

***Multani*: a fundamentally flawed decision?**

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A. Introduction

Every once and a while, the Supreme Court of Canada releases a decision that has the potential to open up a whole series of issues. The *Martin* decision was one such decision.¹ In that decision, the Supreme Court confirmed that tribunals that have the power to determine questions of law also have the power to determine constitutional issues.

Suddenly, the area of administrative law and the constitution assumed a new significance. With more tribunals having the power to determine constitutional issues, the potential for a whole series of new issues arose.

The majority judgment of the Supreme Court of Canada in *Multani v. Commission scolaire Marguerite-Bourgeoys*² represents the Court's first significant foray into these issues, on a matter of fundamental importance: when an administrative tribunal makes a decision on an issue of constitutional law, what is the standard of review?

Unfortunately, the Supreme Court's first foray was not a success. The majority judgment in *Multani* is a decision that raises many more questions than it solves. It seems to have a fundamental flaw at its heart. It also seems very much out of line with other decisions of the Supreme Court concerning the standard of review in constitutional law and in administrative law.

It is to be hoped that the Supreme Court will be able to revisit this issue again soon.

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¹ *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504.

² [2006] 1 S.C.R. 256 *per* Charron J. (McLachlin C.J. and Bastarache, Binnie and Fish JJ. concurring), LeBel J. concurring, Deschamps and Abella JJ. dissenting.

B. The fundamental flaw

In my view, at the heart of the decision of the majority of the Supreme Court of Canada in *Multani* is a fundamental flaw.

There is a fundamental difference between, on the one hand, administrative conduct that itself violates the *Charter* and, on the other hand, the adjudication of a constitutional issue by a tribunal.

To illustrate this point, let's compare a police officer's conduct in conducting a warrantless search of a suspect (*e.g.*, a frisk search) and a decision by the Ontario Securities Commission, after full argument before it, concerning the validity of a subpoena issued by Commission staff to search a company.

Many features concerning these two matters are the same:

- Both the police officer and the Ontario Securities Commission are governmental actors to which the *Charter* applies;³
- Both have engaged in conduct that implicates s. 8 of the *Charter*;⁴
- Both are acting under statutory authority.⁵

One important difference, however, is that while the police officer exercises a discretion regarding whether to conduct a frisk search, there is no “adjudication” in any sense of the term. The police officer himself or herself initiates the conduct. When we interpret the

³ *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

⁴ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

⁵ The Ontario Securities Commission makes its adjudication under the *Securities Act*, R.S.O. 1990, c. S.5. The police officer acts under the *Police Services Act*, R.S.O. 1990, c. P.15, s. 42 (duty to apprehend criminals).

role and powers of police officers under the *Police Services Act*, we do not characterize them as decision-making tribunals. Rather, we characterize them as pure governmental actors, as pure agents of the state.

For this reason, it makes sense that the actions of the police officers are measured against the *Charter* in a very strict fashion. In a long line of cases concerning police officers and whether their conduct infringed the *Charter*, the Supreme Court of Canada has given them no deference. Even though the police officers are administrative actors acting under the authority of a statute, the Supreme Court does not suggest that there are different standards of review for police conduct. It does not apply the “pragmatic and functional test” to police conduct. The standard of review is assumed, automatically, to be correctness.

Going back to the example of the frisk search, such a search is a highly fact-based issue. The police officer acts in the heat of the moment based on the facts observed by him or her. There is very little legal content to the decision. This may also be an area of expertise. Yet no one has suggested that the standard of review for a police officer’s conduct in conducting a frisk search is “patent unreasonableness”. The standard is invariably correctness.

When the court reviews the frisk search, it is not doing the police officer’s job. It is not acting to “apprehend criminals”, which is the police officer’s job under s. 42 of the *Police Services Act*. Its job is to enforce constitutional standards, one of its core functions under s. 96 of the *Constitution Act, 1867*.⁶ The court has every right to intervene on a standard of correctness to enforce the supreme law of the land.⁷ In doing so, it is not doing anything that the Legislature has told it, in valid legislation, not to do.

The Ontario Securities Commission is in a fundamentally different position. It is an adjudicative tribunal. When it adjudicates upon the validity of a subpoena issued by its

⁶ *McEvoy v. New Brunswick (Attorney General)*, [1983] 1 S.C.R. 704

⁷ Section 52(1) of the *Constitution Act, 1982*.

staff, it is not initiating the search. It is not the author of the alleged s. 8 *Charter* violation. Its role is limited to adjudicating upon it.

That adjudicative role is given to it by the statute. The statute gives it – not courts – the power to find the facts, make legal determinations (including, now, constitutional determinations in light of *Martin*), apply the law to the facts and grant a remedy.

Suppose the Ontario Securities Commission decides to uphold the subpoena and the company that is being searched believes that the decision is wrong because the subpoena constitutes an unreasonable search and seizure under s. 8 of the *Charter*. The company launches a judicial review of the Ontario Securities Commission’s decision.

What is in issue in the court is *not* the subpoena. The government action by itself is not in issue. What is in issue is the *decision* of the Ontario Securities Commission to uphold the subpoena. Part of that decision, no doubt, is a legal analysis of s. 8 of the *Charter*, along with findings of fact, and the application of legal standards including constitutional matters to those findings of fact.

Here we are in the realm of so-called “normal” administrative law. A tribunal has made a decision that the Legislature has remitted to it, not the courts. Courts are not automatically free to intervene. The extent to which they are free to intervene under our law is determined by the law concerning the standard of review.⁸

In my view, this example illustrates that there is a fundamental difference between, on the one hand, administrative conduct that itself violates the *Charter* and, on the other hand, an adjudication of a constitutional issue by a tribunal. Automatic standards of correctness are defensible in the case of the former; automatic standards of correctness are less defensible in the case of the latter. In the case of the former, the conduct is subject to review by courts without limitation by the Legislature; in the case of the latter, the

⁸ The so-called “pragmatic and functional test”: see, e.g., *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247.

Legislature has specifically assigned the responsibility of adjudication to the tribunal and the role of the courts is limited to reviewing that adjudication. The difference between the two may be subtle – but, in my view, it is a major difference all the same.

C. The majority judgment in *Multani*

The majority judgment in *Multani* does not recognize the difference between the two and, in my view, this is the fundamental flaw in the decision.

In *Multani*, the school principal decided to impose a restriction upon the pupil concerning his kirpan. The matter proceeded to the “governing board” of the School Board which has the power to approve “rules of conduct and the safety measures proposed by the principal”.⁹

The School Board’s council of commissioners may review a decision of the governing board of the School Board. It did so under the applicable legislation.¹⁰

There is no doubt that the council of commissioners was adjudicating upon an issue that the Legislature had remitted to it, just as the Ontario Securities Commission adjudicates upon issues that the Legislature remits to it. Under the legislation, it was for the School Board’s council of commissioners to find the facts, ascertain the law and apply the facts to the law. It is not for the Court to perform this function. Instead, its job is to *review* the decision that the Legislature had remitted to the School Board’s council of commissioners.

But this is *precisely* what the Supreme Court of Canada did *not* hold.

⁹ *Education Act*, R.S.Q., c. I-13.3, s. 76.

¹⁰ Section 12 of the *Education Act*, R.S.Q., c. I-13.3: “The council of commissioners may, if it considers that the request is founded, overturn, entirely or in part, the decision contemplated by the request and make the decision which, in its opinion, ought to have been made in the first instance.”

In its view, “it is the constitutionality of the *decision* that is in issue in this appeal, which means that a constitutional analysis must be conducted”.¹¹ And that analysis proceeds on the basis of a correctness test in all circumstances.

It would appear that if the “complaint is based entirely on [a] constitutional freedom”, then the usual administrative law standard of review analysis does not apply.¹²

This opens up the possibility that findings of fact that have constitutional significance are suddenly reviewable on the basis of correctness. Does this mean that a party may now offer affidavit evidence in the reviewing court, offering further facts relevant to the constitutional claim? This would mark a radical change in the law.¹³

More significantly, what about questions of mixed fact and law with a constitutional component? A good illustration would be a holding by the Ontario Securities Commission that a particular subpoena, based on the facts before it, was not overbroad in its terms given the privacy interests implicated on the particular facts in the case and given the important purposes bound up in the particular investigation. This is a highly fact-based assessment and may even involve an appreciation of the nature of the securities market and the regulatory challenges facing the Commission. Is all of this suddenly reviewable on the basis of correctness? Do administrative law standards of review now have no application?

Read literally, that is exactly what the decision of the majority of the Supreme Court in *Multani* says. This is wrong, as the Legislature in legislation that is valid and unchallenged has vested the Commission with the power to adjudicate disputes on their merits and as part of that process to find facts, ascertain the law and apply the law to the facts. The Legislature has not given that job to the courts.

¹¹ *Multani*, para. 21.

¹² *Multani*, para. 20.

¹³ *Re Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.) ; *AOV Adults Only Video Ltd. v. Manitoba Labour Board*, (2003), 228 D.L.R. (4th) 656 (Man. C.A.)

What the Supreme Court has done is to place tribunals in which the Legislature has vested the power of factual and legal adjudication on exactly the same basis as any governmental official who engages in some conduct. In doing this, it has overlooked the fundamental difference between the two – in the case of the former the Legislature has effectively said “Courts, this adjudication is to be done by the tribunal not you” while in the case of the latter the courts remain completely free to apply the *Charter*. *Multani* evidences lack of respect for legislative intention.

D. Administrative law standards of review: can they deal with constitutional questions?

In my view, the existing law on administrative law standards of review is more than adequate to handle constitutional law issues.

The existing law on administrative law standards of review is fundamentally concerned with respecting legislative intention. In assessing the standard of review, four factors are to be considered:

- the presence or absence of a privative clause or statutory right of appeal;
- the expertise of the tribunal;
- the purpose of the legislation and the provisions in issue; and
- the nature of the question in dispute: law, fact or mixed law and fact.

These factors are broad and flexible enough to deal with tribunal decisions that have a constitutional law aspect and, frequently but not always, the standard of review will be correctness.

The presence or absence of a private clause or statutory right of appeal would be expected to count for very little. Courts do view themselves as the paramount guardians of the Constitution.

The expertise of the tribunal can be expected to be a factor in favour of deference where the tribunal's specialized appreciation and expertise is centrally relevant to the constitutional question. For example, when the Securities Commission finds that a subpoena is not overbroad under s. 8 of the Charter because of the special needs of the investigators in the capital markets to obtain information in the securities market, that finding is rooted to some extent in the Commission's specialized appreciation of the capital markets. The court has no business substituting its appreciation of the capital markets for that of the Commission, which has been given that responsibility by the Legislature.

The purpose of the legislation could be a factor for deference to the extent that ascertaining that purpose and appreciating its true extent is rooted in the expertise of the Commission. But for that, it would appear to be an issue of pure law for the courts.

The last factor, the nature of the question in dispute, is probably the most significant question to be considered when tribunals make decisions with constitutional content. There is good reason for courts to defer to tribunals' fact finding and to their findings on questions of mixed law and fact when those findings have a particularly significant factual component. The tribunals have been vested with the responsibility to find the facts and to mix with those facts their appreciation of the particular regulated sector or matter remitted to them by the Legislature. Only on questions of pure constitutional law is there a case for no deference, pure constitutional law being within the competence of the courts.¹⁴

¹⁴ *Martin, supra*, n. 1; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 and (1995), 22 O.R.(3d) 1 at 7 (C.A.). See also *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, where the Supreme Court appears to have applied a "nature of the question" test in order to determine the level of deference that should be accorded to constitutional characterizations adopted by the National Energy Board.

The application of these factors means that the standard of review on constitutional issues will frequently be correctness, but not always. This respects the Legislature's constitutional right to vest tribunals, not courts, with the authority to decide certain disputes.

E. The consistency of the administrative law approach with previous decisions of the Supreme Court in constitutional matters

This approach has the virtue of being consistent with the approach of the Supreme Court of Canada and other courts in other constitutional matters.

While the Supreme Court has said that “[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin”,¹⁵ there are many situations where courts legitimately defer to subordinate bodies’ decision-making in constitutional matters:

- Deference was accorded to a highly fact-based determination that a governmental refusal to enter into an agreement with certain aboriginal groups constituted a violation of s. 15 of the *Charter*;¹⁶
- It is a regular occurrence for appellate courts to defer to highly fact-based questions of mixed fact and law in *Charter* decisions;¹⁷

¹⁵ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para. 36, citing *McLachlin J. in RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 136.

¹⁶ *Canada (Attorney General) v. Misquadis*, 2003 FCA 473. Rothstein J.A. wrote that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 “applies to *Charter* cases in the same way as to other cases”.

¹⁷ See, e.g., *R. v. Coates*, [2003] O.J. No. 2295 at para. 20 (C.A.) and *R. v. Chang*, 2003 ABCA 293 at para. 7 (C.A.): “An appeal against a determination of whether a private citizen was acting as an agent of the state or whether s. 8 of the Charter was violated involves the application of a legal standard to a set of facts, which raises a question of mixed fact and law for which the standard of review lies along a spectrum: *Housen v. Nikolaisen* [citation omitted] at para. 36”.

- The interpretation and application of s. 24(2) of the *Charter* (exclusion of evidence) is a question on which appellate courts regularly defer to the rulings of lower courts;¹⁸
- Courts regularly defer to important constitutional rulings that affect the liberty of accused persons;¹⁹
- Courts decline to interfere on a standard of correctness in the case of fundamental issues of freedom of expression and freedom of the press under s. 2(b) of the *Charter*;²⁰
- Issues concerning the proper characterization of facts for constitutional purposes attract a measure of deference where there is no evidence of lack of appreciation by the decision-maker.²¹

As can be appreciated from a perusal of the above list, most of these cases are concerned with the nature of the question that has been decided by the subordinate body and whether that question involves a factual determination or an appreciation of a specialized context. *Multani* and its enunciation of a sweeping standard of correctness in constitutional matters before administrative tribunals, seems very much out of step with these cases, none of which were cited in *Multani*.

¹⁸ See, e.g., *R. v. Buhay*, [2003] 1 S.C.R. 631, at paras. 44-45. The appreciation of whether the admission of evidence would bring the administration of justice into disrepute “is a question of mixed fact and law as it involves the application of a legal standard to a set of facts” and “[t]his question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.” See also *R. v. Belnavis*, [1997] 3 S.C.R. 341 and *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 68 where interference is said to be warranted only when there is “some apparent error as to the applicable principles or rules of law or has made an unreasonable finding”.

¹⁹ See, e.g., *R. v. Oickle*, [2000] 2 S.C.R. 3 (whether a confession is voluntary and thus compliant with s. 7); *R. v. Regan*, [2002] 1 S.C.R. 297 (abuse of process; s. 7 *Charter* violation).

²⁰ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, paras. 188-189.

²¹ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1985] 3 S.C.R. 199 at paras. 80-81 *per* La Forest J.; *R. v. Jarvis*, [2002] 3 S.C.R. 757; *R. v. Ling*, [2002] 3 S.C.R. 814.

G. Where does *Multani* leave us?: some practical considerations

For many years, courts have applied the “pragmatic and functional test” in their judgments. However, many have long suspected that courts have their own sense of when to defer to decision-making and when to interfere with decision-making and they articulate that sense through the “pragmatic and functional test”. The four factors in that test are applied to reach the result that the court considers, in its own judgment, is correct. To some extent, on this view of the standard of review, when it comes to the issue of when courts should defer, courts “know it when they see it”.

On this practical, perhaps cynical, view of the standard of review – a view to which I subscribe – courts do what they feel they should do regardless of the strictures of the “pragmatic and functional test”.

To the extent that this view is correct, *Multani* should not dramatically alter the law.

Courts have always been willing to correct errors of pure constitutional law made by tribunals and *Multani* does not change that.

Courts have usually accepted facts found by tribunals without question (in the absence of “palpable and overriding error”) and it is unlikely that a Court would permit a full evidentiary hearing before them in the face of an earlier evidentiary hearing by a tribunal.

As for the most difficult category of decision-making, the middle category of questions of fact and law or discretionary decisions, *Multani* seems to instruct courts not to defer, but courts are still likely, as a practical matter to factor the tribunal’s appreciation of the matter into its decision. Counsel seeking to uphold a tribunal’s decision-making will strongly defend its merits pointing to the tribunal’s specialized expertise, and many courts may be persuaded by that. In other words, deference may still come in through the back door.

As a practical matter, then, it is probably still “business as usual” for lawyers arguing judicial reviews of constitutional decisions made by administrative tribunals.