

The Bullet-Proof Tribunal: Making Decisions that Survive Judicial Scrutiny

David Stratas^{*}

A. Introduction

A court may overturn a tribunal decision for many reasons. A court may rule that a tribunal reached a decision in an unfair manner. It may rule that a tribunal committed patently unreasonable error. It may simply hold a different view of a complex legal problem such as a constitutional law issue.

Sometimes, in the course of overturning a tribunal decision, a reviewing court may find that a tribunal committed a glaring mistake. Other times, the mistake may be quite innocent.

Circumstances in which courts interfere are broad and varied. But there is one feature common to all these circumstances: no tribunal likes it when one of its decisions fails judicial scrutiny.

As a practitioner who has defended tribunals on judicial review and who has challenged tribunals on judicial review, I offer some practical tips in this paper on how a tribunal can “bullet-proof” itself. A tribunal cannot stop a party from challenging one of its decisions on judicial review. But it can take steps to maximize its chances when one of its decisions falls for judicial scrutiny.

For those relatively unfamiliar with administrative law, this paper also contains a summary of circumstances in which courts may interfere with tribunal decisions. Knowing when reviewing courts may interfere with tribunal decisions is the starting point in identifying how decisions can be made that can withstand judicial scrutiny.

^{*} Of the Ontario Bar. Partner in the Toronto office of Heenan Blaikie LLP. I wish to acknowledge the many excellent discussions I have had with Justice John Laskin on the subject of legal writing, both informally and at conferences, and also many rewarding discussions with Professor Emeritus David Mullan, formerly of Queen’s University, Kingston, Ontario. The views expressed in this article, however, are my own. Thanks also to my colleague, Trevor Guy, for editorial assistance.

B. A brief administrative law primer

Broadly speaking, tribunal decisions can be reviewed on the basis of substance or procedure.

(a) Review on the basis of substance

A reviewing court may hold the view that a tribunal has reached the wrong decision. It may believe that if it were faced with the issue, it might make a different decision. It might find different facts, or reach different legal conclusions. But a reviewing court does not necessarily interfere with the decision.

The Supreme Court of Canada has made it clear in numerous judgments that reviewing courts must approach decisions made by tribunals with different levels of scrutiny depending upon the circumstances. There are three recognized levels of scrutiny:

- The strictest scrutiny, known as correctness review, allows reviewing courts to substitute their own decision for the tribunal if they think the decision is wrong;
- The middle level of scrutiny, reasonableness review,¹ allows reviewing courts to interfere where there are “no lines of reasoning supporting the decision which could reasonably lead [the] tribunal to reach the decision it did”;²
- The lightest scrutiny, known as patent unreasonableness review, allows reviewing courts to interfere only where a decision is “clearly irrational, that is to say evidently not in accordance with reason”³ or one that is “so flawed that no amount of curial deference can justify letting it stand”.⁴

¹ Also known as the standard of *reasonableness simpliciter*: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 74.

² *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247. This is a fairly strict test. Although the word “reasonableness” is used to describe the standard, courts are not supposed to interfere just because the decision is “unreasonable” – the “no lines of reasoning” language suggests that the standard approaches that of “patent unreasonableness”, the highest standard. In fact, one Justice of the Supreme Court, LeBel J. (Deschamps J. concurring), has suggested that the “reasonableness” standard and the “patent unreasonableness” standard can be collapsed into one single standard: see *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77.

³ *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-964 per Cory J.

⁴ *Ryan*, *supra* note 2, per Iacobucci J. Sometimes decisions that are so contrary to the purposes and policies of the legislation under which they are made are patently unreasonable: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 509. Purely punitive remedies that have no rational connection or that are unconstitutional will be patently unreasonable: *Royal Oak Mines Ltd. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 639. Sometimes where the available evidence is utterly incapable of rationally supporting a finding, patent unreasonableness will be present: *Toronto (City) v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487.

The court decides which level of scrutiny by applying a particular test, which it has called “the pragmatic and functional test”.⁵ The test requires that the reviewing court conduct four separate inquiries concerning each decision that is being challenged:

- Is there a “privative clause” in the legislation protecting a decision from being reviewed?⁶ Or is there an absolute right of appeal?⁷
- What is the expertise of the tribunal in relation to the reviewing court? Who is most expert in the area?⁸
- What is the purpose of the legislation and the provision under which the tribunal made its decision?⁹
- What is the nature of the question before the tribunal: a question of general law, a question of fact, or a question of mixed fact and law or discretion?¹⁰

As you can appreciate, a reviewing court that is examining a particular tribunal decision may find that these four inquiries take it towards different standards of review. How the

⁵ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q. v. College and Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226; *Ryan*, *supra* note 2. There are some rare types of substantive decisions where the standard of review is automatically “correctness”, such as constitutional decisions (*Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256) and bad faith decision-making.

⁶ A “privative clause” is a provision in legislation that, literally read, tells the reviewing court that it is not to review the decision. The presence of such a clause is a factor in favour of a finding that the standard of review should be “patent unreasonableness”. A typical example is as follows: “Every order, finding or decision of the Board is final and conclusive and shall not be the subject of any review, further consideration or appeal.” Some privative clauses are less strict. A clause that is less strict is a factor that leads a reviewing court closer to correctness review. Incidentally, the reason why full privative clauses are not read literally is that there is a constitutional principle that courts must always be able to review tribunal decision-making, albeit on a very light standard: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220.

⁷ The presence of a provision in governing legislation that allows a party to appeal directly to court is a factor in favour of the reviewing court applying a strict, or “correctness”, standard of review.

⁸ Securities commissions, for example, are regarded as being expert in the area of regulation of the capital markets. Courts regard them as having more expertise than they do concerning that subject-matter. This is a factor in favour of lighter scrutiny of tribunal decisions. See, e.g., *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672. However, human rights issues before human rights tribunals do not attract deference. Reviewing courts believe that such tribunals are no more expert in such issues than they are: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

⁹ The presence of legislation that requires tribunals to examine and/or develop broad issues of public or regulatory policy and apply that policy is a factor in favour of deference to tribunal decision-making. Where, however, the legislation vests the tribunal to apply general law to particular disputes without much specialized appreciation, review may be stricter (i.e., closer to the “correctness” standard).

¹⁰ If the question that is the subject of the judicial review is one of fact, review may be lighter (i.e., closer to the “patent unreasonableness” standard). If the question that is the subject of the judicial review is one of general law, review may be stricter (i.e., closer to the “correctness” standard).

four inquiries are to be balanced in such a circumstance is a very subjective assessment. For example, two of the inquiries may push the court towards a correctness standard, while two others may push the court towards a patent unreasonableness standard. In another case, it may be that one inquiry *strongly* pushes the court towards a patent unreasonableness standard while others somewhat lightly push the court towards a correctness standard. It is easy for different levels of court to adopt different conclusions concerning the standard of care in a particular case.¹¹

(b) Review on the basis of procedure

Today, it is well-established that a broad variety of tribunals owe parties before them some level of procedural fairness depending on the circumstances.¹² But not all tribunals fall into that category. For example, administrative decision-makers who act in a “legislative” manner, enacting general rules for the purposes of regulation, are not often subject to fairness obligations at common law.¹³

What tribunals are subject to obligations to afford parties procedural fairness? Once again, there is a test to be applied. This test, as yet unnamed, consists of two broad inquiries, the second inquiry consisting of three subsidiary questions:¹⁴

- What does the legislation require?¹⁵
- If the legislation is silent, then the factors to consider are:
 - the nature of the decision;
 - the relationship between the decision-maker and the affected persons; and

¹¹ Perhaps the most notorious example of this is the Supreme Court of Canada’s decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152. *Monsanto* was a rare case where things appeared so clear that all parties and all levels of court were in agreement up to the Supreme Court of Canada: the standard of review was “reasonableness”. The Supreme Court disagreed with everyone who had ever touched the case! It held that the standard of review was “correctness”.

¹² *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Before *Nicholson*, the “duty to act judicially” was thought to apply only to tribunals rendering decisions of a judicial or quasi-judicial nature, to the exclusion of those of an administrative nature.

¹³ *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

¹⁴ See, generally, *Canada (Minister of National Revenue) v. Coopers & Lybrand*, [1979] 1 S.C.R. 495; *Martineau v. Matsqui Inmate Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227.

¹⁵ The Legislature of Ontario and the Parliament of Canada are supreme, subject to the Constitution. Their laws must be obeyed, subject to the Constitution. Therefore, laws that dictate the procedures to be followed are, subject to the Constitution, conclusive of the procedures that must be applied. There is no room for the common law to operate in the face of a clear legislative dictation. See, generally, *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781.

- the effect of the decision on rights, privileges and interests of affected persons.¹⁶

If, as a result of this test, the tribunal is subject to an obligation to afford parties procedural fairness, the tribunal must determine what sort of procedural fairness should be given. As the Supreme Court has repeatedly held, “[t]he concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case”.¹⁷

If the legislation is clear on what sort of procedural fairness is required, that is the end of the inquiry. For example, if a tribunal’s governing statute requires that an oral hearing be held, an oral hearing must be held.

In the absence of any dictation by the tribunal’s governing statute, the tribunal determines the level of procedural fairness to be accorded to a party by applying a five-fold test:¹⁸

- What is the nature of the substantive decision made and the process followed in making it?¹⁹
- What is the nature of the statutory scheme and the terms on which the decision-maker operates?²⁰
- What is the importance of the decision to affected individuals?²¹

¹⁶ A decision that adjudicates specific rights of parties in a contested setting (sometimes called a *lis*) through specific fact-finding and the application of set standards to individual circumstances attracts obligations to afford procedural fairness. On the other hand, a decision that is based the development and application of general policy considerations to issues that have an import well beyond the interests of particular parties before the tribunal may be one where there are no obligations of procedural fairness. A good example would be a decision by a municipal council to pass a general by-law about littering: a particular company may have some interest in the issue, but unless its interest is particularly significant, and unless the by-law can be said to be targeted or directed at the company, the company will not have hearing rights. See, generally, *Canadian Pacific Railway*, *supra* note 14.

¹⁷ *Knight*, *supra* note 14.

¹⁸ *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817.

¹⁹ See *Baker*, *supra* note 18, at para. 23: “One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra* [note 17] at p. 683, it was held that “the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making”. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness.”

²⁰ See *Baker*, *supra* note 18, at para. 24: “The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted”.

²¹ See *Baker*, *supra* note 18, at para. 25: “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”

- Do any affected individuals have legitimate expectations about the procedures that will be followed?²²
- Has the tribunal itself made any choices concerning the procedures that normally will be followed in such circumstances?²³

There are various procedural matters on which a tribunal can err. These include issues of type of hearing (written or oral), timing of the hearing, whether an adjournment should be granted, issues of adequate notice, whether full and timely pre-hearing disclosure has been made, rights to cross-examine or subpoena witnesses, production issues, the provision of adequate reasons, representation of a party by counsel, whether there has been bias and whether there has been an abuse of process. Jurisprudence has developed concerning all of these matters²⁴ and some important subsidiary tests have developed in particular areas of procedural fairness.²⁵

Officially, reviewing courts do not engage in a standard of review analysis of procedural decisions made by tribunals.²⁶ However, the decided cases show that reviewing courts do defer somewhat to the decisions made by tribunals. Deference may be given to a tribunal's decision based on:

- the specific nature of the decision (factual determinations, discretionary remedial choices attract some deference);

²² See *Baker*, *supra* note 18, at para. 26: "If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness... Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded... This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."

²³ See *Baker*, *supra* note 18, at para. 27: This factor assumes importance "when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" – the reviewing court should give "important weight" to "the choice of procedures made by the agency itself and its institutional constraints".

²⁴ For an online enumeration of some of the recent cases, please feel free to consult my webpage at <http://www.davidstratas.com/admin.html>.

²⁵ See, for example, the test for independence and impartiality originally articulated in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394 *per de Grandpré J.* (dissenting) and more recently referred to in *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at para. 17: "what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?"

²⁶ *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 74 *per Arbour J.*: where an application for judicial review raises procedural fairness or natural justice issues, "no assessment of the appropriate standard of review" is required and the reviewing court should conduct "an assessment of the procedures and safeguards required in a particular situation." See also *C.U.P.E.*, *supra* note 4 at paras. 100-102.

- the statutory scheme (it can provide indications that decision-makers' decisions on procedure should be given some deference); and
- the decision-maker's expertise.

This is not the “pragmatic and functional test” for substantive review, although it does share some features with it.²⁷

(c) Summary of the judicial review tests that reviewing courts apply

The above summary shows that there are tests, tests and more tests that are formulated differently and that apply in different circumstances.

Despite this dizzying array of tests, there is one common characteristic shared by each of them: they are multi-factored, quite discretionary tests that require a somewhat subjective balancing of the factors based on circumstances that subjectively present themselves to the reviewing court.

Simply put, a reviewing court often has considerable scope for discretion. This is a key discretion that tribunals can influence in their decision-making and decision-writing. The remainder of this paper offers some ideas on this.

(d) What happens in practice in reviewing courts?

The job of counsel for a party challenging the substance of a tribunal's decision is to present the decision in as bad a light as possible. Because the standard of review is often unpredictable, the safest route for counsel is to argue that a strict standard of review analysis is unnecessary. In their view, the decision is so bad that it fails the lightest standard of review and so the decision is patently unreasonable.

The job of counsel for a party seeking to have the reviewing court uphold the decision is to cast it in as good a light as possible.

The tribunal may not itself be in the reviewing court defending itself. The jurisprudence can be quite restrictive on the issue of the standing of tribunals to appear before the reviewing court.²⁸ Tribunals are expected to speak through their decisions and reasons and they cannot appear before reviewing courts to augment or amend their reasons.²⁹

²⁷ See, generally, *Ministry of Community, Family and Children Services v. Crown Employees Grievance Settlement Board*, unreported, Ont. C.A., June 26, 2006 at paras. 17-23.

²⁸ *Children's Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.); *Northwestern Utilities Ltd. v. Edmonton (City)*, [1979] 1 S.C.R. 684; *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (C.A.); *Chrétien v.*

In my experience, despite the intricacy of the tests, little time is spent on them in the courtroom. Much more time is spent examining the tribunal's reasons, often in a very particular fashion, with the parties following their agendas – either to decry the decision or embrace it.

The reviewing court applies the multi-factored tests that given them such a large scope for discretion, often swayed one way or the other by the competing parties parsing the reasons of the tribunal. The tests are elastic enough to justify competing results in many cases.

In the end, despite the intricacy of the tests, it often comes down to one thing: the reasons. Are they “bullet-proof” or not?

The major objective for a tribunal seeking to “bullet-proof” its decisions is to focus on its reasons, to craft them in a way that will favourably affect the vast discretion of the reviewing court.

C. Strategies for making decisions that survive judicial scrutiny

(a) Write reasons that work

The above analysis shows that perhaps the most important strategy that can be followed for making decisions that survive judicial scrutiny is to communicate reasons that work.

Reasons that work are persuasive reasons, reasons that, despite the attacks made against them before the reviewing court, will convince the reviewing court that the tribunal thought through the matter carefully and in a conceptually sound way.

(i) Write adequate reasons

It is probably a fair reflection of the current state of the law to say that all tribunals that owe obligations of fairness based on the tests above are obligated to write reasons explaining their decisions.³⁰ The case law bears this out.³¹ There has been a virtual explosion of litigation in this area recently.³²

Canada, 2005 FC 591 (T.D.); *Genex Communications Inc. v. Canada* (A.G.), unreported, Fed. C.A., September 1, 2005; *Lang v. British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244.

²⁹ *Bransen Construction Ltd. v. C.J.A., Local 1386* (2002), 39 Admin L.R. 1 (N.B.C.A.) (cannot make submissions designed to supplement tribunal's reasons for judgment)

³⁰ Those that are engaging in “polycentric” or multi-faceted, policy-based decision-making are subject to less demanding requirements or even no requirements to give reasons: *Kowalczyk v. Peel Access to Housing*, 2005 CanLII 1082 (Ont. Div. Ct.); *Syndicat des employés de la fonction publique de l'Ontario et al. v. Collège des Grands Lacs et al.* (2005), 200 O.A.C. 101 (Div. Ct.).

Reasons are to be “adequate,” in that they show the parties that their submissions have been understood and have been considered, they permit the reviewing court to engage in meaningful review and they guide guidance to future panels.³³

Boilerplate, conclusory reasons that do not fully explain why the conclusions were reached are inadequate. Instead, the chain or reasoning or conceptual pathway supporting the conclusions must be presented. In a recent decision,³⁴ the Federal Court of Appeal quashed a Board ruling where the Board held that “based on the evidence taken as a whole” an undervaluation was “important” and that based on being “careful,” an underestimation of “about 10 percent” was appropriate. The reasons simply did not lay bare the real bases for the decision and made it impossible for the reviewing court to conduct a review. The Court noted that the “thin” reasons did not explain how the Board reached its conclusions. The Federal Court of Appeal concluded:

In my view, it was not sufficient in the circumstances of this case for the Board to justify its quantification of the undervaluation by merely referring to the evidence taken as a whole. It is not enough to say in effect: “We are the experts. This is the figure. Trust us.” The Board’s reasons on this issue served neither to facilitate a meaningful judicial review, nor to provide future guidance for regulatees.³⁵

Elsewhere the Federal Court of Appeal mentioned that its task on judicial review is for the reviewing court to assess whether the decision, subject to a patent unreasonableness standard of review, was rationally supportable.³⁶ Accordingly, the provision of full reasons that laid bare all of the reasoning behind the conclusions was necessary in order for the Court to conduct that examination.³⁷

³¹ See, most importantly, *Baker, supra* note 18, *Canadian Association of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada et al.*, unreported, F.C.A., October 19, 2006 and *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] F.C. 25 (C.A.).

³² *Gray v. Ontario (Director, Disability Support Program)* (2002), 212 D.L.R. (4th) 353 (Ont. C.A.); *Corp. of the Canadian Civil Liberties Association v. Ontario (Civilian Commission on Police Services)* (2002), 61 O.R. (3d) 649 (C.A.); *Lee v. College of Physicians and Surgeons* (2003), 66 O.R. (3d) 592 (Div. Ct.); *Megens v. Ontario Racing Commission* (2003), 64 O.R. (3d) 142 (Div. Ct.); *N.(R.) (Litigation Guardian Of) v. Ontario (Minister of Community, Family and Children’s Services)* (2004), 70 O.R. (3d) 420; *Provincial Dental Board of Nova Scotia v. Dr. Clive Creager*, 2005 NSCA 9; *Casavant v. Professional Ethics Committee of the Saskatchewan Teacher’s Federation*, 2005 SKCA 52; *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 (C.A.); *Lerew v. St. Lawrence College of Applied Arts and Technology* (2005), 196 O.A.C. 363 (Div.Ct.); *Smith v. Human Rights Commission (Ontario)* (2005), 195 O.A.C. 323 (Div. Ct.); *Veri v. Hamilton (City)* (2005), 192 O.A.C. 99 (Div. Ct.); *C.P. et al. v. Criminal Injuries Compensation Board* (2005), 193 O.A.C. 124 (Div. Ct.).

³³ *Canadian Association of Broadcasters, supra* note 31, para. 11.

³⁴ *Canadian Association of Broadcasters, supra* note 31, para. 13.

³⁵ *Ibid.*, at para. 17.

³⁶ *Ibid.*, at para. 16.

³⁷ Note that you do not need to write long reasons that set out microscopic details in order to satisfy the requirement to write reasons. The requirement is “adequate reasons”, not “encyclopedic reasons.” See the discussion in *R. v. Galloway*, [2004] S.J. No. 528 (C.A.). See also *English v. Emery*, [2002] 3 All E.R. 385.

When deciding issues of fact, tribunals often decide credibility issues. Credibility issues call for special mention. It is not enough simply to find that a particular witness or a particular explanation is “not credible.”³⁸ The onus is on the tribunal to say why the witness or explanation is “not credible.”³⁹ Here, boilerplate phrases such as, “Having considered all of the evidence, I find Smith not credible...” or, “Having heard Smith’s evidence, I disbelieve him...” are not good enough. It is also risky to place too much reliance on a single factor, such as “demeanour,” in support of a finding that a witness is not credible.⁴⁰

Tribunals are under an obligation to explain why they reached the decision they did, including why contrary evidence was rejected or given less weight.⁴¹ Result-oriented reasoning that does not take into account or explain contrary evidence is easily attacked in the reviewing court.⁴² Evidence must be fairly analyzed and assessed.⁴³ Even-handedness in the assessment of the parties’ evidence is essential: different rules cannot be adopted for different parties.⁴⁴ Failure to explain what evidence was accepted or

³⁸ *Durancik v. Ontario (Attorney General)*, [1994] O.J. No. 958.

³⁹ See *Megens v. Ontario Racing Commission*, *supra* note 32: “I am of the view that the reasons of the majority utterly fail to grapple with numerous issues of importance as to the credibility of the principal witnesses. They are deficient to the point of denying the applicant natural justice and procedural fairness. He, and this court, simply do not know why he and the witnesses favourable to him were disbelieved and the uncorroborated word of an admitted liar with a huge motive to bear false witness was preferred.” See also *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.): “The board cannot simply say... ‘I feel that I have not received credible evidence to rescind the decision of the Respondent.’ Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.”

⁴⁰ See *Megens*, *supra* note 32: “Finally, the majority relied on Megens’ demeanour alone to disbelieve him. While actually seeing the witnesses in the box is an undoubted advantage possessed by the trier of fact, demeanour alone is a weak reed upon which to base an adverse credibility finding in an important case. Surely some analysis of Megens’ evidence was necessary, giving some examples of the vagueness and uncertainty about straightforward matters on which the majority relied.”

⁴¹ See *Megens*, *supra* note 32.

⁴² *Ontario Public Service Employees Union v. The Queen (Ontario)* (1984), 45 O.R. (2d) 70 (H.C.J.): “[T]he majority award glossed over evidence, was selective in what evidence it considered, and failed to refer to, consider and evaluate a wealth of relevant, cogent evidence that should have weighed very heavily on the crucial question of credibility.”

⁴³ *Desai v. Brantford General Hospital*, [1991] O.J. No. 2186, (1991) 87 D.L.R. (4th) 140 (Div. Ct.): “The reasons given by the Hospital Board recite that the Board received information with respect to the ongoing review undertaken over the last two years... concerning quality of care being provided and the appropriateness of procedures. This is equivalent to saying – ‘we heard evidence’ - giving no indication of the type of evidence heard, the significance attached by the Board to the various matters considered by them.” *C.P. v. Ontario (Criminal Injuries Compensation Board)*, [2004] O.J. 5265 (Div. Ct.): “Regrettably the Board did not weigh any of this evidence in its reasons or otherwise disclose how it reached the decision to prefer the uncorroborated evidence of S.G. over the other evidence. The Board certainly had the right to accept that evidence, but it ought to have explained how it came to that conclusion.” *Boyle v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (1996), 39 Admin. L.R. (2d) 150 (N.B.C.A.) *per Bastarache J.A.*: “I am of the view that, in the absence of a true analysis of the evidence, the appeal process is frustrated and that the duty to give reasons cannot be met simply by listing the evidence considered.”

⁴⁴ *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 (Div. Ct.): “The [Social Assistance Review Board] has accepted the director’s hearsay information as credible and simply waved away the direct evidence of three witnesses [for the appellant] as not credible. When dealing with the necessities of life for a mother and her two children, the board should

rejected creates vulnerability in the reviewing court.⁴⁵ Failure to set out relevant factors in reasons – whether or not the factors were actually considered – also creates vulnerability in the reviewing court.⁴⁶

On legal issues, the best approach is to set out all parts of the reasoning. For example, rather than saying that the tribunal has considered the factors set out in s. 5 of the Act, instead set out all of the factors under s. 5 and relate them to the particular case. Once again, the caution is to avoid general boilerplate reasons and, instead, *demonstrate* with precision that the factors have been identified and have been taken on board in the reasoning process.⁴⁷

The writing of adequate reasons – reasons that are logical and fully-supported with all of the supporting reasoning transparent – is best regarded as an admission ticket to “friendly” standards of review: in order for the reviewing court to adopt and apply the friendliest standard of review, patent unreasonableness, the tribunal at a minimum must provide reasons that establish that the decision is rational.⁴⁸

Perhaps the best way to win the “admission ticket” is for the tribunal member to imagine a justice from the reviewing court standing over the tribunal member’s shoulder as he or she is drafting the reasons. The tribunal member writes a paragraph that contains a finding, ruling or conclusion. Imagine the justice looking at that paragraph, reading the finding, ruling or conclusion and asking, “Why did you reach that conclusion?” and, “Why did the losing party lose?” Have the reasons answered those questions?

(ii) Be persuasive: clarity, directness and brevity

Compliance with minimum standards of adequacy does nothing more than keep the tribunal on the right side of the law as far as the issue of adequacy of reasons is concerned. But much more can be done in reasons in order to ensure that they are persuasive.

Reasons that a reviewing court finds persuasive are those in which the writing is clear, direct and brief and in terms of substance nothing is left to the imagination.

Clarity, directness and brevity are exactly what persuade reviewing courts:

not accept unchallengeable hearsay evidence over direct testimony without a proper finding and explanation why the direct testimony was found not to be credible.”

⁴⁵ *Gray, supra* note 32.

⁴⁶ See *Megans, supra* note 32.

⁴⁷ See *Daneshvar v. National Dental Examining Board of Canada*, [2002] O.J. No. 2487 (Div. Ct.) in which the Board simply set out the criteria under a regulation but not the reasoning process that suggested that the criteria were met.

⁴⁸ Of course, writing adequate reasons does things other than “bullet-proofing” the tribunal’s decision. It fulfils obligations to the public to be visible and accountable, it ensures good quality decision-making (bad ideas recorded in preliminary draft reasons do not survive when they are objectively assessed during the editing process), and it communicates to the losing party why he, she or it did not succeed.

- At the outset of any judicial review case, before the reviewing court reads the materials, the reviewing court knows nothing about the case. One of the first things they read, if not the first thing, are the tribunal's reasons. This fact tells you that one of your tasks in writing reasons is to educate a reviewing court about the case. As you will recall from when you were in school, the best educators and lecturers were those that could speak in a clear, direct and brief manner. Writing clearly, directly and briefly hits the "bullseye" of the reviewing court's need to become educated about the case.
- A second feature of the review court is that it likely does not know the author of the tribunal decision. It will ask itself whether the author is up to the task. The author of tribunal reasons, then, must instill confidence. The best way to do that in writing is through clear, direct and brief writing, not fuzzy, evasive and rambling writing.
- A final feature of the reviewing court is that it is likely overworked. It is important that your reasons make it easy for them. A reviewing court will be more favourably disposed toward reasons that are clear, direct and brief rather than reasons that take hours to go through and understand.

In order to achieve clarity, directness and brevity, try to implement the following ideas:

- *Use active, direct verbs.* Active, direct verbs are those that go directly, without evasion, to the concepts that are being expressed. Compare the following two sentences:

(1) It was said by the Supreme Court that the law must be changed.

(2) The Supreme Court said that Parliament must change the law.

The second sentence is superior in that it is slightly shorter and has a less evasive tone. The first sentence reveals who did the saying almost as an afterthought and hides who changes the law. Repeated use of this sort of construction can result in a sense of evasion and imprecision – concepts antithetical to persuasiveness.

- *Where possible, replace the verb "to be" with an action verb.* Chances are that if you are using the verb "to be" (or its various forms: am, are, is, were, be, being, been), you are adopting awkward, sometimes fuzzy constructions. Compare the following two sentences:

(1) Smith's contention is that those shares are worth \$50 million.

(2) Smith values the shares at \$50 million.

The second sentence is superior in that it is slightly shorter and has a less evasive, more confident tone.

- *Use one word where you can.* It is a fact that we are more likely to absorb and be convinced by things that are easy to understand. Tribunals should strive to draft reasons that can be understood by a non-legally trained neighbour or family member. You would never tell your neighbour that the fellow across the street “underwent three breath tests by means of a breath testing device.” Instead, you would point across the street and say, “He took three breath tests.”
- *Eliminate “putty” words.* Some writers are uncertain about a particular point, so they qualify their conclusions with words like “generally” or “mostly.” Such words often inject uncertainty and unconfident equivocation, thereby rendering fairly clear and easy concepts fuzzy. Some use those words like “putty” to fill conceptual cracks in their sentences. It is far better to be explicit about what qualifications you wish to make. For example, rather than saying, “Generally, the Board will not permit an adjournment unless timely notice to opposing parties is given,” it is better to state the rule about timely notice in an unequivocal way and then to be explicit about the rare exceptions that apply.
- *Strive for coherence.* There are various levels of coherence that can be implemented:
 - *Strive for coherence within each paragraph.* Each sentence should connect to a previous sentence either by repeating a particular key word or concept or through the use of connectives such as “therefore”, “however”, “moreover”, “accordingly”, “consequently” and so on.
 - *Strive for overall coherence: point-first writing.* State your conclusion, finding or main theme in a particular section of your reasons and then develop the reasons in support of the conclusion. It is a well-known fact that readers absorb information best and have confidence in it when they understand its significance as soon as they see it, not afterwards. Use headings liberally: headings are one way in which point first exposition can be achieved, signaling the topic that you are developing under the heading.

- *Strive for logical, coherent structure.* A good structure for reasons is an introduction that will supply the basic information for the reader in order to understand your decision,⁴⁹ a “point first” statement of the finding with the reasons for the finding listed in summary form,⁵⁰ and then each reason discussed under individual headings, with the competing arguments acknowledged and rationally analyzed.⁵¹
- *Organize the facts in a coherent way that relates to the issues that matter.* When recounting the facts of the case, consider organizing the facts according to the issues you will be dealing with, rather than in chronological order. Under this approach, the facts are deployed on the issues that matter, rather than being presented independently from the issues that matter.

Reasons structured in these ways comfort the reader and inspire confidence by ensuring that the reader is never lost or left wondering exactly what point is being developed.

- *Be reader-friendly.* Readers react better to writing with short paragraphs, with plenty of white space on the page. In this way, try to emulate newspaper writers. Also remember that your reader does not necessarily want to relive the entire hearing that you went through. You should synthesize the information from the hearing in a reader-friendly way. Some tribunals set out the facts by going through each witness’ evidence. This is not reader-friendly. Instead, the information should be synthesized, selected and summarized so that the reviewing court gets the basics and is not forced to relive your hearing.

(iii) Write your reasons knowing about the standard of review

Reasons that are substantially based on facts found by the tribunal are more likely to be reviewed on the standard on patent unreasonableness because “the nature of the question” (one of the four inquiries under the pragmatic and functional test for judicial review) is fact-based.

Reasons that are grounded in specialized expertise or regulatory concerns also are more likely to be reviewed on the standard of patent unreasonableness because of the

⁴⁹ Who are the parties, what is the basic issue before the tribunal and what are the basic facts that allow the reader to understand the issue?

⁵⁰ Tribunals sometimes lack the courage to identify the precise reasons in a clear way, preferring instead to stir various reasons all together in a pot. The resulting impression is one of opaqueness and evasion that can lead a reviewing court to conclude that the tribunal did not really think through the issue before it.

⁵¹ Statements of conclusions without deep analysis and acknowledgement of the competing arguments run the risk of being dismissed on the basis set out in *Canadian Association of Broadcasters*, *supra* note 31.

“expertise” consideration (again, one of the four inquiries under the pragmatic and functional test for judicial review).

Note that even so-called jurisdictional questions that have substantial law content can attract deference from reviewing courts when there are significant factual or expertise elements that are part of the analysis.⁵²

It is apparent from these principles that tribunals can affect the standard of review – in effect telling the reviewing court to “lay off” – by drafting their reasons in such a way as to make it apparent that their decisions are rooted in specialized fact or expertise.

(c) Be legally sound

Questions of law are hazardous. While deferential standards can apply to tribunals’ legal determinations and interpretations of legislation,⁵³ and while discretionary decisions (the applications of law to particular facts before the tribunal) can attract considerable deference, reviewing courts do tend to see legal issues as being their bailiwick. It is often the case that tribunals are not assisted very much on legal issues by the parties appearing before them. The onus on tribunals is high to ascertain the correct state of the law and apply it in the cases before them.

(d) Be fair

This is another hazardous area. As noted above, reviewing courts will assess procedural fairness on the basis of what they believe was fair in the circumstances. On occasion, some deference will be provided but more usually the standard of review will be demanding: reviewing courts will impose what they consider to be fair.

As noted above, however, courts will tend to defer to procedural rulings or fairness rulings when those rulings are suffused with factual considerations or considerations based on the tribunal’s expertise. This suggests that one route to deference in this area is to make explicit in the reasons the relevant factual considerations and expertise considerations that bear upon the fairness or procedural issue.

On occasion, a tribunal will make a ruling that a party considers very unfair and prejudicial. Here, the onus on the tribunal to draft clear, fully explanatory reasons is high. It is important that the tribunal accurately acknowledge the prejudice or unfairness but explain why, in the precise circumstances of the case, the tribunal must rule in the matter it did. The reasons must be very explicit and compelling. For example, suppose that the tribunal refused a party’s request for an adjournment or dismissed a request for production and disclosure. Why did it do so? Were the requests merely tactical? Say

⁵² See, for example, *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology*, 2006 CanLII 14236 (Ont. C.A.).

⁵³ *Ibid.*

why. Were they not timely? Say why. Would acceding to the requests cause a particular problem or work prejudice to another party or the public interest? Say why. Sometimes an inability to say why can expose a flaw in the tribunal's decision and lead a tribunal to reach a different result.

Tribunals are obligated to make some very tough decisions and if they write very clear, confident reasons that truly show a full and rich appreciation of the factors and principles, they have maximized their chances of surviving strict scrutiny on appeal. Tribunals fall afoul of fairness requirements when they do not follow the "say why" advice in the preceding paragraph.⁵⁴

The law on what is fair in particular circumstances or what is procedurally appropriate in particular circumstances is complex and sometimes hard to access quickly and conveniently. To minimize the hazards associated with tribunals making decisions that are unfair, I have established a website to assist tribunals on various issues and the current state of the law, most particularly procedural and fairness issues. Chances are that there will be a case on the website that is directly on point with a particular problem of procedure faced by a tribunal, or at least a case that discusses basic principles and leading cases on the problem.

The website sets out leading and recent cases (hyperlinked to the full text of cases) on topics such as tribunal procedures, natural justice and fairness, impact of earlier proceedings, use of evidence from earlier proceedings, the duty to give reasons, bias and lack of independence, undue delay and abuse of process, the doctrine of legitimate expectations, issues concerning regulatory investigations and the Charter, special considerations in disciplinary and licensing cases, the special status of native peoples, and the overlapping jurisdiction of tribunals. A number of topics relevant to judicial reviews are also set out.

The website is found at: <http://www.davidstratas.com/admin.html> and you are welcome to visit it at any time.

(e) Some other practical tips

The process of writing can help the reasoning process of the tribunal. Bad reasons and bad ideas that are put in writing are discovered for what they are and are eliminated. The sooner that bad ideas are taken off of the table, the better. More time will be left for developing good ideas, to insert all of the necessary detail and explanations to disarm a reviewing court when it scrutinizes the decision. The best advice here, then, is for tribunal members to write early.

Another good tip is to take steps to have the tribunal reasons reviewed objectively. A reviewing court will review the tribunal reasons objectively, with no prior knowledge of

⁵⁴ For a recent example, see *Waxman v. Ontario Racing Commission*, unreported, Ont. Div. Ct., October 20, 2006.

the case. The reviewing court, with the benefit of its objective perspective, may discover gaps in reasoning or illogical reasoning steps or points that are evaded or fudged. These matters may have escaped the attention of the author of the tribunal's reasons because the author has become far too close to the matter.

There are a number of ways in which authors of tribunal reasons can get the benefit of an objective perspective even though they have been very intensely involved in their work:

- If the author has written early, he or she may have time to set the reasons aside for a week or two. After a week or two, the author will have distanced himself or herself from the reasons and may have a good measure of objectivity;
- Some tribunals have the benefit of in-house counsel who can review the reasons objectively;
- It is appropriate for tribunal members to circulate draft reasons to tribunal members that are not involved in the case in order to receive comments on the reasons;
- In important cases, it might be worth paying for an hour of external counsel's time to review the reasons and comment on them from an objective standpoint in order to expose potential flaws that the reviewing court may detect.

In cases where the reasons have been circulated to in-house lawyers, external lawyers, or tribunal members who are not involved in the case, it is important to remember that while it is legitimate to receive comments, the substantive decision must be that of the tribunal member deciding the case. The tribunal member is not permitted to delegate his or her decision-making. There is a difference, however, between reviewing and commenting on reasons already drafted on a decision that has already been made but not communicated to the parties (legitimate) and actually making the decision for the tribunal member (not legitimate).⁵⁵

⁵⁵ *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.