

The standard of review of substantive and procedural decisions of administrative tribunals: a six page guide

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

A. Review of substantive decisions

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 two recognized levels of scrutiny:¹

- 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 higher level of scrutiny, currently called the “revised reasonableness standard” or simply “reasonableness”, allows reviewing courts to interfere in relatively rare circumstances.²

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¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9.

² It is unclear precisely what this standard means in the early days of the post-*Dunsmuir* era, but most post-*Dunsmuir* courts are applying the standard set out in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247: where there are “no lines of reasoning supporting the decision which could reasonably lead [the] tribunal to reach the decision it did”. See, for example, *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, at paras. 15-19. 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 what used to be known as the “patent unreasonableness” standard. The Supreme Court of Canada in *Dunsmuir* suggested that these two standards were to be collapsed into one and that its decision “does not pave the way for a more intrusive review by courts” (at para. 48). This echoes the words of one Justice of the Supreme Court, LeBel J. (Deschamps J. concurring), who suggested that the “reasonableness” standard and the “patent unreasonableness” standard could be collapsed into one single standard: see *Toronto (City) v. C.U.P.E.*, [2003] 3 S.C.R. 77. To the extent that the standard of review for this higher category has not changed from the former jurisprudence, then the words used to define the “patent unreasonableness” standard may also be relevant: “clearly irrational, that is to say evidently not in accordance with reason” (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-964 *per* Cory J.) and “so flawed that no amount of curial deference can justify letting it stand” (*Ryan, supra*, n. 2, *per* Iacobucci J.). Sometimes decisions that are so contrary to the purposes and policies of the legislation under which they are made are unreasonable: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R.

The court decides which level of scrutiny either:

- (1) by applying the standard applied under the former jurisprudence, where the jurisprudence has already worked out the particular standard to review to be applied to the decision in question;³ or
- (2) by asking four questions, similar to what was previously known as the “the pragmatic and functional test.”⁴ The four questions are as follows:
 - Is there a “privative clause” in the legislation protecting a decision from being reviewed?⁵ Or is there an absolute right of appeal?⁶
 - What is the expertise of the tribunal in relation to the reviewing court? Who is most expert in the area?⁷
 - What is the purpose of the legislation and the provision under which the tribunal made its decision?⁸
 - 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?⁹

509. Purely punitive remedies that have no rational connection or that are unconstitutional will be 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, unreasonableness will be present: *Toronto (City) v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487.

³ *Dunsmuir*, *supra*, n. 1, at paras. 57 and 62.

⁴ *Ibid.*, para. 55. Under the former jurisprudence, see *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* n. 2.

⁵ 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 highly deferential. 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.

⁶ 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.

⁷ 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.

⁸ 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).

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 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.¹⁰

However, there is some guidance on the particular mix of factors in the recent case law. Where the question is one of fact, discretion or policy, deference will usually apply automatically. This is also true for the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.¹¹ Courts also defer in cases in which a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.¹² Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.¹³ Questions of constitutional law¹⁴ and “true questions of jurisdiction or *vires*”¹⁵ are reviewable on the basis of correctness.

⁹ If the question that is the subject of the judicial review is one of fact, review may be lighter (*i.e.*, more deferential). 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).

¹⁰ 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”.

¹¹ *Dunsmuir*, *supra*, n. 1, at para. 53, citing *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; *Dr. Q*, *supra*, n. 4, at para. 29; *Suresh v. Canada (Minister of Employment and Immigration)*, [2002] 1 S.C.R. 3, at paras. 29-30.

¹² *Dunsmuir*, *supra*, n. 1, at para. 54, citing *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48 and *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39.

¹³ *Dunsmuir*, *supra*, n. 1, at para. 54, citing *Toronto (City) v. C.U.P.E., Local 79*, *supra*, n. 2, at para. 72.

¹⁴ *Dunsmuir*, *supra*, n. 1, at para. 58, citing *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 and *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504. See also *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

¹⁵ True jurisdiction questions are those “where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.” If the “tribunal [fails to] interpret the grant of authority correctly...its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.” See *Dunsmuir*, *supra*, n. 1, at para. 59, citing *United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485.

B. Review of procedural decisions

Today, it is well-established that a broad variety of tribunals owe parties before them some level of procedural fairness depending on the circumstances.¹⁶ 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.¹⁷

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:¹⁸

- What does the legislation require?¹⁹
- 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
 - the effect of the decision on rights, privileges and interests of affected persons.²⁰

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

¹⁶ *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.

¹⁷ *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

¹⁸ 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.

¹⁹ 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.

²⁰ 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*, n. 18.

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”.²¹

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:²²

- What is the nature of the substantive decision made and the process followed in making it?²³
- What is the nature of the statutory scheme and the terms on which the decision-maker operates?²⁴
- What is the importance of the decision to affected individuals?²⁵
- Do any affected individuals have legitimate expectations about the procedures that will be followed?²⁶
- Has the tribunal itself made any choices concerning the procedures that normally will be followed in such circumstances?²⁷

²¹ *Knight, supra*, n. 18.

²² *Baker v. Canada (Minister of Employment and Immigration)*, [1999] 2 S.C.R. 817.

²³ See *Baker, supra*, n. 22, at para. 23: “One important consideration is the nature of the decision being made and the process followed in making it. In *Knight, supra*, n. 18, 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.”

²⁴ See *Baker, supra*, n. 22, 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”.

²⁵ See *Baker, supra*, n. 22, 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.”

²⁶ See *Baker, supra*, n. 22, 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.”

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 matters²⁸ and some important subsidiary tests have developed in particular areas of procedural fairness.²⁹

Officially, reviewing courts do not engage in a standard of review analysis of procedural decisions made by tribunals.³⁰ 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);
- 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.³¹

²⁷ See *Baker, supra*, n. 22, 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".

²⁸ For an online enumeration of some of the recent cases, please feel free to consult the webpages listed at <http://www.davidstratas.com/admin.html>.

²⁹ 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?"

³⁰ *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*, n. 2, at paras. 100-102.

³¹ See, generally, *Ministry of Community, Family and Children Services v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 (C.A.), at paras. 17-23.