *Law Society of Upper Canada v. Pieter Carel Verbeek*, 2008 ONLSAP 0010; *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (Div. Ct.). There are some cases, on the other hand, primarily in the Federal Court, that recognize considerable leeway here: see, e.g., *Ragupathy v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 654 (C.A.) at para. 15: “[A] reviewing court should be realistic in determining if a tribunal’s reasons meet the legal standard of adequacy. Reasons should be read in their entirety, not parsed closely, clause-by-clause, for possible errors or omissions; they should be read with a view to understanding, not puzzling over every possible inconsistency, ambiguity or infelicity of expression.”

<sup>60</sup> *Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142 (Div. Ct.); *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364 at 374-375; *Kalin v. Ontario College of Teachers* (2005) 75 O.R. (3d) 523 (Div. Ct.) at para. 59; *Law Society of Upper Canada v. Pieter Carel Verbeek*, 2008 ONLSAP 0010; *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission*, 2008 CanLII 25052 (Div. Ct.); *Vinland Resources Limited v. Mineral Claims Recorder*, 2008 NLCA 12; *Gibson v. Insurance Corporation of British Columbia*, 2008 BCCA 217; *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (2006), 54 C.P.R. (4th) 15 (Fed. C.A.); *Harley v. Employment and Assistance Appeal Tribunal*, 2006 BCSC 1420.

- Reviews on the basis of inadequate reasons are taking place even though quite substantial reasons are offered.<sup>61</sup>
- Criminal law cases are often cited in support of the requirement to give reasons.<sup>62</sup>
- In another, a decision of a municipal board to reduce the applicant's realty assessment was upheld despite brief reasons because, in the end, the losing party was aware (barely) of the basis on which the assessment was granted.<sup>63</sup>
- The reasoning must be set out in order to facilitate reasonableness review.<sup>64</sup> The Court will not look at the record of the tribunal for that purpose.<sup>65</sup>

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<sup>61</sup> *Canada (Attorney General) v. Fetherston* (2005), 31 Admin. L.R. (4th) 69 (F.C.A.) (four single spaced pages of factual analysis); *Law Society of Upper Canada v. G.N.*, 2005 ONLSAP 0001 (forty pages of factual reasoning).

<sup>62</sup> *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), 160 N.S.R. (2d) 241 (N.S.C.A.); *Slawik v. Manitoba (Workers' Compensation Board)* (2006), 205 Man. R. (2d) 124 (Man. C.A.), at para. 28: "[T]he essence of the approach taken in *Sheppard* is not significantly different from the decisions quoted earlier in these reasons, including the Supreme Court's decision in *Baker*."; *Law Society of Upper Canada v. Pieter Carel Verbeek*, 2008 ONLSAP 0010; *Law Society of Upper Canada v. G.N.*, 2005 ONLSAP 0001.

<sup>63</sup> *Briarwood Investment Corp. v. Winnipeg (City) Assessor*, [2006] 6 W.W.R. 250 (Man C.A.). The Court of Appeal recognized at para. 14 that "[a]dministrative tribunals operate in a bewildering variety of circumstances and affect individual rights to varying degrees" and so there can be no 'one size fits all' standard for the provision of reasons. The minimum standard is that "the parties must be able to say that they know what the result is and the rationale or basis on which the decision was reached."

<sup>64</sup> *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada* (2006), 54 C.P.R. (4th) 15 (Fed. C.A.) (the reasons of a tribunal are a central focus when a court is engaged in reasonableness review).

<sup>65</sup> *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), 160 N.S.R. (2d) 241 (N.S.C.A.). ("The respondents are in effect asking this Court to guess at the reasoning underlying the conclusions of the Board simply because there is evidence upon which the Board could, if it chose, base its conclusions. The real problem here is that we simply do not know what it was that drove the Board to its conclusions.")

- The surprising thing that one sees on a review of the jurisprudence is that few courts recognize that administrative tribunals are different from courts.<sup>66</sup>

## **B. Timely decision-making**

### **(a) *The decision in Blencoe v. British Columbia (Human Rights Commission)***

The Supreme Court's decision in *Blencoe v. British Columbia (Human Rights Commission)* towers over all other cases in this area. It sets the terms for debate, and, after *Blencoe*, there has been no significant Supreme Court decision in the area.

*Blencoe* confirmed that stay is available for “inordinate delay” that “compromise[s] the very fairness of the hearing” or where the delay “in the conduct of the process” would amount to “a gross or shocking abuse of the process.”<sup>67</sup>

Delay alone does not warrant a stay of proceedings.<sup>68</sup> But where there is proof of “significant prejudice” which results from “unacceptable delay,”<sup>69</sup> a stay may be warranted. *Blencoe* provided a list of examples of “significant prejudice.” These include impairment of a party's ability to answer the complaint against it because memories have

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<sup>66</sup> Refreshing exceptions here are *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 (C.A.), at para. 112-117 and *Sylvester v. Municipal District of Pincher Creek No. 9 (Subdivision and Development Appeal Board)*, 2008 ABCA 92 (recognition of the lay composition of the hearing panel).

<sup>67</sup> *Blencoe*, *supra*, n. 3, at para. 180. This is not a new jurisdiction founded by the Supreme Court. Precedents for a stay of proceedings for delay certainly predated *Blencoe*, and existed at common law in the United Kingdom: see *In re Preston*, [1985] 1 A.C. 835 (H.L.) per Lord Templeman at 864-67 and Lord Scarman at 851-52; *Laker Airways Ltd. v. Department of Trade*, [1977] 1 Q.B. 643 (C.A.) per Lord Denning M.R. at 707.

<sup>68</sup> See *Blencoe*, *supra*, n. 3, at para. 101. See also *Warren v. Criminal Injuries Compensation Board* (2005), 262 D.L.R. (4th) 144 (Ont. Div. Ct.).

<sup>69</sup> *Blencoe*, *supra*, n. 3, at para. 101.

faded, witnesses are no longer available,<sup>70</sup> or evidence is lost.<sup>71</sup> The rationale is that parties are entitled to fairness and natural justice and so a remedy must be given for undue delay that impairs the fairness of the hearing.<sup>72</sup>

Interestingly, however, a complete impairment of the fairness of the hearing is not required for the issuance of a stay.<sup>73</sup> Where “inordinate delay” has “directly” caused “significant psychological harm to a person” or “attached stigma to a person’s reputation” such that the reputation of the particular administrative system would be brought into disrepute, there may be sufficient prejudice to warrant the granting of a stay of proceedings.<sup>74</sup>

However, the threshold required for the granting of a stay of proceedings is very high. The Supreme Court in *Blencoe* did not place it at the level of required for a stay of proceedings in criminal cases. In the absence of prejudice to hearing fairness, the delay must be “clearly unacceptable,” directly cause “significant prejudice” sufficient to amount to an abuse of process, and bring the reputation of the particular administrative system into disrepute.<sup>75</sup> There should be a weighing of “the damage to the public interest in the fairness of the administrative process should the proceeding go ahead” with “the harm to the public interest in the enforcement of the legislation if the proceedings were halted.”<sup>76</sup> This is a tough test, as “few lengthy delays” will qualify.<sup>77</sup>

The Supreme Court emphasized that in assessing whether a delay is “inordinate,” one must examine the nature of the case and its complexity, the facts and issues, the purpose

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<sup>70</sup> See, e.g., *NLK Consultants Inc. v. British Columbia (Human Rights Commission)*, [1999] B.C. J. No.380 (B.C.S.C.).

<sup>71</sup> *Blencoe, supra*, n. 3, at para. 102.

<sup>72</sup> *Blencoe, supra*, n. 3, at para. 105, citing *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at 628.

<sup>73</sup> *Blencoe, supra*, n. 3, at para. 115.

<sup>74</sup> *Ibid.*, at para. 115.

<sup>75</sup> *Ibid.*, at para. 115.

<sup>76</sup> *Ibid.*, at para. 120.

<sup>77</sup> *Ibid.*, at para. 115.

and nature of the proceedings, whether the aggrieved party contributed to the delay or waived it, and “other circumstances of the case”. One must also look at factors other than the passage of time, such as the nature of the various rights at stake in the proceedings and whether the community’s sense of fairness would be offended by the delay.<sup>78</sup>

Four Justices in *Blencoe* dissented in part. In the course of their reasons, they discussed three main factors that should be considered. Although this is a minority decision, some courts have picked up on these factors, either citing the minority decision directly,<sup>79</sup> or simply applying them without attribution. The three factors, as summarized by one court, are as follows:

(1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data) as well as reasonable periods of time for procedural safeguards that protect parties or the public;

(2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and

(3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.<sup>80</sup>

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<sup>78</sup> *Ibid.*, at para. 122.

<sup>79</sup> *Paul v. Canadian Broadcasting Corp.* (2001), 198 D.L.R. (4th) 633 (F.C.A.).

<sup>80</sup> *Ibid.*, at para. 60.

(b) *Subsequent applications of Blencoe*

It is useful to examine the later cases, as they shed light on how courts have been applying *Blencoe*, and the practical effect of *Blencoe*. These cases show that the threshold for obtaining a stay of proceedings is extremely high, and so the remedy is seldom granted. As a result, parties are not getting any relief for severe delay that causes damage to them. This, as we will see, is unsatisfactory and raises the question whether the remedial armory needs to be expanded and, if so, how.

Some examples where stays are granted are as follows:

- Ten years of delay in an administrative process that is to proceed summarily, with a two year limitation period for Board proceedings to be brought, in circumstances where witnesses no longer had an independent recollection of relevant events and the defendant doctor had suffered severe psychological harm and harm to his reputation which he had spent a lifetime building. The defendant doctor had tried, unsuccessfully to expedite the hearing. At one point, the Board had closed its file and had notified the doctor of that fact and the file was closed for four and a half years.<sup>81</sup>
- Seven years of delay in a disciplinary proceeding against an insurance agent where diminished memories “might” affect the fairness of a hearing.<sup>82</sup>
- 44-month delay where complete inactivity had led a doctor to believe that the claim of professional misconduct had been abandoned.<sup>83</sup>

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<sup>81</sup> *Warren v. Criminal Injuries Compensation Board* (2005), 262 D.L.R. (4th) 144 (Ont. Div. Ct.).

<sup>82</sup> *Stearns v. Alberta Insurance Council* (2001), 37 Admin. L.R. (3d) 114 (Alta. Q.B.). See also

<sup>83</sup> *Hutchinson v. Newfoundland (Minister of Health & Community Services)* (2001), 204 Nfld. & P.E.I.R. 254 (N.L. S.C.), at para. 29.

- A physician carried on his practice and then retired, thinking that a billing dispute was behind him. He had written to the tribunal requesting action but got no response. A hearing notice was delivered seven years later.<sup>84</sup>
- A 3.7 year long investigation by a discipline body in a simple case, followed by a seven year prosecution, in circumstances of severe harm to the individual's reputation, and loss of business.<sup>85</sup>
- Discipline charges were laid eight years after the first complaints. That period was a period of "complete inactivity." The defendant was unable to contest issues of credibility because of the loss of vital evidence and lack of disclosure.<sup>86</sup>

Some examples where stays are not granted are as follows:

- Plenty of delay but only "vague assertions that fall short of establishing an inability to prove facts necessary to respond to the complaints."<sup>87</sup>
- The potential evidentiary prejudice was related to "potential witnesses who would, if available, be asked to cast their memories back 8 years ... to establish what didn't happen as opposed to positive assertions as to an occurrence." Compounding the prejudice was the fact that some of the allegations in the complaint were not specific, and the court conceded that

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<sup>84</sup> *Ratzlaff v. British Columbia (Medical Services Commission)* (1996), 17 B.C.L.R. (3d) 336 (B.C.C.A.): "where the delay is so egregious that it amounts to an abuse of power or can be said to be oppressive, the fact that the hearing itself will be a fair one is of little or no consequence."

<sup>85</sup> *Investment Dealers Association of Canada v. MacBain* (2007), 299 Sask. R. 122 (Sask. C.A.). On similar, more egregious facts, see *Misra v. College of Physicians and Surgeons of Saskatchewan* (1988), 52 D.L.R. (4th) 477 (Sask. C.A.).

<sup>86</sup> *Stinchcombe v. Law Society of Alberta* (2002), 212 D.L.R. (4th) 675 (Alta. C.A.)

<sup>87</sup> *Blencoe, supra*, n. 3, at para. 103.

this would “add to the difficulty of recollection by Crown's potential witnesses.” However, the clearest of cases threshold was not met.<sup>88</sup>

- Delay not approaching the level of affecting the public’s sense of decency or fairness.<sup>89</sup>
- Inferences of faded memories or possible non-reliability of witnesses are not sufficient evidence of actual or significant prejudice. There must be an absence of evidence of the non-availability of a witness, non-availability of documentation, or no actual memory of the events by a witness.<sup>90</sup>
- It took a labour board three years to render its decision after a hearing but that did not mean that its decision should be quashed. The aggrieved party failed to adduce any evidence of prejudice.<sup>91</sup>
- A doctor was informed that no further disciplinary action would be taken, only to be told four years later that the matter had been re-opened. This was insufficient prejudice.<sup>92</sup>
- Four years of delay in disciplinary proceedings, in the absence of prejudice, is not “clearly unacceptable” or an abuse of process.<sup>93</sup>

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<sup>88</sup> *Crown Packaging Ltd. v. Ghinis*, [2002] 4 W.W.R. 242 (B.C.C.A.) (court notes that the record before it is one “marked by lack of direction, internal confusion and unnecessary delay.”)

<sup>89</sup> *Canada (Attorney General) v. Norman*, [2003] 2 F.C. 411

<sup>90</sup> *Walsh v. Mobil Oil Canada*, [2006] 370 A.R. 38 (Alta. Q.B.).

<sup>91</sup> *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger, Regina)*, 2008 SKCA 38 (Sask. C.A.)

<sup>92</sup> *Holder v. Manitoba (College of Physicians and Surgeons)* (2002), 220 D.L.R. (4th) 373 (Man. C.A.).

<sup>93</sup> *Law Society of British Columbia v. Ewachniuk*, [2003] 6 W.W.R. 459 (B.C.C.A.).



- Two and a half years of delay in a disciplinary regime that involves investigation and exploration of possible settlement is not inordinate delay.<sup>94</sup>
- A human rights judgment rendered nine years after the events in question was not found to be inordinate due to the complexity of the proceedings. There was no evidence of significant prejudice. The judgment was under reserve for two years and this was not found to be inordinate.<sup>95</sup>
- A six month delay before a child protection hearing was unreasonable in light of the need for such hearings to take place quickly. However, it was explained by a party's failure to attend a case conference and the complexity of the proceedings. Also, there was no evidence of prejudice.<sup>96</sup>

The normal remedy for unacceptable delay, with extreme prejudice, is a stay of proceedings. As we can see, it is seldom granted.

(c) *Possible other remedies for administrative delay*

The ancient writ of *procedendo* is available to redress delay. This writ is the equivalent of an order that a tribunal “hurry up.” It is also equivalent to an order for *mandamus*, requiring the tribunal to take action within a specified time. Those concerned by delay as it is happening may have these recourses open to them.

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<sup>94</sup> *O'Toole v. Law Society of New Brunswick* (2007), 312 N.B.R. (2d) 258 (N.B.C.A.).

<sup>95</sup> *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission* (2006), 244 N.S.R. (2d) 321 (N.S.C.A.).

<sup>96</sup> *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519.

In *Blencoe*, the minority of the court also suggested that costs might be an acceptable remedy.<sup>97</sup> This may be problematic in light of the very high threshold that must be met in order for an award of costs.<sup>98</sup>

Another possibility, quite controversial, is a reduction in the penalty imposed by the tribunal, in order to “compensate” for the harm caused by the delay.<sup>99</sup>

An open issue is whether negligence, with attendant liability for damages, may lie against those responsible for administrative delay. There have been several recent developments in the law of negligence against administrative officials that make this quite possible.<sup>100</sup>

In future, creative counsel may argue that the test in *Blencoe* is nothing more than the importation into administrative proceedings of the very high, “clearest of cases” test that

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<sup>97</sup> *Blencoe*, *supra*, n. 3 at para. 179.

<sup>98</sup> Jurisdiction to award costs may be available under s. 24(1) of the *Charter* if a *Charter* breach has been established. There are two obstacles here. First, infringements of the *Charter* due to delay are most exceptional – in most cases, a violation of s. 7 of the *Charter* is the only theoretical possibility, and *Blencoe* makes it clear that only extreme psychological harm inflicted by the state will qualify. Further, for a costs award under s. 24(1), there must be circumstances of a marked and unacceptable departure from reasonable standards: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575.

<sup>99</sup> Assuming that a *Charter* breach has been established (a difficult burden in administrative proceedings), s. 24(1) has been used in criminal courts to redress *Charter* infringements by reducing the accused person’s sentence: *R. v. Charles* (1987), 36 C.C.C. (3d) 286 (Sask.C.A.), *R. v. Stannard* (1989), 52 C.C.C. (3d) 544 (Sask.C.A.), *R. v. Dennison* (1990), 60 C.C.C. (3d) 342 (N.B.C.A.) and *R. v. MacPherson* (1995), 100 C.C.C. (3d) 216 (N.B.C.A.) all reduced sentences to compensate for *Charter* breaches. See also *R. v. Kenny* (1994), 126 Nfld. & P.E.I.R. 199 (Nfld. C.A.) and *R. v. Canadian Broadcasting Corporation*, [2007] 270 Nfld. & P.E.I.R. 117 at para. 53 (Nfld. C.A.). On the other hand, in *R. v. Glykis* (1995), 100 C.C.C. (3d) 97 (Ont. C.A.) a trial judge was held to have erred as a matter of principle in reducing the sentence he would ordinarily have imposed because of violations of *Charter* rights. The Quebec Court of Appeal called this a “very tricky question which has not yet been settled”: *R. v. Chabot* (1992), 77 C.C.C. (3d) 371 at 373 (Que. C.A.).

<sup>100</sup> See *Hill v. Hamilton-Wentworth Police Services Board* (2007), 285 D.L.R. (4th) 6 (negligent investigation). There is also authority that supports the imposition of liability for *Charter* breach without any need even to show negligence: *Ward v. City of Vancouver*, [2007] 4 W.W.R. 502 (B.C.S.C.); *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board* (2005), 254 D.L.R. (4th) 410 (P.E.I.S.C.A.D.); *Blouin v. R.* (1991), 51 F.T.R. 194 (T.D.) at para. 24. *Contra*, *Hawley v. Bapoo* (2007), 156 C.R.R. (2d) 351 (Ont. C.A.); *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397; *Wynberg v. Ontario* (2006), 269 D.L.R. (4th) 435 (Ont. C.A.); *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.); *R. v. Ravndahl*, [2007] 10 W.W.R. 606 at para. 77 (Sask C.A.) (requirement that there be an abuse of power, clearly wrong conduct or bad faith, mirroring the requirement for liability of government for invalid law-making set out in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405 and *Canada (Attorney General) v. Hislop*, 2007 SCC 10).

exists in criminal proceedings.<sup>101</sup> In cases where a remedy short of a stay is sought, perhaps a lower test, relevant to that remedy, is applicable, instead of the high test for the granting of a stay of proceedings.

However, until such an argument is accepted, there will be a serious remedial gap. As the list, above, of cases where a stay was not granted shows, a vast majority of serious administrative delays that cause damage will not be redressed. Persons subject to long administrative delays will have no recourse. The gap in remedial tools is to be regretted. Until it is filled, there may be little incentive for tribunals to address issues of delay, to the extent that those issues are within their power to control.

*(d) Issues of delay may be getting worse*

Anecdotally, issues of delay may be getting worse. The author has been involved in administrative proceedings that have taken several years. In one case, although a decision was urgently required, the tribunal took over a year to reach its decision.

Assuming that this trend exists, what might account for it? There are several possible reasons. Some of these possible reasons do cause delay, but they have obvious benefits that outweigh the harm caused by delay – not all of the possible reasons can or should be eliminated. Nevertheless, it is useful to identify and enumerate the possible reasons and analyze them, in order to determine whether reform would be useful.

Some empirical research and study into the problems encountered by tribunals might be helpful.

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<sup>101</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Regan*, [2002] 1 S.C.R. 297; *R. v. Power*, [1994] 1 S.C.R. 601; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (stays of proceedings only in the “clearest of cases”).

(i) *New constitutional law jurisdiction*

After much controversy,<sup>102</sup> the Supreme Court of Canada has confirmed that tribunals that have a power to decide questions of law also have the power to decide constitutional law issues.<sup>103</sup> They may also award remedies under s. 24 of the *Charter* if they have the structures and functions for that purpose.<sup>104</sup> Suddenly, many administrative tribunals are *fora* for constitutional battles, and reasons must be written.

This creates new procedural challenges for those tribunals that have the power to consider and determine constitutional law issues and for the litigants who have constitutional law issues to raise. Many tribunals must adopt procedures and develop expertise in the area. This increases the need for reasons and lengthens and complicates tribunal proceedings.

Aside from the time that it takes to consider constitutional law issues, tribunals are bound to encounter complications that will result in court proceedings that have the potential to delay proceedings. While there is authority to suggest that tribunals have the right to adjudicate constitutional issues that are placed before them,<sup>105</sup> and that interlocutory

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<sup>102</sup> See the sharp differences between majority and dissent in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 and the Supreme Court's reversal in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

<sup>103</sup> *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

<sup>104</sup> *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 at para. 43 (Supreme Court's structural and functional test for determining whether a tribunal has the jurisdiction to award *Charter* remedies): "whether the court or tribunal in question is suited to grant the remedy sought under s. 24 in light of its *function and structure*". See also *R. v. Hynes*, [2001] 3 S.C.R. 623 at para. 27: if "Parliament or a legislature confers on a court or tribunal a function that engages *Charter* issues, and equips it with procedures and processes capable of fairly and justly resolving these incidental *Charter* issues, then it must be presumed that the legislature intended the court or tribunal to exercise this power." For examples of s. 24 determinations (where the "structural functional test" has been met, see *Chrysler Credit Canada Ltd. v. Arnold*, [2006] O.J. No. 1568 (S.C.J.); *Canada v. O'Neill Motors Ltd.*, [1998] 4 F.C. 180 (C.A.); *Donovan v. Canada (Attorney General)*, [2000] 4 F.C. 809 (C.A.); *Huerto v. College of Physicians and Surgeons*, [2001] S.J. No. 572 (Q.B.) at para. 25; *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, [2004] O.L.A.A. No. 327 (labour arbitrator); *Law v. Canada (Solicitor-General)*, [1983] 2 F.C. 181 (T.D.), reversed on a subsidiary issue: [1985] 1 F.C. 62 (C.A.) (Immigration Appeal Board).

<sup>105</sup> *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, [2005] 1 S.C.R. 257 at paras. 38-39. See also *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 at para. 36: "Section 35 is not, any more than the *Charter*, 'some holy grail which only judicial initiates of the superior courts may touch'."

forays to court are to be discouraged,<sup>106</sup> these principles run up against authority that recourse to superior courts in constitutional matters is always available when necessary.<sup>107</sup> Recent authority shows<sup>108</sup> that forays to superior courts for the determination of constitutional issues in the middle of administrative proceedings may become more common, with resulting delay to the administrative proceedings.<sup>109</sup>

(ii) ***Delay due to the need to consider statutes outside of the tribunal's home statute***

The Supreme Court has confirmed that tribunals that have the power to consider questions of law are obligated to consider statutes that they may be unfamiliar with, if the statutes are relevant and bear upon their problem.<sup>110</sup>

(iii) ***Higher stakes***

A number of tribunals have been given more remedial weapons, and stronger, more drastic remedial weapons, to redress misconduct, and courts have rejected constitutional

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<sup>106</sup> *Gervasio v. British Columbia Association of Optometrists*, [1994] B.C.J. No. 1476 (S.C.); *Ontario College of Art v. Ontario (Human Rights Commission)*, [1993] O.J. No. 61 (Div. Ct.); *Jafine v. College of Veterinarians of Ontario*, [1991] O.J. No. 1847 (Gen. Div.); *Hughes v. College of Physicians and Surgeons of Ontario* (1994), 112 D.L.R. (4th) 253 (Div. Ct.); .); *Howe v. Institute of Chartered Accountants of Ontario*, [1994] O.J. No. 1803 (C.A.); *Partington v. Institute of Chartered Accountants of Alberta*, [2005] A.J. No. 787 (C.A.) at para. 15; *Sears Canada Inc. v. Davis Inquest (Coroner of)*, [1997] O.J. No. 1424 (Div. Ct.).

<sup>107</sup> *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *R. v. Gamble*, [1988] 2 S.C.R. 595; also *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 882: "...a person whose Canadian *Charter* rights have been infringed or denied has the right to obtain the appropriate and just remedy under the circumstances. A corollary which flows from this is the fundamental principle that there must always be a court available to grant, not only a remedy, but the remedy which is the *appropriate* and *just* one under the circumstances" [emphasis in original].

<sup>108</sup> *Kelly et al. v. Ontario*, unreported, May 6, 2008, Ont. S.C.J. (*per* Himel J.).

<sup>109</sup> See discussion in See D. Stratas, "Constitutional Practice and Procedure in Administrative Tribunals: An Emerging Issue," a paper presented at the Ontario Bar Association Conference on Workplace Safety, May, 2008.

<sup>110</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513.

and other objections to that new weaponry.<sup>111</sup> The stakes are getting higher. As a result, there is a tendency of tribunals to afford substantial procedural justice, which can cause delay.

**(iv) *The duty to provide adequate reasons: longer reasons, and usually written reasons***

Lack of clarity in the legal tests concerning the duty to provide adequate reasons and expressions of those legal tests that encourage more detail in the reasons may cause some tribunal members to write lengthy reasons.

While long reasons are not necessarily seen as sufficient, tribunal members may feel that long reasons are safer. There may be a tendency to err on the side of more detail, not less. As well, anecdotally, the author has heard some tribunal members say that in light of recent legal developments they are less likely to deliver oral reasons. The message they hear is that “courts are getting fussy about reasons” and so they are more likely to think about their reasons and issue them in writing. All of this causes delay.

**(v) *Resource limitations***

Delay may also be caused by resource limitations. This operates at three levels.

The case loads in some tribunals may be too high for the staff to handle. Certainly, many of the cases of administrative delay appear also to be cases of stretched staff, with no time to process cases quickly.

For many tribunals, tribunal members’ pay is very poor. Many who serve on tribunals are doing it essentially on a volunteer basis. We must query whether some are dissuaded

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<sup>111</sup> See, e.g., *Re Cartaway Resources*, [2004] 1 S.C.R. 672.

from serving on tribunals because of the inadequate pay. Many are appointed on a part-time basis and have other priorities in their lives.

In the experience of the author, most tribunal members are extremely diligent and professional despite the fact that they are not being adequately remunerated for their work. Nevertheless, some might be more diligent and some of higher quality might be attracted to tribunal positions if the remuneration were better.

Finally, it is frequently the case that positions on administrative tribunals are not filled quickly. For example, on June 24, 2008, the federal government made 9 appointments and 12 reappointments to the Immigration and Refugee Board, but even after those appointments, 22% of the available positions remain vacant. Meanwhile, case backlogs grow, both in number and length.

**(vi) *Incomplete reform***

Related to the problem of resource limitations is the problem of incomplete reform. Governments seem all-too-happy to add to the jurisdiction of tribunals and to arm them with new powers, but anecdotally the author hears complaints from tribunals that those reforms do not arrive with additional resources. The reform is incomplete – tribunals are forced to do more, without more resources.

**(vii) *The conduct of persons subject to tribunal jurisdiction***

For many who find themselves facing jeopardy in tribunal proceedings, justice delayed is justice. There are many incentives to delaying tribunal proceedings. It may be done in order to try to increase leverage for a settlement. It may be done because the person facing jeopardy wishes to advance some other important private objective before the

tribunal makes its decision. Perhaps a change in the law is anticipated. The reasons are as varied as the cases that come before a tribunal.

***(viii) Misplaced views about the nature of administrative justice***

In many settings, administrative tribunals have been set up in order to provide inexpensive, easily accessible, expeditious justice. The original intention was that these tribunals not replicate all of the procedures, features and trappings of a court. The author's sense, however, is that many such tribunals are getting more and more "court-like," with procedures both before and during the hearing that take up time. This may be prompted by counsel, used to the courtroom, who, expecting the tribunals to replicate court procedures that they view as fair, arrive in the tribunal and start making procedural demands. What may have been lost is the original aim of administrative justice being a different sort of justice, different from courts.

***(ix) The proliferation of written rules for tribunals***

Related to the foregoing issue is the proliferation of written rules for tribunals.

Most significant tribunals have adopted written rules. These rules can provide great certainty and can achieve procedural efficiencies. However, some adopt a one-size-fits-all approach, making all cases subject to the same rules. Often, the rules chosen for the one-size-fits-all approach are most appropriate for the most complicated cases. As a result, simpler cases end up progressing at the same rate as complex cases.



(x) *The emergence of “soft law”*

Many tribunals, in the interests of certainty and effective regulation, have published so-called “soft law”, such as guidelines, to assist them in the exercise of their discretion.

Guidelines are no doubt useful for regulatees to determine the likely result of a tribunal proceeding. Regulatees can plan their conduct, and, from the standpoint of the administrative agency, greater compliance with the regulatory objectives they have set out in the guidelines.

However, there is a cost to guidelines and that cost is incurred at the hearing. It is trite law that unless there is a statutory provision to the contrary,<sup>112</sup> guidelines are not binding on the tribunal.<sup>113</sup> Nevertheless, guidelines may be used by the tribunal to govern its discretion. So an issue arises: when should the tribunal depart from its guidelines? This can cause great debate, with attendant effects on the length of the proceedings.

Going into a hearing, counsel do not know whether the tribunal will adhere to the substantive standards under the guidelines or whether it will countenance a departure from the guidelines. In effect, two or more cases must be prepared and presented based on two or more substantive standards, with the effect that tribunal proceedings are protracted.

Guidelines are often more detailed than the statutory provisions. This can give rise to arguments that the guidelines are inconsistent with the statute, thereby creating another issue for judicial review. More important, the complexity of some guidelines<sup>114</sup> can give rise to extremely arcane issues of interpretation, all the while creating debates as to whether the interpretations are consistent with the governing statute.

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<sup>112</sup> See, e.g., *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884.

<sup>113</sup> *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 385; *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2008] 1 F.C.R. 155.

<sup>114</sup> See, e.g., the Patented Medicine Prices Review Board’s *Compendium of Guidelines, Policies and Procedures*, accessible online at <http://www.pmprb-cepmb.gc.ca/english/view.asp?x=1034>.

**(xi) *Investigations are getting more complicated and slower***

A number of recent developments have made regulatory investigations more complicated, with more possibility of time-consuming legal challenge. A particularly complicated area that spawns significant litigation is when investigatory measures such as summonses, regulatory search warrants, and the like are issued to investigate serious misconduct. Whether these investigatory tools can be used and in what circumstances is often open to debate, depending upon a multi-factored test prescribed by the Supreme Court of Canada.<sup>115</sup> Multi-jurisdictional investigations and circumstances of regulatory cooperation create even more difficult problems.<sup>116</sup>

**(xii) *The absence of other incentives to move quickly***

Without a broader array of judicial weapons to redress their delay, tribunal members may have little incentive to act faster. While a particular tribunal member who is slow in rendering decisions might not be reappointed to his or her position, many positions are patronage positions to be filled by the party in power and so many know that reappointment is not a likely event. Removal of tribunal members is a rare happening, even if that power exists under the particular statute. Unlike judges, who are subject to discipline by judicial councils, and unlike lawyers, who are subject to discipline by law societies, tribunal members are often not subject to any discipline. Finally, chairs of tribunals have few tools at their disposal to deal with members who are slow in issuing their reasons for decision. Usually, moral suasion is the only tool at their disposal.

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<sup>115</sup> *R. v. Jarvis*, [2002] 3 S.C.R. 757. Where the “predominant purpose” is the investigation and determination of penal (criminal) liability, the same *Charter* standards and protections that apply in criminal proceedings must be followed and applied. The test for determining “predominant purpose” is set out in para. 94. The limitations that apply once the “predominant purpose” is the investigation and determination of penal (criminal) liability are described in paras. 95-98.

<sup>116</sup> See D. Stratas, “Regulatory Cooperation: Some Constitutional Considerations,” presented at the National Judicial Institute conference on white collar crime, Halifax, N.S., March, 2007.