

## **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 much 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 be given to 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,

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

to a far stricter posture, and then, recently, to a slightly more liberal posture aimed 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 inadequate. 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 were 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.

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

<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

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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.

received “a set of reasons that permitted meaningful appellate review of the correctness 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.

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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.).

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

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* signalled the adoption of a more practical, and perhaps lenient, approach to the assessment of adequacy of reasons.

This emphasis on practicality has continued. In *R. v. Dinardo*,<sup>35</sup> emphasized the need for reasons to “respond to the case’s live issues” and, where credibility is a determinative issue on the facts, to articulate the rationale for finding evidence credible or not credible.<sup>36</sup> Failure to avert to a key credibility issue gives rise to reversal. However, where the basis for a conclusion is apparent from the record, even without being explicitly articulated in the reasons, an appellate court should not quash the judgment.<sup>37</sup>

Many see this trend towards practicality and leniency culminating in the Supreme Court’s ruling in *R. v. R.E.M.*<sup>38</sup> Writing for the Court, Chief Justice McLachlin made it clear, once again, that appellate scrutiny of reasons should not be overly strict, nor should it impose too great a burden on trial courts. Trial courts need not show how they arrived at their conclusion in a “watch me think” fashion; rather the obligation is limited to showing why the courts made their decisions.<sup>39</sup> A logical connection must be shown between the

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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> [2008] 1 S.C.R. 788.

<sup>36</sup> At para. 31.

<sup>37</sup> At para. 32. To similar effect see *R. v. Walker*, [2008] 2 S.C.R. 245.

<sup>38</sup> [2008] 3 S.C.R. 3.

<sup>39</sup> At para. 17.

verdict reached and the basis for the verdict, with the only requirement beyond that being that the foundations of the verdict be “discernable, when looked at in light of the evidence, the submissions of counsel and the history of how the trial unfolded.”<sup>40</sup> This need not include expositions of “matters that are well settled, uncontroversial or understood and accepted by the parties” or uncontroversial evidence. It is also unnecessary for trial courts to detail their findings “on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can be logically discerned.”<sup>41</sup>

*R.E.M.* represents the Supreme Court’s last very detailed review of the law on adequacy of reasons. It usefully summarized the relevant principles as follows:

- (1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).
- (2) The basis for the trial judge’s verdict must be “intelligible”, or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge’s process in arriving at the verdict is unnecessary.
- (3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the “live” issues as they emerged during the trial.

It went on, once again, to emphasize the need to read reasons in their overall context, including the evidentiary record before the court, the issues that were live before the court and the fact that judges are presumed to know the law on basic points.<sup>42</sup> As for the level of detail required, the Supreme Court was blunt: the reasons need only show that “the judge has seized the substance of the matter”; further, “detailed recitations of

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<sup>40</sup> At para. 17.

<sup>41</sup> At para. 20.

<sup>42</sup> At para. 45.

evidence or the law are not required” unless the issues are “troublesome,” “confused,” or “contradictory.”<sup>43</sup>

*R.E.M.* also contains the most detailed examination of perhaps the most troublesome task in the drafting of reasons: the making of credibility findings. Some may well consider that the following comment by the Court significantly lowers the obligation on judges to verbalize credibility findings:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness’s evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.<sup>44</sup>

Again, the focus of the reviewing court should simply be on whether the trial judge has “seized the substance of the issue.”<sup>45</sup>

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. During this era, the Supreme Court of Canada has been unanimous in the majority of the cases it decides in all other areas of law. But in the area of adequacy of reasons, now there is often a majority decision and a dissenting decision, and no real difference in principle between the two.<sup>46</sup>

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<sup>43</sup> At paras. 43-44.

<sup>44</sup> At para. 49.

<sup>45</sup> At paras. 50-57.

<sup>46</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.

This raises the question: should there be a higher standard of review for adequacy of reasons? As long as the principles on adequacy of reasons are applied in an exacting way, reasonable minds may differ – and this will only encourage litigation in this area. This particularly matters in the administrative tribunal context. Administrative justice is meant to be cost-effective, accessible, fair and efficient. Litigation over the form of reasons and whether or not they are sufficient can undercut these objectives.

**(b) *The principles in civil cases***

There are far fewer cases concerning adequacy of reasons in the civil context. The key case was in 2007: *Hill v. Hamilton-Wentworth Police Services Board*.<sup>47</sup> Interestingly, and perhaps inadvertently, the Supreme Court borrowed heavily from *Sheppard*, and not its later jurisprudence that arguably loosens the standard:

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 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

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<sup>47</sup> [2007] 3 S.C.R. 129.

making the assessment of the adequacy of reasons in part based on the nature of the record before the Court.

(c) *The principles in administrative proceedings*

At common law, a number of courts held that procedural fairness did not require the provision of reasons,<sup>48</sup> but courts did repeatedly emphasize the desirability of it,<sup>49</sup> and some courts went further and did impose limited requirements to issue reasons.<sup>50</sup> 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>51</sup> and the need for administrative tribunals to be able to dispense just but expeditious decisions.<sup>52</sup>

The Supreme Court resolved the issue in *Baker v. Canada (Minister of Citizenship and Immigration)*.<sup>53</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

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<sup>48</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>49</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. 3748, 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>50</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.); *Taabea 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.

<sup>51</sup> *Osmond*, *supra*, n. 37, at 668.

<sup>52</sup> R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123.

<sup>53</sup> [1999] 2 S.C.R. 817.

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>54</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>55</sup> However, the requirement to give reasons was fulfilled when the appellant was given certain notes 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>56</sup> While “individuals are entitled to fair procedures and open decision-making,” this fairness and transparency can take place in many ways.<sup>57</sup>

Recently, in *Dunsmuir*,<sup>58</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:

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<sup>54</sup> *Ibid.*, at para. 43.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, at para. 44.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190..



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 possible, acceptable outcomes which are defensible in respect of the facts and law.<sup>59</sup>

It is fair to say that *Baker* unleashed a torrent of litigation 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.

The jurisprudence shows that in many cases, *Baker* may be misapplied. While in *Baker* the Supreme Court was content to link to the record and see the official's notes as part of the reasons for decision, few cases have adopted a similar approach. Instead, reasons are looked at in isolation. Further, as will be seen below, the standards often seem to be applied more strictly than they were applied in *Baker*. Rather than citing *Baker*, many cases use the standard as enunciated in criminal cases like *Sheppard* and *Braich*, often omitting the more recent cases that try to engage in some retrenchment. This is done without broader regard to the objectives of the administrative justice system, which include fairness, efficiency, and cost-effective, accessible justice.

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

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<sup>59</sup> *Ibid.*, at para. 47.

- 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>60</sup> But in some cases, fairly demanding requirements for the giving of reasons have been imposed.<sup>61</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>62</sup>
- Where there is conflicting evidence, the tribunal must make clear the path by which the evidence has been accepted or rejected.<sup>63</sup>

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<sup>60</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.

<sup>61</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 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.”

<sup>62</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>63</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.

- Inadequacy may be found where “[i]t is simply unclear what relevant evidence the Tribunal accepted and what it rejected.”<sup>64</sup>
- The greater the protection from judicial review accorded to a Tribunal, the greater may be the need for reasons.<sup>65</sup>
- Seldom do courts use the record that was before the tribunal to supplement the reasons.<sup>66</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>67</sup>
- There are frequent reminders that reasons need not include every last bit of evidence and argumentation raised in the case.<sup>68</sup>

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<sup>64</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.

<sup>65</sup> *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)* (1997), 160 N.S.R. (2d) 241 (N.S.C.A.).

<sup>66</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>67</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>68</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

- It is not enough just to give conclusions without the reasons.<sup>69</sup>
- Reviews on the basis of inadequate reasons are taking place even though quite substantial reasons are offered.<sup>70</sup>
- Criminal law cases are often cited in support of the requirement to give reasons.<sup>71</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>72</sup>

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with a view to understanding, not puzzling over every possible inconsistency, ambiguity or infelicity of expression.”

<sup>69</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.

<sup>70</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>71</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>72</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.”

- The reasoning must be set out in order to facilitate reasonableness review.<sup>73</sup> The Court will not look at the record of the tribunal for that purpose.<sup>74</sup>
- 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>75</sup>

Perhaps the most recent and detailed examination of adequacy of reasons in the administrative law context is *Clifford v. Ontario Municipal Employees Retirement System*.<sup>76</sup> The Court of Appeal for Ontario drew upon *R. v. R.E.M.*, not *R. v. Sheppard*, for guidance as to the appropriate standard:

*R.E.M.* emphasizes that where reasons are legally required, their sufficiency must be assessed functionally. In the context of administrative law, reasons must be sufficient to fulfill the purposes required of them, particularly to let the individual whose rights, privileges or interests are affected know why the decision was made and to permit effective judicial review. As *R.E.M.* held at para. 17, this is accomplished if the reasons, read in context, show why the tribunal decided as it did. The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision. To paraphrase for the administrative law context what the court says in *R.E.M.* at para. 24, the “path” taken by the tribunal to reach its decision must be clear from the reasons read in the context of the proceeding, but it is not necessary that the tribunal describe every landmark along the way.

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<sup>73</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>74</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.”)

<sup>75</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>76</sup> 2009 ONCA 670.

*R.E.M.* also emphasizes that the assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter: see *R.E.M.* at para. 43.

The task is to assess the reasons from a “functional perspective” to see if the basis for the decision is “intelligible.”<sup>77</sup>

In *Clifford*, the majority of the Divisional Court was concerned that the tribunal did not refer to evidence that might have caused it to rule differently, its language might have been taken to reverse the burden of proof and that the tribunal might have misapprehended evidence that it did not refer to. The Court of Appeal for Ontario reversed the majority of the Divisional Court emphasizing that the task is to determine only whether what was said was sufficient, whether the reasons show that the tribunal “grappled with the...live issues before it,” and whether they show at a basic level why the tribunal ruled the way it did.<sup>78</sup> In particular, on legal issues:

...recognition of the day-to-day realities of administrative agencies is important in the task of assessing sufficiency of reasons in the administrative law context. One of those realities is that many decisions by such agencies are made by nonlawyers. That includes this one. If the language used falls short of legal perfection in speaking to a straightforward issue that the tribunal can be assumed to be familiar with, this will not render the reasons insufficient provided there is still an intelligible basis for the decision.<sup>79</sup>

*Clifford* has caused plenty of debate in the administrative law bar concerning whether the Court of Appeal for Ontario has set the bar too low. To facilitate this debate, I set out the full text of what the tribunal in *Clifford* released in support of its decision, as Schedule “A” to this discussion paper.

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<sup>77</sup> At para. 31.

<sup>78</sup> At paras. 37-43.

<sup>79</sup> At para. 43.

## 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” and where the delay “in the conduct of the process” would amount to “a gross or shocking abuse of the process.”<sup>80</sup>

Delay alone does not warrant a stay of proceedings.<sup>81</sup> But where there is proof of “significant prejudice” which results from “unacceptable delay,”<sup>82</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 faded, witnesses are no longer available,<sup>83</sup> or evidence is lost.<sup>84</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>85</sup>

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<sup>80</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>81</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>82</sup> *Blencoe, supra*, n. 3, at para. 101.

<sup>83</sup> See, e.g., *NLK Consultants Inc. v. British Columbia (Human Rights Commission)*, [1999] B.C. J. No.380 (B.C.S.C.).

<sup>84</sup> *Blencoe, supra*, n. 3, at para. 102.

<sup>85</sup> *Blencoe, supra*, n. 3, at para. 105, citing *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 at 628.

Interestingly, however, a complete impairment of the fairness of the hearing is not required for the issuance of a stay.<sup>86</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>87</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>88</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>89</sup> This is a tough test, as “few lengthy delays” will qualify.<sup>90</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 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>91</sup>

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<sup>86</sup> *Blencoe*, *supra*, n. 3, at para. 115.

<sup>87</sup> *Ibid.*, at para. 115.

<sup>88</sup> *Ibid.*, at para. 115.

<sup>89</sup> *Ibid.*, at para. 120.

<sup>90</sup> *Ibid.*, at para. 115.

<sup>91</sup> *Ibid.*, at para. 122.



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>92</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>93</sup>

**(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.

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<sup>92</sup> *Paul v. Canadian Broadcasting Corp.* (2001), 198 D.L.R. (4th) 633 (F.C.A.).

<sup>93</sup> *Ibid.*, at para. 60.

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>94</sup>
- Seven years of delay in a disciplinary proceeding against an insurance agent where diminished memories “might” affect the fairness of a hearing.<sup>95</sup>
- 44-month delay where complete inactivity had led a doctor to believe that the claim of professional misconduct had been abandoned.<sup>96</sup>
- 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>97</sup>

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<sup>94</sup> *Warren v. Criminal Injuries Compensation Board* (2005), 262 D.L.R. (4th) 144 (Ont. Div. Ct.).

<sup>95</sup> *Stearns v. Alberta Insurance Council* (2001), 37 Admin. L.R. (3d) 114 (Alta. Q.B.). See also

<sup>96</sup> *Hutchinson v. Newfoundland (Minister of Health & Community Services)* (2001), 204 Nfld. & P.E.I.R. 254 (N.L. S.C.), at para. 29.

<sup>97</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.”

- 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>98</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>99</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 this would “add to the difficulty of recollection by Crown's potential witnesses.” However, the clearest of cases threshold was not met.<sup>100</sup>
- Delay not approaching the level of affecting the public's sense of decency or fairness.<sup>101</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>102</sup>

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<sup>98</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>99</sup> *Blencoe, supra*, n. 3, at para. 103.

<sup>100</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>101</sup> *Canada (Attorney General) v. Norman*, [2003] 2 F.C. 411

<sup>102</sup> *Walsh v. Mobil Oil Canada*, [2006] 370 A.R. 38 (Alta. Q.B.).

- 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>103</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>104</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>105</sup>
- Four years of delay in disciplinary proceedings, in the absence of prejudice, is not “clearly unacceptable” or an abuse of process.<sup>106</sup>
- Two and a half years of delay in a disciplinary regime that involves investigation and exploration of possible settlement is not inordinate delay.<sup>107</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.

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<sup>103</sup> *United Food and Commercial Workers, Local 1400 v. Tora Regina (Tower) Limited (Giant Tiger, Regina)*, 2008 SKCA 38 (Sask. C.A.)

<sup>104</sup> *Stinchcombe v. Law Society of Alberta* (2002), 212 D.L.R. (4th) 675 (Alta. C.A.)

<sup>105</sup> *Holder v. Manitoba (College of Physicians and Surgeons)* (2002), 220 D.L.R. (4th) 373 (Man. C.A.).

<sup>106</sup> *Law Society of British Columbia v. Ewachniuk*, [2003] 6 W.W.R. 459 (B.C.C.A.).

<sup>107</sup> *O'Toole v. Law Society of New Brunswick* (2007), 312 N.B.R. (2d) 258 (N.B.C.A.).

There was no evidence of significant prejudice. The judgment was under reserve for two years and this was not found to be inordinate.<sup>108</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>109</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.

In *Blencoe*, the minority of the court also suggested that costs might be an acceptable remedy.<sup>110</sup> This may be problematic in light of the very high threshold that must be met in order for an award of costs.<sup>111</sup>

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<sup>108</sup> *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission* (2006), 244 N.S.R. (2d) 321 (N.S.C.A.).

<sup>109</sup> *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519.

<sup>110</sup> *Blencoe*, *supra*, n. 3 at para. 179.

<sup>111</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.

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>112</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>113</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 exists in criminal proceedings.<sup>114</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

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<sup>112</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>113</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).

<sup>114</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”).

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.

**(i) *New constitutional law jurisdiction***

After much controversy,<sup>115</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>116</sup> They may also award remedies under s. 24 of the *Charter* if they have the

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<sup>115</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>116</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

structures and functions for that purpose.<sup>117</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>118</sup> and that interlocutory

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*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>117</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>118</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 initiatives of the superior courts may touch'."



forays to court are to be discouraged,<sup>119</sup> these principles run up against authority that recourse to superior courts in constitutional matters is always available when necessary.<sup>120</sup> Recent authority shows<sup>121</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>122</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>123</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>119</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>120</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>121</sup> *Kelly et al. v. Ontario*, unreported, May 6, 2008, Ont. S.C.J. (*per* Himel J.).

<sup>122</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>123</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513.

and other objections to that new weaponry.<sup>124</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 two 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>124</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.

**(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>125</sup> guidelines are not binding on the tribunal.<sup>126</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>127</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.

**(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

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<sup>125</sup> See, e.g., *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884.

<sup>126</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>127</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>.

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>128</sup> Multi-jurisdictional investigations and circumstances of regulatory cooperation create even more difficult problems.<sup>129</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.

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<sup>128</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>129</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.

**SCHEDULE “A”**  
**REASONS OF THE TRIBUNAL IN *CLIFFORD***

Reasons for President’s Determination

Estate of Tony Clifford

Claimants: Ms. Berni Campbell claiming common-law spousal status; and Family of Mr. Clifford claiming Ms. Berni Campbell was not the common-law spouse

In order for an individual to be considered a common-law spouse for survivor benefits under the OMERS plan, s/he must have been living in a continuous conjugal relationship for a period of not less than three years (or shorter, under some circumstances where there is a child) and must not have been living separate and apart at the date of death. Living separate and apart generally means that the two parties are physically living separate and apart and there is an intent to end the “spousal” relationship by one or both parties. However, there are situations where both criteria are not met. For example, two parties may be living under the same roof but have ended the relationship. In this case, they are, in fact, living separate and apart. In other cases, two parties may be physically living separate and apart (e.g. one is living in a nursing home) but there is no intent to end the “spousal” relationship. In this case, the two are not deemed to be living separate and apart.

As is often the case, there were conflicting submissions put forth describing the nature of the relationship between Mr. Clifford and Ms. Campbell by both claimants. Based on a review of the information submitted, it was determined that on balance of probabilities, Ms. Campbell met the definition of spouse under the OMERS plan for the following reasons:

- Bills and other documentation submitted support Ms. Campbell’s claim that the two lived together for approximately 5 ½ years.
- Numerous testimonials and copies of cards addressed to Mr. Clifford and Ms. Campbell as a couple reinforce the spousal relationship.
- Although the two did have brief periods of physical separation due to his substance abuse, including on the date of Mr. Clifford’s death, testimonials from third parties (e.g. neighbours, professional associates of Mr. Clifford) indicate that these absences did not reflect an intent by either party to end the spousal relationship.

## ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

In the Matter of the Ontario Municipal Employees Retirement System Act, R.S.O.  
1990, c. 0-29 (“OMERS Act”)

and

In the Matter of an Appeal from the Decision of the President by Ms. Sylvia Clifford to  
the Appeals Sub-Committee

## DECISION

## The Appeal

Ms. Sylvia Clifford brings this appeal from the decision of the President dated December 21, 2005.

By this appeal, Ms. Clifford, through representations made by her counsel in correspondence dated January 18, 2006 seeks an order overturning the President’s decision and having her declared “*the former wife of Tony Clifford and the designated beneficiary under the OMERS Plan*”. It is the position of Ms. Clifford that “*Ms. Bernie Campbell was not the common-law spouse of Tony Clifford, and was not considered by Tony Clifford to be his common-law spouse*”.

The appeal proceeded by way of an oral hearing *de novo* held on November 1, 2006 and November 30, 2006, followed by written submissions. Closing submissions were heard on January 24, 2007. Throughout the proceedings the parties were represented by counsel.

Mr. Tony Clifford was a firefighter with the Toronto Fire Services. He was an active member of the OMERS Plan when he passed away on February 20, 2005. The central question before the Appeals Sub-Committee was whether Ms. Campbell and Mr. Clifford had been in a common-law relationship for at least three years prior to his death, and was this relationship still in place at the time of his death.

The governing legislation states as follows:

Under the OMERS Act:

Definitions:

1.(1) In this Act:

...

“spouse” has the same meaning as in the *Pension Benefits Act*.



Under the *Pension Benefits Act*, R.S.O. 1990, Chapter P.8:

1. (1) In this Act:

...

“spouse” means either of two persons who,

- (a) are married to each other, or
- (b) are not married to each other and are living together in a conjugal relationship,
  - (i) continuously for a period of not less than three years,

### The Facts

Considerable evidence was presented by respective counsel. However, it was undisputed that some time during 1999, Mr. Clifford moved in to Ms. Campbell’s residence. It is the position of Ms. Clifford that this was a landlady/tenant relationship while Ms. Campbell asserts that they were living together as common-law partners.

The evidence indicates that subsequent to 1999, Ms. Campbell and Mr. Clifford vacationed together; and attended social and family functions together, including staying overnight at Mr. Clifford’s parent’s home. Ms. Campbell was in attendance at key meetings involving Mr. Clifford’s status as a firefighter. In documentation provided from Mr. Hugh Doherty, a representative of the Toronto Professional Firefighters Association, she is identified as having lived with Mr. Clifford for six years and as his “partner”. In the weeks prior to his death, Mr. Doherty attended Ms. Campbell’s residence to return personal effects to Mr. Clifford. Ms. Campbell was involved in funeral preparations for Mr. Clifford. She was named in the notice in the newspaper and was given a share of his ashes.

There is also evidence from a number of neighbours as to the nature of the relationship between Ms. Campbell and Mr. Clifford. Paul Calarco, a barrister and solicitor and a neighbour of Ms. Campbell testified that he believed that Ms. Campbell and Mr. Clifford were in a common-law relationship because of his dealings with the couple and in particular because: 1) Mr. Clifford was at Ms. Campbell’s house all of the time and came and went freely; 2) Mr. Clifford took care of Ms. Campbell’s dog; 3) Mr. Clifford drove Ms. Campbell’s car; and 4) Mr. Clifford and Ms. Campbell went shopping together. Vivian Ropchan, a barrister and solicitor and a neighbour of Ms. Campbell also testified that she believed that Ms. Campbell and Mr. Clifford were in a common-law relationship because of her observations, interactions with both Mr. Clifford and Ms. Campbell and a number of conversations that she had with Ms. Campbell where Ms. Campbell clearly indicated that Mr. Clifford was moving in with Ms. Campbell as part of a long-term commitment.

Based on the totality of all of the evidence, the Appeals Sub-Committee finds that Ms. Campbell and Mr. Clifford were in a common-law relationship as defined by the OMERS Act and the *Pension Benefits Act*.

The next question before the Appeals Sub-Committee therefore was whether this relationship continued until Mr. Clifford's death. Evidence was heard from Mr. Keith Clifford and Mr. Hugh Doherty to the intended effect that either Mr. Clifford had wilfully moved from Ms. Campbell's residence or that she had evicted him in the weeks prior to Mr. Clifford's death on February 20, 2005.

The Appeals Sub-Committee heard that Mr. Clifford was involved in a number of rehabilitation programs over a number of years which involved him leaving the Campbell residence from time to time. It also heard that, Mr. Clifford would be absent on occasion because of his drinking problems, even taking up residence in a motel on occasion. In each instance, however, Mr. Clifford returned and resumed residency with Ms. Campbell. Mr. Clifford died in a motel while on a drinking binge.

The evidence was that on two separate occasions in January, 2005, Mr. Doherty met with Mr. Clifford to review papers involving his termination agreement from the Toronto Fire Services. Both times this occurred at Ms. Campbell's residence and she was present and assisted at the meeting.

In early February 2005, approximately two weeks prior to Mr. Clifford's death, Mr. Doherty attended Ms. Campbell's residence to return some items to Mr. Clifford. He was not present and Mr. Doherty gave evidence that Ms. Campbell stated that Mr. Clifford no longer resided at her home and the relationship had essentially ended. It is recognized that this evidence was disputed. Ms. Campbell denied Mr. Doherty's recollection of this conversation. Ms. Campbell gave evidence that she told Mr. Doherty that she did not know where Mr. Clifford was, but she "didn't throw Tony out," and that she expected, as in the past, that he would return after a few days.

There was also evidence from Ms. Campbell that Mr. Clifford was at the Campbell residence in mid-February 2005 and stayed overnight. Further, there was evidence that Ms. Campbell and Mr. Clifford had spoken on that occasion with the intent of possibly celebrating their "anniversary" on February 14<sup>th</sup>. Ms. Campbell's evidence was that Mr. Clifford was in the home with her when she went to Church on February 13, 2005, but not there when she returned. Shortly thereafter, he was found dead in a motel. Much of his personal belongings and important papers were still in the home Ms. Campbell owns and in which as we earlier found they lived in a conjugal relationship.

Based on all the evidence before us including the evidence of Hugh Doherty and Keith Clifford, we are not persuaded that the conjugal relationship between Ms. Campbell and Mr. Clifford had terminated at the time of his death, and accordingly we dismiss the appeal of Ms. Clifford.