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## NATIONAL ROUNDTABLE ON ADMINISTRATIVE LAW

Chasing the  
Reasonableness Rainbow:  
The Translucence of Judicial Review

Friday, May 27, 2016  
8:30 am to 4:30 pm  
University of Ottawa

### CO-CHAIRS

- Athanasios Hadjis, Senior Legal Counsel, Administrative Tribunals Support Service of Canada
- Michael Gottheil, Executive Chair of the Social Justice Tribunals of Ontario
- The Hon. Georgina Jackson of the Court of Appeal for Saskatchewan and President of CIAJ



This roundtable provides a unique opportunity for judges, tribunal members, practitioners, academics and students to consider questions about reasonableness in the context of judicial review of administrative law decision-making.

Two keynote speakers, the Hon. Marshall Rothstein and the Hon. Joseph T. Robertson will share their insights about issues of particular interest to the broad judicial review community.

Mr. Rothstein served on the Supreme Court of Canada from March 2006 to August 2015. While at the country's highest court, he wrote extensively in the area of judicial review. He will be able to share his present views of the state of judicial review based on his years as a practitioner, an academic and a judge on the Federal Court of Appeal and the Supreme Court of Canada.

Mr. Robertson has viewed the issues surrounding administrative law from many perspectives: as a judge of the Federal Court of Appeal, as a judge of the New Brunswick Court of Appeal and now as a respected Jurist-in-Residence, Faculty of Law, University of New Brunswick. He is also an author of many works in the area, including most notably as a co-author of *Judicial Deference to Administrative Tribunals in Canada: Its History and Future*, (Markham: LexisNexis, 2014) and a working paper in progress entitled "Deference in a Nutshell: Sort Of," which will be made available to seminar participants. He will give his view of deference as of 2016.

### TOPICS

- "Deference in a Nutshell"
- What is expected by the Supreme Court of Canada by way of a "reasonable decision"?
- The Content and Parameters of Reasonableness
- The Charter's Effect on the Reasonableness of a Tribunal Decision
- The Role of the Principles of Natural Justice in the Development of a Reasonable Decision
- How Does a Tribunal Write a Reasonable Decision?
- Justice in the Development of a Reasonable Decision
- Explaining the Tribunal's Decision: The Role of the Tribunal before the Reviewing Court
- Going Forward

For the judiciary • Tribunal community • Practitioners • Academics • Students

# NATIONAL ROUNDTABLE ON ADMINISTRATIVE LAW

## Chasing the Reasonableness Rainbow: The Translucence of Judicial Review

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### Detailed Program

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**8:00 – 8:45 am**      **Registration and Continental Breakfast**

**8:45 – 9:00 am**      **Welcome Remarks and Introduction**

*Co-Chairs*

- Athanasios Hadjis, Senior Legal Counsel, Administrative Tribunals Support Service of Canada
- Michael Gottheil, Executive Chair of the Social Justice Tribunals of Ontario
- The Hon. Georgina Jackson of the Court of Appeal for Saskatchewan and President of CIAJ

**9:00 – 10:00 am**      **“Deference in A Nutshell”**

Since 2008, when *Dunsmuir v. New Brunswick* was issued, the Supreme Court of Canada has rendered approximately 50 decisions and has applied the standard of review of correctness on five occasions only. Is this what was intended? Is this what deference means? Insofar as there can be a any one distinct view of deference, what is the court’s view? What is the tribunal’s view of deference? What is the academy’s view of deference?

*Co-Moderators*

- The Hon. Georgina Jackson and Mr. Athanasios Hadjis

*Speaker*

- The Hon. Joseph T. Robertson, QC, formerly of the Federal Court of Appeal and the New Brunswick Court of Appeal

*Commentators*

- Mr. Bernard Fishbein, Chair of the Ontario Labour Relations Board
- Mr. Alexander Pless, General Counsel, Quebec Regional Office, Justice Canada

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**10:00 – 10:20 am**

**BREAK**

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**10:20 am – Noon**      **Part One – What is expected by the Supreme Court of Canada by way of a “reasonable decision”?**

What makes a decision reasonable? Do the Courts and tribunals have different perspectives on this issue? What are the expectations of the judiciary with respect to reasons? What is the tribunal perspective with respect to the giving of sufficient reasons? To what extent is a tribunal required to seek out the legislature’s intent? How does a tribunal address in its reasons, or does it, issues surrounding procedural fairness? To what extent do reasons address, or should they address, the Charter? If a party makes an argument, is the decision unreasonable if the tribunal does not address it? (See: *Driver Iron Inc. v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local Union No. 720* 2011 ABCA 55.) Does the review for reasonableness differ if the tribunal is itself an appellate tribunal? To what extent should the courts be differentiating between tribunals? Is a labour relations board different than a residential tenancies board, for the purposes of judicial review, assuming differences in legislation? These issues will be considered in the context of a fact pattern.

*Moderator*

- Justice Mary Gleason, Federal Court of Appeal

# NATIONAL ROUNDTABLE ON ADMINISTRATIVE LAW

## Chasing the Reasonableness Rainbow: The Translucence of Judicial Review

### Session A – The Content and Parameters of Reasonableness

This session will briefly review the provenance of the reasonableness standard of review and the central developments at the Supreme Court of Canada since *Dunsmuir*. The Supreme Court of Canada has indicated that review for reasonableness is to be conducted in a manner that is respectful of, not submissive to, administrative reasoning. What understanding of the constitutional role of courts and tribunals underpins that respect? And how is that respect to be conveyed – without sliding into either submission, or overly rigid expectations? While the case law has repeatedly affirmed that reasonableness review is to be responsive to the legal and factual context of the decision, what “contextual factors” must inform application of the standard in the particular case? What key questions arise for judges when seeking to “calibrate” the standard, or set the “margin of appreciation”? Finally, we will ask: is there a way of consolidating the law on reasonableness review that may better conduce to predictability and consistency, while remaining true to the principled imperatives that inspired the fashioning of the standard in the first place?

*Speaker* • Professor Sheila Wildeman, Schulich School of Law, Dalhousie

### Session B – The Charter’s Effect on the Reasonableness of a Tribunal Decision

To what extent is the Charter relevant to the development of a “reasonable” decision? This session will consider the application of Charter values in the interpretation of a statute and in the exercise of discretion. *Doré v. Barreau du Québec*, [2012] 1 SCR 395 and *Mouvement laïque québécois v. Saguenay (City)* 2015 SCC 16 will be considered.

*Speaker* • The Hon. Harvey Groberman, Court of Appeal for British Columbia

### Session C – The Role of the Principles of Natural Justice in the Development of A Reasonable Decision

What is the content of natural justice? What does “duty of fairness” mean? What makes a decision procedurally fair? What is the impact of self-represented litigants on this question? How does a high volume tribunal address this question? How does one ensure that a decision meets the standard demanded by the principles of natural justice?

*Speaker* • Ms. Gertrude Lavigne, Senior Counsel, Legal Services, Parole Board of Canada

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Noon – 1:00 pm

LUNCH

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## Chasing the Reasonableness Rainbow: The Translucence of Judicial Review

### 1:00– 2:30 pm **Part Two – How Does a Tribunal Write a Reasonable Decision?**

In this session, we will reflect further on the morning's discussion in light of a concrete problem, asking: What are the practical implications of the law on reasonableness review for the drafting of tribunal decisions? What unique perspectives may judges, tribunal members, counsel, and academics bring to the question of whether a set of draft reasons meets the standard? We will consider the potential for tensions between the imperatives of efficiency and justification, as we explore, for instance, implications of the law relating to adequacy of or "gaps in" reasons, the role of the Charter (or "Charter values") in administrative reasoning, and how reason-giving is affected by elements of the law on judicial review conventionally framed under the heading of procedural fairness.

- Chair* • The Hon. Harvey Groberman, Court of Appeal for British Columbia
- Problem Author* • Professor Sheila Wildeman, Schulich School of Law, Dalhousie
- Commentators* • Mr. Simon Turmel, Régie de l'énergie du Québec  
• Ms. Julie Baril, Directrice des affaires juridiques, Tribunal administratif du Québec

### 2:30 – 3:00 pm **Part Three – Explaining the Tribunal's Decision: The Role of the Tribunal before the Reviewing Court**

The issue of a tribunal's standing has recently been considered in *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44. What are the practical implications of that decision? When does representation become justification for the decision under review? What is the role of tribunal counsel when one of the parties is self-represented?

- Speaker* • Margaret Leighton, Counsel to the Executive Chair/Manager of Legal Services, Social Justice Tribunals Ontario

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### 3:00 – 3:15 pm **BREAK**

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### 3:15 – 4:30 pm **Going Forward**

Is there a natural, and expected tension, between the judicial role and a review for reasonableness only? Is there room for some broader review which takes account of the courts' experience with equity and justice? Does the assessment for reasonableness challenge the judicial function? What are the respective roles of judges, practitioners and academics in navigating the way forward? How can judges, practitioners and academics contribute to improving the state of the law? To what extent can these groups advocate for change within the *Dunsmuir* framework? Beyond doctrine, are there systemic barriers, such as lack of substantive expertise or interest, which may prevent these groups from making meaningful contributions? Do we need legislative overhaul? Is there room for the legislatures to be engaged, tribunal by tribunal, to determine precisely what is intended by way of a review?

- Moderator* • Michael Gottheil, Executive Chair of the Social Justice Tribunals of Ontario
- Speaker* • The Hon. Marshall Rothstein, Q.C., Hunter Litigation Chambers

### 4:30 pm **Wrap-Up and Closing Remarks**

# REGISTRATION FORM

## 2016 NATIONAL ROUNDTABLE ON ADMINISTRATIVE LAW Chasing the Reasonableness Rainbow: The Translucence of Judicial Review

Friday, May 27, 2016 – 8:30 am to 4:30 pm, University of Ottawa (ON)

Surname: .....

First Name: .....

Title: .....

Organization: .....

Address: .....

..... Postal Code: .....

Email: .....

Telephone: .....

Fax: .....

I am fluent in:  English  French  both

Do you have any dietary restrictions?  Yes  No

Which? .....

### REGISTRATION FEE

(includes documentation, continental breakfast and lunch)

CIAJ members **\$395**  Non members **\$495**

Students **\$75** (enrolled full-time at Canadian universities)

**PAYMENT BY:**  Cheque  Am Ex  Visa  MasterCard

Account No: .....

Exp. Date: .....

Name on the card: .....

Signature: .....

**ACCOMMODATION:** Participants are required to make their own hotel reservations.

**CANCELLATION FEE:** Any request for reimbursement must be submitted in writing to CIAJ at least seven (7) days prior to the event. An administrative fee of 10% will be withheld on cancellations made in time. Except as noted, fees will not be reimbursed. Another participant may be designated as substitute.

### TO REGISTER:

Please complete and return this form with your payment:

#### By mail:

Canadian Institute for the Administration of Justice  
PO Box 6128, Station "Centre Ville"  
3101 Chemin de la Tour, Room A-3421  
Montreal, Quebec, H3C 3J7

**By fax :**  
514-343-6296

**By email :**  
[ciaj@ciaj-icaj.ca](mailto:ciaj@ciaj-icaj.ca)

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### Are you a Member of the CIAJ?

#### Membership Categories and Fees

**Individual** **\$150**

Individual members active in their profession are entitled to access all the documentation available on CIAJ's website (conference and seminar papers and video-recordings among other benefits). (This membership fee is recoverable by federally-appointed judges under S. 27(1) of the Judges Act. It may also be possible for provincially-appointed judges and others to be reimbursed through professional allowances from their organizations.)

**Retired Person** **\$75**

Members retired from their profession have the same benefits as individual members.

**Student** **\$10**

Members enrolled as full-time students have the same benefits as individual members.

#### I wish to join CIAJ:

No  Yes (See category checked above)

**Payment included with registration fee**

I would like information about Institutional Membership

**Contributor**

As an alternative to annual membership dues, you may choose to become a contributor. You will be issued a tax receipt for a charitable donation (Registration number: 10686 1529 RR 0001).

Amount of donation: \$ \_\_\_\_\_

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