

Deference in Disarray: Standards of Review of Human Rights Tribunal Decisions across Canada

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INTRODUCTION

There is no uniformity across Canada in respect of the appropriate standard of review of human rights tribunal decisions. In some jurisdictions (British Columbia, Ontario), the standard of “patent unreasonableness” persists despite its purported demise in *Dunsmuir*¹; while in others (Alberta, Nova Scotia, Federal) one or both *Dunsmuir* standards (reasonableness or correctness) may apply depending on the number and characterization of the issues in question.

This article canvasses the range of standards of review of decisions of human rights tribunals² in five Canadian jurisdictions:

British Columbia—where, since 2003, a complainant must file a complaint directly with the B.C. Human Rights Tribunal. The standard of review here is statutorily directed pursuant to B.C.’s *Administrative Tribunals Act*.³

Alberta—where, under the province’s *Human Rights, Citizenship and Multiculturalism Act*,⁴ a party may appeal a decision of a Human Rights Panel to the Alberta Court of Queen’s Bench and no privative clause applies.

Nova Scotia—where, under the province’s *Human Rights Act*,⁵ any party to a hearing before a Board of Inquiry may appeal from the decision or order of the Board to the Nova Scotia Court of Appeal on a question of law.

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¹ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 69 Admin. L.R. (4th) 1.

² This article does not focus on judicial review of human rights commission decisions whether or not to forward a complaint to a tribunal, the so called “gatekeeper” function. In British Columbia (as of 2003) and Ontario (as of July 2008), where there is now “direct access” to the tribunal, there is no longer any commission involvement in new complaints, so judicial review of commission decisions is, or will be, a thing of the past.

³ S.B.C. 2004, c.45.

⁴ R.S.A. 2000, c. H-14.

⁵ R.S.N.S. 1989, c. 214.

Federal / Canada—where an applicant may seek judicial review of a decision of the Canadian Human Rights Tribunal before the Federal Court of Canada pursuant to the *Federal Court Act*.⁶

Ontario—where, as of June 30, 2008, all sections of the *Human Rights Code Amendment Act* (formerly Bill 107)⁷ are now in force. The new *Code* revolutionizes human rights enforcement in the province by allowing applicants (formerly known as complainants) to file an application directly with the Human Rights Tribunal of Ontario. The Human Rights Commission of Ontario is not eliminated but is assigned a revised role to focus on education, research and systemic discrimination. The amended *Code* directs that a Tribunal decision is final and not subject to appeal, and shall not be set aside on judicial review unless the decision is found to be patently unreasonable.⁸

This article concludes that the lack of uniformity across Canada of standards of review of human rights decisions reflects disagreements amongst legislatures and judges about how much deference to specialized human rights tribunals is warranted. Ultimately, this lack of uniformity also reflects a more fundamental disagreement about whether accountability for the resolution of human rights disputes properly rests with the administrative or judicial sphere. It is time that the Supreme Court engages in a thorough review of the principles of judicial review in respect of human rights tribunal decisions to provide better guidance to courts across Canada.

THREE RECENT DEVELOPMENTS

Three relatively recent developments in administrative law account for changing approaches to the standard of review of human rights tribunals:

1. Statutory reform, involving statutorily directed standards of review, as a legislative response to the unpredictability of the “pragmatic and functional approach”.
2. The Supreme Court of Canada’s decision in *Dunsmuir*, which collapsed the three standards of review (patent unreasonableness, reasonableness *simpliciter*, correctness) into two (reasonableness, correctness); and
3. Segmentation, which involves the possibility that, on judicial review, a court may apply different standards of review to different constituent parts of a tribunal’s decision.

These three developments are briefly described below.

⁶ R.S.C. 1985, c. F-7.

⁷ 2006, S.O. 2006 [*Human Rights Code*].

⁸ *Human Rights Code*, s. 45

Legislative Reform and Statutorily Directed Standards of Review

Despite the Supreme Court's attempts in such cases as *Ryan*⁹ and *Dr. Q*,¹⁰ to clarify the "pragmatic and functional approach" and articulate a principled standard of review methodology, lower courts and factions within the Supreme Court have criticized the standard of review jurisprudence as unprincipled and unpredictable.¹¹ Not surprisingly, some legislatures, thus far in British Columbia¹² and Ontario,¹³ have responded to the jurisprudential confusion by legislatively directing that a particular standard of review shall apply for certain tribunals. Unfortunately, these statutory provisions themselves have left unresolved questions about their applicability. In B.C. this has given rise to a number of decisions which have attempted to clarify the *Administrative Tribunals Act*.¹⁴ In Ontario, the new human rights legislation has so recently come into effect that there is no decision yet involving judicial consideration of s. 45.8 of the *Human Rights Code* which permits judicial review but only on a "patent unreasonableness" standard.

Dunsmuir v. New Brunswick

In *Falkenham*,¹⁵ the Nova Scotia Court of Appeal succinctly described the main aspects of the Supreme Court's *Dunsmuir* decision concerning judicial review:

[20] The Supreme Court of Canada has very recently reconsidered the approach to be taken in judicial review of decisions of administrative tribunals in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9. In this seminal judgment the Court reduces the standards of review to correctness and reasonableness, while offering concise and practical definitions of these standards. The Court rejected the traditional model which to that point had prescribed three levels or criteria for judicial review: patent unreasonableness, reasonableness *simpliciter* and correctness as being "too difficult to apply to justify its retention", and instituted in its place a "revised system" which we are now to refer to as the "standard of review analysis."

[21] Undertaking this review requires a contextual analysis. As the Court observed:

⁹ *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 48 Admin. L.R. (3d) 33.

¹⁰ *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 48 Admin. L.R. (3d) 1.

¹¹ See, for instance, Justice LeBel's critique of the three standards of review (which foreshadowed its demise in *Dunsmuir*) in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161; or the fragmentation of the Supreme Court in *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, [2007] 1 S.C.R. 650, 59 Admin. L.R. (4th) 1.

¹² *Administrative Tribunals Act*, *supra* note 3.

¹³ *Human Rights Code*, *supra* note 7.

¹⁴ See Robin Junger's article, "British Columbia's Experience with the *Administrative Tribunals Act*", reproduced and updated for the Osgoode Professional Development Administrative Law & Practice Conference, September 2007.

¹⁵ *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia (Human Rights Board of Inquiry)*, 2008 NSCA 38, 264 N.S.R. (2d) 281 per Saunders J.A.

[64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[22] The Court provided a working definition for "reasonableness" at para. 47:

[47] ...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.

[23] The Court went on to define "correctness" as:

[50] ...When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[24] As the Court explained in *Dunsmuir*, an exhaustive review is not required in every case in order to decide the appropriate standard of review. Existing jurisprudence may be helpful in characterizing the nature of the question under scrutiny and which of the two standards ought to be applied when subjecting it to the necessary review analysis.

While *Dunsmuir* formally reconciled the tensions between the most deferential (patent unreasonableness) and intermediate (reasonableness *simpliciter*) standards of review, it opened up new vistas of debate.¹⁶ A key remaining question is whether, as Justice Binnie suggests in his concurring reasons in *Dunsmuir*, the new reasonableness standard will, in practice if not in theory, attract a sliding scale

¹⁶ See David Mullan's article, "The Year in Review", Osgoode Professional Development Administrative Law & Practice conference, October 2008, in which he posits 11 major points of contention in the *Dunsmuir* majority's judgment.

approach to deference *within* the standard, a prospect that was previously rejected in *Ryan v. New Brunswick*.¹⁷ For human rights tribunal decisions that had effectively been insulated from review by the patent unreasonableness standard, does *Dunsmuir* signal the potential for heightened scrutiny?

Segmentation or Multiple Standards of Review

In several recent decisions, *Moreau-Bérubé*¹⁸, *Lévis*¹⁹, and *Via Rail*²⁰, the Supreme Court of Canada has suggested that more than a single standard of review may arise in the judicial review of an administrative actor's decision. Justices Rothstein and Deschamps (writing in dissent in *Via Rail*, albeit not on this point) explained the necessity of "segmentation" as follows:

[278] The standard of review jurisprudence recognizes that segmentation of a decision is appropriate in order to ascertain the nature of the questions before the tribunal and the degree of deference to be accorded to the tribunal's decisions on those questions. In *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27, Major J. stated:

In general, different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, 2003 SCC 20, although there were no legal questions to be examined separately in that case, Iacobucci J. clearly indicated that there are situations in which extrication is appropriate (para. 41). See also *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 (CanLII), [2006] 1 S.C.R. 772, 2006 SCC 22, at para. 39. Subjecting all aspects of a decision to a single standard of review does not account for the diversity of questions under review and either insulates the decision from a more exacting review where the pragmatic and functional considerations call for greater intensity in the review of specific legal questions, or subjects questions of fact to a standard that is too exacting. A tribunal's decision must therefore be subject to segmentation to enable a reviewing court to apply the appropriate degree of scrutiny to the various aspects of the decision which call for greater or lesser deference.

Will segmentation of human rights tribunal decisions increase, thereby rendering aspects of the decisions more amenable to review? Or will appellate courts consider segmentation an overly intrusive and unprincipled concept akin to the "jurisdictional, preliminary or collateral questions" doctrine of a bygone era.²¹

¹⁷ *Ryan*, *supra* note 9.

¹⁸ *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11.

¹⁹ *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591, 2007 SCC 14.

²⁰ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, *supra* note 11.

²¹ See Dickson J.'s (as he was then) critique in *New Brunswick Liquor Corp. v. C.U.P.E.*, [1979] 2 S.C.R. 227.

As we shall see, the three developments (legislated standards of review, *Dunsmuir*, segmentation) can have interrelated effects on the standard of review depending on the jurisdiction.

We turn now to examine the judicial approach to standards of review of human rights tribunal decisions in each jurisdiction.

BRITISH COLUMBIA

The British Columbia *Human Rights Code*,²² does not contain a privative clause. Section 59 of the *Administrative Tribunals Act*,²³ establishes the standard of review to be applied to tribunals where the enabling legislation does not contain a privative clause.

- 59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.
- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence the finding is otherwise unreasonable.
- (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
 - (a) is exercised arbitrarily or in bad faith,
 - (b) is exercised for an improper purpose,
 - (c) is based entirely or predominantly on irrelevant factors, or
 - (d) fails to take statutory requirements into account.
- (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Two recent decisions have considered the intersection between s. 59(3) and the Supreme Court's decision in *Dunsmuir* in the human rights context. The British Columbia Supreme Court seems intent on preserving the higher statutory degree

²² R.S.B.C. 1996, c. 210.

²³ *Supra* note 3.

of deference to the Human Rights Tribunal under the ATA. In *Carter v. Travelex Canada Ltd.*,²⁴ the B.C. Supreme Court held:

[12] The standard of review of a decision of an administrative tribunal has been the subject of a number of appellate decisions, and is legislated in British Columbia under the *Administrative Tribunals Act*, R.S.B.C. 2004, c. 45 [Act]. Since counsel argued this application, the Supreme Court of Canada has revisited its earlier jurisprudence on the standard of review for such cases in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL) [*Dunsmuir*]. In *Dunsmuir*, the court stated that, depending on the nature of the issue to be reviewed, there are but two standards of review: correctness for issues of jurisdiction and other questions of law, and reasonableness for issues of fact, discretion or policy.

[13] The Code does not contain a privative clause. In the event that a tribunal's enabling legislation does not provide a privative clause, as is the case here, s. 59 of the Act provides...

[14] In the result, despite the recent decision of the Supreme Court of Canada in *Dunsmuir*, three standards of review remain applicable on judicial review in British Columbia depending upon the nature of the question or questions raised.

In *Evans v. University of British Columbia*,²⁵ Macaulay J. also held that the collapsing of three standards of review to two in *Dunsmuir* did not override the clear legislative intent in B.C. to restrict judicial review of discretionary decisions to patently unreasonable decisions:

[8] In considering the impact of *Dunsmuir* on the ATA, it must be kept in mind that the decision did not address legislated standards of review generally or, in particular, under the ATA. The Supreme Court of Canada did, however, reconsider the need for three standards of review in the current approach to judicial review, ranging "from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying theoretically, in the middle" and concluded that there ought to be just two standards: correctness and reasonableness. See Bastarache and LeBel JJ., for the majority, at para. 34.

[9] The collapsing of the patent unreasonableness and reasonableness *simpliciter* standards into a single standard of reasonableness resulted, in part, from the historical difficulties in distinguishing between them as well as the anomaly created by sometimes applying the patently unreasonable standard to preserve an unreasonable decision (para. 39). Further, the majority concluded from a review of the cases that any actual difference in the operation of the two standards appeared illusory (para. 41).

[10] The majority described the new reasonableness standard...

[11] The petitioner contends in her written argument that the court should adopt this definition in determining patent unreasonableness under s. 59 of the ATA. In my view, that goes too far and would require me to ignore the clear

²⁴ 2008 BCSC 405, 70 Admin. L.R. (4th) 88.

²⁵ 2008 BCSC 1026, [2008] B.C.J. No. 1453 (QL),.

legislative intent underlying s. 59 as it relates to discretionary tribunal decisions. It is also apparent from a reading of *Dunsmuir* that the courts, in the context of the particular decision under review, must continue identifying the potentially differing levels of deference required to determine if it is reasonable.

[12] The factors identified in s. 59(4) as rendering a discretionary decision patently unreasonable connote a high degree of deference. The case law requires that at least one of those factors must be established before concluding that a discretionary decision of a tribunal is patently unreasonable and to be set aside.

[13] Having said that, the majority decision in *Dunsmuir* is still helpful in considering the contextual interplay between reasonableness and deference in judicial reviews. It reinforces the need for the courts to respect the decision-making process of adjudicative bodies (para. 48), a form of respectful deference. Thus, the move towards a single standard of reasonableness was not intended to “pave the way for a more intrusive review by courts” (para. 48).

[14] In a minority concurring judgment, Binnie J. alerts us to the danger that collapsing the common law standards of patent unreasonableness and reasonableness to a single standard might be seen as also collapsing the degree of deference to a singular approach. He points out that there necessarily remain differing dimensions to the deference owed within a reasonableness standard:

...That said, a single “reasonableness” standard will now necessarily incorporate both the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, and an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the “reasonableness” standard. (para. 149).

This observation is apposite and illustrates the danger in the approach that the petitioner urges.

[15] The petitioner’s argument is also bound to fail because of previous appellate authority interpreting s. 59 and, more recently, post-*Dunsmuir*, a decision of the Supreme Court of British Columbia on the three standards of review set out in the section. In *Carter v. Travelex Canada Ltd.*, 2008 BCSC 405, a recent decision, Hinkson J. concluded that the three standards of review set out in the ATA remain despite *Dunsmuir* (para. 14).

Accordingly, in British Columbia, decisions of the Human Rights Tribunals are subject to the following standards of review, depending on the nature of the decision:

Nature of Decision of Human Rights Tribunal	Standard of Review
Question of law	Correctness
Question of fact	Reasonableness
Question of exercise of discretion	Patent Unreasonableness
Natural Justice and Procedural Fairness	Having regard to whether, in all the circumstances, the Tribunal acted fairly?

ALBERTA

Section 37 of Alberta’s *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, provides that decisions of a Human Rights Panel may be appealed without leave to the Court of Queen’s Bench. At the time of writing, only one decision of the Alberta Court of Appeal appears to have considered the standard of review to be applied to decisions of the Alberta Human Rights Panel post-*Dunsmuir*.

In *Walsh v. Mobil Oil Canada*,²⁶ Ritter J.A. canvassed the Supreme Court’s human rights jurisprudence which indicates that the Supreme Court has generally shown little deference to human rights tribunals. Ultimately, Ritter J.A. held that, due to the broad statutory right of appeal in Alberta’s *HRCMA*, deference to the Human Rights Tribunal would only extend to “findings of fact and credibility”:

[44] Following the parties’ submission of written argument, but prior to the appeal hearing, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, which reassessed the pre-existing administrative standard of review analysis. At the hearing, both parties made oral submissions respecting the application of *Dunsmuir* to this case.

[45] The majority in *Dunsmuir* concluded that determining the correct standard on which to review an administrative tribunal’s decision involves two steps. First, a court must ascertain whether existing jurisprudence has satisfactorily established the degree of deference that ought to be accorded to the administrative tribunal with respect to the category of questions into which the issue at hand falls: *Dunsmuir* at para. 62. If there is no such jurisprudence, the reviewing court must move to the second step and identify the appropriate standard of review by establishing whether deference is warranted: *Dunsmuir* at para. 62.

[46] The following factors, according to *Dunsmuir*, are indicators that deference is warranted: the governing legislation contains a privative clause (para. 55); the administrative regime is such that the decision-maker has special expertise

²⁶ 2008 ABCA 268, 296 D.L.R. (4th) 178.

(para. 55); and the question is one of fact, discretion or policy, where legal issues cannot be easily separated from the facts (para. 51), as opposed to being a question of "central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 62, per LeBel J., cited in *Dunsmuir* at para. 60).

[47] Following that analysis, if a court determines deference is warranted, it must apply a standard of reasonableness to the administrative tribunal's decision, meaning there may be more than one possible, reasonable, conclusion. In its reasonableness review, a court must assess whether the administrative tribunal's articulation of reasons is justifiable, transparent, and intelligible. It must also assess whether the administrative tribunal's determination of outcome falls within the range of outcomes that are both acceptable and defensible in light of the applicable facts and law: *Dunsmuir* at para. 47. If deference is not warranted, the standard of review is correctness.

[48] In this case, the reviewing judge determined that the first question was whether the panel applied the correct legal test in determining what constitutes discrimination, and found this question was reviewable on a standard of correctness. Mobil argues the real question was whether Mobil's conduct towards Walsh constituted discrimination, and was therefore a factually-laden question warranting deference. Of the retaliation question, Mobil contends the reviewing judge was correct to review the panel's decision on a reasonableness standard, but argues that he failed to apply the reasonableness standard correctly.

[49] Following the Supreme Court's direction, we will first ascertain whether existing case law provides insight into the proper standard for reviewing questions of what constitutes discrimination. *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, 127 A.R. 241 [cited to S.C.R.] is a decision specifically considering Alberta human rights legislation, where the Court assessed what degree of deference was owed to a Human Rights Commission board of inquiry in light of the Individual's Rights Protection Act, R.S.A. 1980, c. I-2 [IRPA]. The majority of the Court reasoned that little or no deference was owed to the administrative decision-maker because the appeal provision under the IRPA allowed appeals to the Court of Queen's Bench on questions of fact, with leave, and because there was nothing in the IRPA to indicate the Commission had any specialized expertise. At 1126-1127, Cory J., for the majority, held:

On a plain reading of the IRPA, it is clear that the legislature specifically intended that appellate courts should examine the evidence anew and, if deemed appropriate, make their own findings of fact. Under this Act, no particular deference is owed by the Court of Appeal to the findings of the initial trier of fact. [...]

[...] [T]he right to an appeal on questions of fact would be meaningless if the appellate court were not empowered to substitute its own opinion for that of the Board. Nor is this a situation in which the administrative decision-maker possesses a specialized expertise which would merit curial deference. It can be seen that the IRPA grants the Court of Appeal and thus this Court the jurisdiction to make findings of fact based on a review of the evidence on the record, without deferring to the conclusions drawn by the Board of Inquiry.

[50] The only major difference between the applicable provisions of the IRPA and the parallel provisions of the HRCMA is that leave to appeal is no longer required: see HRCMA, s. 37. There is no longer any limit to the nature of questions that can be appealed. This change does not suggest that deference should be given to the tribunal. Rather, if it were possible, it suggests that even less deference is called for.

[51] In *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 583-585, 100 D.L.R. (4th) 658, La Forest J., for the majority, held that an ad hoc tribunal, constituted under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, a statute that has no privative clause nor any appeal provision, had superior expertise in terms of "fact-finding and adjudication in the human rights context", but its expertise did not extend to questions of law such as statutory interpretation. That view was also expressed in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 102 D.L.R. (4th) 665, where the administrative decision maker was a member designate of the British Columbia Council for Human Rights, which was then governed by the *Human Rights Act*, S.B.C. 1984, c. 22. That *Act* contained no privative clause, nor any provision for appeals.

[52] The question of how much deference to accord a human rights tribunal was also addressed in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, 133 D.L.R. (4th) 449, where the Court confirmed its conclusions in *Mossop* and *Berg* in terms of deferring to human rights tribunals on questions of fact, but not on questions of law. That case involved an appeal from a decision by a board of adjudication, constituted by the Yukon Human Rights Commission and governed by the *Human Rights Act*, R.S.Y. 1986 (Supp.), c. 11, which provided for appeals from questions of law. Interestingly, in *Gould*, where the tribunal did not hear any testimony and where most of the facts were agreed, Iacobucci J. noted: "where the issue is not the facts themselves but rather the inferences to be drawn from agreed facts, the policy considerations which ordinarily militate in favour of deference are significantly attenuated": at para. 4, citing *New Brunswick (Workmen's Compensation Board) v. Greer*, [1975] 1 S.C.R. 347, 42 D.L.R. (3d) 595.

[53] Another instructional case is *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, 93 D.L.R. (4th) 346, involving an appeal from a board of inquiry constituted under *Ontario's Human Rights Code*, 1981, S.O. 1981, c. 53. That statute contained the following appeal provision:

41.(1) Any party to a proceeding before a board of inquiry may appeal from a decision or order of the board to the Divisional Court in accordance with the rules of court.

[...]

(3) An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the board of inquiry or direct the board to make any decision or order that the board is authorized to make under this Act and the court may substitute its opinion for that of the board.

Unlike *Mossop*, *Berg*, and *Gould*, the governing legislation in *Zurich*, as in *Dickason*, contained a very broadly-worded appeal provision. In *Zurich*, based on the absence of specialized expertise in the human rights tribunal and the broadly-worded appeal provision, Sopinka J. reasoned that although some deference

was owed with respect to findings of fact, none was warranted respecting questions of law. Nor was any deference warranted respecting the legal implications flowing from those facts; therefore, the evidence could be reviewed "unconstrained by curial deference": *Zurich* at 338.

[54] In recent decisions from this Court, addressing the standard of review applicable to human rights tribunals, limited deference has been afforded to findings of fact, but none to questions of law: see *United Food and Commercial Workers, Local 401 v. Alberta Human Rights and Citizenship Commission*, 2003 ABCA 246, 330 A.R. 340 at para. 18; *Alberta (Minister of Human Rights and Employment) v. Weller*, 2006 ABCA 235, 391 A.R. 31 at paras. 16-18; *Alberta (Human Rights and Citizenship Commission) v. Kellogg, Brown & Root (Canada) Company*, 2007 ABCA 426, 84 Alta. L.R. (4th) 205 at para. 20. This, in part, reflects the broad appeal provision in Alberta's current human rights statute. Section 37 of the *HRCMA* provides:

37(1) A party to a proceeding before a human rights panel may appeal an order of the panel to the Court of Queen's Bench by originating notice filed with the clerk of the Court of the judicial district in which the proceeding was held.

[...]

- (4) The Court may
- (a) confirm, reverse or vary the order of the human rights panel and make any order that the panel may make under section 32, or
 - (b) remit the matter back to the panel with directions.

[55] In our view, in light of Alberta's human rights legislation, the existing case law answers the question of standard of review, at least in a general sense. It indicates that human rights tribunals, such as the panel in this case, may be afforded some deference with respect to findings of fact and credibility, given their role in hearing viva voce evidence. However, reviewing courts will be unconstrained in their assessment of the evidence as it relates to the applicable law, particularly where an error is found in respect of the tribunal's articulation of the law. [emphasis added]

Accordingly, the standard of review applicable in an appeal of a decision of the Alberta Human Rights panel before the Alberta Queen's Bench is as follows:

Nature of Decision of Alberta Human Rights Panel	Standard of Review
Question of Law, Policy, Discretion	Correctness
Question of fact or credibility	Reasonableness
Natural Justice and Procedural Fairness	Did the Tribunal act fairly? ²⁷

²⁷ Although not a human rights decision, I am extrapolating from *Edmonton Police Assn. v. Edmonton (City)* 2007 ABCA 184 (CanLII), (2007), 409 A.R. 1, 2007 ABCA 184 at paras. 3ff, which recalled that the Supreme Court of Canada has determined that the pragmatic and

NOVA SCOTIA

The Nova Scotia Court of Appeal has had the opportunity, post-*Dunsmuir*, to reconsider its standard of review analysis with respect to Human Rights Board of Inquiry decisions. In *Falkenham*,²⁸ the N.S.C.A. affirmed its pre-*Dunsmuir* analysis in *Nova Scotia Construction Safety Association* that issues of law should be reviewed on a correctness standard whereas issues of fact should be reviewed on the reasonableness (*simpliciter*) standard. However, the Court went on to suggest that its analysis would call for greater or lesser deference if the question was fact-intensive or law intensive, respectively. This dicta comes perilously close to advocating a “sliding scale” methodology that would violate the tenets set out by the Supreme Court in *Ryan*, and affirmed by the majority in *Dunsmuir* - that there is no spectrum of deference within the annunciated standards of review. However, it may accord with the reality of how courts approach their task, not only in Nova Scotia, but across Canada. It also echoes what Justice Binnie (writing in his minority judgment in *Dunsmuir*), suggested will occur *within* the reasonableness standard as rearticulated by *Dunsmuir*.

In *Falkenham*, the Nova Scotia Court of Appeal stated:

[19] In *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, [2006] N.S.J. No. 210, 2006 NSCA 63, this Court considered the appropriate standard of review in matters involving complaints launched pursuant to the *Human Rights Act*. We observed:

[50] Accordingly, different aspects of the Board's decision in this case will be subject to different standards of review. If the nature of the problem is a strict matter of law, or statutory interpretation, the standard of review will be one of correctness. If, on the other hand, the issue arises as a result of the Board's findings of fact, I will apply a standard of review of reasonableness. If the issue triggers a question of mixed fact and law, my analysis will call for greater deference if the question is fact-intensive, and less deference if it is law-intensive. Finally, if the issue concerns the Board's application of law to its findings of fact, I will apply a reasonableness standard of review. (Authorities omitted)

[20] The Supreme Court of Canada has very recently reconsidered the approach to be taken in judicial review of decisions of administrative tribunals in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9. In this seminal judgment the Court reduces the standards of review to correctness and reasonableness, while offering concise and practical definitions of these standards. The Court rejected the traditional model which to that point had

functional approach to standard of review does not apply to procedural fairness issues: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, *supra* note 18 at 292.

²⁸ *C.R. Falkenham Backhoe Services Ltd. v. Nova Scotia*, *supra* note 15.

prescribed three levels or criteria for judicial review: patent unreasonableness, reasonableness *simpliciter* and correctness as being "too difficult to apply to justify its retention", and instituted in its place a "revised system" which we are now to refer to as the "standard of review analysis."

[...]

[24] As the Court explained in *Dunsmuir*, an exhaustive review is not required in every case in order to decide the appropriate standard of review. Existing jurisprudence may be helpful in characterizing the nature of the question under scrutiny and which of the two standards ought to be applied when subjecting it to the necessary review analysis.

[25] In my respectful view the Court's directives in *Dunsmuir* completely support the analysis we undertook in *Nova Scotia Construction Safety Association, supra*, and which I have described in para. 19, *supra*. Accordingly, there is no need for me to repeat the kind of analysis we applied in that case and which may be properly invoked again here.

[26] In respect of the matters before the Board of Inquiry appointed to consider Mr. Gough's complaint, if the nature of the problem being considered by the Board was strictly a matter of law, the required analysis will attract a standard of correctness. On the other hand, if the issue arises as a result of the Board's findings of fact, or inferences drawn from those facts, we will recognize the appropriate deference and margin of appreciation that is to be accorded such decisions and will apply a standard of reasonableness in our review.

Accordingly, the standard of review applicable in an appeal of a decision of the Nova Scotia Human Rights Board of Inquiry before the Nova Scotia Court of Appeal is as follows:

Nature of Decision of N.S. Human Rights Board of Inquiry	Standard of Review
Question of Law	Correctness
Question of fact, inference drawn from fact	Reasonableness
Questions of mixed law and fact	Reasonableness with more or less deference depending on how much fact or law
Natural Justice and Procedural Fairness	Did the Tribunal act fairly?

FEDERAL / CANADA

Pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, a decision of the Canadian Human Rights Tribunal may be judicially reviewed by the Federal Court. Section 18.1(4) sets out the various categories under which the Federal Court may review the decision of the Tribunal, and grant relief if necessary.

18.1(1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

[...]

Grounds of review

- (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
 - (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
 - (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - (e) acted, or failed to act, by reason of fraud or perjured evidence;
or
 - (f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

- (5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may
- (a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and
 - (b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

Although the *Act* sets out the types of issues arising from Tribunal decisions which may be reviewed by the Federal Court, it does not specify standards of review for each of these categories.

The Federal Court has, however, considered what standards of review should be applicable to these questions post-*Dunsmuir*. In *Tremaine v. Warman*,²⁹ the

²⁹ 2008 FC 1032 (CanLII)

Federal Court held that, at least as far as mixed questions of fact and law were concerned, the pre-*Dunsmuir* jurisprudence would continue to apply. The Court relied on a number of previously decided cases, including *Chopra v. Canada (Attorney General)*.³⁰ It concluded that the appropriate standard of review for mixed questions of fact and law was reasonableness.³¹

[10] I begin by examining the appropriate standard of review for the Tribunal's decision. A determination of whether Mr. Tremaine's web postings fell within the ambit of s.13 of the Act is a question of mixed law and fact. The Tribunal's decisions to issue a cease and desist order and to order Mr. Tremaine to pay a \$4000 fine are exercises of the Tribunal's discretion; these decisions are mainly fact driven and discretionary.

[11] The Supreme Court of Canada stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9 at para. 57, that courts may rely on existing jurisprudence in determining the proper standard of review.

[...]

[13] The reasonableness standard should therefore apply to the first three issues. On this standard, the decision, the cease and desist order and the penalty must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir, supra* at para. 47).

In this decision the Federal Court maintains essentially the same degree of deference toward decisions of the Tribunal that it had pre-*Dunsmuir*. Mixed questions, and questions involving the exercise of discretion, are reviewable on the reasonableness standard.

In *National Capital Commission v. Brown*,³² the Federal Court determined that the standard of review applicable to questions of law, and to questions of procedural fairness and natural justice, was correctness.³³ In *obiter dicta*, Noel J. summarized the Court's view of what the applicable standards of review are post-*Dunsmuir*, and what they mean in practice:

[71] This deferential standard of reasonableness implies that the decision was arrived at not only through a justifiable, intelligible and transparent process but it falls within an acceptable range of possible outcomes in light of the facts and the law of each case. As such, the reasonableness standard applies to questions of fact, discretion and policy and to questions of mixed fact and law where the question is factually intensive or where the legal issues cannot readily be separated from the factual context...

[72] With respect to the correctness standard of review, the Court preserved it intact. Questions of jurisdiction, law, constitutional issues and natural justice remain subject to review on the correctness standard. In such

³⁰ 2006 FC 9 (CanLII), 2006 FC 9, 285 F.T.R. 113 at para. 40, aff'd 2007 FCA 268 (CanLII), 2007 FCA 268, [2008] 2 F.C.R. 393

³¹ *Tremaine v. Warman*, 2008 FC 1032 (CanLII) at para. 12.

³² 2008 FC 733 (CanLII)

³³ *Ibid.* at para. 93.

instances, the reviewing court must determine, at the outset whether the impugned decision was correct and undertake its own analysis; substituting its own view, the correct answer, in those instances where the decision is incorrect...

For the most part, the Federal Court has maintained the same level of deference towards decisions of the Canadian Human Rights Tribunal that it had prior to *Dunsmuir*.

Although the Federal Court has not significantly altered its standard of review analysis post-*Dunsmuir*, the segmented approach to this analysis which was prominent in *Moreau*, *Levis*, and *Via Rail*, has found its way into the jurisprudence. Each of the grounds of review listed in the *Federal Courts Act* may give rise to a separate issue for review. Together they may require multiple standards of review in a given Tribunal case. In *Brown*, *supra*, the Court found that there were five distinct issues, each of which required a separate standard of review analysis. In the result, a correctness standard was applied to each of the 5 issues.³⁴ This sort of segmentation of the standard of review analysis may be a harbinger of things to come in human rights cases.

The standards of review of decisions of the Canadian Human Rights Tribunal are as follows:

Nature of Decision of the Canadian Human Rights Tribunal	Standard of Review
Question of Law, jurisdiction, natural justice	Correctness
Question of fact, discretion, policy	Reasonableness
Questions of mixed law and fact	Reasonableness
Natural Justice and Procedural Fairness	Did the Tribunal act fairly?

ONTARIO

The enforcement of human rights in Ontario fundamentally changed with the full coming into force of the *Human Rights Code Amendment Act*, on June 30, 2008. The roles of the Ontario Human Rights Commission and the Human Rights Tribunal were utterly transformed.

- The Commission is no longer involved in the intake, investigation, settlement or forwarding of individual complaints to the Tribunal.
- Instead, the Commission's focus is on education, outreach and elimination of systemic discrimination.

³⁴ *Ibid.* at paras. 77-93

- For the first time, individuals and groups are permitted to file their complaints directly with the Tribunal, which will use a more flexible and streamlined approach to settle or adjudicate complaints.
- The legislation creates a new “third pillar” of the human rights system, the Human Rights Legal Support Centre, which provides information, support, advice and legal representation to complainants without a financial means test.
- A further area of significant reform is the requirement imposed on a complainant to elect between the Tribunal and a civil court as the forum in which to resolve a dispute that includes a human rights claim.

Another area of significant reform is the change in the standard of review in the revised *Code*. In the previous system, a party before a Human Rights Tribunal had a broad right of appeal on a question of fact, law or both³⁵ to the Divisional Court.³⁶ The revised *Code* now eliminates the right of appeal, and permits judicial review only on the basis of a decision being “patently unreasonable”:

Decisions final

45.8 Subject to section 45.6 of this Act [dealing with the Commission’s ability to state a case to the Court], section 21.1 of the *Statutory Powers Procedure Act* and the Tribunal rules, a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

Given that the new *Code* only came fully into force on June 30, 2008, the Divisional Court has yet to comment on section 45.8. When it does, the Divisional Court will have to grapple with several challenging interpretive and methodological questions:

1. Does section 45.8 set out a particular standard of review or is it simply a “privative clause”?
2. How should the court approach judicial review of substantive human rights decisions involving questions of law, fact, mixed law and fact, policy and discretion?
3. How should the court approach judicial review of natural justice and procedural fairness decisions?

³⁵ For a post-*Dunsmuir* decision where the Divisional Court dealt with an appeal from the Human Rights Tribunal of Ontario in respect of a human rights complaint that was filed pre-June 30, 2008, see: *ADGA Group Consultants Inc. v. Lane* (2008), 240 O.A.C. 333, 295 D.L.R. (4th) 425.

³⁶ The Divisional Court is the branch of the Ontario Superior Court of Justice responsible for judicial review of administrative decisions under the *Judicial Procedure Act*, R.S.O. 1990, c. J.1.

I attempt to answer these questions based on the provisions of the *Human Rights Code* and the context in which human rights reform took place in Ontario.

Does section 45.8 set out a particular standard of review or is it simply a “privative clause”?

At first glance and until the addition of the last 6 words of section 45.8, the section reads like a typical privative clause. However, the addition makes all the difference because the Ontario legislature goes beyond declaring the finality of the Tribunal’s decision. It directs that the setting aside of a decision is prohibited “unless the decision is patently unreasonable”.

I suggest that the legislature did not want the court to go through the tortuous and unpredictable exercise of the “pragmatic and functional approach” (renamed the “standard of review analysis” in *Dunsmuir*) to arrive at a particular standard of review. Instead the legislature was directing *what* standard of review the court should utilize on judicial review. In other words, section 45.8 is not so much a privative clause as it is a legislatively codified or directed standard of review.

Several arguments support this “directed standard of review” characterization. First, the consequence of characterizing section 45.8 merely as a privative clause leads to somewhat absurd results. A court would have to engage in the standard of review analysis, the first factor of which examines the presence or absence of a privative clause. Having answered this factor in the affirmative the analysis would proceed to look at the other three factors (expertise, the legislation, and the nature of the question) to arrive at, per *Dunsmuir*, either the correctness or reasonableness standard of review. The standard is therefore certain to be misaligned with the patent unreasonableness threshold specified in the section. This would guarantee that, regardless of whether the court determined the Tribunal’s decision to be incorrect or unreasonable, it would have to ask the further question of whether the decision was patently unreasonable before potentially setting the decision aside. This approach would make little sense.

Secondly, a comparison between the language of section 45.8 of Ontario’s *Code* and section 59(3) of British Columbia’s *Administrative Tribunals Act*³⁷ reveals that the language is virtually identical. In *Evans v. University of British Columbia* and other decisions interpreting that section of the *ATA*, the B.C. Court of Appeal has treated the section as legislatively directing the standard of review, not as a privative clause.

I deal with further related arguments in answering the second and third questions that I posed about section 45.8.

³⁷ *Supra*, note 12. Section 59(3) of B.C.’s *ATA* reads, “A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.”

How should the court approach judicial review of substantive human rights decisions involving questions of law, fact, mixed law and fact, policy and discretion?

One challenge in interpreting section 45.8 is that it is stark; it lacks specificity. Unlike section 59(3) of B.C.'s *ATA* which assigns different standards of review to different legal, factual and discretionary questions, Ontario's *Code* only provides one standard of review, patent unreasonableness. It does not reflect the Supreme Court's nuanced standard of review jurisprudence. Did the Ontario legislature really mean to have Ontario Human Rights Tribunal decisions involving questions of law, for instance, reviewed on a standard of patent unreasonableness, the most deferential standard, when typically, such questions are dealt with under correctness, involving no deference at all? I suggest that this is precisely what the legislature intended.

Under section 39 of the new *Code*, the Tribunal has the jurisdiction to determine all questions of fact or law that arise in any application before it. That is one indication that the Tribunal has expertise to competently answer questions of law.

The ordinary principles of statutory interpretation also suggest that section 45.8 should be given its plain meaning. If the Ontario legislature wanted questions of law separated out and treated less deferentially than other questions, then the legislature would have said so.

Another explanation for the radical departure from the past jurisprudence is the Ontario government's revisioning of the Tribunal as a fully independent expert human rights tribunal. In the run-up to the passage of the *Human Rights Code Amendment Act*, the watchwords from the government were "modernization", "reducing delay", "finality" and "innovation". It is generally agreed that Bill 107 completely overhauled the system of enforcement of human rights in the province of Ontario. An overhaul of the standards of review would therefore be consistent with this approach.

A further indication that the Ontario legislature wanted to protect the Tribunal's legal decisions from judicial review is that the appointees to the new Human Rights Tribunal were legislatively required for the first time to have experience, knowledge or training in human rights law and issues. Section 33(3) of the *Code* provides:

Selection process

(3) The selection process for the appointment of members of the Tribunal shall be a competitive process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training with respect to human rights law and issues.
2. Aptitude for impartial adjudication.

3. Aptitude for applying the alternative adjudicative practices and procedures that may be set out in the Tribunal rules.

As well, the new legislation reflects the “institutionalization” of a human rights tribunal in the province of Ontario (which has also occurred in other provinces over the last decade) and its evolution from an *ad hoc* Board of Inquiry with a few part-time members, to a permanent, independent adjudicative administrative tribunal. As of the time of writing, the Human Rights Tribunal of Ontario had a full-time Chair, Alternate Chair, and over 20 full-time vice-chairs, not to mention a Registrar and staff. The Supreme Court jurisprudence (adopted by lower courts) from the 1990s, claiming that human rights tribunals had no special expertise,³⁸ is arguably obsolete with respect to Ontario, and possibly in other jurisdictions as well.

In the circumstances, it is likely that the legislature intended that the Tribunal’s decisions concerning questions of law, including human rights law, should be accorded great deference and only set aside in exceptional circumstances. Similarly, for the same reasons set out above, the Divisional Court would likely review other questions (of mixed law and fact, policy and discretion) on a standard of patent unreasonableness.

How should the court approach judicial review of natural justice and procedural fairness decisions?

As mentioned above, the Supreme Court has held that judicial review of questions of natural justice or procedural fairness do not engage the standards of review: *Moreau-Bérubé v. New Brunswick (Judicial Council)*. However if, as I suggest, section 45.8 is not a privative clause but a statutorily directed standard of review, does it also apply to Tribunal decisions involving questions of natural justice and procedural fairness? Once again, I answer the question in the affirmative. If this is correct, then the Divisional Court would be required, uniquely with respect to the Human Rights Tribunal of Ontario, to approach judicial review of fairness concerns by asking “was the procedure patently unreasonable” rather than “was it fair?” After all, according to section 45.8, only patently unreasonable decisions can be set aside.

I suggest two reasons why the Ontario legislature may have wanted to extend extreme judicial deference to the Tribunal’s natural justice or procedural fairness decisions. One is to protect and possibly encourage the novel adjudicative and alternate dispute resolution mechanisms available to the Tribunal pursuant to the new *Code*. A second is to protect judicial resources and promote finality and efficiency.

³⁸ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 13 Admin. L.R. (2d) 1; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353, 13 Admin. L.R. (2d) 141; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, 37 Admin. L.R. (2d) 1; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, (1992), 9 O.R. (3d) 224.

Ontario’s new human rights legislation is unique in the Canadian administrative law landscape for its conferral of novel adjudicative, alternate dispute resolution and quasi-inquisitorial powers on the Tribunal. For instance, section 43(3) of the *Code* provides that the Tribunal Rules may authorize the Tribunal to define or narrow the issues, limit the evidence and submission of the parties, conduct examinations in chief or cross-examinations of a witness, examine records, require parties or others to produce documents and provide statements. When judicial review of Tribunal decisions is going to occur, it would seem that the Tribunal’s procedural decisions, as opposed to its substantive ones, would be most subject to challenge; particularly as parties before the Tribunal will likely be challenged by the Tribunal’s greater ability to control and direct the proceeding. It is likely that legislature wished to protect the *Tribunal’s* vision of fair process and procedure rather than the Divisional Court’s, except in patently unreasonable situations.

Precepts of judicial economy and efficiency also counsel toward the Divisional Court accepting that the legislature intended that Tribunal decisions involving natural justice and fairness be reviewed on the standard of patent unreasonableness. Under the previous human rights regime, the Human Rights Tribunal only presided over those complaints that were forwarded to it by the Human Rights Commission.³⁹ Of those fully adjudicated Tribunal decisions, only a handful were appealed to Divisional Court. However, in the new “direct access” system in Ontario, it is expected that the Tribunal will receive approximately 3000 new applications each year. Obviously many of these applications will settle or be withdrawn along the way, but there will be a far greater volume of decisions involving questions of fairness that could be candidates for judicial review. It would appear that the Ontario government wanted to relocate the “gate” that previously existed between the Commission and the Tribunal, and move it to between the Tribunal and the Divisional Court. The highly deferential standard of review in section 45.8 appears to have been one way to achieve this.

Accordingly, it appears based on section 45.8 of the *Human Rights Code*, that the standard of review of human rights tribunal decisions in Ontario is as follows:

Nature of Decision of HRTO	Standard of Review
Question of law, fact, mixed law and fact	Patent Unreasonableness
Question of policy or discretion	Patent Unreasonableness
Natural Justice and Procedural Fairness	Patent Unreasonableness

³⁹ The Ontario Human Rights Commission indicates in its Annual Report that 285 cases were referred to the Human Right Tribunal in 2005-06, and 140 in 2006-07.

ANALYSIS OF STANDARDS OF REVIEW

This survey of standards of review of human rights tribunals from various Canadian jurisdictions demonstrates that the standards vary considerably across the country.⁴⁰ Questions of mixed law and fact, for instance, are reviewed on a standard of correctness in B.C. and Alberta, reasonableness federally and patent unreasonableness in Ontario. Questions of policy and discretion are reviewed on a basis of correctness in Alberta, reasonableness in Nova Scotia and patent unreasonableness in B.C. and Ontario. While in most jurisdictions judicial review of natural justice and fairness questions is conducted on the basis of the court's own determination of what's fair, in Ontario, due to section 45.8 of the Ontario Code, even that question may be reviewed on the basis of patent unreasonableness. Is there any consistency whatsoever? Should there be? Or should we simply accept that each jurisdiction has a different demographic, a different history and different legislation, so differences in standards of review are only to be expected.

First, the Supreme Court has cautioned that there isn't a direct correlation between the nature of the question (which is the 4th factor in the pragmatic and functional approach / standard of review analysis) and a particular standard of review. The other 3 factors, particularly the presence or absence of a private clause or right of appeal, can sway the outcome and point the court toward a more or less deferential standard. Accordingly, the exercise of comparing standards of review of human rights tribunals in relation to the nature of the question may be a bit of an artificial exercise.

Second, I suggest that if we remove Ontario from the analysis, a discernible pattern does generally emerge from the rest of the jurisdictions surveyed. Clearly, questions of law answered by human rights tribunals are still reviewed on a standard of correctness, and questions of fact on a standard of reasonableness (post-*Dunsmuir*). Questions of mixed law and fact, outside Ontario, tend to be reviewed on a standard of either correctness (B.C., Alberta) or reasonableness (Nova Scotia, Canada). Questions of natural justice and fairness are not amenable to the standard of review analysis but this effectively resembles a correctness review since the reviewing court will set aside the Tribunal's decision if, *in the court's opinion*, the Tribunal's answer was not fair.

Not surprisingly, the pattern reflects the Supreme Court's tendency to provide very little deference to human rights tribunals on questions of law. There are several explanations for this. Courts, in particular the Supreme Court, legitimately consider themselves as having superior expertise in legal questions; human rights legislation is considered quasi-constitutional so legal questions tend to be reviewed using the correctness standard which is used for

⁴⁰ See the attached document, "Summary of the Standards of Review of Decisions of Human Rights Tribunals" for a chart setting out the applicable standards in the jurisdictions that are surveyed in this paper.

constitutional questions;⁴¹ appellate review of judicial review of human rights tribunal decisions is rare so that by the time the matter reaches a provincial appellate court or the Supreme Court of Canada, usually with leave of those courts, there is likely a challenging and discrete legal question that the court is invested in, and considers important to answer from *its own perspective*, not the Tribunal's.

In recent Supreme Court cases, albeit not from one of the jurisdictions considered in this article, the Court has simply applied a correctness standard without any consideration of the standard of review. In *Potash Corporation of Saskatchewan*,⁴² the New Brunswick Board of Inquiry considered the term, “*bona fide* pension plan” in relation to an allegation of age discrimination. The Supreme Court set aside the Board of Inquiry's decision and provided its own interpretation of the term without considering the standards of review. In *Montreal (City)*,⁴³ the Supreme Court upheld the Quebec Human Rights Tribunal's decision about discrimination on the basis of a prior criminal record; but, in doing so, the Court did not engage in any standards of review analysis and proceeded directly to its own interpretation of the law. Accordingly, it is likely that human rights tribunals will continue to be reviewed on a standard of correctness for questions of law. What is unfortunate is that the Supreme Court has not provided an explanation in these cases why a standard of review analysis was not warranted. One would think that the fact that a human rights tribunal is interpreting its own constituent statute would at least provide a “speed bump” in the path to review, but the Supreme Court has simply proceeded to the interpretive question thoroughly engaged in a full-blown correctness review.

British Columbia and, more recently, Ontario have struck out on their own via wholesale statutory reform. Complainants (applicants in Ontario parlance) must file directly with the Human Rights Tribunal and the Commission's role is eliminated (B.C.) or attenuated (Ontario). But B.C. and Ontario have not struck out in the same direction. The standard of review of the B.C. Human Rights Tribunal is not to be found in the B.C. *Human Rights Code*. Rather, the B.C. *Administrative Tribunals Act* now provides a statutorily directed standard of review that reflects the Supreme Court's jurisprudence *circa* 2003 (*Ryan, Dr. Q.*). This explains the reference in the *ATA* to the patently unreasonableness standard that has now fallen out of favour in *Dunsmuir*. Still the B.C. Court of Appeal has taken section 59 of the *ATA* at face value and applied the standards of review, including patent unreasonableness, against decisions of the B.C. Human Rights Tribunal.

⁴¹ See the cases cited at footnote 38, *supra*.

⁴² *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (CanLII).

⁴³ *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48 (CanLII).

Ontario has struck out on a different course altogether. In a complete overhaul of its *Code*, the Ontario legislature has tilted the former scheme of review on its head. Under the previous “gatekeeper” model it was very difficult for a complaint to reach the Tribunal and relatively easy to reach the Divisional Court courtesy of the broad right of appeal in the former *Code*. Now, via the Ontario “direct access” model, it is easy to get to the Tribunal but difficult, I predict, to have the Divisional Court set aside a decision of the new Human Rights Tribunal. Based on legislative clues and the context in which Bill 107 was passed, I suggest that the Divisional Court should interpret section 45.8 of the Ontario *Code* as providing a universal, directed standard of review of patent unreasonableness for all questions of law, fact, mixed fact and law, policy, discretion, natural justice and fairness. It remains to be seen whether the Divisional Court will actually adopt this approach but this would appear to be what the Ontario legislature intended.

CONCLUSION

I suggest that the time is ripe for the Supreme Court to review its reflexive tendency to review human rights tribunal decisions on the least deferential standard of correctness. Times have changed since the early and mid-90s and so have human rights tribunals. In my view, cases like *Mossop*, *Zurich* and *Berg* which, to this day are regularly cited, do not reflect the evolution in human rights or administrative law or the context in which human rights tribunals now operate. The Supreme Court’s jurisprudence in this area also fails to capture the more deferential standard of review analysis confirmed in *Ryan* and *Dr. Q.* (2003), further refined in *Dunsmuir* (2008). The human rights standard of review jurisprudence must also be reexamined in light of the directed standards of review in British Columbia and Ontario. Clearly the legislatures in those provinces are signaling that greater deference to and finality of human rights tribunal decisions is warranted. I suggest that this may be true in other provinces as well.

Human rights protection is thought of as a minoritarian concern until, of course, one’s own human rights are implicated. Politicians are not inclined to shake the human rights “hornet’s nest”, preferring instead to let the courts provide a potentially unpopular answer. The reality is that the disarray of standards of review of human rights tribunals across Canada reflects an unsettling and sometimes unstated consensus that, while human rights tribunals are entitled to a measure of deference, they cannot be left entirely to their own devices. Future cases must decide whether that proposition is incorrect, unreasonable or unfair.

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