From Theory To Adjudicative Practice: An Overview of Recent Developments In Administrative Law

Process Fairness The Adjudicator’s Guide to Manage and Conduct Hearings
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This paper is designed to provide an overview of recent developments in Administrative Law that may be of interest to tribunals and other administrative decision-makers. As in most such “overview” papers, it sacrifices depth for breadth; this paper will (to torture one metaphor), identify the signposts on the Administrative Law highway, and perhaps make occasional pit stops along that highway, but not stay long at any of the myriad of interesting locations along our trip.

**RAMIFICATIONS OF DUNSMUIR**

*Dunsmuir decision*

*Dunsmuir v. New Brunswick (Board of Management)*\(^1\) concerned the dismissal of a public servant. Mr. Dunsmuir was employed by the Court Services Division of the New Brunswick Department of Justice. He was appointed by Order-in-Council to the position of Court Clerk. After some performance-related issues, the employer decided that Mr. Dunsmuir was not right for the job and dismissed him on a without-cause basis. Mr. Dunsmuir filed a grievance under the New Brunswick *Public Service Labour Relations Act*. The grievance was denied by management, and Mr. Dunsmuir referred the grievance to adjudication. There were two issues before the adjudicator. First, there was a question of statutory interpretation: namely, whether the Act permitted the Adjudicator to determine the real reason for termination (and, if it was for cause, determine whether the employer could prove that there was just cause for the termination). Second, there was a question of procedural fairness: namely, was Mr. Dunsmuir, as a public office-holder, entitled to procedural fairness

\(^1\) [2008] SCC 9.
prior to his dismissal (and was he afforded the appropriate procedural safeguards in this case).

The Adjudicator ruled in Mr. Dunsmuir’s favour and ordered Mr. Dunsmuir to be reinstated. Eventually, the matter went to the Supreme Court of Canada (by way of judicial review and subsequent appeals). The Supreme Court of Canada took the case as an opportunity to re-examine whether and to what extent tribunals should be deferred to on judicial review. The majority of the Supreme Court of Canada concluded that both the pragmatic and functional analysis and the existence of three standards of review were no longer appropriate. Instead, the Supreme Court of Canada adopted a “standard of review” analysis to determine which of only two standards of review ought to be adopted: reasonableness and correctness.

The “standard of review” analysis first requires a reviewing court to review the existing case law to determine whether the appropriate standard of review has already been determined. If not, a reviewing court must assess the standard of review by reference to a series of non-exclusive factors:

1. The existence of a privative clause.
2. The purpose of the tribunal as determined by its enabling legislation.
3. The nature of the question at issue. Questions of fact, mixed fact and law, or questions of law within the specialized expertise of the tribunal are typically reviewed on a standard of reasonableness. Constitutional questions, questions of law that are of central importance to the legal system, and true questions of jurisdiction are typically reviewed on a correctness standard.

Justice Binnie wrote a concurring decision in which he questioned the utility of the majority’s standard of review analysis. Justice Deschamps (with Justices Charron and Rothstein) wrote another concurring decision in which they accepted the use of only two standards of review, but would have adopted a method of determining those two standards that is closer to the method used to determine the standard of review in appellate courts: deference is owed on questions of fact and questions of mixed fact and law, and on questions of law concerning the interpretation of the enabling statute unless there is a “right of review.”
4. The expertise of the tribunal.3

There are only two standards of review: correctness and reasonableness. The application of the correctness standard is self-evident: the reviewing court must be convinced that the tribunal’s decision being reviewed is correct. The “reasonableness” standard is more difficult to encapsulate. The majority of the Supreme Court set out the basis of that standard as follows:

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.4

Reasonableness thus requires a two-step approach: the decision must be rational or intelligible on the face of the reasons, and it must come to a result that falls within a range of reasonable, acceptable outcomes. The Nova Scotia Court of Appeal has recently summarized this approach as follows:

[29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.

[30] Several of the Casino’s submissions apparently assume that the "intelligibility” and “justification” attributed by Dunsmuir to the first step allow the reviewing court to analyze whether the tribunal's

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3 Dunsmuir, supra at paragraphs 55- 64.
4 Ibid. at paragraph 47.
decision is wrong. I disagree with that assumption. “Intelligibility” and “justification” are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (Dunsmuir, ¶ 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal’s reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board’s conclusion inhabits the range of acceptable outcomes. . . .

[31] Under the second step, the court assesses the outcome’s acceptability, in respect of the facts and law, through the lens of deference to the tribunal’s “expertise or field sensitivity to the imperatives or nuances of the legislative regime.” This respects the legislators’ decision to leave certain choices within the tribunal’s ambit, constrained by the boundary of reasonableness.5

On the merits of the case, the Supreme Court unanimously rejected Mr. Dunsmuir’s claims. They concluded that the Adjudicator’s interpretation of his enabling statute was unreasonable (or, for the minority, incorrect) and that he had no power to “look behind” the decision to determine if it was a for-cause termination. The Supreme Court also decided that those public office holders who have a contract of employment with the Crown – which is to say, almost all of them – are not entitled to procedural fairness prior to their dismissal. In short, public office holders with a contract of employment with the Crown are entitled to contractual rights and remedies, not public law rights and remedies.

**Application and Consequences of Dunsmuir**

Dunsmuir has been cited in over a thousand decisions in less than a year since it was released. However, Dunsmuir permits – and arguably encourages – the preservation of previous decisions on standard of review. Thus, where a Court has previously – using the pragmatic and functional approach – adopted a standard of review of "reasonableness simpliciter or "patent unreasonableness", reviewing Courts typically

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apply the new reasonableness standard of review, often without undertaking a new “standard of review” analysis.⁶

To be certain, an area as marked with difficulties as the standard of review analysis cannot be entirely resolved by one Supreme Court of Canada decision. *Dunsmuir* has still left a number of unresolved questions, such as:

- Does the “reasonableness” standard exist on a sliding scale (so that there are different “levels” of deference within the reasonableness standard), or is the 2003 Supreme Court of Canada decision in *Law Society of New Brunswick v. Ryan* that reasonableness is a point, not a continuum, still good law? The Ontario Court of Appeal⁷ and Alberta Court of Queen’s Bench⁸ have stated that reasonableness is a single standard, but some other courts have still spoken about “levels” of deference within the reasonableness standard.⁹

- What makes a decision fall outside the “range of acceptable outcomes” in the second part of the reasonableness test? Is the judge entitled to review the possible acceptable outcomes and then determine whether the decision being reviewed falls into those outcomes, or is this a more limited review based on, for example, ensuring that the decision is consistent with fundamental legal and constitutional tenets?

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⁶ See, for example, *Conway v. Darby*, 2008 CanLII 54773 (Ont. S.C.J.) at paragraph 7 or *Limestone District School Board v. O.S.S.T.F.*, 2008 CanLII 63992 (Ont. Div. Ct.).


⁹ *Zaytoun v. Canada (CFIA)*, 2008 FC 502, overturned on appeal 2009 FCA 17 but the Court of Appeal did not address this point.
• When will a court defer on a question of law – i.e. when is a question of law of central importance to the legal system?\(^\text{10}\)

• What makes a tribunal expert? While the Court in *Dunsmuir* refers extensively to “expertise”, none of the three decisions clarify how to determine expertise. Is *experience* equivalent to *expertise*, or are there some other factors to consider?

• What impact does *Dunsmuir* have on statutory standards of review? The British Columbia *Administrative Tribunals Act* and Ontario *Human Rights Code* both specify “patently unreasonable” standards of review for certain decisions. Do those statutes preserve the pre-*Dunsmuir* standard of “patent unreasonableness” or are those statutes simply a factor – like a privative clause – indicating that reasonableness is the appropriate standard?\(^\text{11}\)

• Do tribunals have the jurisdiction to determine whether subordinate decision-makers observed procedural fairness? Although the Supreme Court decided that Mr. Dunsmuir was not entitled to procedural fairness, the Court did not address (and no party appeared to be concerned about) the fact that the Adjudicator – a tribunal – rendered the initial decision about procedural fairness. Traditionally, questions of procedural fairness were reserved for Superior Courts. If there was a right of administrative review, any procedural

\(^{10}\) See *Rebel Holdings Ltd. v. Divisionof Scholaire Franco-Manitobaine*, 2008 MBCA 64 at paragraph 173, where the Manitoba Court of Appeal applied the standard of correctness to a question of statutory interpretation by the Land Value Appraisal Commission under *The Expropriation Act* because of the “fundamental importance to the statutory regime for expropriation and will have precedent-setting value” – notwithstanding the Court’s conclusion that the issue was not a matter of “central importance to the legal system.”

\(^{11}\) This question may be answered by the pending Supreme Court of Canada decision in *Khosa v. Canada (MCI)*, currently on reserve. The Court may address the extent to which section 18.1 of the *Federal Courts Act*, which specifies particular grounds of review (e.g. “error of law” or “erroneous finding of fact made in a perverse or capricious manner”), modifies the standard of review analysis in *Dunsmuir*. 
unfairness in front of a subordinate administrative tribunal was cured by the availability of a full appeal or review by the final administrative tribunal. In *Dunsmuir* (and other cases discussed below) there appears to be a movement towards tribunals determining questions of procedural fairness. *Dunsmuir* left open the question of the extent to which tribunals can review subordinate decisions for procedural fairness.
STANDING OF A TRIBUNAL ON JUDICIAL REVIEW

The “strict” approach

For years, the rule on standing of a tribunal on judicial review of its own decision was articulated in the Supreme Court of Canada decision in *Northwestern Utilities Ltd. and al. v. Edmonton.*\(^{12}\) In that case, the Supreme Court set out a very limited role for tribunals to appear on an appeal or application for judicial review against their decision. The Court stated that “[t]he Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.”\(^{13}\) The Supreme Court limited tribunals to making submissions on the issue of jurisdiction; tribunals could not make submissions about the merits of their decision or about allegations of breaches of procedural fairness.

The issue of jurisdiction was, eventually, expanded to include the ability of a tribunal to make submissions about the appropriate standard of review of its own decision and to "explain the record"\(^{14}\) in order to explain why its decision was a reasonable approach to adopt and could not be said to be patently unreasonable. However, Courts were still reluctant to allow tribunals to advocate in defence of their own decisions.

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\(^{13}\) *Ibid.* at page 709.
\(^{14}\) *Caimaw v. Paccar of Canada Ltd.,* [1989] 2 S.C.R. 983
The “contextual” approach

This stricter approach to tribunal standing was relaxed in the 2005 Ontario Court of Appeal’s decision in *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*.\(^\text{15}\) In that case, the Children’s Lawyer had acted for a Jane Doe in number of legal proceedings when she was a minor. Upon reaching the age of majority and apparently dissatisfied with her representation, Doe requested a copy of her legal file. The Children’s Lawyer, pursuant to the *Freedom of Information and Protection of Privacy Act*, disclosed the majority of Doe’s file but denied access to a minor portion. Doe appealed the decision to deny access to the Information and Privacy Commissioner, who then ordered disclosure of the entire file except a handful of pages. The Children’s Lawyer subsequently applied to have the Commissioner reconsider her decision but was largely unsuccessful. Next, the Children’s Lawyer applied for judicial review of the decision.

The Commissioner opposed the application. In response, the Children’s Lawyer moved for an order that the Commissioner be denied standing, or at least be prohibited from arguing that her decision was correct. The Divisional Court held that the Commissioner had a right to standing as a party to the judicial review application and that a court ought not exercise its discretion to limit the Commissioner’s participation because the court would deny itself the assistance of legitimate and helpful submissions. The Children’s Lawyer appealed.

The Ontario Court of Appeal dismissed the appeal and permitted the Commissioner to participate in the proceedings. The Court was guided by two considerations: first, that the court should have a fully informed adjudication of the issues (citing *CAIMAW*  
Local 14 v. Paccar of Canada Ltd.) and, second, that the tribunal must maintain its impartiality (citing Northwestern Utilities Ltd v. Edmonton (City)).

The Court of Appeal first acknowledged that because the Judicial Review Procedure Act does not clearly articulate the scope of standing accorded to a tribunal whose decision is under review, it is up to the court to exercise its discretion in determining the issue. The Court set out four relevant (but non-exclusive) considerations in deciding whether to grant a tribunal standing:

(i) the nature of the problem (e.g. is the issue unique to the parties, or is there a question of broader impact);
(ii) the purpose of the impugned legislation;
(iii) the extent of the tribunal’s expertise; and
(iv) the availability of another party able to knowledgeably respond to the attack on the tribunal’s decision.

The Court of Appeal agreed with the Divisional Court that permitting the Commissioner full standing in the judicial review proceedings would facilitate a fully informed adjudication of the issues without significantly compromising the Commissioner’s impartiality and without undermining the integrity of her decision-making process. Additionally, the Court of Appeal held that because the issues raised by the judicial review were fundamentally ones of statutory interpretation, it was unlikely that the Commissioner’s ability to act impartially in future hearings would be adversely affected by her participation. Most importantly, however, the original requester did not participate in the judicial review application. Without the Commissioner’s involvement, the case would have been heard without any person advocating the requester’s position.
New cases in various jurisdictions (BC, Alberta, and Federal Court)

Since the 2005 decision in *Children’s Lawyer*, courts across Canada have differed on whether to adopt the “strict” approach to standing in the *Northwestern Utilities* decision or the more “contextual” approach in *Children’s Lawyer*.

The British Columbia Court of Appeal has adopted the contextual approach in *Children’s Lawyer*. *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*16 involved an appeal by Global Securities Corp. from a decision of the Securities Exchange Commission Panel. The issue in that case involved the standing of a regulatory body to challenge a ruling made by that body’s own disciplinary panel.

The TSX Venture Exchange Inc. issued a notice of hearing against Global Securities Corp., one of its branch managers, and two representatives. The Exchange alleged that the notified parties committed infractions in contravention of the British Columbia *Securities Act*. After a hearing, the Exchange disciplinary panel found against the three representatives in relation to the infractions but dismissed the infractions alleged against the corporation. The Exchange and the Executive Director of the British Columbia Securities Commission applied to the British Columbia Securities Commission for a hearing and review of the decision of the disciplinary panel. Global Securities Corp. challenged the standing of the Exchange to bring the application. The corporation further submitted that any argument of the Exchange

must be limited to an explanatory role relating to the record or relating to jurisdiction.

The Commission determined that (a) the Exchange is a party directly affected by the decision, (b) the Exchange is entitled to apply for a hearing, and (c) the Exchange is entitled to make submissions on the merits of the decision of the disciplinary panel. Global Securities Corp. further appealed the Commission’s decision.

The British Columbia Court of Appeal referred favourably to Children’s Lawyer for the proposition that standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an a priori rule. The Court observed that the disciplinary panel itself cannot appear and make submissions on the merits at a review of its own decision. However, the Court differentiated the Exchange from the disciplinary panel. The Court found the Exchange’s role is limited to conducting the investigation of infractions and prosecuting them; it is not involved with adjudicating the infraction. As such, the Court found a very clear functional difference between the Exchange and the disciplinary panel. Accordingly, the Court of Appeal upheld the decision of the Commission and dismissed the appeal.

The Alberta Court of Appeal, by contrast, has recently confirmed the strict approach in Northwestern Utilities. In Brewer v. Fraser Milner Casgrain LLP17, Brewer had complained to the Alberta Human Rights and Citizenship Commission that her employer, Fraser Milner Casgrain LLP, had insufficiently accommodated her health condition. The Chief Commissioner found that Brewer had not cooperated sufficiently with her employer nor had she sufficiently proven her case. Brewer then

applied to the Court of Queen’s Bench for a judicial review and obtained an order quashing the order of the Commission. Fraser Milner Casgrain LLP subsequently appealed to the Court of Appeal. The Chief Commissioner filed a separate notice of appeal to argue the merits of the case. Upon a motion to strike his appeal, he made four arguments: first, that he has appealed judicial review decisions to the Court of Appeal in recent years and had been heard at those appeals; second, that he was named as a respondent in the Court of Queen’s Bench, and so is a full party and can appeal anything; third, that the scope of any appeal by the Chief Commissioner is a separate question and has been seriously disputed from the outset; and finally, that the Court of Appeal has received factums from various statutory tribunals discussing the merits of those appeals. Brewer brought an application to strike the Chief Commissioner’s appeal.

The Court of Appeal rejected each of the Chief Commissioner’s arguments and allowed the application. First, the Court held the “silent precedents” the Chief Commissioner relied on were, at best, very weak authorities because the issue under consideration had not been raised and considered directly in those instances.

Second, the Court held that, in Alberta, naming the tribunal subject to judicial review as a respondent in the style of case is merely a historical and logistical feature and not a statement for or against any substantive rights or standing of that tribunal. The Court reiterated that (a) a person or body who is not a full party in the Court of Queen’s Bench cannot appeal its decision to the Court of Appeal, and (b) no one should be made a party after the Court of Queen’s Bench has pronounced judgment just to let that party appeal. The Court explained that this reasoning is especially true if the party wishing to appeal has no personal interest which will be affected and is merely concerned about developing the law.
Third, the Court concluded that there has been no case brought to its attention which states that a statutory tribunal can argue the merits of the dispute to a superior court. In support of this conclusion, the Court referred to the policy that statutory tribunals should maintain patent neutrality. On the issue of whether a statutory tribunal whose own decision has been quashed by judicial review can appeal from that to the Court of Appeal, the Court concluded that it cannot unless its own jurisdiction is in question or was questioned by the Court of Queen’s Bench.

Finally, the Court found that the factums from the other statutory tribunals dealt with other issues and were of little guidance.

The Alberta Court of Appeal considered “decisions of some other courts of appeal that would expand the Northwestern Utilities rule” but did not specifically discuss Children’s Lawyer.

The Federal Court is also continuing to follow the more strict rule in Northwestern Utilities instead of the more contextual rule in Children’s Lawyer. For example, in Air Canada, Jazz Air LP v. Canada (Cdn. Transportation Agency)\(^\text{18}\), the airline companies involved in the case applied for leave to appeal from the Canadian Transportation Agency’s decision concerning the “One Person-One Fare” decision. In response, the Agency filed a comprehensive Memorandum of Fact and Law. The airlines brought a motion to strike the Agency’s Memorandum. The Federal Court of Appeal agreed to strike the memorandum, explicitly stating that the Paccar decision is of questionable use (now that the patent unreasonableness standard no longer exists) and that it would apply a more strict approach to tribunal standing.

\(^{18}\) 2008 FCA 168.
Finally, the Ontario Divisional Court recently gave very limited standing to the Agricultural, Food and Rural Affairs Tribunal (the tribunal responsible for labour relations in the agricultural sector): The Tribunal could make submissions on its structure and composition (in response to an allegation of institutional bias on the basis of the Tribunal’s structure and the absence of any labour-side representatives on the Tribunal) and on the appropriate standard of review.¹⁹

DUTY TO PROVIDE REASONS

In Baker v. Canada (MCI), the Supreme Court of Canada first enunciated a duty of administrative tribunals to provide reasons for decisions, stating:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H & C decision to those affected, as with those at issue in Orlowski, Cunningham, and Doody, militates in favour of a requirement that reasons be provided. 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.

The duty to provide reasons informs two aspects of administrative law: substantive review and procedural fairness. This paper will address both of those aspects in turn.

Reasons and substantive review

The recent decision in Dunsmuir, as discussed above, re-stated the reasonableness standard as one which is based upon the reasons provided for a decision. The reasonableness inquiry is to determine whether the reasons given for the decision are logical and coherent. What then will courts do when the reasons given for a decision are inadequate? Two recent Ontario decisions provide two different alternatives.

The first decision is *Clifford v. Ontario (Attorney General)*. In that case, the Ontario Municipal Employees Retirement System ("OMERS") Appeal Sub-Committee had to determine whether Bernadette Campbell was the common law spouse of the late Tony Clifford at the time of his death. If she was his common-law spouse then she would receive death benefits; if not, the benefits would be paid to the named beneficiary, Sylvia Clifford (Tony's ex-wife). There was evidence to support both views: Tony Clifford lived with Bernadette Campbell for several years, but there was some evidence that she put him out shortly before his death and that he may have been paying rent to her when they were cohabiting. The OMERS Tribunal held in favour of Bernadette Campbell. The Divisional Court, on judicial review, concluded that this decision fell within a range of acceptable outcomes – i.e. met the second criteria for reasonableness set out in *Dunsmuir*. However, the OMERS Tribunal’s decision failed the first inquiry because it did not provide a logical or rational reason for its decision. The Divisional Court stated that the OMERS Tribunal did not provide a rational justification for preferring some evidence instead of other, and also did not demonstrate that it understood or applied the correct legal test. The Divisional Court held as follows:

Rationality of the result is not the only consideration of the reasonableness standard of review. The question is not solely whether the result is a rational one, but whether the Tribunal acted reasonably and rationally in reaching that conclusion. That is a question that can only be answered by reviewing the Tribunal’s reasons. In this case, the Tribunal heard conflicting evidence on many points. However, in its decision it makes no findings of credibility or reliability. If it chose to accept the evidence of one witness over another, that can only be gleaned by the ultimate decision reached. No reasons are provided as to how that decision was reached.

This is not a situation in which the nature of the evidentiary analysis undertaken by the Tribunal is obvious by virtue of the result reached. For example, it could be argued that to have

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reached the conclusion it did, the Tribunal must have believed the testimony of Ms Campbell and that her testimony is sufficient to support the result. However, what is unclear is whether the Tribunal members appreciated the potential credibility issues with her evidence but nevertheless were satisfied as to her truthfulness, or whether they misapprehended the evidence to the contrary, or whether they disbelieved the witnesses who provided evidence to the contrary, or whether they misapprehended the testimony of those witnesses, or whether they misapplied the law.

The Tribunal did not articulate what the test for common-law status that it applied. [sic] It is therefore unclear whether the Tribunal appreciated that the test for common-law status has both a subjective and objective element: Glen v. Kirby-MacLean Estate, [2006] O.J. No. 520 (S.C.J.) and cases referred to therein. It is not just a matter of common residence or what outsiders to the relationship, such as the neighbours who testified, may have thought. It is very much an issue of how the two people in the relationship regarded the relationship and each other. In that regard, it would have been relevant for the Tribunal to consider that:

[The Divisional Court goes on to list several evidentiary points]

. . . It was open to the Tribunal to prefer her [Campbell’s] evidence over the evidence of others if it had valid reasons for doing so. However, since the Tribunal made no findings of fact and no findings of credibility, it is not possible to tell if that was the conclusion it reached, or if it simply failed to properly consider the nature of this evidence.

Thus in that case insufficient reasons were themselves a basis to overturn the Tribunal’s substantive decision.

The second way in which Courts have dealt with inadequate reasons was set out in the pre-Dunsmuir case of Kerry (Canada) Inc. v. DCA Employees Pension Committee. That case involved an appeal of the decision of the Financial Services Tribunal concerning a number of pension issues. One of those issues was the adequacy of the notice provided to pension plan members of the amendment of the

22 2007 ONCA 416. This case is currently before the Supreme Court of Canada.
pension plan from a defined benefit plan to a defined contribution plan. The Ontario Court of Appeal concluded that the standard of review on that issue would normally have been one of deference; however, “as the Tribunal gave no meaningful reasons for its decision, no deference is owed to it.” Thus, in that case the inadequacy of reasons shifted the standard of review from reasonableness to correctness.

**Reasons and procedural fairness**

The Supreme Court in *Baker*, as quoted above, stated that the failure to provide adequate reasons for a decision may violate the rules of procedural fairness. To determine what constitutes an appropriate level of detail to constitute “fair” reasons, administrative law has borrowed extensively from the criminal law rules concerning adequacy in reasons.

The high-water mark for adequacy of reasons is generally considered to be the 2002 Supreme Court decision in *R. v. Sheppard*[^24^], which stressed the importance of intelligible reasons that explain the reasoning pathway followed by the decision-maker in order to permit meaningful appellate review. The Supreme Court of Canada has, more recently, clarified that *Sheppard* does not require perfect reasons. In *R. v. Walker*[^25^] the Supreme Court of Canada upheld a conviction based on reasons that were “far from ideal”, stating:

[^23^]: *Ibid.* at paragraph 149.
[^25^]: 2008 SCC 34.
Reasons are sufficient if they are responsive to the case’s live issues and the parties’ key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue.26

The Supreme Court of Canada has recently addressed the related issue of adequacy of reasons concerning credibility assessments. In two cases, the Court recognized that it can be difficult to put the reasons for credibility findings into words, and that this difficulty means that the decider has some leeway in articulating his or her reasons for making particular findings of credibility. In R. v. REM, the Court reasoned as follows:

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.27

In F.H. v. McDougall, a civil case involving an allegation of sexual assault, the Supreme Court of Canada again warned against overturning decisions because of terse explanations for credibility findings, stating:

[A]n appeal court cannot intervene merely because it believes the trial judge did a poor job of expressing herself. . . .

An unsuccessful party may well be dissatisfied with the reasons of a trial judge, especially where he or she was not believed. Where findings of credibility must be made, it must be recognized that it may be very difficult for the trial judge to put into words the process by which the decision is arrived at (see R. v. Gagnon). But that does not make the reasons inadequate. . . . Nor are reasons inadequate

26 Ibid. at paragraph 20.
because in hindsight, it may be possible to say that the reasons were not as clear and comprehensive as they might have been.\textsuperscript{28}

The Supreme Court of Canada also adopted a fairly low threshold for reasons in \textit{Lake v. Canada} – an extradition decision where the Minister provided “brief” reasons. The Court stated that “reasons need not be comprehensive” so long as they allow the individual to understand why the decision was made and allow the reviewing court to assess the validity of the decision.\textsuperscript{29}

Aside from the rules about the adequacy or sufficiency of reasons, there have been judicial developments on other aspects of the duty to provide reasons. Two relatively recent cases have addressed the timing of reasons: one concerning a long delay, and the other concerning a short delay.

In \textit{R. v. Teskey}\textsuperscript{30}, the Supreme Court of Canada overturned a conviction because of a lengthy delay between the announced results of the case and the issuance of the reasons for that decision. In that case, the trial judge heard evidence over the course of five days, and then four months later released an oral decision. The accused filed a notice of appeal within one month; however, the trial judge did not release his reasons for decision until eleven months after his oral finding. The Supreme Court of Canada quashed the conviction because, in the circumstances of that case, the delay in issuing the verdict coupled with the delay in issuing written reasons gave rise to a concern that the trial judge engaged in result-driven reasoning.

\textsuperscript{28} 2008 SCC 53 at paragraphs 99-100.
\textsuperscript{29} \textit{Lake v. Canada}, 2008 SCC 23 at paragraph 46.
\textsuperscript{30} 2007 SCC 25.
In *Sternberg v. Ontario Racing Commission*, on the other hand, too short a delay between the hearing and the reasons gave rise to a breach of procedural fairness. The Ontario Racing Commission ordered that a counsel (Mr. Sternberg) be prohibited from appearing as counsel before the Commission, pending receipt from him of an unqualified apology to the Commission. The apology was demanded as a result of Mr. Sternberg’s attack on Rod Seiling, Chair of a Commission hearing before which Mr. Sternberg appeared on behalf of two clients. The panel heard the matter, deliberated for eight minutes, and then returned to read its decision for twenty-five minutes. The decision consisted of fifteen pages of carefully-prepared reasons, complete with “certain rhetorical flourishes not normally found in a decision drafted in eight minutes” including:

First offender status is a bountiful benefit enjoyed but once...

A cross-examination mired in repetition and degenerating into argument could precipitate inadequacy and frustration culminating in a certain petulance...

The declaration must not be a pragmatic incantation of words carrying no persuasive force. No expression of apology made this day would serve to atone. The taint of expediency would be ingrained – a facile response to circumstances of the moment...

As the Divisional Court put it: “To suggest that the reasons could have been prepared in the eight-minute adjournment defies logic.” Thus, there was a reasonable apprehension that the panel had pre-judged the matter. The decision was quashed.

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31 2008 CanLII 50514 (Ont. Div. Ct.)
33 The Divisional Court took the further, and unusual, step of refusing to refer the matter back to the Commission on the grounds that Mr. Sternberg’s conduct should be dealt with by the Law Society of Upper Canada, not the Ontario Racing Commission.
Finally, the Ontario Divisional Court has recently decided that inadequate reasons can sometimes be cured by the release of a second set of (supplementary) reasons. Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353\(^3^4\) involved a decision by the Ontario Labour Relations Board. The Board issued a brief decision, and the union requested the Board to provide fuller reasons, which the Board provided. The employer then brought an application for judicial review of the Board’s decision. The employer submitted that the initial set of reasons was inadequate and that the Board had no jurisdiction to issue supplemental reasons. As such, the employer contended that the Divisional Court should only consider the initial set of reasons.

The Divisional Court dismissed the application. The Court adopted the functional approach set out by the Supreme Court of Canada in R v. Sheppard, in assessing whether the reasons in this case were adequate. The test is whether the reasons provided a basis for meaningful judicial review on a standard of reasonableness. The Court concluded that the Board’s first set of reasons were indeed inadequate because there was no explanation as to why the Board reached the conclusion that it did. However, the Court held that the Board had the jurisdiction pursuant to section 114(1) of the Labour Relations Act to vary or revoke any decision, including the jurisdiction to issue supplemental reasons. This provision is framed broadly so as to ensure that the Board is not functus once it has issued a decision. In particular, the Court noted that Board in this case specifically reserved the power to issue further reasons.

The Court observed that the second set of reasons, while fuller than the first, still were far from the thorough and careful reasons generally issued by members of the

\(^{3^4}\) (2008), 91 O.R. (3d) 20 (Div. Ct.)
Board. Still, the Court was satisfied that the supplemental reasons were adequate as they permitted the court to engage in its judicial review function on a standard of reasonableness. In particular, the Court commented that the Board, in the supplemental reasons, made reference to the evidence in support of its conclusion.
DELAY

Delays are an unfortunate but inevitable part of our justice system. The question that is often raised is “how long is too long” – in other words, at what point does delay stop being unfortunate and become abusive?

The leading decision on this issue remains Blencoe v. British Columbia (Human Rights Commission)\(^{35}\). That case involved human rights complaints that were filed in 1995 but not scheduled to be heard by the British Columbia Human Rights Tribunal until March of 1998, a delay of over 30 months. The respondent (Blencoe) commenced judicial review proceedings to have the complaints stayed. He alleged that the Commission had lost jurisdiction due to the unreasonable delay in processing the complaints. Further, he alleged that the delay caused serious prejudice to him and his family and amounted to an abuse of process and a denial of natural justice.

The Supreme Court of Canada found that the delay was reasonable. The Court explained that the determination of whether a delay is inordinate is not based on the length of the delay alone, but on other contextual factors such as the nature of the case and its complexity, the purpose and nature of the proceedings, and whether the respondent contributed to the delay or waived the delay. Delay alone would not warrant a stay of proceedings as an abuse of process at common law unless there is proof of significant prejudice resulting from the delay. The prejudice must be of sufficient magnitude to impact the fairness of the hearing: it must bring the human rights system into disrepute, or be directly prejudicial to one of the parties. In that

respect, the Court found that Blencoe did not suffer prejudice such as to affect the fairness of his hearing.

The Court found that, although the B.C. Human Rights Commission took longer than is desirable to process the complaints, the delay was not so inordinate as to amount to an abuse of process. The Court commented that during the period of delay, there was no extended period without any activity in the processing of the complaints.

There have been a number of recent decisions concerning whether particular tribunals have delayed hearings so long that the delay amounts to an abuse of process.

In *Igbinosun v. Law Society of Upper Canada*[^36] a solicitor was charged with sexual assault. The criminal charges were later stayed due to unreasonable delay. Meanwhile, the Law Society of Upper Canada commenced disciplinary proceedings against him. The disciplinary proceedings took four years to begin. The Hearing Panel found Igbinosun to have been guilty of professional misconduct and sentenced him accordingly. Igbinosun subsequently appealed to the Appeal Panel, but was largely unsuccessful.

Among other things, Igbinosun appealed the Appeal Panel’s decision to uphold the Hearing Panel’s refusal to stay the discipline proceedings notwithstanding the delay of over four years in getting to the hearing. The Divisional Court declined to interfere with the Appeal Panel’s decision on this issue (although it did overturn the...

discipline on other grounds\textsuperscript{37}), holding that the Appeal Panel had applied the correct legal lest and addressed the relevant factors to be taken into account. The Divisional Court concluded that this was a “close” case but refused to interfere with the Hearing Panel’s decision to proceed. Interestingly, the Divisional Court granted deference to the Hearing Panel (and the Appeal Panel) on this issue. Typically, issues of procedural fairness are always reviewed on a correctness standard; however, in this case the Divisional Court deferred to the Hearing Panel, stating that its decision fell within the “reasonable range of options” open to it.\textsuperscript{38}

In \textit{Tora Regina (Tower) Ltd. (c.o.b. Giant Tiger, Regina) v. Saskatchewan (Labour Relations Board)}\textsuperscript{39} the Saskatchewan Labour Relations Board heard an application to certify the Union as a bargaining agent and only rendered its decision 37 months later (certifying the Union as a bargaining agent). During that time, the employer opened a new store and hired new employees. However, the employer did not notify the Board of the changing character of the workforce. The employer was then successful in filing an application to quash the Board’s decision due to the significant changes that had occurred in the employer’s workforce. The Union appealed to the Saskatchewan Court of Appeal.

The Court of Appeal found that the Board’s delay in dealing with the certification was indeed unreasonable, but the Chambers judge erred in quashing the decision. The Court noted that the Board was obliged to make its decision on the basis of the facts presented before it. The Board had no independent obligation to actively seek out

\textsuperscript{37} The decision was quashed on two grounds. First, the Hearing Panel moved from the “misconduct” to “penalty” phases of the hearing so quickly that the solicitor was only provided with a half-day’s notice that he was guilty of misconduct and would have to present on penalty. Second, the Hearing Panel had unreasonably refused a request for a short adjournment (initially 2 weeks, but then eventually only for a matter of hours) so that his solicitor could attend another court matter before proceeding.

\textsuperscript{38} Igbinosun, supra at paragraph 76.

information respecting changed circumstances. Accordingly, the Board’s delay in rendering a decision did not give rise to a breach in the principles of natural justice or procedural unfairness.

The Court pointed out that, unlike Blencoe, which dealt with pre-hearing delay, this case was concerned about post-hearing delay. Nevertheless, the Court held that the basic principles articulated in Blencoe should apply. In that respect, the Court found that the employer suffered no prejudice at all during the delay period. In essence, the impact of the delay was simply that the employer carried on business union-free for over three years following the filing of the certification application.

In Shooters Sports Bar Inc. v. Ontario (Alcohol and Gaming Commission)40, Shooters Sport Bar Inc. appealed an order of the Alcohol and Gaming Corporation Board suspending its liquor license for 10 days for having permitted drunkenness on its premises. The bar had not been informed about the charge until three months after the events. The Divisional Court found that this delay breached the rules of procedural fairness. The context of this type of case was important to the Divisional Court; the bar knew nothing about what the liquor inspector observed on the night in question until 103 days later, and all the bar owner had to work with was a date some three months earlier and some descriptions of patrons that were so vague as to be useless. The Court concluded that the prosecution had not justified either the delay in notifying the bar or the lack of particulars provided in the notification. These transgressions made it impossible for the bar to have a fair hearing on the charges. In the end, the Court set aside the Board’s decision and permanently stayed the notice giving rise to the hearing.

The next case, *Hennig v. Institute of Chartered Accountants of Alberta*,\(^\text{41}\) involved an appeal from the Appeal Tribunal of the Institute of Chartered Accountants of Alberta who refused to stay disciplinary charges against the appellant accountants and auditors due to delay in prosecution. The Institute of Chartered Accountants received a complaint in regard to the conduct of the appellants. As a result, the Institute launched an investigation but failed to produce an investigator’s report until some 28 months after the investigator first promised it. Four years and one month after the initial complaint, the Institute notified the appellants that there was sufficient evidence to conduct a hearing into the allegations of professional misconduct. The appellants then applied to the Discipline Tribunal for a stay of the charges based on delay. In this case, the primary reason for the delay was the complexity of the investigation.

Eventually, the Alberta Court of Appeal denied the challenge based on delay. Citing *Blencoe*, the Court of Appeal held that administrative proceedings will only be stayed when there is proof of significant prejudice resulting in unacceptable delay. In particular, the Court stated that the mere passage of time is insufficient to justify a stay because the court cannot impose a limitation period if the statute does not contain one. The Court agreed with the Appeal Tribunal’s assessment that because the prosecution would be based primarily on documentary evidence and that parallel hearings would serve to preserve memories, the appellants’ right to a fair hearing was not compromised. Ultimately, the Court determined that while the delay was of concern, viewed in the context and in light of the reasons for delay, the Appeal Tribunal reached a reasonable conclusion.

Finally, the Federal Court has recently dealt with delay in *Pacific Parts Co. v. Canada (Minister of Public Safety and Emergency Preparedness)*.\(^{42}\) Pacific Parts Co. imported garment products for sale to retailers. Revenue Canada, Customs Investigations Division commenced an investigation into Pacific’s importing practices and, as a result, seized merchandise (for goods not yet entered into Canada) and issued a Notice of Ascertained Forfeiture (for goods already entered into Canada). The company appealed the forfeiture notice but not the seizure. A series of proceedings in connection with this appeal then ensued and lasted over 10 years.

Pacific Parts Co. maintained that the delay in investigating and reaching a decision was unreasonable and caused serious prejudice to its case to the point that it had lost an opportunity to produce evidence in which to mount a persuasive case. The Court found that the delay in itself was not unreasonable. The Court reasoned that the company itself was responsible for much of the delay and that it had agreed to some of the delay. Finally, the Court was not persuaded that the company had been prejudiced by the delay.

Delay is obviously an ongoing concern of tribunals. Even though a lengthy delay may not result in a tribunal’s decision being quashed or an ongoing proceeding being stayed, too long a delay between the commencement and conclusion of a proceeding will bring the administration of that tribunal into disrepute. In response to these concerns, a number of tribunals have adopted processes or plans to streamline certain hearings. Courts have, to date, permitted tribunals to streamline cases in order to avoid delay and have rejected complaints from participants that the streamlining measures violate the rules of procedural fairness.

\(^{42}\) 2008 FC 1050.
Recently, the Ontario Divisional Court approved of streamlining measures adopted by the Ontario Labour Relations Board. In *International Brotherhood of Electrical Workers, Local 1739 v. International Brotherhood of Electrical Workers*\(^{43}\) the Labour Relations Board decided to adjudicate a “jurisdictional” dispute (a dispute about which construction union has jurisdiction over particular work) by way of a consultation rather than holding a full hearing. A consultation involves having most of the evidence and submissions presented in writing, and then a short (in this case, two-day) oral hearing. The unsuccessful Local of the IBEW applied for judicial review, alleging that the consultation process was contrary to the rules of procedural fairness.

The Divisional Court dismissed the application, holding that the Board did not deny the Local natural justice in proceeding by way of a consultation process. The Court noted that, absent constitutional limitations, the exercise of powers by a board or tribunal in accordance with the express provisions of its governing statute cannot be attacked as a breach of natural justice. The *Labour Relations Act* specifically gives the Ontario Labour Relations Board the power to proceed by way of consultation when necessary (particularly in construction cases).

The Court emphasized that the nature of the decision in this case (i.e., labour dispute on a large construction project requiring timely completion) required the Board to undertake an expedited procedure. In particular, the Court stated that holding the kind of formal hearing proposed by the Local in the face of impending deadlines for the completion of the project in question would have rendered the Board’s determination on the merits meaningless and moot. Finally, the Court made clear that delay in these circumstances would have been highly prejudicial to all.

\(^{43}\) (2007), 86 O.R. (3d) 508 (Div. Ct.)
parties, a fact that the Board appropriately took into consideration in making the procedural determination that it did.
BIAS

The rule against bias has remained relatively static over time: there must be a reasonable apprehension of bias, held by reasonable and right-minded persons, fully informed and viewing the matter realistically and practically.44 There have been two relatively recent cases concerning the application of this rule; those two cases are summarized below.

In *Boardwalk Reit LLP v. Edmonton*45, the Alberta Court of Appeal had occasion to consider the rule against bias and provided a useful context-driven summary of situations when bias is present. In that case, Boardwalk appealed its land tax assessments to the Assessment Review Board, then to the Municipal Government Board and eventually up to the Alberta Court of Appeal. After the matter had been heard by the Alberta Court of Appeal, counsel for the assessor asked to have the Court of Appeal’s panel set aside on the basis of a reasonable apprehension of bias. One of the panel members had previously appealed her own property taxes and had used accountants from the same accounting firm employed by Boardwalk. While that panel member volunteered to take no further part in the deliberations, the remaining panel members still ruled on whether she (and, by implication, the whole panel) was disqualified.

The Court of Appeal concluded that the panel member was not disqualified, and went so far as to call the allegation “far-fetched.” The panel member had no relationship with the parties or any of the witnesses in the matter (she used different

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45 2008 ABCA 176.
accountants from the same firm that Boardwalk used). Further, her tax appeal was on an entirely different issue and involved a different municipality.

The Court of Appeal summarized several instances of allegations of bias. This helpful summary is produced in full below.

(a) One counsel is someone with whom the trial judge sometimes socializes, but he does not do so around the time of an actual case and did not around the time of this case, and never mentions his cases with that lawyer: *Wellesley L. Trophy Lodge v. BLD Silviculture*, 2006 BCCA 328 (CanLII), 2006 BCCA 328, 2006 BCCA 328 (CanLII), [2006] 10 W.W.R. 82.


(c) Even in a big city, where the judge’s brother is a member of the large law firm appearing for one side; one cannot bar a judge from hearing any cases involving a large firm in his or her city: *G.W.L. Property v. W.R. Grace Ins. Co. of Canada* 1992 CanLII 934 (BC C.A.), (1992) 74 B.C.L.R. (2d) 283, 288-89 (one J.A.).

(d) One party’s firm of lawyers also acts for the trial judge in drafting and holding the judge’s will, even if the firm is revising

(e) Two lawyers are in a big firm. One (a partner) is retained to defend a suit against a small law firm. The plaintiff in that suit is the respondent in a probate proceeding (a separate suit) being tried by a judge married to the other lawyer (an employee) in the big firm: *Re Serdahaly Est. (Popke v. Bolt)*, 2005 ABQB 861 (CanLII), 2005 ABQB 861, 392 A.R. 220.

(f) Counsel for the accused is from the same law firm which had previously defended the son of the trial judge on a somewhat similar criminal charge: *R. v. Nicol*, 2006 BCCA 370 (CanLII), 2006 BCCA 370, 211 C.C.C. (3d) 33.

(g) A statutory tribunal retains a lawyer as its adviser who had previously advised it with respect to other matters with which one party before it had been involved (which had been overturned on appeal), irrespective of the lawyer’s personal views: *Ayangma v. Human Rts. Comm.*, 2005 PESCAD 18 (CanLII), 2005 PESCAD 18, 248 N. & P.E.I.R. 79 (paras. 19-20).

(h) The trial judge was divorced from a lawyer practising with one of the firms acting in the lawsuit in question, but no longer has any relationship with him: *Middelkamp v. Fraser Valley Real*

(i) The trial judge’s present spouse was represented in unrelated litigation by one of the big law firms acting on the present trial, and the trial judge was an inactive officer of the spouse’s management company (which was not a party): Middelkamp v. Fraser Valley Real Est. Bd., supra (S.C.) (paras. 9-15).


The Court of Appeal went on to discuss disqualification because a trier of fact knows a witness, giving the following examples:

(a) An important witness works for the complainant, which used to be an important client of the judge before he was appointed to the Bench, which witness instructed the judge on some files some years before: R. v. Quinn, 2006 BCCA 255 (CanLII),

46 Ibid. at paragraph 26.
(b) The witness is the son and brother of lawyers who had been the judge’s former law partners, even his mentor. See the decision of the Privy Council in *Man O’War Stn. v. Auckland (City) (#1), supra.*

(c) Important controversial expert evidence will be given by a professional person with whom over the years the judge has had some professional and social contact: see *Ibrahim v. Giuffre* reflex, (2000) 258 A.R. 319, 46 C.P.C. (4th) 114, affd. and adopted 2000 ABCA 112 (CanLII), (2000) 255 A.R. 388 (C.A.).


(f) There is evidence about certain conduct of a lawyer, and the judge can make fact findings about that lawyer, even if previously there had been a somewhat acrimonious split between that lawyer and a law firm in which the trial judge was then a partner. See *Amethyst Petr. v. Primrose Drilling Ventures*, 2007 ABCA 355 (CanLII), 2007 ABCA 355, [2007] A.R. Uned. 601, [2007] A.J. #1242 (Nov. 19), leave den. Mar. 27, 2008 (S.C.C.).

(g) A newly-appointed judge hearing a trial about and against a retired judge of the same court (and who was a lawyer when she was): *Chaba v. Greschuk* (1992) 127 A.R. 133, 134 (C.A.).

(h) A member of a statutory tribunal can finish a reserved judgment after accepting a job with the government, even if the government is a party to the case reserved: *Eckervogt v. R.*, 2004 BCCA 398 (CanLII), 2004 BCCA 398, 241 D.L.R. (4th) 685.


The Court of Appeal went on to conclude that, even if the panel member was disqualified for bias, the rest of the panel would not be disqualified as a result.

The second widely-publicized case involving bias is *Chretien v. Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities, Gomery Commission)*. That case involved an allegation by former Prime Minister Jean Chretien that Justice Gomery – the head of a commission of inquiry into the federal sponsorship program in Quebec – was biased against him. During the course of the Commission proceeding – and before hearing from Chretien or other important witnesses – Justice Gomery made several statements that were widely reported in the media. The Federal Court summarized those statements as follows:

In an article in the *Ottawa Citizen*, dated December 16, 2004, the Commissioner is quoted as having stated, “I’m coming to the same conclusion as (Auditor General) Sheila Fraser that this was a government program which was run in a catastrophically bad way. I haven’t been astonished with what I’m hearing, but it’s dismaying.” In an article published the following day in the *National Post*, Commissioner Gomery, speaking of his previous comment that the Sponsorship Program “was run in a catastrophically bad way,” stated: “Does anyone have a different opinion on that subject?” “I simply confirmed the findings that Sheila Fraser had made, which I think I am in a position to do after three months of hearings”

There is other evidence to lead a reasonable observer to conclude that the Commissioner prejudged the outcome of the investigation. In Mr. Perreault’s book entitled *Inside Gomery* (which the Commissioner in

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49 *Ibid.* at paragraph 82.
the foreword to the book described as “accurate” [“exacte” in the original, French version]) and in an article in the Toronto Star, dated March 1, 2006, Commissioner Gomery is cited as having stated the following with respect to the answer given by the Applicant when asked who was responsible for managing the Sponsorship Program: “And the very answer he gave me was the only answer that counted as far as I was concerned.” “So, with this answer, I had everything that I needed.” Again, this comment was made before all the evidence had been heard from the witnesses who were called to testify or were to be called to testify. A reasonable, well-informed person, viewing this statement, would conclude that, instead of sitting as a dispassionate decision-maker presiding over the hearings with no pre-established ideas regarding the conclusions he would eventually reach after hearing all the evidence, the Commissioner had a plan or checklist of the evidence that was expected and which was required in order to support pre-determined conclusions.

Also, in an article in the Ottawa Citizen, dated December 16, 2004, the Commissioner is quoted as having stated, in reference to upcoming evidence that was to be heard by the Commission, that the “juicy stuff” was yet to come. The term “juicy” is defined by the Canadian Oxford Dictionary as meaning “racy or scandalous.”

The Court concluded that these statements indicated that Justice Gomery prejudged issues and was not impartial towards former Prime Minister Chretien.

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50 Ibid. at paragraphs 86-87.
CAN A TRIBUNAL DEFINE THE SCOPE OF ITS OWN DISCRETION AND PROCEDURE: USE OF “SOFT” LAW

Effective decision-making by administrative agencies and tribunals often involves striking a balance between general rules and ad hoc discretion. A balance must be struck between certainty and consistency on one hand, and flexibility and fact-specific findings on the other. This balance is reflected in the use of guidelines or other forms of “soft law.” The use of these forms of “soft law” has been the subject of two recent Court decisions.

The first such decision is Thamotharem v. Canada (MCI). In that case, Justice Evans of the Federal Court of Appeal provided a thorough analysis of “soft law” principles. That case involved Guidelines for the conduct of hearings of the Refugee Protection Division. The crux of the complaint in that case concerned a provision in the Guidelines stipulating that the oral hearing should commence with the Refugee Protection Officer questioning the claimant – although the RPO still has the discretion to allow the claimant’s counsel to begin the questioning.

The Federal Court of Appeal first had to rule on whether this procedure violated the duty of fairness – and concluded that it did not. The main issue in the appeal, however, was whether the Guidelines were invalid as an improper fetter on an RPO’s discretion to conduct a fair hearing.

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51 As distinguished by “hard law”: statutes, regulations, or Orders-in-Council.
52 2007 FCA 198.
53 Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act (IRPA).
54 The Guidelines list some examples, such as a severely disturbed claimant or a young child who may feel intimidated by the process. The Guidelines refer to “exceptional circumstances” to justify a change in the normal procedure.
Justice Evans wrote that the use of guidelines, policy statements, manuals, handbooks, and other forms of “soft law” was important to achieve an acceptable level of consistency in administrative decisions – particularly for tribunals with discretionary decision-making authority. However:

> [W]hile agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in light of the particular facts, may be set aside, on the ground that the decision maker’s exercise of discretion was unlawfully fettered.\(^{55}\)

The wording of some statutes may mean that “guidelines” prepared pursuant to statutory provisions are binding as “law”. However, Justice Evans concluded that s. 159 of the IPRA did not lead to that result: the “Guidelines” were not “hard law.” Therefore, the Guidelines had to be drafted in a way that did not unlawfully fetter an RPO’s discretion. Justice Evans held that a reviewing Court must examine the wording of the Guideline; the fact that individual RPOs may, in the past, have treated the Guideline as binding does not make the guideline unlawful if it is properly worded (but improperly applied).\(^{56}\) The Guideline at issue expressly permitted RPOs to depart from the standard order of questioning in exceptional circumstances; therefore, the Guidelines did not unlawfully fetter the RPOs’ discretion.

The second case is Rodrigues v. Ontario (WSIAT) involving a Workplace Safety and Insurance Board policy. The claimant in that case argued that his employer’s contributions to health, welfare and pension employment benefits were “earnings” under s. 2 of the Workplace Safety and Insurance Act. The Board has the

\(^{55}\) Thamotharem, *supra* at paragraph 62.

\(^{56}\) If the Guidelines had routinely been applied without individual decision-makers feeling that they could exercise discretion to displace the standard order of questioning, then that would be relevant. The Court of Appeal concluded that no such evidence existed in this case.
jurisdiction to create policies concerning the interpretation of the Act and other issues. Subsection 126(1) of the Act states that “[i]f there is an applicable Board policy with respect to the subject matter of an appeal, the Appeals Tribunal shall apply it when making its decision.” Subsection 126(4) of the Act then provides that if the Workplace Safety and Insurance Appeals Tribunal concludes that a Board policy is inconsistent with, or not authorized by the Act, it shall not make a decision until it refers the policy to the Board for review and the Board issues a direction. The Board had a policy (Operational Policy 4.1) concerning the definition of “earnings”, and that policy did not include the cost of benefits as a component of “earnings.”

Before the Tribunal, Ms. Rodrigues argued that the legislative history of the Act favoured her position. The Tribunal did not explicitly refer to legislative history in its reasons. Therefore, Ms. Rodrigues applied for judicial review on the grounds that the Tribunal failed to consider all relevant evidence and submissions (namely, legislative history). The majority of the Court of Appeal rejected her application, concluding that the Tribunal’s decision was logical and fell within the range of reasonable outcomes.

More importantly for the purposes of this discussion of “soft law”, the majority of the Court of Appeal stated:

In its analysis, the majority [of the Divisional Court, who quashed the Tribunal’s decision] failed to take into account that the evidence of legislative history, while admissible, was irrelevant. Under s. 126(1) of the Act, the Tribunal was bound to apply Operational Policy 4.1. That policy as interpreted by the tribunal, did not include employer payments for benefit plans or pension plans in “earnings”.

This is an example of “soft law” becoming “hard law” – a policy or guideline prepared by a board becomes “hard law” in the sense that it is legally binding upon the tribunal.
CHOICE OF FORUMS: THE “ADEQUATE ALTERNATIVE REMEDY” DOCTRINE

Administrative decision-making is often “layered”; a party dissatisfied with the result in one administrative forum has the right to appeal or apply for a review of that decision in another (higher) administrative forum. In its 1979 decision in *Harelkin v. University of Regina*\(^{57}\) the Supreme Court of Canada stated that a party with a right to an administrative recourse must exercise that recourse before applying for judicial review of a decision. In two recent decisions, lower courts have applied and confirmed the *Harelkin* doctrine.

In *Hazanavicius v. McGill University*\(^{58}\), a PhD candidate sued McGill University for almost $4 million because he was not allowed to complete his PhD in experimental psychology. One of Mr. Hazanavicius’ grounds of review was an allegation that he was not afforded procedural fairness when the University made its decision not to allow him to continue as a PhD student. The Court concluded that this ground must be dismissed, as Mr. Hazanavicius could have appealed that decision to the Senate Committee on Student Grievances – coming to the same result as in *Harelkin*.

In *Merchant v. Law Society of Alberta*\(^{59}\), a Hearing Committee of the Law Society of Alberta found Mr. Merchant guilty of six violations and disbarred him from that Law Society. During the course of the hearing on whether Mr. Merchant was guilty of misconduct, he had stated that he had sent a letter of apology to the complainant. After that hearing was over, the Hearing Chair telephoned the complainant and asked the complainant whether the letter of apology had been received. The complainant advised that he had received the letter. When the hearing reconvened

\(^{58}\) 2008 QCCS 1617.
\(^{59}\) 2008 ABCA 363.
on January 30, 2007 on the issue of penalty, the committee ordered the immediate disbarment of the Applicant. The telephone conversation between the Hearing Chair and the complainant was not made known during that proceeding.

Rather than appeal his decision, Mr. Merchant applied directly for judicial review on the grounds of bias. The sole issue before the Alberta Court of Appeal was whether Mr. Merchant could apply directly for judicial review, or whether he had to exercise his appeal rights to a full panel of the Benchers of the Law Society. The Court of Appeal dismissed the application on the grounds that Mr. Merchant had to appeal, not apply for judicial review. Mr. Merchant argued against the application of *Harelkin* on the grounds that the Benchers were biased by their association with the initial Hearing Committee (which is comprised of other Benchers). The Court of Appeal dismissed that argument. The Court of Appeal also commented on the Benchers’ traditional role in reviewing hearings for both substantive and procedural fairness grounds, so that the Benchers were the appropriate forum in which to challenge the alleged partiality of a Hearing Chair.
LEGITIMATE EXPECTATIONS

In Canada, the rule of “legitimate expectations” is a part of the rules of procedural fairness in two ways. In both, the existence of legitimate expectations is a factor in assessing the degree of procedural fairness that needs to be afforded in a particular case – it does not generate substantive rights.\(^{60}\) First, a representation by a tribunal or other decision-maker may give rise to a legitimate expectation that a particular procedure will be followed in that case. Second, legitimate expectation of a particular substantive result may give rise to greater procedural fairness before the decision-maker makes a contrary decision. Recently, the Federal Court has summarized these rules as follows:

As stated in *Baker*, the legitimate expectations of the person challenging the decision may determine the procedures required by the duty of fairness. The content of the duty of fairness will be affected where a legitimate expectation is found to exist, and the duty of fairness will require that the procedure expected is followed. . . . However, the doctrine of legitimate expectations does not create substantive rights. . . . But, where the decision-makers act in contravention of representations as to procedure, or backtrack on substantive promises without according significant procedural rights, the decision-maker will generally be seen to have acted unfairly.\(^{61}\)

There have been two recent decisions that exemplify and explain the first part of the legitimate expectations doctrine. The first is the Federal Court’s decision in *Worthington v. Canada (MCI)*.\(^{62}\) In that case, the applicant successfully challenged – on constitutional grounds – the rule that prevented foreign born adoptive children of Canadian citizens from obtaining “deemed” citizenship on the basis of their status as adopted children. More importantly for our purposes, however, the Federal Court also addressed an issue of legitimate expectations. The applicant, after applying for Canadian citizenship, was advised by letter that “The application and documents will


\(^{61}\) *Chretien*, *supra* at paragraph 57.

now be reviewed and we will contact you if additional information is required.” When the case analyst who made the decision dismissed the application, she stated “the documentation you submitted in support of your application was insufficient to demonstrate that your parents were Canadian citizens at the time of your adoption.” Justice O’Keefe of the Federal Court allowed an application for judicial review on procedural fairness grounds. He concluded that the applicant had a legitimate expectation that he would be contacted if further information was required, and that this expectation was breached by the case analyst when she rendered her decision on the basis of insufficient information.

The second recent case is a decision of the Ontario Divisional Court in Great Blue Heron Charity Casino v. Seguin. In that case, the applicant applied for judicial review of a decision of the Ontario Human Rights Tribunal. The Casino had a policy of keeping at least two men on every housekeeping “team” so that there was always somebody available to clean the men’s washroom. The Tribunal concluded that the Casino discriminated against Ms. Seguin when it refused to hire her for a full-time housekeeping position because she was not a man when the Casino hired a second man for a housekeeping team. The Divisional Court dismissed the Casino’s application for judicial review on the merits. However, the Casino raised a separate ground of review: it alleged that it had a legitimate expectation that the Tribunal would not render a decision on remedy until a separate opportunity to make submissions on that issue was available. The Divisional Court concluded that the Casino had a legitimate expectation of a separate opportunity to make submissions

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on remedy, and therefore ordered that the issue of remedy be re-heard before a different member of the Tribunal.\textsuperscript{64}

\textsuperscript{64} \textit{Ibid.} at paragraph 27. Interestingly, the New Brunswick Court of Appeal has recently confirmed that a tribunal is not required to hear submissions on the merits and remedies (or penalties) separately: \textit{Moore v. New Brunswick Real Estate Assn.}, 2007 NBCA 64.