“…where Angels Fear to Tread”
An Analysis of Recent Developments in Judicial Review

Arman Chak
B.A., LL.B, LL.M.
Diploma in Justice Administration
Legal Counsel
Alberta Human Rights & Citizenship Commission

Paper presented for the Canadian Bar Association – National Administrative Law and Labour and Employment Law CLE Conference
For fools rush in where angels fear to tread.
Distrustful sense with modest caution speaks;
It still looks home, and short excursions makes;
But rattling nonsense in full volleys breaks;
And never shock'd, and never turn'd aside,
Bursts out, resistless, with a thund'ring tide.¹

Introduction

Understanding perspective is imperative in the study of the administrative law in Canada. Alexander Pope in his writings on criticism put forward a poetic dismemberment of those who attempted to criticize writers without sufficient knowledge to assist in the discourse under review. Perspective, I submit, is one major element of knowledge with respect to the discourse about Judicial Review. Embedded in a perspective is history, values as well as bias – the latter being the most worrisome for those that believe in the “Rule of Law”². In Dunsmuir v. New Brunswick³ (hereinafter “Dunsmuir”) , the Supreme Court of Canada once again looks to provide some answers to the complex questions that have been raised by the sheer volume of Judicial Review applications all over the country. Just in the few months after the decision of Dunsmuir, there have been 599 citations to its decision. While the purpose of this paper is not to analyze the use and effect of the decision, it is clear that it has brought about a new energy into the Judicial Review process.

The focus of this paper is to work from the premise that the prior conceptualizations of Judicial Review have been a failure and that the decision in *Dunsmuir* provides us with some answers as to how the Legal Profession as well as the Courts who are engaged in Judicial Review can assist in the development of the law without suffering the serious criticisms that were bombarded upon the “pragmatic and functional approach”. Overall, the reformation of the two standards of review are not as important as recognizing the issues, the parties, the legal tools, the review process as well as Judicial support in maintaining the functionality of administrative institutions. As I will point out, Justice Binnie’s aspect of the *Dunsmuir* decision goes farther to recognizing these issues than does the majority.

Moreover, one should not lose sight that the Judicial Review process is a fact-based process which must allow for the right level of expansion and judicial intervention as circumstances dictate. The most important issue is to create a structured process within the common law - which provides direction to articulate deference as not simply a secondary interpretation of a Judicial Review decision but a clear articulated legal maxim. This decision must precede the Judicial Review analysis on the merits. Deference in this conceptualization will mean judicial restraint at the preliminary stages as well as transparent and detailed analysis if and when it is needed at the latter stages. With respect to the judicial attempts to date, administrative law cannot be reduced to discussing this major concept without introducing a legal maxim of some type without the counterproductive tests, which simply reify the subjective nature of the analysis.
This paper will highlight certain portions of Dunsmuir which I submit will provide the basis for reviewing the deferential perspectives that are present as well as exemplifying how they have been implemented recently in Alberta in the Judicial Review process. Moreover, the structure that I recommend does not address the Standards of Review as much as provide us with a transparent and administratively sound procedure to deal with the numerous issues that arise within the context of a Judicial Review application.

**Deference**

Drawing upon what Madame Justice MacLachlin pointed out many years ago\(^4\) the main concern for the Judiciary is the maintenance of the Rule of Law. Building upon some of the legal positivist tradition of A.V. Dicey, the approach that Madame Justice MacLachlin proposed was to ensure that there was “culture of justification”. The significance of this was self-explanatory as a safeguard against arbitrary use of power. Unfortunately, while many administrative tribunals are significantly aware of the potential for review, the ability to provide a stable, coherent process for tribunals (and other administrative law decision-makers) to understand what are the demarcating lines between those decisions which will be given deference and those that will not.

**Rule of Law**

Two distinct concepts arise out of this discussion. As the Supreme Court articulated, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority"\(^5\).

---

\(^4\) Supra Note 2 at Page 174.

\(^5\) (Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, at pp. 805-6)
Encompassed within this is the belief in accountability, legitimacy as well as procedural fairness. This forms the core perspective of why Judicial Review is a constitutional necessity. Examples such as in *Roncarelli v. Duplessis*\(^6\), provide significant evidence of why that is so. The abuse of executive power needs to find some avenue of redress.

Also, In the case of *Authorson v. Canada*, the Ontario Court of Appeal went through an analysis, which looked squarely at “reprehensible” conduct committed by the Canadian Government against veterans that they had been statutorily required to act in their benefit\(^7\). The Government instead acted negligently and decided to wait for a legal challenge to be filed against them. Moreover, the Government further insulated itself with an expropriating clause, which the Supreme Court validated.

In terms of finding liability against the Government, the Ontario Court of Appeal found that the Government had a fiduciary obligation to the veterans. This obligation is grounded in the law of equity\(^8\), because the Government is holding the property of the veteran because he cannot do so. The OCA refused to accept this matter as a “political trust”; or that this was something solely ‘within the administrative domain of the statute’ which created and maintained the pension.

The secrecy shown in the *Authorson* decision exposed the Government to large costs and displayed how accountability can be hindered by the norm of bureaucratic neutrality associated with political institutions.

\(^6\) *Roncarelli v. Duplessis* [1959] S.C.R. 121
\(^7\) *Authorson v. Canada (Attorney General)* 58 O.R. (3d) 417 at para. 130.
\(^8\) Ibid at para 42.
Executive Sovereignty

Balancing this former perspective is the decision in *Ocean Port*\(^9\), which outlined a new direction for respect for legislative intent and policy. As stated by the Supreme Court of Canada:

> Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial [page 795] decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

Professors Sossin’s analysis of the standard of review provides us with the prime issues that involve access to justice. The proposal put forward is for a transparent process of recognizing that the judicial process involves a detailed, principled look at the social problem that has been put before the Court. The standard of review therefore should not be criticized for its lack of certainty, but for its failure to extrapolate on the meaning of a principled “fuller understanding of administrative realities and perspectives”\(^{10}\). Part of understanding perspective is to recognize the complex social, political and financial frameworks that Tribunals work within. Failing to take that into consideration will produce no positive benefit for a Standard of Review analysis. However, to incorporate this aspect, more information is

---


“Real administrative law, in the end, is concerned with how politics, economics, culture, social change, and discursive strategies define the state’s role in the lives of its citizens”¹¹. Those that are deciding Judicial review matters needs to have the specialized knowledge of how the administration operates and apply it to their decision-making.

As Professors Hawkins & Martin have noted (yet not really applying in their criticism of Judicial Review), the dialectic discussion that occurs in society can be summarized using the general proposition of individual values (rights, freedoms and morality) vs. pragmatic policy (accountability, transparency and legitimacy).

Liberal democracy has institutionalized a permanent and irreconcilable contradiction: the simultaneous imperatives that, on the one hand, the claims of individuals be respected despite the express wishes of the majority and, on the other, that the wishes of the majority be implemented despite those claims. Politics in liberal democracies is largely taken up with the ceaseless, but impossible, attempt to resolve this contradiction or, at least, to address its most egregious manifestations.¹²

The necessity of the administrative state precedes the development of different types of institutions in society, which have taken on the challenge as to how we should manage difficult societal problems; however their perspectives refuse to allow them to recognize the importance of making the ‘process of reflection’ a dynamic constant that provides legitimacy to our societal order¹³.

I have outlined some perspectives on the Judicial Review to justify why it is more important to have a defined adjudicative process rather than a enhanced test.

¹³Supra note 2 at para 128. Justice LeBel stated that “the purpose of judicial review is to uphold the normative legal order”.
Further, I have outlined certain basic issues surrounding Judicial Review and deference; the goal is to exemplify the unique role that different perspectives play in this discussion helps to understand the difficulties we all face in our administrative law practice\textsuperscript{14}.

\textit{Dunsmuir v. New Brunswick}

For the purposes of this paper, I only point to the following aspects of the \textit{Dunsmuir} decision; these quotes highlight both the majority approach of “streamlining” the Standard of Review Analysis as well as some of the philosophical reflections that come from Mr. Justice Binnie’s decision.

\textbf{Reasonableness}

As the Supreme Court of Canada indicated at Paragraph 47:

\begin{quote}
Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
\end{quote}

\textsuperscript{14} For further reading, I reviewed a number of articles which I thought were helpful which were David Dyzenhaus, “The Logic of the Rule of Law: Lessons from Willis”, 55 U. Toronto L.J. 691 and Peter L. Lindseth, “Reconciling with the Past: John Willis and the Question of Judicial Review in Inter-War and Post-War England. These both come from different perspectives, but provide summaries, which help to better understand the \textit{Dunsmuir} decision in historical context.
Almost immediately, the Courts of Alberta have adopted this passage in their Judicial Review analysis, however as is pointed out further below, the result and understanding of this section is not consistent, as can be imagined. This paragraph merges the previous reasonableness simpliciter and patently unreasonable standards. More importantly, it adds three key terms to the lexicon of judicial review – justification, transparency and intelligibility. While we can see that justification clearly is a development which has built from when Madame Justice McLachlin introduced it in 1998, the need for transparency was suggested by Professor Lorne Sossin in 2003:

*Transparency, in other words, may be more important than precision when it comes to judgments involving the standard of review.*

While these terms are not revolutionary, they have generated jurisprudential interest, especially in Alberta, however this has created a certain degree of the “metaphysics” that Justice Binnie had warned of.

The most important development to come out of this analysis would be if the nature of the question asked places the onus on the decision-maker to prove that they were reasonable or on the Applicant to a Judicial Review to suggest that the statutory authority was “unreasonable”. While this may seem like a tautology, but as outlined previously, the Judicial Review process lends itself to unique perspectives in relation to how the individual Judiciary approach they supervisory role. While some are content with placing the burden on the Applicant, there are some that also look at the role in a *de novo* fashion leaving open the question as to who is required to prove what and by what standard. This becomes even more difficult if you encapsulate the unique ways outside of the Standard of Review - procedural fairness, res judicata, abuse of process and the *Charter of Rights and Freedoms*, which can also encapsulate the Judicial Review arena.

---

Examples of Deference

Of direct concern to the theme of this Conference, the expanding and overlapping jurisdiction of arbitrators & tribunals, is the expansion of the areas where deference will apply. As stated by the Supreme Court of Canada at paragraph 54:\(^{16}\)

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157, at para. 48; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 39. 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: Toronto (City) v. C.U.P.E., at para. 72. Adjudication in labour law remains a good example of the relevance of this approach.

Reinforcing the particular expertise of Labour Boards, the Supreme Court goes further to argue in favour of some type of concurrent jurisdiction amongst administrative tribunals to apply statutes and even the common law. This should have provided further tools for the Judiciary to apply broad based understanding of deference rather than the multiple standards which seemed to be the result of a number of cases before the Supreme Court of Canada:\(^{17}\). The cases in Alberta point to an inconsistent application of these principles and further strain the Judicial Review process.

The Philosophy of Justice

The most comprehensive aspect of the \textit{Dunsmuir} decision is the perspective that Justice Ian Binnie brought in with his concurring position:\(^{18}\). While confirming the new approach, the philosophy and the future need for direction is clear. At Paragraph 122 Justice Binnie states:

---

\(^{16}\) Supra Note 3.


\(^{18}\) Supra Note 3 from paras. 119-157.
I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what they consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within their function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations:

This specifically outlines the two contrasting perspectives at play in this discussion. Two parts of the Judicial Review process, the role that the Judiciary plays in the normative legal order and the practical necessity of administrative state. This is only confirming that there is a need to have certain decisions defined by practice and policy as “administrative”, even though in form they may have many of the attributes of a court of law. This does not take away from the important to ensure that both are functioning in the best interests of society.

Legal Culture

As a starting point it is necessary to view the Judicial view as one that represents the view of the “Rule of Law”. As stated by H.W. Arthurs, this perspective places “courts and lawyers at the centre of the universe”19. Written in 1983, Arthurs’ perspective on judicial review is a critical analysis of the legitimacy of judicial hegemony as opposed to recognition that “value judgments involve highly controversial political, social and economic issues”20.

---

20 Ibid at 283.
The position is founded in the notion that there should be more public involvement in the legal system because the judiciary represents a class that has their own “highly unrepresentative education, experience and personal characteristics”\textsuperscript{21}. Professor Ron Ellis added another dimension to the issue where he stated that while the current judiciary does show some deference, it has not yet shown the deference necessary to reflect the practical realities of the administrative justice system\textsuperscript{22}.

My own perspective is that Justice Binnie is recognizing the philosophical failings which have led to the necessity to re-examine the Judicial Review process states:

\begin{quote}
Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.
\end{quote}

Considering the direction by Justice Binnie, some of Professor Arthurs and Ellis’s criticisms may finally be addressed.

**Privative Clause**

The strongest argument by Justice Binnie for recognizing deference was in the manner in which he addressed the privative clause. The privative clause signals a clear indication that the Court should not lightly “intrude” into the affairs of a statutory body, moreover it signals a level of respect which must be shown not only for the executive but for the statutory body itself. Moreover, Justice Binnie discusses the fact that a presumption “foreclosing judicial review” should follow with a properly worded privative clause.

\textsuperscript{21} Supra Note 19 at 287.
The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of outcome on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.\(^\text{23}\)

The censure towards the Judiciary in referencing Chief Justice Laskin’s statement is a strong indication that there is a frustration with the inability of certain members of the Judiciary to provide the deference that the Court has been pointing to since the decision in \textit{C.U.P.E. Local 963 v. New Brunswick Liquor Corp.}\(^\text{24}\). For almost thirty years, the Judiciary has wrestled with these types of clauses, classifying them as “weak” and other nomenclature to simply indicate the lack of deference that was to be applied to the administrative tribunal.

This is not meant to be a comprehensive review of \textit{Dunsmuir} as others such as Professor David Mullan have provided a much better commentary on the decision. Professor Mullan has indicated that this represents an “analysis that concentrates on asking whether there is a match between the decision-maker's expected area of competence (or its home turf) and the question that is the focus of the judicial review application or statutory appeal"\(^\text{25}\).

---

\(^{23}\) Supra Note 3 at para. 143.


Prerequisites to Judicial Review

For all of you who practice in the field of administrative law, it cannot be understated that there are many preliminary, collateral, evidentiary as well as procedural matters which provide for much of the litigation in this area.

Many times Legal Counsel are faced with difficult choices on whether to continue with a particular administrative proceedings or to engage the Judicial Review process. This process has many elements to it and requires an excessive amount of resources to adequately deal with the issues which arise. While there are those who advocate for early intervention to determine whether there is a need for further clarification on the law or on a particular procedure, there are also those who feel strongly that an administrative process must be allowed to be completed before there are any further reviews or Appeals.

The recent cases in Alberta outline the importance of recognizing the two distinct aspects of a Judicial Review process and provide support for the suggestions made at the conclusion of this paper. I will outline important aspects of the recent Alberta decisions, which are mostly all *Post-Dunsmuir* which will exemplify how Alberta Courts have dealt with these issues prior to addressing the Standard of Review analysis.
Presumption of Regularity

In the recent decision of *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, the Alberta Court of Queen’s Bench (hereinafter “Alberta QB”) decided in favour of adopting the common law principle of the doctrine of regularity. Accepting the Respondent’s position, the Court confirmed that the Applicant was required to provide an evidentiary basis that the decision of the tribunal was “unreasonable”\(^{26}\).

The decision was important for the fact that this aspect of the common law was merged into the “reasonableness” doctrine in the analysis.


\(^{[172]}\) The Applicants have failed to demonstrate that Boards’ decisions on the Costco applications were unreasonable, and have not rebutted the presumption of regularity.

Sufficiency in Form

Another aspect of the decision in the *Alberta Liquor Association* decision was an objection to raise new issues, which were not raised in written argument. The Court reviewed the situation and the general allegation of a breach of natural justice from the Originating Notice was sufficient to have that included as part of the oral argument and there was a subsequent discussion of those breaches, although not specifically decided\(^{27}\).

\(^{26}\) *Alberta Liquor Store Association v. Alberta (Gaming and Liquor Commission)*, 2008 ABQB 595 at para. 38, 171-172] for the purposes of this paper I will refer to all respondents as tribunals - representing the statutory body that is under Judicial Review. Although, there are issues with respect to whether this legal designation can apply to those who are administrative decision-makers, the generic term of tribunal works well in reference to the cases covered in this paper.

\(^{27}\) Supra Note 26 at para. 67
In the *Katherine McConnell* decision as well as the *Lynne Karch* decisions referenced below, it was stated that the drafting choices made by Applicants should not be easily amended, even if they are losing a statutory right of review. The litigants can be assumed to have sufficient knowledge to engage the process and properly draft their pleadings, whatever form they may be.

In the decision of *G.A.E. v. Alberta (Child, Youth and Family Enhancement Act, Director)*, it was found that the failure in form did not disentitle the Applicant to their Judicial Review, relying on the discretionary provisions of the Alberta Rules of Court\(^28\).

---

**Prematurity**

Although pre-*Dunsmuir*, the Alberta Court of Appeal decision in *Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)* outlined key areas of procedure which are applicable. The Court of Appeal confirmed that because the application before the Court did not deal with the substantive aspects of the act and/or the procedural fairness under the *Baker* decision, the Court did not have to go through an extensive analysis in terms of looking at the Standard of Review\(^29\). The facts were largely irrelevant in the context of the central question which dealt with an interpretation of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c. H-14.

---

\(^28\) *G.A.E. v. Alberta (Child, Youth and Family Enhancement Act, Director)* 2008 ABCA 199 at para. 8

\(^29\) *Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)*, 2008 ABCA 217-para. 4
The use of the prematurity doctrine was expanded on in terms of requiring extraordinary circumstances to warrant fragmented litigation. This should encompass preliminary matters as well as issues, which were within the jurisdiction of the tribunal.

*The Act does not contemplate multiple appeals. The legislative scheme must be read to further the goal of speedy and inexpensive resolution of human rights complaints. The Appellant’s appeal to the Court of Queen’s Bench was premature. The preliminary decision was neither final nor binding. Exceptional circumstances warranting review of an interim ruling are not made out.*

The application of the prematurity doctrine, was successful in opposing part of a Judicial Review application during the administrative process, where the Court stated:

*In my view, court intervention at this stage of the proceedings would be very premature. Dr. Ritchie has not yet made a report. Nor has he been asked to do anything after the making of his report. Again, intervention at this stage would be extraordinary.*

The timing of an application for Judicial Review is a necessary consideration and should be reviewed by the Court, before continuing further in the Judicial Review Process.

The doctrine of prematurity is a recognized tool for the Court to review their discretion in choosing to continue with a Judicial Review, the rationale for this doctrine as was stated by the Alberta Courts in the *Montgomery* decision:

*...If parties are permitted to bring interim applications to the courts prior to the conclusion of the administrative hearing, the hearing may be delayed indefinitely leading to wasted time and expense. Piecemeal judicial review applications may also lead to fragmentation of proceedings before the statutory delegate, thereby causing distracting interruptions in the administrative proceedings.*

Moreover, Justice Evans in his book cautions against the Court to “automatically” intervene and engage the Judicial Review process:

*...Furthermore, for courts to intervene automatically on “jurisdictional” issues before the tribunal has rendered a reasoned decision would tend to frustrate the pragmatic or functional approach that courts now adopt when reviewing for jurisdictional error...*

---

30 Supra Note 27 at para. 13.
Accordingly, the cost and inconvenience of completing the administrative proceedings and appeal must be weighed against the usual benefits of avoiding a multiplicity of proceedings and of having a reasoned decision from the specialist tribunal.\textsuperscript{33}

The Courts have recognized how the Judicial Review process can be streamlined by incorporating common law doctrines to ensure efficiency and reduce the inefficient use of resources. A consideration that is not consistent in the jurisprudence of Judicial Review.

**Duty to Provide Reasons**

In the *Alberta Liquor Association* decision, the failure to provide written reasons did not create procedural unfairness or warrant the matter going back to the tribunal. The Court pointed to the *Dunsmuir* as possibly opening the door for a general duty to provide reasons following the rationale from the *Baker* decision\textsuperscript{34}:

> The Court in this case was very cognizant of the difficulties in judicially reviewing a decision, particularly on a reasonableness standard, where reasons are sparse. I clearly found this judicial review much more difficult because of the absence of detailed reasons in the Costco decisions. While reasons can be cobbled together by incorporating the officer’s reports into them, such reasons do little to provide transparency in the process, or guidance on the interpretation of policy. The adequacy of the Board’s reasons is not in issue here because of the Applicants’ concessions. However, the Court’s decision should not be interpreted as advocating the sparse recorded reasons which were the result of the Board’s decision making process in this case.\textsuperscript{35}

The decision in *Furst v. Alberta Motor Vehicle Industry Council* provided the first attempt at interpreting *Dunsmuir* as incorporating the Duty to Provide Reasons under the “reasonableness” doctrine. While the Court went through an exhaustive examination of both the *Pushpanathan* factors as well as the *Baker* factors, it concluded that:

> I am of the view that the decision of the Panel in failing to provide reasons was unreasonable. As noted in *Dunsmuir*, at para. 47\textsuperscript{36}

\textsuperscript{33} Brown and Evans J., Judicial Review of Administrative Action in Canada (*Toronto: Canvasback Publishing, Looseleaf, 1998*) at 3-17 to 3-18
\textsuperscript{34} *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
\textsuperscript{35} Supra Note 25 at para. 82
The issue of deference and the necessity of reasons was confirmed in the *Macdonald v. Mineral Springs Hospital* decision in which the majority of the Court of Appeal decided that the Duty to Provide Reasons was necessary in order to fulfill their new role under *Dunsmuir*. While specifically realizing that nothing in the common law or the statute gives rise to the duty, the Court indicated that the inability to assess the reasons made the duty necessary.\(^{37}\)

The dissent by Justice Ronald Berger provides for the best example of how the Duty to Provide Reasons should not be incorporated into the common law. Justice Berger provides a summary of the law and application and points to specific details. He further stresses that the change the Court of Appeal has advocated has no precedent:

*The majority opinion contends that the failure of the HPAB to give reasons warrants returning the matter to the Board with a direction that the refusal to entertain Dr. Macdonald’s appeal be explained. My colleagues’ analysis and reasoning is tantamount to an invocation of *R. v. Sheppard*, [2002] 1 S.C.R. 869 in an administrative law context absent a statutory command that the tribunal must provide reasons (see, for example, s. 687(2) of the *Municipal Government Act*, RSA 2000, c. M-26).*\(^{38}\)

*In my opinion, the relevant inquiry is whether meaningful appellate review is possible on this record. In the Court of Queen’s Bench and on appeal to this Court from the disposition below, neither party argued that the failure of the HPAB to give reasons amounted to a breach of natural justice or a denial of procedural fairness. No one contended that meaningful appellate review was frustrated by the absence of reasons.*\(^{38}\)

The importance of Justice Berger’s dissent is that there needs to be a specific allegation in order for the Court to engage the discussion of the Duty of Fairness. If the Applicant had raised the procedural fairness question, the issue would not be a question of Standard of Review; it would immediately be transported into the *Baker* analysis. The failure to allege that as a ground for Judicial Review should have been fatal.

---


\(^{38}\) *Supra Note 36 at paras. 94-95.*
Rules of Court

As in most jurisdictions, the process of Judicial Review has certain limitations built into by virtue of the Rules of Civil Procedure or some other statutory construction. In Alberta, the Alberta Rules of Court\textsuperscript{39} governs the Judicial Review proceedings. Rules of Court provide structure to not only the process, but ensure an essential fairness to the proceedings.

In recent jurisprudence, there has been an interpretation of the requirements of service on all those parties that are part of the Judicial Review process, in the unreported decision of Katherine McConnell vs. Appeal Commission, the Court dismissed an Originating Notice because the other parties that were “directly affected” by the proceeding under review were not served. The Court interpreted 753.09(c) as a mandatory requirement to serve all those who were part of the Worker’s Compensation Board process that was in question. Madame Justice Topolniski stated that “want of service on CRA and WCB is a sufficient ground alone to strike the originating notice”\textsuperscript{40}.

Madame Justice Kent followed the rationale from the McConnell decision and decided to dismiss an originating notice where the Respondent to the Human Rights complaint was not included in the originating notice. Lynne Karch v. Alberta Human Rights and Citizenship Commission (May 12, 2008)\textsuperscript{41}.

\textsuperscript{39} Alberta Regulation 390/68-Alberta Civil Procedure Handbook (Stevenson & Côté: Juriliber: 2006)
\textsuperscript{41} Lynne Karch v. Alberta Human Rights and Citizenship Commission (May 12, 2008) – QB 0801-03002
The interpretations of the Rules of Court established a process which requires those who bring applications of this nature to inform all the appropriate parties within the required time period. The six-month time period had elapsed in these cases and therefore the Originating Notice can be dismissed for want of service alone. There was no necessity for the statutory tribunal to take any action.

In another recent decision, the Court addressed the discretionary aspect of Judicial Review in the context of the Rules of Court in an application for an amendment. The Court stated:

> Judicial review is not, of course, granted as of right: it is a discretionary remedy. The status of judicial review in the court system reflects the relatively complex relationship between the courts and governments, specifically in relation to independent tribunals created by governments. In establishing the Human Rights and Citizenship Commission, the Alberta government stated, in s. 35 of the statute, that a decision of the chief commissioner is final and binding on the parties, subject to a party’s right to judicial review of the decision. As noted in Rule 753.07, a mere defect in form or technical irregularity by an administrative tribunal is one of the reasons why a court may decide not to award judicial review even where a breach has clearly been made out.42

**Alternative Remedy**

The Alberta Court of Appeal confirmed the policy and jurisprudence with respect to this issue. As an issue related to the prematurity doctrine, this specifically asks the question whether the statutory process allows for the issue to be decided to be decided by the tribunal before they engage their supervisory jurisdiction. The Court of Appeal stated:

> The Supreme Court of Canada has held that a variety of factors should be considered by courts in determining whether they should engage in judicial review or require an applicant to proceed with the available alternatives, including the convenience of the alternative remedy, the nature of the error and the nature of the alternative decision-maker: Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1 at paras. 37, 38, 42.

---

42 Ahmed v. Edmonton Public School Board, 2008 ABQB 351 at para. 35
The entirety of the process, and not just the tribunals themselves, must be considered.

As pointed out by the Manitoba Court of Appeal in **Turnbull et al v. Canadian Institute of Actuaries et al** (1995), 107 Man. R. (2d) 63 (C.A.) at para. 38, Misra was decided before Matsqui “and must now be understood in light of its emphasis on the utilization of an efficacious administrative process if one is available”. As in **Turnbull**, this case does not involve a clear question of whether the Committee or the Tribunal usurped authority outside the ambit of the disciplinary scheme, but an allegation of a denial of natural justice. In **Harelkin v. University of Regina**, [1979] 2 S.C.R. 561, the Court noted that in cases where there is no want of jurisdiction, but an allegation of failure to observe the rules of natural justice, “while it can be said in a manner of speaking that such an error is ‘akin’ to a jurisdictional error”, it is not the same kind of nullity as a jurisdictional error, and the courts retain their discretion to refuse to grant relief before alternate remedies are pursued.\(^\text{43}\)

A similar approach was taken in the decision of **Chow v. Mobil Oil Canada** outlined the proper procedure for a collateral attack on a statutory body with respect to who shall decide whether the tribunal had lost jurisdiction to hear a complaint under the human rights legislation\(^\text{44}\). Justice Rooke outlined a process by which jurisdictional challenges would be first brought before the Human Rights Panel and upon the completion of the hearing; the matter could be brought before the Court of Queen’s Bench for review.

Furthermore, the Court affirmed this principle again in the **Curda** decision where there was an issue of alternative remedy as well as a prohibition against collateral attack.

\(\text{The argument relating to collateral attack is similar to the argument relating to adequate alternative remedy, and succeeds for essentially the same reasons. The Discipline Tribunal rendered its decision. Although Mr. Curda commenced an appeal he did not complete it. His appeal was dismissed. He did not file an appeal to the Court of Appeal. At that point the disciplinary process was complete. The attempt by Mr. Curda to revive his judicial review application at this time violates the principles prohibiting collateral attack, as summarized in **Alberta (Energy Resources Conservation) v. Sarg Oils Ltd.**, 2002 ABCA 174; [2002] A.J. 938.}\(^\text{45}\)


The Court’s reference to the common law jurisprudence with respect to collateral attack of an administrative decision warrants further application with respect to expanding/overlapping jurisdiction. If one would like to control the multiple forums that could possibly be involved in your client’s issues, it would be better to determine how to ensure that the issues are dealt with in the proper forum in the first instance pursuant to your client’s best interest. While those involved from a particular tribunal perspective may not want to interfere in the type of adjudication that is conducted by others, those that are responsible for the public interest, such as the administrative bodies, would definitely have a right to voice concerns if their statutory duties are being removed. The reason for this being that without the proper full adjudication, as required by the statute and other jurisprudence, there is the high possibility of public harm.

The overriding concern by necessity is that decisions, which are made inconsistent with legislative intent and public benefit, would create a negative precedent for future application. Many times in the human rights tribunal process, there is an attempt to incorporate the principles and/or facts from the Provincial Civil Court, Employment Standards, Worker’s Compensation Board as well as the Alberta Labour Relations Board. All these adjudicative processes have unique public purpose behind them with very little jurisprudence overlap, except for perhaps event occurring in the same time period.

**Judicial Discretion**

In applying Judicial Discretion the Courts of Alberta have also applied various other doctrines to provide boundaries to the Judicial Review process.
In the decision of *Ji v. Alberta (Human Rights and Citizenship Commission)*, the Court dismissed a Judicial Review on the basis that there was no jurisdiction for the Court to expand statutory time periods as proscribed from the enabling statute\(^{46}\).

It must be noted that the Commission had to prepare the Record for the Court as well as submit a partial brief dealing with the merits for a relatively non-contentious issue. The amount of resources used in these proceedings could have been utilized in other ways had the Judicial Review process been more demarcated. In the *Katherine McConnell* decision as well as the *Lynne Karch* decisions, there was no need to produce a record because the Applicant had not met the threshold to warrant a proper Judicial Review.

Other steps to preclude review could be emphasizing those challenges that are against decisions of an administrative nature and cannot be subject to Judicial Review. As indicated by Madame Justice Rowbatham:

*The setting of an adjourned date for a hearing is purely an administrative act within the confidence of the Board and not subject to review by way of prerogative writ.*

*The question of possible loss which might be incurred by the applicant as a result of the Board continuing its hearings on the date in question must be carefully weighed against the possible loss which may be incurred by the respondent if the hearings are further delayed.*\(^{47}\)

The Alberta Court of Appeal decision in *Blood v. Aime* confirmed that discretion was to be used to defer and not to intervene unnecessarily where they stated:

*While we have jurisdiction to rule in an application for an Order in the nature of Prohibition for an anticipatory excess of jurisdiction, it is sparingly exercised. The Court has consistently expressed its reluctance to engage in prerogative short cuts in these cases.*\(^{48}\)


In the *Curda* decision, the Court went further and applied the common law doctrines of delay and mootness to decline a Judicial Review:

*I conclude that unreasonable and inordinate delay, and the fact that a declaration would no longer have any practical effect, provide additional and alternative grounds to decline to grant a declaration.*

Factual Matrix

Possibly one of the most interesting aspects of a Judicial Review deals with the Record and the factual matrix surrounding the application, while it may seem obvious that this should only be a review of the record before the tribunal, those practicing in the area know that this is not the case. Many times the Applicant will make allegations of missing information, failure to disclose as well as other aspects of evidence that engage the Court to review additional materials.

It is even more difficult where the interpretation offered by the Applicant places the issues of procedural fairness before the Court. In a decision of *Edmonton (City of) v. Alberta Human Rights Commission*, the City of Edmonton applied for an Order of Prohibition – prohibiting a Human Rights Panel from hearing the matter. This was a judicial review/appeal of a preliminary decision of the Panel. Justice Greckol dismissed the application saying that the City had not passed the threshold necessary to warrant the issue of an order of prohibition.

*In declining to grant judicial review due to the lack of a factual matrix, I am guided by our Court of Appeal in Amoco Canada Petroleum Co. v. Alberta (Minister of Municipal Affairs) (2000), 271 A.R. 161. The court in that case was persuaded that there were several unresolved and relevant issues of fact that were predicate to a finding that the Municipal Government Board was without jurisdiction to hear an appeal. The court concluded that this undermined the jurisdiction of the chambers judge to grant an order of prohibition. The Court of Appeal returned the case to the Board for resolution of those factual issues. In doing so, it stated at para. 5:*

49 Supra Note 44 at para. 45
...where there is a clear question of law standing alone, relating to the jurisdiction of an administrative tribunal to enter into an inquiry, the parties may apply to the court for an order for prohibition without awaiting a final decision by the administrative tribunal in question. But the jurisdiction to decide such questions in such an accelerated proceeding rests only upon a foundation of undisputed material facts: a foundation that is absent here.\footnote{Edmonton (City of) v. Alberta Human Rights Commission (2002) ABQB 1013 at 41}

Central to any Judicial Review are the contextual facts that the Applicant relies on in terms of creating the necessity of warranting judicial intervention. There is no real examination of this evidence; it is simply laid before the reviewing Justice without being tested. While some Justices may look at this from the perspective of fresh evidence or materials not relied on by the tribunal, there are also those that take those facts and incorporate them into their decision-making.

In the decision of \textit{Lethbridge College Board of Governors v. Lethbridge College Faculty Association}, the Court specifically dealt with the issue of what specifics fact should be before the reviewing Justice, excluding dissenting reasons. As stated by the Court:

\textit{Given the definition of “decision” in the collective agreement, the reference to “the decision” in Rule 753.13(1) and the findings in the cases of Manitoba Telephone System v. Greater Winnipeg Cablevision Ltd. (1984), 26 Man. R. (2d) 173 (C.A.), para. 25 and United Food and Commercial Workers International Union, Local 342P-2 v. Dawn Food Products (Canada) Ltd. et al., 259 Sask R. 49, 2005 SKQB 11, paras. 9-11, I have concluded that I will follow the general rule “...that if reasons are to constitute part of the record, only the majority reasons should be included”: see Manitoba Telephone System v. Greater Winnipeg Cablevision Ltd. (1983), 23 Man.R. (2d) 263 (Q.B.), para.11. Accordingly, the decision of the majority forms part of the record for this Court’s review. The dissenting reasons of the College’s nominee do not form part of the record and will not be considered.\footnote{Lethbridge College Board of Governors v. Lethbridge College Faculty Association, 2008 ABQB 316 at para. 23.}}

In deciding to limit the factual basis upon which to base a Judicial Review, the Court focused on the majority reasons and whether the challenge could be upheld.
It should be noted that particular allegations of fact will immediately create that necessity for review, as found by the Court in

Having established that review is only available to determine whether Dr. Ritchie’s mind is closed to the point that he is unable or unwilling to objectively assess the information he discovers in his investigation, I will deal with each of the allegations against him in turn. I will assess the allegations from the viewpoint of an informed person, viewing the matter realistically and practically, and having thought the matter through: Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369 at p. 394.\(^\text{52}\)

**Parties to the Judicial Review**

Recently the issue of the proper parties to a Judicial Review has become of central focus in the proceedings. In the Katherine McConnell decision as well as the Lynne Karch decisions referenced above not naming the proper Respondent was fatal to the application.

A variation to the theme of proper parties was decided in the decision of Brewer v. Fraser Milner Casgrain LLP, the Court of Appeal went through an historical analysis to point out that the Judicial review process is essentially a process which involves the citizen and the judiciary. The citizen comes before the Judiciary with their complaint and all that is required is a record. As stated by the Court of Appeal the following are important considerations to determine the proper parties.

a. Naming the tribunal that is subject to review is a “historical accident” and simply for “logistical” reasons. (para. 14 and 26)

b. The tribunal is not a party in the traditional sense; after service of the notice of motion, they give up their file and lose jurisdiction over the case. (para. 23)

c. There is jurisprudence that the tribunal should not be named at all in judicial review process. (para.24)\(^\text{53}\)

\(^{52}\) Supra Note 31 at para. 83

\(^{53}\) Brewer vs. Fraser Milner Casgrain LLP 2008 ABCA 160
The Court of Appeal went farther in the approach taken by the Supreme Court of Canada in *Northwestern Utilities v. Edmonton (City)*, by limiting the status of the tribunal under attack as well as limiting any potential argument to one of jurisdiction.

The Court of Appeal in *Brewer* specifically stated:

> The statutory tribunal should be patently neutral. It cannot do that if it dons the uniform of one army, still less if it enters that army’s front line and joins its bayonet charge.\(^54\)

As pointed out by subsequent cases, there has been an inconsistency to apply this type of analysis by other Justices. Specifically in the decision of *Ahmed v. Edmonton Public School Board*, indicated that the naming of the Human Rights Commission was mandatory\(^55\).

Further, the decision of *Coward v. Alberta (Human Rights and Citizenship Commission, Chief Commissioner)*, indicated that the *Brewer* decision was not about the right of a tribunal on Judicial Review before the Court of Queen’s Bench, but simply decided whether the tribunal had the right to appeal\(^56\) to the Court of Appeal.

Further comment on *Brewer* was made in the decision of *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, where the Court made specific reference to the fact that there were subsequent Supreme Court of Canada decisions as well as Court of Queen’s Bench decisions which made decision less clear:

> While the issue in *Brewer* was whether the Chief Commissioner of the Alberta Human Rights and Citizenship Commission had a right of appeal from a judicial review decision of this court quashing the tribunal’s decision, the Court of Appeal’s reasons for judgment reiterate that a tribunal should not be heard on a judicial review of its decision, unless there is a question of its jurisdiction.

---

\(^54\) Supra Note 53 at para. 49.


The Supreme Court of Canada also addressed the issue in *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983. LaForest J. (for himself and Dickson C.J.) indicated that the tribunal in question had standing to make representations regarding the standard of review and the argument that it had taken a reasonable approach. L’Heureux-Dube J. dissenting agreed with LaForest J. on this point, Sopinka J. (concurring with LaForest for himself and Lamer J.) and Wilson J. (dissenting) did not express an opinion on the tribunal’s standing. There are Queen’s Bench decisions which appear to stand for the proposition that a tribunal can also argue topics such as the standard of review, the Court in *Brewer*, without referring to the *Paccar* decision, seems to suggest at paragraph 33 that these cases are wrongly decided.\(^57\)

Frank Falzon recently provided a summary of the issues in relation to tribunal standing confirming the need for reevaluation and pointing out that the direction from *Paccar* and other decisions made subsequent was to focus on fully informed adjudication\(^58\). This issue of the proper parties also necessitates the discussion of what role those parties will have, whether it is as an intervener, amicus curiae or a representative of the Executive.

**Concurrent Jurisdiction**

As part of this Conference’s key issue, in the prerequisites to Judicial Review, it follows that questions about multiple forums is a natural topic to consider. While alternative remedy and collateral attack provides an understanding of where the Judiciary will consider their limits within the Judicial Review analysis, the question shifts to the type of review that would be conducted once a tribunal is reviewing another tribunals home statute or whether it has the ability to do so.

In the decision of *ATU (Local No. 583) v. Calgary (City of)* (hereinafter “*Bracey*”), the Court of Appeal outlined that the Alberta Labour Relations Board (hereinafter “*ALRB*”) as well as the Alberta Human Rights and Citizenship Commission shared concurrent jurisdiction over the Alberta Human Rights and Citizenship Act (hereinafter “Human

\(^{57}\) *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, 2008 ABQB 421para. 19

Rights Act”). The application came as a Judicial Review in which the ALRB had made the Order that by virtue of a grievance coming before them, that all issues, including the human rights issues covered by the Human Rights Act, were exclusively under their jurisdiction. The Court of Appeal overturned that order indicating that the correct interpretation of the relevant home statutes did not give the ALRB the jurisdiction to claim an exclusive domain over the Human Rights Act59.

It was unclear if this issue was limited to simply the human rights act or whether this would extend to other acts. This decision was made pre-Dunsmuir, so it is difficult to ascertain whether the Court would engage a new analysis simply on the basis that the ALRB had dealt with several issues of human rights within their statutory duties. The difficulty with this is apparent because as pointed out in the Bracey decision, many aspects of the Human Rights Act have no parallel, especially with respect to remedy and entitlements, so that a decision in the ALRB would not give the tribunal the ability to grant certain other aspects of the public or individual remedy. By defining the nature of the issues to simply one of providing relief to the employee, the public interest issues may be foreclosed and undermine the systemic discrimination which the Act is meant to curtail.

In the decision of the Ombudsman for the Province of Alberta, it is the public interest, which became the central focus of this application. In a bold step for a declaration concerning the breadth of the Ombudsman Act60 the Court declared that there were no operational statutory conflicts for the Ombudsman to make recommendations to amend a final decision made by the Chief Commissioner.

59 ATU (Local No. 583) v. Calgary (City of) [2007] A.J. No. 374, 2007 ABCA 121
60 Ombudsman Act, R.S.A. 2000, c.O-8
Irrespective of the paramountcy and finality provisions in the Human Rights Act, the Court stated that the public purpose served by the *Ombudsman Act*, took precedence over the procedural safeguards of the Human Rights Act. Moreover, since the recommendations were non-mandatory, the overall decision to accept or not to accept the findings of the Ombudsman remained with the Chief Commissioner.\(^6\)

The important aspect of this decision was that the complainant in this matter had not engaged the Judicial Review process, which was referred to in the Human Rights Act and the in Rules of Court, instead engaging the review process of the *Ombudsman Act*.

When viewed in the context of the *Curda* decision referred to above, how does this type of collateral attack on an administrative decision survive the common law perspectives on maintaining the integrity of an adjudicative process.

Moreover, because of the overlap between interpreting fairness within the two administrative realms, how does the law reconcile both to coexist? Should not the decision not to engage the Judicial Review process disentitle the individual complainant from filing a complaint with the Ombudsman?

These questions become even more important when extrapolating whether the review process under the Ombudsman becomes a secondary review, thereby perhaps requiring a Judicial Review by the Respondent in cases his rights of finality and certainty are potentially affected by a decision of the Ombudsman.

---

\(^6\) Alberta (Ombudsman) v. Alberta (Human Rights and Citizenship Commission) 2008 ABQB 168 at 50.
Reasonableness

The reasons and factors offered in response to reasonableness have varied from highly deferential to very low deference. The difficulty with the analysis is to locate which aspects of a tribunal’s decision are being stressed on based on the arguments from Counsel as well as the facts that the Court relies on. There is no consistency with which to address this issue. Moreover, many aspects of an “unreasonable” decision may simply fall under preliminary issues such as the Duty to Provide Reasons, the Correctness doctrine under Dunsmuir, or general Procedural Fairness under Baker.

Deference - Respect

The Alberta Court of Appeal in Calgary (City) v. Alberta (Municipal Government Board) adopted the approach that at the outset, respect and deference must play a part in the reviewing Court looking at the interpretation of its home statute. The approach taken by this panel was to have a significant degree of deference and confirm that it was this tribunal who was in the best position to make these decisions.

Reasonableness, according to the majority of the Supreme Court in Dunsmuir, requires that deference be accorded to the underlying decision, which “imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law,” (para. 48) and “implies that courts will give due consideration to the determinations of decision makers” (para. 49).

In the final decision the Court of Appeal went further and stated that this “issue deals largely with policy and the efficient functioning of the appeals process provided by the MGA, and deference must be accorded to the MGB decision”62. The Court specifically recognized the importance of leaving certain decisions in the forum of the tribunal due to policy and efficiency.

62 Calgary (City) v. Alberta (Municipal Government Board), 2008 ABCA 187 at paras. 18-20 and 34.
The Court in *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, followed the same respectful attitude when they were faced with what reasonableness meant where they stated:

*The Court in Dunsmuir described deference as both an attitude of the court and a requirement of the law of judicial review. This approach imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. As stated by Bastarache and LeBel JJ. at para 49.*

The Court had added to the deferential toolkit, by expanding on the application of the common law within a particular statutory context:

*Given that the standard of review is one of reasonableness and that Dunsmuir directs that courts should accord deference where a specialized tribunal such as the Board makes findings of fact and where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context, I can see no reason to disturb these findings.*

This is of particular importance in comparison to other decisions, which limit the deference afforded to tribunals to only their enabling statute as we will discuss further on.

Going further in respect aspect of deference, is the decision in *Canadian Union of Public Employees, Local 3421 v. Calgary (City)*, the Court followed a Pushpanathan analysis however the most important issue for the Court was the level of deference to give to the Labour Arbitrator, in this case was David Jones Q.C. This inherent respect for the expertise of the arbitrator was clear where the Court indicated:

*The Tribunal was Mr. David Jones, Q.C. He is recognized as an experienced and knowledgeable labour arbitrator. He is familiar with current issues in labour relations and with the bargaining history of these specific parties.*

*Considerable deference should be given to his decision, particularly given the purpose of the legislation, the issues before him and his high level of expertise.*

---

63 *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, 2008 ABQB 421-para.27
64 Supra Note 59 at para. 83
65 *Canadian Union of Public Employees, Local 3421 v. Calgary (City)*, 2008 ABQB 374 at paras. 42 & 47.
Even though part of the issues rested on procedural fairness, there was no Baker analysis conducted by the Court, moreover, the Duty to Provide Reasons was also not important as the Court inferred that the proper level of analysis was conducted even though there could have been more reasons in the decision under review. The Court specifically stated:

Mr. Jones may have given more reasons. He was not required to do so. He may have referred specifically to other wages and benefits. He was not required to do so, although I am quite satisfied that he did do so. He was required to make a full inquiry and to make an award which dealt with each matter in dispute. He did so.  

It is uncertain whether this type of deference can be emulated with any Labour Arbiterator, my submission that the respect that particular arbitrators get far exceeds those that do not have the experience and the knowledge of David Jones Q.C. Regardless, contrary to what David Mullan had indicated in review of Dunsmuir, Alberta Courts still recognize expertise as a predominant factor in determining whether to defer.

As an example of an multifaceted deferential approach, the Court in the United Food and Commercial Workers case adopted an approach which had enhanced deference, the Court adopted the prior formulations of the Alberta Court with respect to the procedure, the actual Standard of Review as well as the with respect the interpretation of human rights principles.

66 Ibid at para. 65.
67 Supra Note 25.
68 United Food and Commercial Workers, Local 401 v. Real Canadian Superstore, 2008 ABQB 332
Deference - Range of Possible Acceptable Outcomes

This approach is a high-deferential, which requires the Applicant to show with indication to the facts that there is no possible line of reasoning which could produce the conclusion being challenged. This approach does not focus so much on the reasons as much as it focuses on the nature of the allegations against the statutory body.

Following this approach, the decision of Roy v. Alberta (Insurance Councils Appeal Board) allowed for a significant degree of deference, even though part of the analysis was to be based on “correctness”, which did not get addressed. The Court found that the tribunal had picked one of several options that were open to them, therefore the applicant’s suggestion that there were “no lines of reasoning supporting the decision” was not proven.

The dissent of Justice Berger advocated this approach in looking at the complete record that was before him, in deciding that the tribunal had heard viva voce evidence and the issue on review is with respect to the conclusion reached by the tribunal, therefore one must give deference to a choice that was made.

As I have already pointed out, the HPAB heard and considered viva voce evidence and competing argument was advanced for the Board’s consideration. The appeal to the Court of Queen’s Bench and to this Court is with respect to the conclusion reached premised upon precisely the same record that was available to the HPAB. To the extent that interpretation of the language of the enactment or of the Bylaws is in issue, the absence of reasons does not preclude meaningful appellate review on the question of law that is arguably engaged. The majority concedes that the question that came before the Tribunal does not lend itself to one specific, particular result. That said, the conclusion reached by the HPAB is certainly one of a number of possible reasonable conclusions. The Board is entitled to a margin of appreciation within the range of acceptable and rational solutions (Dunsmuir, supra, at para. 47).

69 Roy v. Alberta (Insurance Councils Appeal Board), 2008 ABQB 572
When the Court relies on the issue of “range” it should be concerned with not the process but the conclusion based on reviewing the information before it. If there is some “line of reasoning” that can produce the same conclusion, it should not be interfered with.

**Deference – What is the Legal Definition of Reasonableness**

In order to provide some direction to the question of what “reasonableness” means several Courts have simply adopted the earlier definition of *Ryan* decision from the Supreme Court of Canada, although adding the *Dunsmuir* provision of a “range of possible outcomes”. As stated by the Court – reasonableness means highly deferential:

> In considering the "reasonable" standard, the Supreme Court of Canada in *Law Society of New Brunswick v Ryan*, [2003] S.C.R. 247, in discussing what the reasonable standard requires of a reviewing Court, said at ¶50, 55 and 56:

> At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the Court may undertake its own reasoning process to arrive at the result it judges [page 269] correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see Southam, a par. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see Southam, at para. 79).
This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.\(^{70}\)

The Alberta Court of Appeal also added their own definition of “reasonableness” where they state:

> By “unreasonable”, I mean that the decision was not taken in accordance with reason, is not one of the possible reasonable conclusions, and is outside the tribunal’s range of acceptable and rational solutions, both as to the conclusion and the reasons given by the tribunal: Dunsmuir v. R., supra ( paras. 42, 47-48). Indeed, to be careful, I have gone a step further than that. By “unreasonable”, I also mean that the reason proffered by the court or tribunal was not a rational route to the conclusion stated, and that I do not know of another rational route to that conclusion. By “unreasonable”, in this appeal I do not simply mean wrong, nor merely wrong plus or minus some margin of error.\(^{71}\)

These two different approaches project two different types of Judicial Review. While the former bases its understanding on the basis of deference to the adjudicator, the latter focuses on the issues of rationality as defined by the Court. The result in application of these two legal standards produces two different types of Judicial Review analysis.

Adding to the discussion, the Court specifically addresses the definitions of the new approach with respect to “justification, transparency and intelligibility” where they state:

> According to the majority in Dunsmuir, at para. 47, a court that is reviewing a decision based on the reasonableness standard should ensure that the tribunal’s decision is justified, transparent and intelligible. In its brief, the Association offered the following definitions of these terms:


\(^{71}\) Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 220 at para. 35.
Black’s Law Dictionary (5th ed.) defines “justification”, in part, as: “Justification means explanation with supporting data.” Funk & Wagnalls New Standard Dictionary (1947) defines “transparency”, in part as “the property of being transparent” and “transparent” as “easy to see through or understand.” Webster’s Encyclopedic Dictionary (1988) defines “intelligibility”, in part as “the quality or state of being intelligible”, and “intelligible” as “that can be understood... that can be perceived by the intellect.”

The reasonableness standard also requires that the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law,” para. 47; where defensible is defined, in part, as “justifiable; supportable by argument”: see The Canadian Oxford Dictionary, 1st ed., s.v. “defensible”. In other words, the reasonableness standard requires a court to determine whether a tribunal’s decision is reasonable both in terms of the reasoning and the outcome.73

By adding all these terms to the lexicon of Judicial Review, there may be a future development of how these will affect the nature of the proceedings. As we have seen part of this definition has already incorporated the Duty to Provide Reasons, what about the “defensible” argument. Are tribunals now required to add more reasons so that if challenged they can be “defensible”. What would be the criteria for “defensible”.

The Court in Lethbridge College Board of Governors, makes two additional comments which is unique in Alberta, firstly, the Court rejects the “pragmatic and functional” test, instead indicates that there is a contextual non-exhaustive criteria to decide the Standard of Review74. Secondly, the Court rejects any suggestion of a spectrum of deference, where the Court prefers Justice Binnie’s analytical position in reference to Dunsmuir:

It is my view that by injecting varying degrees of deference into the two-standard model, this Court would be reintroducing the standards of patently unreasonable and reasonableness simpliciter. In addition to the difficulties with these two standards highlighted by the majority Dunsmuir, Binnie J. voices concern with the length, expense and complexity added to the judicial review process by arguments over the appropriate standard of review at para. 133.75

72 Lethbridge College Board of Governors v. Lethbridge College Faculty Association, 2008 ABQB 316 at para 26.
73 Supra Note 69 at 27.
74 Supra Note 69 at paras. 29-30.
75 Supra Note 69 at para. 35.
Adopting a specific deferential stance could perhaps provide certainty than by indicating a process whereby you would increase or decrease the test for reasonableness based on the *Pushpanathan* factors, plus or minus others.

In reference to the theme of this conference, the “reasonableness” test can also apply to the other tribunals applying other statutes:

*The standard of review applicable to the interpretation of human rights principles and the application of those principles to facts has been considered by Alberta’s courts in the cases of Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc. (2005), 382 A.R. 270, 2005 ABQB 496 and United Nurses of Alberta, Local 115 v. Calgary Health Authority (2004), 339 A.R. 265, 2004 ABCA 7. In both Suncor and United Nurses, it was held that the appropriate standard of review was reasonableness. In view of this existing jurisprudence, I accept that reasonableness is the appropriate standard of review for this issue.*

Following the discussion of the expansive jurisdiction, if the Court is now willing to grant a high deferential standard as was applied in this case (*United Food and Commercial Workers, Local 401*), the effect of this would be significant in producing *de facto* super tribunals; tribunals which would be able to apply their own enabling statute as well as other statutes – in a very real way expanding the inherent jurisdiction of the tribunal.

In defining a test for the Standard of Review, the Court confirms a two part test:

*There are two steps in the new standard of review analysis. The first requires that the court ascertain whether the degree of deference is well settled by the case law with respect to the particular category of question. If not, the court must proceed to the second step of undertaking a contextual analysis of the four factors identified and applied since Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982. Not all of these factors need necessarily be considered if some of the factors are determinative of a reasonableness standard in a specific case.*

---

76 *United Food and Commercial Workers, Local 401 v. Real Canadian Superstore*, 2008 ABQB 332 at para. 32.
77 Ibid at para. 16.
More importantly, it emphasizes where the legal burden supports deference, where the Court states:

*Where the standard of reasonableness is used, the onus is on the party challenging the decision to show the decision being challenged was unreasonable.*

Another aspect that has appeared in the Alberta decisions has been to look at the deferential standard as simply adopting the “patently unreasonable” standard if the common law had formally accepted that as the basis for the analysis. The Court goes through a lengthy analysis and then concludes:

**No Deference - Inconsistency as Unreasonable**

In the decision of *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, the Alberta Court of Appeal followed the aspect of *Dunsmuir*, which looked reasonableness as “possible, acceptable outcomes, which are defensible in respect of the facts and law”. The Court of Appeal decided that the interpretation was unreasonable due to inconsistency in two tribunal decisions.

The decision did not give any deference to the reasons why the tribunal decided they way they did because of factors of historical irrelevance and proper understanding of statutory interpretation. Overall, the decision read more like an analysis of “correctness” rather than the deferential standard of reasonableness.

The same result was found in the decision of *Alberta Union of Provincial Employees v. Health Science Association of Alberta*, where the Court stated:

---

78 Ibid at para. 33.
The Original Panel decision was thus unreasonable in that it made significant changes to the definition of ANC. In doing so, it declined to follow previous ALRB decisions, and in particular the Pincher Creek decision. It also failed to follow previous ALRB practice in that the description of ANC had not been limited in the past to “support nurses”. While the Original Panel rationally distinguished the previous decisions, it gave no policy reasons for doing so. In failing to identify the wrong being remedied or providing meaningful reasons for the changes being made, its decision was unreasonable.\(^{80}\)

This decision is important because it chose to ignore the other precedents regarding the former “patently unreasonable” standard and focused on an examination of existing policy of the tribunal.

**No Deference - Multi-nuanced reasonableness**

In the Alberta Liquor Store decision, the end result on the standard of review was inconsistent as to whether the Court actually applied the test as indicated in Dunsmuir. The test the Court went through was to apply an onus on the applicant to show that the decision was unreasonable, adopting the rationale from other decisions they have made on reasonableness and quoting from the Ryan of the Supreme Court of Canada:

> [65] Our Court of Appeal recently summarized the reasonableness review in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2008 ABCA 200, [2008] A.J. No. 566 at para. 18 (citing Dunsmuir at para. 47), as a review to determine whether the reasons are justifiable, transparent and intelligible, and fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The often cited formulation espoused by the Supreme Court in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 is whether there is no line of analysis that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

The Court continues with adopting a reasonableness standard with the factual determinations which added a dimension which is hard to understand. Normally, the fact finding process of an administrative tribunal would not be subject to review (as referred to above in the prerequisites section).

\(^{80}\) *Alberta Union of Provincial Employees v. Health Science Association of Alberta*, 2008 ABQB 279 at para. 136
Although any procedural fairness issues will be considered using a standard of correctness, any factual determinations underlying those issues are entitled to deference and will be considered on a reasonableness standard.

The test is also misstated further in the decision; the effect of this is non-consequential because the test applied did not expand on justification, transparency or intelligibility.

Under the Dunsmuir reasonableness test, it is necessary for this Court to determine whether the reasons were cogent, transparent and intelligible, and were within the range of decisions open to the panel on the evidence before it. 81

In the Furst decision, the Court varied between applying the Pushpanathan analysis and Baker and finally settling on the Dunsmuir decision for a failure to provide reasons, therefore there could be no deference. There was no indicia of “unreasonableness”, therefore the decision came down to a choice of which decision made the Duty to Provide Reasons determinative of the issue to send the matter back to the tribunal with direction to give reasons 82.

The cases regarding the Duty to Provide Reasons should be clarified to preclude the necessity of unnecessary Standards of Review Analysis. However, the facts as alleged may still require the Court to consider whether in any particular circumstance the requirement for reasons becomes necessary.

The more troubling issues arise when the concept of “administrative discretion” may be including in this decision, those that are non-adjudicative and non quasi-judicial. When the enabling statute does not require reasons and the issues raise goes to procedural fairness or a question of law of general importance, would that mean that the deferential standard will therefore require an additional duty? In contrast, where the requirement of reasons would require additional institutional resources or a procedural change, how does that play a part in the Court’s review process?

81 Supra Note 25 at para. 127
82 Furst v. Alberta Motor Vehicle Industry Council, 2008 ABQB 530
In the *Currie v. Alberta* decision, a Judicial Review application was brought which challenged the independence and impartiality of staff employees in the Edmonton Remand Centre from hearing disciplinary complaints. In an extensive hearing in which *viva voce* evidence and expert evidence was heard, the Court concluded that these staff employees were in an essential conflict, which then required a declaration that the impugned sections of the *Corrections Act* R.S.A. 2000, c.29 were unconstitutional however suspended the declaration of invalidity for a year. The Government of Alberta as a result implemented a completely new administrative procedure in which independent adjudicators were appointed by the Legislature to address the Court’s concerns.

Referring back to the theme of the conference, could the tribunal in question deal with a Judicial Review dealing with a constitutional challenge or could the Courts be the only appropriate forum? In the *Currie* case the context of the Judicial Review within disciplinary settings cast a shadow of non-deference. The Court specifically distinguished all case law dealing with other tribunals by stating:

"I accept the Applicants’ argument that an appearance before the disciplinary tribunal more closely resembles a criminal trial than the implementation of government policy by a liquor commission, a planning board, or a taxing authority."  

Moreover, the Court offered their opinion on the other potential avenues of redress, including Judicial Review where they stated:

"In my opinion, access to judicial review, ministerial review, or to the ombudsman are not practical solutions to the problems. Judicial review should be reserved for cases in which new issues of broad application are implicated. Judicial review, available to prisoners who object to the fairness of a hearing, would be ineffective, since, as already noted, it is important that discipline be implemented quickly. By the time the judicial review is heard, the matter will already have been dealt with and the prisoner’s punishment imposed. Moreover, it is uneconomical use of judicial resources."

---

84 Supra Note 64 at para. 50.
85 Supra Note 64 at para. 185.
The Court engaged in a discussion of what level of procedural fairness is required and looked at the spectrum between the executive and the judicial. Undoubtedly, the issue will arise where even if there is an overlapping and expansive jurisdiction, it may require the tribunal to change the type of procedural fairness it accords depending on the nature of the issue it is deciding. Rather than being about “reasonableness”, the discussion seems more about context, which is exactly the problem with the multi-faceted approach to the question of reasonableness. How does one neatly slip in the term reasonableness into this discussion without being a bit afraid where it could lead?

**No Deference - Reasonableness as Correctness**

The final category of the Alberta Courts approach to reasonableness produces the most difficult to reconcile, while the test for correctness should have been limited to true jurisdiction, certain decisions have applied a no-deference approach in the manner they engaged the discussion.

In the decision of *Pan Canadian Energy Services v. Alberta (Municipal Affairs)*, the Court in deciding to quash a tribunal’s decision stated as follows:

> The Crown submits that to characterize this issue as an error in procedural fairness is inappropriate and causes it to be reviewed under the law of correctness rather than reasonableness. If I am wrong in accepting this issue as an issue of procedural fairness, I would in any event find that the decision of the Board on this issue was not reasonable, as being outside the scope of reasonable responses open to the Board on the issue before it.\(^{86}\)

The decision to equate the analysis under *Baker* as producing the same result as a reasonableness analysis is difficult to accept, considering that there were no reasons provided as to how the alternative finding could be made pursuant to the facts. Simply by stating that it “outside the scope of reasonable responses” does not coincide with the ratio of *Dunsmuir* as applied by other members of the Judiciary.

---

\(^{86}\)*Pan Canadian Energy Services v. Alberta (Municipal Affairs)*, 2008 ABQB 393 at para. 51.
The Alberta Court of Appeal decision in Boardwalk Reit LLP v. Edmonton (City), is on the other end of the deferential spectrum. The Court of Appeal engaged in an analysis of the facts and law which gave no deference to the tribunal, in this case was the Municipal Government Board. The specifics of this case are important in the context of the cases that have proceeded. The case outlines the following:

a. The Court of Appeal outlined that the tribunal process was akin to a “trial”. Specifically the Court of Appeal stated:

   ...when the issue is whether a particular taxpayer has lost his or her ordinary right of appeal, the issues are neither polycentric nor policy-driven. This is a two-sided fight over a penalty (and what is the law applicable to all such penalties). Nor is this Board a traditional regulatory body; it hears disputes like a court, between defined parties to a defined dispute under defined criteria.87

b. The Court of Appeal adopted multiple Standards of Review and applied the Pushpanathan approach88.

c. The Court of Appeal applied the Standards of Review Analysis to indicate that the Courts were in the best position to interpret the statute in question:

   The statutory interpretation questions here are not technical matters of land assessment, and indeed involve broad general questions of pure law, including interpretation of general statutory provisions, and the rules of procedural fairness and natural justice. These legal questions are important to all Albertans as precedents, and arise fairly often in many contexts. The level of generality, breadth of applicability, and importance matter, and considerably shape the Pushpanathan (standards of review) analysis.89

d. The Court of Appeal maintained that no deference was to be given to the issue of statutory interpretation90.

e. The Court of Appeal went further and disregarded paragraphs 124 and 128 of the Dunsmuir decision Justice Binnie’s comment that it “should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker”.91 The Court of Appeal rejected that the tribunal was applying their home statute and disregarded the privative clause as “weak”.92

87 Boardwalk Reit LLP v. Edmonton (City), 2008 ABCA 220 at para. 12 & 30
88 Ibid. at para. 19.
89 Ibid. at para. 20.
90 Ibid. at paras. 21-23
91 Supra Note 3.
92 Supra Note 87 at para. 24.
f. The Court of Appeal in addition confirmed that the *Pushpanathan* approach was not the correct approach with respect to issues of procedural fairness and the Standard of Review was correctness.\(^{93}\)

g. The Court of Appeal applied an exacting approach to reasonableness Standard of Review analysis.

The *Boardwalk* decision is a complex decision which goes through an extensive analysis of the facts and law. The decision is akin to full trial, it involved new facts, statutory interpretation, multiple Standards of Review, a discussion of procedural fairness and an expansive remedy. The result is as the Court stated:

\[\textit{The summary dismissals by the Assessment Review Board and the Municipal Government Board were unreasonable for a host of reasons. They contravened both the Municipal Government Act and the administrative law duties of procedural fairness and natural justice.}^{94}\]

**Correctness and Procedural Fairness**

Both of these non-deferential categories must be addressed separately because of the fact that they are properly not a part of the Standards of Review analysis. Once a Court embarks on the review based on correctness, it is providing guidance based on its own perception of a particular legislation or generalized administrative legal principles. To categorize that as part of the Standards of Review process is counterproductive. The “esoteric” argument regarding the proper level of deference in these cases should not be more than a simply review of the allegations and an application of a particular common law doctrine to that issue.

---

\(^{93}\) Supra Note 87 at para. 174.

\(^{94}\) Supra Note 87 at para. 212.
For example, in the decision of *Desouza v. Alberta (Director, Calgary Corrections Centre)*, the Court recognized that issue that was brought before them was both an issue of “central importance to the legal system” as well as procedural fairness. The need to categorize this within the Standards of Review analysis was not necessary. The Court stated:

*Dunsmuir*, supra, indicated the correctness standard will apply where there is a question of general law that is of central importance to the legal system and is outside the specialized area of expertise of the Board. Here the Board’s decision in failing to consider issues of possible self-defence and failing to provide adequate disclosure to Desouza to enable him to present his defence in both these areas are issues of law and subject to the correctness standard.

To put it another way, did the Board’s decision to revoke the 10 days of earned remission meet its common law duty of procedural fairness and requisite statutory duties?\(^{95}\)

The Court did not address the *Baker* principles but applied a common law approach to the issues to the rights of the Applicant. The context of this decision was in the area of the penitentiary disciplinary system, perhaps warranting less deference as indicated in the *Currie* decision\(^ {96}\).

In the decision of *Johnston v. Alberta (Director of Vital Statistics)*, the Court of Appeal provided a definitive statement on the issue where they stated:

Neither the *Pushpanathan* nor the *Dunsmuir* analyses apply to issues of procedural fairness or natural justice. Rather, these issues are reviewed on the correctness standard using the analysis set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4) 193; *ATCO Gas & Pipelines Ltd. v. Alberta Energy and Utilities Board*, 2005 ABCA 226, 48 Alta. L.R. (4th) 1 at para. 13."\(^ {97}\)

---

\(^{95}\) *Desouza v. Alberta (Director, Calgary Corrections Centre)*, 2008 ABQB 294 at para. 29 & 30.

\(^{96}\) Supra Note 83.

\(^{97}\) *Johnston v. Alberta (Director of Vital Statistics)*, 2008 ABCA 188 at para. 12.
In the decision of *General Teamsters, Local Union No. 362 v. Consolidated Fastfrate Inc.*, the Court applied the *Pushpanathan* factors to limit the deference indicating that labour arbitrator was not entitled to deference in considering the ‘law of estoppel’. The designation as the ‘law of estoppel’ outside the realm of the tribunals expertise was a defining factor in determining the appropriate Standard of Review. The Court specifically\(^98\) stated:

> The nature of the legal question at issue in the case at bar is the application of the general law of estoppel to the enforcement of the terms of the Collective Agreement. This is a question of law that is of central importance to the legal system as a whole and not within the exclusive or special expertise of the arbitrator. Accordingly, this would suggest that the correctness standard is appropriate.

On its face, the decision runs contrary to the *Canadian Union of Public Employees, Local 3421 v. Calgary (City)*\(^99\) in terms of the deference to the labour arbitrator in that decision as well as the decision in *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*\(^100\) where the application of the general principles of the common law was also given deference. The inconsistency in practice is difficult to reconcile for the practitioner.

Specifically, in relation to the theme of the Conference, it should be mentioned that a moving target with respect when a tribunal will be afforded deference when applying statute outside of their enabling statute would not be indicative of an expanding jurisdiction.

---

\(^{98}\) *General Teamsters, Local Union No. 362 v. Consolidated Fastfrate Inc.*, 2008 ABQB 230 at para. 35.
\(^{99}\) *Supra Note 65.*
\(^{100}\) *Supra Note 63.*
Structured Adjudication

I submit that the above analysis provides the taxonomy of various reasons and issues that arise in the Judicial Review analysis. Rather than point to how the Standards of Review analysis can be improved, I submit a rather modest practical suggestion that the Courts should adopt, a structured adjudication in the form of a mandatory leave application in which it should be first determined whether the Court will need to undergo an extensive Judicial Review. This approach will clarify the law with respect to common law perspectives on procedural fairness, prematurity, Duty to provide reasons, alternative remedy, mootness, rules of court, res judicata, abuse of process, status of tribunals, factual matrix and a range of other factors which precede the actual merits of the challenge to the actual decision.

I have considered the status quo as providing the necessary direction for a more refined approach, however I do not believe that the Dunsmuir decision is actually a streamlined process, it simply has engaged the Judiciary to incorporate some new ideas into a difficult area of the law. The options I considered as follows:

1. Statement of Claim – As envisioned by the current Rules of Court this would require a detailed claim with respect to the facts, law and remedy. Also, this would allow for a Summary dismissal process. Pursuant to the fact that many of the Applicants for Judicial Review are self-represented you would want to make the process simpler rather than more complicated.

2. Changes to the Administration Procedures and Jurisdiction Act\(^{101}\) in Alberta – These changes could implement a Standard of Review as was done in British Columbia, but the effect will be the same. The deferential standard can only be determined by the Judiciary. This perspective is supporting by the conflicting case law in relation to Dunsmuir in British Columbia\(^{102}\)

---

\(^{101}\) Administration Procedures and Jurisdiction Act, Chapter A-3.

\(^{102}\) In the decision of Pugliese v. British Columbia (Registrar of Mortgage Brokers) 2008 BCCA 130, [2008] B.C.W.L.D. 3062, the British Columbia Court of Appeal has stated that the Statutory Standard of Review Analysis applies. While other lower court decisions have decided to apply the Dunsmuir such as indicated in the decision of Canada Post Corp. v. C.U.P.W., 2008 BCSC 338, [2008] B.C.W.L.D. 5382.
The process I submit would work best would be a mandatory leave application followed by an application on the merits which would consist of the following:

PART I – Judicial Gatekeeping

a. Parties – All parties of interest could make an application to determine their status and the extent to their involvement. The Court would assess what would be the most efficient way to have all aspects of the application for leave heard.

b. Nature of the Application – Whether this is a collateral attack, procedural fairness, proper statutory review. It would outline the test as well as the legal burden that was required.

c. Rules of Court – This would address deficiencies in form as well as potential amendments.

d. Review of the Statutory Body under Attack – This would involve a Statutory Interpretation of the role of the tribunal as well as whether the statute precludes this type of judicial review.

e. Preliminary Judicial Discretion – The Court could at this time assess whether they would want to dismiss the application on the basis of prematurity, mootness, alternative remedy, no factual matrix or other common law principles.

f. Facts/Evidence – The Court would assess whether the evidence is sufficient or whether there needs to be further evidence by way of affidavit or viva voce evidence or expert evidence presented (as in the Currie decision)

g. Standard of Review – If the Court decides that a Judicial Review is warranted, they could The Court would review all these preliminary issues and make a decision on the Standard of Review. The Court could indicate whether it was fact specific or it had provided a comprehensive Standard for the Act under review.

PART II – Merits Application

Depending on the questions answered above this Application may not even be necessary. The merits application should be a focused analysis of the facts and law based on the challenge brought against the Statutory Tribunal. Depending on the nature of the attack this may be a complex matter involving the determinations of new facts or alternatively a documentary review of the facts brought forward from the leave application.
The goal of this two-stage process would be to specify what factors would affect the Judiciary in the actual merits aspect of the review process. The more important issues that arise out of a structured approach is that it would follow the Dunsmuir perspective to have the Applicant provide facts, grounds and jurisprudence to substantiate that they should be allowed to argue the merits of their Judicial Review Application. Issues such as a partial privative clause (as opposed to the pejorative “weak” terminology) should be decided one time only and then followed through the principle of stare decisis in subsequent cases. The difficulty of Judicial Review at present is that it is never the same thing twice.

**Conclusion**

*In a word, judicial reconsideration of administrative decision-making might be inefficient, it might be costly, it might not be bureaucratically rational, but it is what people want.*

*If one were to describe the rule of law as a sort of "confidence game," public faith is the ante.*

To conclude, I would stress the fact that my purpose for this paper was not to provide a critique of the decisions that have been made in Alberta post-Dunsmuir. After several years of practicing in Administrative Law and learning about the complexity of the issues surrounding the Standard of Review analysis, I propose a more neutral solution which simply provides guidance through structure. By having the Standard or Review process divided between statutory interpretations, Civil Procedure, common law discretion, legislative pronouncements and formalized legal standards – the effect is a lack of consistency which does not lead itself to an inherent confidence in the process.

---

Ian Holloway referred to Judicial Review as a ‘Sacred Right’, one which individuals feel that they have the ability to challenge the coercive powers of the state. That form of empowerment cannot be undermined. However, there must be a process by which we understand it so that those institutions which operate on a day to day basis do not get hindered in their efforts to provide service to those who access their institutions.

At the ground level, Administrative Tribunals are recognizing the need to adapt to an increasingly aware population that wants to participate in the adjudication of their rights. Therefore these tribunals are actively modifying their processes to accommodate various barriers so that people can participate. Ultimately the goal is to be fair to all the parties and remain neutral. This had led to developments in legislation as well as improved processes. The Court should take notice and provide the requisite level of deference to ensure that the institutions remain effective.

In discussing the vastness of the administrative state, it is important to note that the decision to enter into the social contract starts with a relationship of perspectives and continues to grow into complex bureaucracies in which the decisions made (adjudicative or administrative) really end up to be about the relationship more than the issues, as we have seen in the “esoteric” discussions surrounding the Standards of Review. My observation is that the Rule of Law is aptly designated as a ‘process of reflection’ in which people have avenues of redress, which engages the debate regarding the proper balance between those who presumably have equality in power within a democracy.

---

104 By rights I mean all things that the state controls on behalf of their citizens. Differing levels of entitlements, obligations, and citizen responsibilities play a part in what we consider our ‘rights’.

I would have used the analogy of the ethos/culture of justification, but it does not have the philosophical underpinnings, which I submit Justice LeBel discussed in the *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*106 as well as in the decision of *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371107. As articulated by Professor Tollefson, the Supreme Court has “embarked on an extended reflection”108 with respect to judicial discretion. This is more than justification; this is about morality, accountability as well as legitimacy.

Professor Sossin states that the “standard of review represents the search for a constructive relationship between courts and administrative decision-makers which reflects respect for the rule of law, Parliamentary supremacy, judicial capacity, administrative expertise and the complex decision-making environments of the modern state.”109

My suggestion is not new; the practice of having a leave application is currently the practice in England. However, what I am suggesting is incorporating the Judiciary as the primary conduits to develop this structured process because they are the final arbitrators or our rights under the Constitution.

---