File No. EB-2019-0166

ONTARIO ENERGY BOARD

IN THE MATTER OF THE *Ontario Energy Board Act*, S.O. 1998, C.15, Schedule B, and in particular Section 21(2) thereof;

AND IN THE MATTER OF the *Assessment Act*, R.S.O. 1990, c. A31, and in particular Section 25(3) thereof;

AND IN THE MATTER OF an Application by Lagasco Inc. for an Order determining whether or not the natural gas pipelines owned and operated by Lagasco Inc. in Haldimand County are gas transmission pipelines

SUPPLEMENTAL BOOK OF AUTHORITIES THE APPLICANT, LASGASCO INC.

(November 2, 2020)

November 2, 2020

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TAB 1

1960

c 23 Assessment Act

Ontario

(4) In assessing such property, whether situate or not situate upon a highway, street, road, lane or other public place, it shall when and so long as in actual use be assessed at its actual value in accordance with section 35. R.S.O. 1950, c. 24, s. 37 (3); 1957, c. 2, s. 6 (2). Principle of assessment

(5) Notwithstanding any other provision of this Act, the structures, substructures, superstructures, rails, ties, poles and wires of such a transportation system are liable to assessment and taxation in the same manner and to the same extent as those of a steam railway are under section 46 and not otherwise. R.S.O. 1950, c. 24, s. 37 (4). Assessment of structures, rails, etc., of transportation system

41.—(1) In this section, Interpretation

(*a*) "gas" means gas as defined in *The Energy Act*; R.S.O. 1960, c. 122

(*b*) "oil" means crude oil or liquid hydrocarbons or any product or by-product thereof;

(*c*) "pipe line" means a pipe line for the transportation or transmission of gas that is designated by the Ontario Energy Board as a transmission pipe line and a pipe line for the transportation or transmission of oil, and includes,

(i) all valves, regulators, couplings, cathodic protection apparatus, protective coatings, casing, curb-boxes, meters, and all incidental fastenings, attachments, appliances, apparatus and appurtenances,

(ii) all haulage, labour, engineering and overheads in respect of such pipe line,

(iii) any section, part or branch of any pipe line,

(iv) any easement or right of way used by a pipe line company, and

(v) any franchise or franchise right,

but does not include a pipe line or lines situate wholly within an oil refinery, oil storage depot, oil bulk plant or oil pipe line terminal;

(*d*) "pipe line company" means every person, firm, partnership, association or corporation owning or operating a pipe line all or any part of which is situate in Ontario.

Transmission lines to be designated by Board

(2) The Ontario Energy Board shall designate as transmission pipe lines all gas pipe lines in Ontario that in its opinion are transmission pipe lines. 1957, c. 2, s. 7, *part*.

Notice to municipalities

(3) On or before the 1st day of March in each year the Board shall notify the clerk or the assessment commissioner of each local municipality of the length and diameter of all transmission pipe lines located in the municipality. 1957, c. 2, s. 7, *part, amended*.

Disputes

(4) All disputes as to whether or not a gas pipe line is a transmission pipe line shall, on the application of any interested party, be decided by the Ontario Energy Board and its decision is final.

Assessment of pipe line

(5) Notwithstanding any other provisions of this Act, but subject to subsection 6, a pipe line shall be assessed for taxation purposes at the following rates:

Size of Pipe		Assessment per Foot of Length
¾"	Nominal inside diameter	$ .07
1"	" " "	.09
1¼"	" " "	.11
1½"	" " "	.13
2" and 2½"	" " "	.17
3"	" " "	.46
4" and 4½"	" " "	.55
5" and 5⅝"	" " "	.83
6" and 6⅝"	" " "	.98
8"	" " "	1.24
10"	" " "	1.55
12"	" " "	2.31
14"	Outside diameter	2.34
16"	"	2.35
18"	"	2.67
20"	"	2.96
22"	"	3.25
24"	"	3.56
26"	"	3.69
28"	"	3.85
30"	"	4.03
32"	"	4.24
34"	"	4.46
36"	"	4.72

Pipe lines installed before 1940

(6) A pipe line installed prior to 1940 shall be assessed for taxation at the rates set forth in subsection 5 but shall be depreciated up to the year 1940 at the rate of 2 per cent per annum of the assessed value of the pipe line, with a maximum depreciation of 50 per cent.

Pipe lines installed after 1939

(7) A pipe line installed in 1940 or in any subsequent year shall be assessed for taxation at the rates set forth in subsection 5 with no allowance for depreciation

Pipe lines removed and installed in another location

(8) A pipe line removed from one location and reinstalled in another location shall, where depreciation is applicable, continue to be depreciated at the foregoing rates as though remaining in its original location.

Pipe lines abandoned

(9) A pipe line that has been abandoned in any year ceases to be liable for assessment effective with the assessment next following the date of abandonment.

Liability to taxation of pipe line on exempt property

(10) Where a pipe line is located on, in, under, along or across any highway or any lands exempt from taxation under this or any special or general Act, the pipe line is nevertheless liable to assessment and taxation in accordance with this section.

Tax liability

(11) Notwithstanding the other provisions of this Act or any other special or general Act, a pipe line liable for assessment and taxation under this section is not liable for assessment and taxation in any other manner for municipal purposes, including local improvements, property and business taxes; but all other land and buildings of the pipe line company liable for assessment and taxation under this or any other special or general Act continue to be so liable.

Assessment of pipe line extending into two or more municipalities

(12) Where a pipe line extends through two or more municipalities, only the portion or portions thereof in each municipality are liable for assessment and taxation in that municipality.

Pipe lines on municipal boundaries

(13) Where a pipe line is placed on a boundary between two municipalities or so near thereto as to be in some places on one side and in other places on the other side of the boundary line or on or in a road that lies between two municipalities, although it may deviate so as in some places to be wholly or partly within either of them, such pipe line shall be assessed in each municipality for one-half of the amount assessable against it under this section.

Real property assessment

(14) The assessment of a pipe line under this section shall be deemed to be real property assessment and the taxes payable by a pipe line company on the assessment of a pipe line under this section are a lien on all the lands of such company in the municipality.

Review of rates

(15) The rates set out in subsection 5 shall be reviewed by the Minister in the year 1960 and every third year thereafter and in any such year the Lieutenant Governor in Council may by regulation amend or re-enact the table of rates set out in subsection 5. 1957, c. 2, s. 7, *part*.

TAB 2

1998 CarswellOnt 1
Supreme Court of Canada

Rizzo & Rizzo Shoes Ltd., Re

1998 CarswellOnt 1, 1998 CarswellOnt 2, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 106 O.A.C. 1, 154 D.L.R. (4th) 193, 221 N.R. 241, 33 C.C.E.L. (2d) 173, 36 O.R. (3d) 418 (headnote only), 50 C.B.R. (3d) 163, 76 A.C.W.S. (3d) 894, 98 C.L.L.C. 210-006, J.E. 98-201

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, Appellants v. Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, Respondent and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, Party

Gonthier, Cory, McLachlin, Iacobucci, Major JJ.

Heard: October 16, 1997
Judgment: January 22, 1998
Docket: 24711

Proceedings: reversing (1995), 30 C.B.R. (3d) 1 (C.A.); reversing (1991), 11 C.B.R. (3d) 246 (Ont. Gen. Div.)

Counsel: *Steven M. Barrett* and *Kathleen Martin*, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Subject: Employment; Insolvency

APPEAL by employees of bankrupt employer from decision reported at (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), reversing decision reported at (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), reversing disallowance of claim by trustee in bankruptcy.

POURVOI interjeté par les employés d'un employeur failli à l'encontre d'un arrêt publié à (1995), 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 22 O.R. (3d) 385, *(*sub nom. *Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd.)* 95 C.L.L.C. 210-020, *(*sub nom. *Re Rizzo & Rizzo Shoes Ltd. (Bankrupt))* 80 O.A.C. 201 (C.A.), infirmant un arrêt publié à (1991), 11 C.B.R. (3d) 246, 6 O.R. (3d) 441, 92 C.L.L.C. 14,013 (Gen. Div.), infirmant le rejet par le syndic d'une preuve de réclamation dans la faillite.

The judgment of the court was delivered by *Iacobucci J.*:

1 This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65% of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed

against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July, 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario (Employment Standards Branch) (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C. 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively:

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7.--

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40.-- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . . . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . . . .

40*a* ...

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1) Part XII of the said Act is amended by adding thereto the following section:

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C. 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> **10.** Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . . . .
>
> **17.** The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441 (Ont. Gen. Div.)

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Local 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C.), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (Ont. S.C.), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C.), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee...." Similarly, s. 40*a*(1) begins with the words, "Where...fifty or more employees have their employment terminated by an employer...." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by the employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by the employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by the employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by

reason of their employer's bankruptcy, this constitutes termination "by the employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *Canada (Procureure générale) c. Hydro-Québec*, *(*sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213 (S.C.C.); *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.); *Verdun v. Toronto Dominion Bank*, [1996] 3 S.C.R. 550 (S.C.C.); *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.).

22 I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

23 Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

24 In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.* (1997), 219 N.R. 161 (S.C.C.). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "...the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination." Accordingly, the majority concluded, at p. 1003, that, "...an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not."

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546 (Ont. C.A.), Robins J.A. quoted with approval at pp. 556-57 from the words of D.D. Carter in the course of an employment standards determination in *Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont. Arb. Bd.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service....Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes, supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees 'fortunate' enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *Employment Standards Amendment Act, 1981*, ("*ESAA*") introduced s.40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> **2.** ...
>
> (3) Section 40*a* of the said Act does not apply to an employer who became bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been

employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469 (S.C.C.), at p. 487; *R. v. Paul*, [1982] 1 S.C.R. 621 (S.C.C.), at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows:

> ...any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *ESA*...it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . . . .
>
> ...the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached. [Ontario, Legislative Assembly, *Debates*, No. 36, at pp. 1236-37 (June 4, 1981)]

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this Act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions. [Ontario, Legislative Assembly, *Debates*, No. 48, at p. 1699 (June 16, 1981)]

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.), at p. 484, Sopinka J. stated:

> ...until recently the courts have balked at admitting evidence of legislative debates and speeches....The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 (S.C.C.), at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513 (S.C.C.), at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect." Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were amended by the *Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C. S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (Ont. C.A.), which cited the decision in *Malone Lynch*, *supra* with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025 (S.C.C.)). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESSA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections 74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "the repeal or amendment of an Act shall be deemed not to be or to involve any

declaration as to the previous state of the law." As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed.

Pourvoi accueilli.

TAB 3

2013 ONCA 75
Ontario Court of Appeal

Blue Mountain Resorts Ltd. v. Bok

2013 CarswellOnt 1337, 2013 ONCA 75, [2013] O.L.R.B. Rep. 196, [2013] O.J. No. 520, 114 O.R. (3d) 321, 223 A.C.W.S. (3d) 967, 302 O.A.C. 124, 359 D.L.R. (4th) 276, 5 C.C.E.L. (4th) 151

Blue Mountain Resorts Limited Applicant (Appellant) and Richard Den Bok, The Ministry of Labour and The Ontario Labour Relations Board Respondents (Respondents)

J.C. MacPherson, R.P. Armstrong, R.A. Blair JJ.A.

Heard: September 27, 2012
Judgment: February 7, 2013
Docket: CA C54427

Proceedings: reversing *Blue Mountain Resorts Ltd. v. Bok* (2011), 2011 CarswellOnt 3468, 335 D.L.R. (4th) 483, *(*sub nom. *Blue Mountain Resorts Ltd. v. Ontario (Minister of Labour))* 278 O.A.C. 325, 2011 ONSC 3057, [2011] O.L.R.B. Rep. 401 (Ont. Div. Ct.); affirming *Blue Mountain Resorts Ltd. v. Bok* (2009), 2009 CarswellOnt 9201, [2009] O.L.R.B. Rep. 203 (Ont. L.R.B.)

Counsel: John Olah, for Appellant
David McCaskill, Kikee Malik, for Respondents, Richard Den Bok and The Ministry of Labour
Leonard Marvy, for Respondent, Ontario Labour Relations Board
John Terry, Sarah Whitmore, for Intervenor, Conservation Ontario
Peter Pliszka, Rosalind Cooper, Andrew Baerg, for Intervenor, Tourism Industry Association of Ontario

Subject: Occupational Health and Safety; Employment; Public

APPEAL by employer from decision reported at *Blue Mountain Resorts Ltd. v. Bok* (2011), 2011 CarswellOnt 3468, 335 D.L.R. (4th) 483, *(*sub nom. *Blue Mountain Resorts Ltd. v. Ontario (Minister of Labour))* 278 O.A.C. 325, 2011 ONSC 3057, [2011] O.L.R.B. Rep. 401 (Ont. Div. Ct.), which dismissed employer's application for judicial review of decision to dismiss employer's appeal to Ontario Labour Relations Board.

***R.A. Blair J.A.*:**

Overview

1 On December 24, 2007, a guest at Blue Mountain Resorts died while swimming in an unattended indoor pool at the resort. The issue on this appeal is whether Blue Mountain was required to report this "guest injury" to the Ministry of Labour on the basis that it was a death or critical injury incurred by a person at a workplace as contemplated by subsection 51(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

2 Blue Mountain takes the position that it is not required to report deaths or critical injuries to guests at its recreational facility because the facility is not predominantly a workplace and a worker was not present at the site when the injury incurred. However, the respondent, Mr. Den Bok — an inspector under the Act — took the view that reporting was required, and issued an order to that effect, along with other related orders. The Ontario Labour Relations Board upheld the order.

3 An application for judicial review from that order was dismissed by the Divisional Court. It found the Board's determination that the swimming pool was a "workplace" to be reasonable. The Board inferred that employees of Blue Mountain must have

been present at other times in the pool area in order to check and maintain it. Similarly, the Divisional Court accepted that "it is common ground that the swimming pool is a place where one or more workers work."

4 For the reasons that follow, I would set aside the decisions of the Divisional Court and the Board. The interpretations they gave to s. 51(1) of the Act would make virtually *every place* in the province of Ontario (commercial, industrial, private or domestic) a "workplace" because a worker may, at some time, be at that place. This leads to the absurd conclusion that every death or critical injury to anyone, anywhere, *whatever the cause*, must be reported. Such an interpretation goes well beyond the proper reach of the Act and the reviewing role of the Ministry reasonably necessary to advance the admittedly important objective of protecting the health and safety of workers in the workplace. It is therefore unreasonable and cannot stand.

5 In my view, a proper interpretation of the Act requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that site. There is no such nexus here.

6 Sometimes a swimming pool is just a swimming pool.

The Legislative Framework

7 The relevant provisions of the Act are the following:

> **Definitions**
>
> (1) In this Act,
>
> "employer" means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services; ("employeur")
>
> "worker" means a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program; ("travailleur")
>
> "workplace" means any land, premises, location or thing at, upon, in or near which a worker works; ("lieu de travail")
>
> . . . . .
>
> **Notice of death or injury**
>
> 51(1) Where a person is killed or critically injured from any cause at a workplace, the constructor, if any, and the employer shall notify an inspector, and the committee, health and safety representative and trade union, if any, immediately of the occurrence by telephone or other direct means and the employer shall, within forty-eight hours after the occurrence, send to a Director a written report of the circumstances of the occurrence containing such information and particulars as the regulations prescribe.
>
> **Preservation of wreckage**
>
> (2) Where a person is killed or is critically injured at a workplace, no person shall, except for the purpose of,
>
> (a) saving life or relieving human suffering;
>
> (b) maintaining an essential public utility service or a public transportation system; or
>
> (c) preventing unnecessary damage to equipment or other property,
>
> interfere with, disturb, destroy, alter or carry away any wreckage, article or thing at the scene of or connected with the occurrence until permission so to do has been given by an inspector.
>
> . . . . .

Powers of inspector

54(1) An inspector may, for the purposes of carrying out his or her duties and powers under this Act and the regulations,

(a) subject to subsection (2), enter in or upon any workplace at any time without warrant or notice;

(b) take up or use any machine, device, article, thing, material or biological, chemical or physical agent or part thereof;

(c) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same;

. . . . .

(i) require that a workplace or part thereof not be disturbed for a reasonable period of time for the purposes of carrying out an examination, investigation or test;

8 The word "person" is not defined in the Act.

Facts

9 Blue Mountain Resort Limited owns and operates an all-season resort and recreational facility, located on a 750-acre property near Collingwood, Ontario. The resort offers 36 downhill ski runs and other recreational facilities including mountain biking trails, a golf course, and an indoor swimming pool.

10 When the deceased guest was first found, a defibrillator was used in an attempt to revive him; it showed no electrical signal and Blue Mountain therefore assumed the guest had suffered a heart attack. As it turned out, he had simply drowned while swimming in the pool.

11 The pool was unsupervised and intended for use by resort guests for recreational purposes. No Blue Mountain employees were working there at the time the drowning occurred.

12 In her reasons, the Board member acknowledged that she had "heard no evidence as to the work done by the employees of Blue Mountain within the enclosed area of the indoor swimming pool where the guest drowned ... [and no evidence] ... as to how regularly employees go into this area ... or how many employees enter this area." "Based on general and common knowledge," however, she inferred "that at least one and perhaps more Blue Mountain employees must enter the enclosed area of the indoor swimming pool in order to clean the pool and check the water at least once, and likely more times, each day." She therefore concluded that "[t]he swimming pool thus comprises a part of at least one Blue Mountain employee's workplace", and that "[i]t does not cease to be a 'workplace' because the employee in question moves from that area of his or her workplace to another area of the same workplace."

13 Much evidence before the Board — and much argument here and below — were dedicated to the broader implications of Mr. Den Bok's reporting order for Blue Mountain's ski operations and for recreational facilities in general in the province of Ontario. Conservation Ontario was granted leave to intervene below and Tourism Industry Association of Ontario was subsequently granted leave to intervene in this Court because of the perspectives they bring to those broader concerns.

14 Those broader implications and concerns are instructive for the interpretation to be given to the language used in s. 51(1) because they provide insight into the concerns arising from the Ministry's interpretation of the section. I will outline them briefly.

15 In peak season, Blue Mountain employs 1,750 staff. In February, it may have as many as 16,000 visitors on a Saturday and another 10,000 on a Sunday. The evidence was that there are approximately 1.5 skiing related incidents for every 1,000 visitors at Blue Mountain (the industry average is 2 incidents per 1,000 visitors). It follows that there could be as many as 39 occasions on a February weekend where — if inspector Den Bok's approach is to be adopted — Blue Mountain could be required to report to the Ministry. As the appellant and the intervenors point out, s. 51(2) of the Act prohibits the employer from disturbing or altering the scene of the occurrence until permission is given by an inspector. Therefore, many ski slopes may have to be closed entirely or in part until released by a Ministry inspector.

16 Mr. Den Bok's evidence was that in most cases, such a release will be provided by telephone but, if not, within a couple of hours if an inspector had to attend the site. However, the evidence was that such closures would create potential hazards for skiers and snow boarders using the runs in winter and for mountain bikers in the summer, as well as disruptions to Blue Mountain's operations generally.

17 A representative of the Ontario Snow Resorts Association testified before the Board. His evidence was that there were approximately 7,000 accidents at ski resorts across Ontario during the 2007-2008 ski season. His concern was that ski patrollers do not have the training to diagnose whether an injury is "critical" or not and that, in many cases, there is no way of making that determination at the time of the incident. Failure to report, however, could lead to prosecution under the Act. He repeated the concern that the requirement to preserve the accident scene under s. 51(2) would make ski hills very dangerous and difficult for resorts to operate.

18 The Ministry's requirement that resorts report "guest injuries" is apparently new. Blue Mountain has been subject to the Ministry's review for 27 years, but has never before been required to report such injuries. The same is true for other resorts. The Ministry explained its shift in policy by saying it was due to a number of resorts appearing in its high risk category.

19 Here, the guest injury occurred in a swimming pool, not on the slopes. However, the foregoing factors ground the concerns of the tourism and recreation industries in Ontario with the potential expansion of the Ministry's role in the regulation of their affairs.

Analysis

20 The Ontario Labour Relations Board is an expert tribunal that was interpreting a statute within its mandate and engaging its specialized expertise. The Divisional Court was therefore correct in holding that the standard of review of the Board's decisions is reasonableness: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.); and *Lennox Drum Ltd. v. Ouimet*, 2010 ONSC 4424, 266 O.A.C. 369 (Ont. Div. Ct.), at para. 4.

21 The concept of reasonableness, for administrative law purposes, was described by the Supreme Court of Canada in *Dunsmuir* as a deferential standard. Reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. While tribunals have a "margin of appreciation" within the range of rational outcomes, a reasonable decision is also one that "falls within a range of possible, *acceptable outcomes which are defensible* in respect of the facts and law" (emphasis added): *Dunsmuir*, at para. 47.

22 The appellant and the intervenors argue that the Board and the Divisional Court erred in conducting an analysis that focused only on end risks without considering whether there was, in the circumstances, any reasonable connection between what actually happened and a risk to worker safety at the site. Counsel submits this open-ended approach leads to absurd results, rendering the interpretation unreasonable. I agree.

The Board's Interpretation is Unreasonable

23 The language "where a person is ... critically injured from any cause at a workplace" in s. 51(1) of the Act is undoubtedly intended to capture a wide range of injury-related occurrences affecting the safety and wellbeing of workers. As the Board member correctly observed, "the Act is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers."

24 Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (Ont. C.A.), at para. 22.

25 In *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (Ont. C.A.), at para. 16, Sharpe J.A. reinforced that notion:

> The *OHSA* is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

26 This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

27 One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.

28 Such is the case, in my view, with the interpretation given by the Board and the Divisional Court to the language of s. 51(1) in this case.

29 In these circumstances, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation in order to avoid absurdity may come into play: *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at pp. 1081-82; and *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 (S.C.C.), at para. 109, *per* Iacobucci J.

30 The central thrust of the Board's reasoning is found at paras. 61 and 75 of its reasons:

> [T]he purpose of the Act is to provide protection to workers ... where workers are vulnerable to the same hazards and risks as non-workers who attend at a workplace, it is not an absurd result for an employer to be required to report when a non-worker suffers a critical injury at a workplace.... If the goal is to enhance worker safety by alerting the Ministry to hazards in the workplace that could affect workers, a provision that requires the reporting of critical injuries suffered by non-workers in places where workers work, regardless of whether a worker was present at the time and place of the critical injury, is not absurd.
>
> . . . . .
>
> Blue Mountain is a fixed workplace. There is a fixed location to which employees regularly report.... The area of the resort where the Blue Mountain employees perform their work functions is a "workplace" ... The fact that an employee is not physically present within a section of that "workplace" does not mean that that particular section is not part of the "workplace" during the period when no employees are present.

31 There are some attractive aspects to this reasoning, to be sure. I do not quarrel with the proposition that workers may be subject to the same hazards and risks of death or critical injury as non-workers. When this is the case, an employer may be required to report when a non-worker dies or suffers a critical injury at a workplace in order to give effect to the purpose of the Act. The Divisional Court's comment in this regard is particularly instructive:

> Workers and guests are vulnerable to the same hazards. The purposes and intents of the legislation would be undermined *if a physical hazard with the potential to harm workers and non-workers alike* was not subject to reporting and oversight. [Emphasis added.]

32 I do not disagree with that observation. It is anchored in *a hazard or risk that has the potential to harm workers*. However, the conclusions of the Board and the Divisional Court are founded on an analysis that has no such anchor. It simply assumes that because an accident has occurred at a place where a worker may be at some point in time, the accident becomes a workplace accident. This is apparent from the following statement in the reasons of the Divisional Court:

> The obligation created by s. 51(1) upon employers to report when a person is killed or critically injured *is driven by result rather than by causation*. Hence on a plain reading of the subsection, any event resulting in death or critical injury, *even if occurring in circumstances having no potential nexus with worker safety*, is reportable so long as they occur in a workplace. [Emphasis added.]

33 Respectfully, I do not agree with that conclusion. The potential results are too far reaching. Indeed, the Divisional Court recognized, at the close of the foregoing passage, that "the subsection as interpreted by the Board has a potential to reach beyond the ambit of the purposes of the statute." The interpretation is unreasonable for that very reason, in my view.

34 Why do I say that?

35 The Board's conclusion — found by the Divisional Court to be reasonable — is founded on what is, in effect, an entirely location-based analysis. It would trigger s. 51(1) whenever a non-worker dies or is critically injured at or near a place where a worker is working, has passed through, or may at some other time work, regardless of the cause of the incident. The ramifications of this interpretation go far beyond what the legislature could have intended and beyond what is reasonably necessary to give effect to the purpose and objective of the Act or the mandate of the Ministry. Therefore, while at one level the decision may exhibit some degree of "justification, transparency and intelligibility," as the Divisional Court concluded, it fails to meet the test of "[falling] within *a range of possible, acceptable outcomes which are defensible* in respect of the facts and law" (emphasis added): *Dunsmuir* at para. 47.

36 Section 51(1) must be read in light of the subsection that follows it. Both the Board and the Divisional Court erred, in my opinion, in declining to consider the provisions of s. 51(2) in the interpretation context. They appear to have done so because no one alleged that Blue Mountain had failed to comply with that provision. However, interpreting the two provisions together is instructive in showing how an overly broad interpretation of the reporting obligation in s. 51(1) can lead to consequences beyond the purposes of the Act.

37 Section 51(2) requires that an injury site be preserved — shut down, in effect — until released by a Ministry inspector. There is evidence to suggest that closures to recreational sites such as ski and bike-riding slopes may create hazards to other skiers, bikers, and workers alike. The significantly intrusive effect of s. 51(2), combined with an overly broad interpretation of the notification and reporting requirements of s. 51(1), has the potential to give quite expanded powers to the Ministry and its inspectors.

38 A consideration of some possible outcomes will bear this out. As the Supreme Court of Canada confirmed in *Canadian Pacific Ltd.*, at pp. 1044-45, the consideration of hypotheticals is useful when interpreting the meaning of legislation.

39 Counsel for the Ministry conceded before the Board that on the Ministry's interpretation of the reporting section he could not think of any location in the province of Ontario, except perhaps an abandoned woodlot, that would not be classified as a workplace. In this Court, counsel and his client could not think of any examples. That is not a defensible outcome.

40 Consider the following, as well.

41 Mr. Den Bok acknowledged that if there were a critical injury to a hockey player or a spectator during a Toronto Maple Leaf hockey game at the Air Canada Centre, it would have to be reported to the Ministry. If the injury occurred on the ice, the hockey game would have to be shut down — televised or not — until the premises were released by a Ministry inspector. He took the same position with respect to a wide variety of other circumstances. For instance, he took the view that reporting to the Ministry would be mandatory in the case of customer injuries at a Canadian Tire Store or other retail outlet; in the case of injuries sustained by the public on highways patrolled by police (because the police or other workers may arrive after the accident, or may have passed by on a prior occasion); and in the case of worshippers who may suffer a heart attack or other critical injury at a religious institution (whether the services would have to be halted pending Ministry release of the place of worship, was left unsaid).

42 One can envision endless examples that would be caught by the Board's interpretation, all without any causal relationship with a workplace safety issue. Would parents have to report to the Ministry if their child were injured at home because they had hired a nanny? Does a roller coaster become a "workplace" when a guest is injured while riding on it? Because hotel employees enter guest rooms, does a hotel room become a "workplace" when a guest dies of a heart attack or a drug overdose, or is murdered?

43 As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 27; *Boma Manufacturing*, at para.109; and *Canadian Pacific*, at pp. 1081-82. In *Rizzo*, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd results."

44 The consequences or results of the Divisional Court's and the Board's decision are incompatible with the objects of the Act and the enforcement provisions of s. 51(1), in my opinion. Their interpretation extends the scope of the Act and has the potential to give the Ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace. The interpretation is therefore unreasonable.

The Proper Interpretation of s. 51(1)

45 That being the case, it falls to this Court to determine the proper interpretation of s. 51(1). In doing so, we must have regard to the words of that provision in their grammatical and ordinary sense and in their context, read harmoniously with the scheme of the statute as a whole, the purpose of the statute, and the intention of the legislature: *Rizzo* at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.) at para. 25; and *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

46 As I noted earlier in these reasons, the provisions of the Act are to be interpreted generously, but a generous approach to the interpretation of public welfare statutes does not justify a limitless interpretation of their provisions.

47 With that in mind, I would not interpret the language of s. 51(1) of the Act in a way that would give it the almost limitless scope flowing from the interpretation adopted by the Board and the Divisional Court. Nor would I give it either the narrow interpretation favoured by the appellant, which would limit the application of the notice and reporting requirements only to situations where a worker is actually present at the scene of the occurrence, or the interpretation that a non-worker can never be a "person" within the meaning of s. 51(1).

48 "Textually" speaking, taking the language of s. 51(1) of the Act at face value, the guest who died in the swimming pool might be seen as someone who died in a workplace. Blue Mountain has approximately 1,750 employees working at its 750-acre complex, and some of them may be in the pool area at some time during the day to perform maintenance services. The language of s. 51(1), read only in its grammatical and ordinary sense, is very broad.

49 "Contextually" and "purposively" speaking, however, s. 51(1) is not engaged unless there is some reasonable nexus between the hazard giving rise to the injury and a realistic risk to worker safety issue at the pool or the resort.

50 This restricted interpretation is consistent with the oft-cited observation of Lord Wensleydale in *Grey v. Pearson* (1857), 29 L.T.O.S. 67 (U.K. H.L.), at p. 71:

> In construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, *but no further*. [Emphasis added.]

51 It is also consistent with the principle that broad language in a statute may be given a somewhat restricted interpretation where necessary in order to avoid absurdity and to give the words their appropriate meaning, having regard to their context, the purpose of the Act, and the intention of the legislature. To quote Gonthier J. in *Canadian Pacific Ltd.*, at p. 1082:

> One method of avoiding absurdity is through the strict interpretation of general words ... *Driedger on the Construction of Statutes* (3rd ed. 1994) states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: 'Absurdity is often relied on to justify giving a restricted application to a provision'.

52 It is within this framework, then, that the words "person", "from any cause" and "workplace" in s. 51(1) must be examined. In their submissions, the parties and intervenors focused on the meaning of the words "person" and "workplace." Certainly the contours of these words, particularly "workplace", need to be drawn. It seems to me, however, that the potentially all-embracing expression "from any cause" is the core phrase calling for a restrictive interpretation in order to give the language of s. 51(1) its proper meaning.

53 I agree with the Board and the Divisional Court that the word "person" in s. 51(1) is not synonymous with "worker". Had the legislature intended that to be the case it would simply have used "worker" instead of "person". I think it is clear that the legislature intended the reporting requirement to extend beyond injuries to workers themselves and to encompass — as the Divisional Court observed in the passage cited above — "physical hazards with the potential to harm workers and non-workers alike." That is consistent with the purposes and objectives of the Act.

54 But it does not follow that any death or critical injury involving any person at a place frequented, or sometimes frequented, by workers is caught by s. 51(1). To give the words "killed or critically injured *from any cause*" such an expansive interpretation may well lead to absurd results, as we have seen. That is why a reportable occurrence requires that there be some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at the site of the incident.

55 This somewhat limiting interpretation of the words "from any cause" is key to the interpretation of s. 51(1). It is broad enough to capture "worker safety" related incidents and to give effect to the purpose of the Act. Yet it is not so broad as to lead to absurd consequences or to engage the intrusion of the state where that intrusion is unnecessary to achieve that purpose. It grounds the limiting interpretation of s. 51(1) in cause rather than location.

56 That said, the death or critical injury with the required nexus to worker safety must still occur at a location the Act describes as a "workplace". Once the words "from any cause" have been given their proper meaning, however, the meaning of "workplace", as defined in the Act becomes clearer. To reiterate, "workplace" is defined as "any land, premises, location or thing at, upon, in or near which a worker works; ('lieu de travail')."

57 The Board and the Divisional Court concluded that the word "works" in that expression was not confined to a place where a worker *is working*, but could extend to a place where a worker sometimes worked. I do not disagree that s. 51(1) may be engaged where no worker is present at the time the injury occurs. I would simply say that when the legislature referred to a place where "a worker works", it must have intended that place to be one where a worker is carrying out his or her employment duties at the time the incident occurs, or one where a worker might reasonably be expected to be carrying out such duties in the ordinary course of their work.

58 This is consistent with the view that a "workplace" may not necessarily be a fixed location, but may in some circumstances travel with a worker, a view that makes some sense in today's world of mobility, and which the parties appear to accept: see *R. v. Port Colborne (City)*, [1992] O.J. No. 2555 (Ont. Prov. Ct.).

59 In summary, the notification and reporting requirements of s. 51(1) of the Act are engaged where:

> a) a worker or non-worker ("any person") is killed or critically injured;
>
> b) the death or critical injury occurs at a place where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) a place where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work ("workplace"); and
>
> c) there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at that workplace ("from any cause").

60 The guest drowning in the Blue Mountain swimming pool does not meet the foregoing criteria.

61 There was no evidence that the Blue Mountain guest's death in the swimming pool was caused by any hazard that could affect the safety of a worker, whether present or passing through. All that is known is that the guest either had a heart attack (the first diagnosis) or drowned while swimming (the final report). The purpose of the Act is to further worker safety; it is not to capture death by natural causes. If there is a need for supervision at the pool to ensure the safety of Blue Mountain's guests, that may raise other issues for Blue Mountain, but it does not give rise to considerations of worker safety. It is highly unlikely that a Blue Mountain employee is going to drown while swimming in the pool in the course of his or her employment duties.

62 The interpretation I place on s. 51(1) is consistent with the Act's purpose and objective of protecting the health and safety of workers. It anchors worker safety to a hazard with the potential to harm workers, thereby placing some constraints on the scope of the notification and reporting requirements of the Act. By doing so, it also honours the legislative and external context in which those requirements operate.

63 Part of the context within which s. 51(1) must be interpreted is reflected in the history of the legislation. The *Occupational Health and Safety Act* came into effect in 1978. It repealed a number of then-existing pieces of legislation dealing with the protection of workers in factories and mines and on construction sites, and consolidated them into one Act. The history behind the legislation was conveniently summarized by this Court in *R. v. Wyssen* (1992), 10 O.R. (3d) 193 (Ont. C.A.), at p. 198-99:

> The Act was passed in 1978.... Intense public discussion of industrial safety was stimulated by the 1976 Report of the Royal Commission on the Health and Safety of Workers in Mines (the Ham Report). Bills relating to industrial safety were introduced in the legislature in 1976, 1977 and 1978 when the Act was finally passed. The object of the legislative proposals was to achieve safety in the workplace and their scope greatly expanded before the Act was passed in 1978.
>
> The statute was described by the Minister of Labour as a "comprehensive omnibus act which would consolidate all existing occupational health and safety legislation": Debates, Legislative Assembly of Ontario, October 18, 1977, p. 856. The Act repealed five statutes and parts of two others dealing with occupational health and safety. The statutes, which the Act replaced, were limited almost completely to the protection of employees with only minimal expansion of protection beyond the common law master and servant relationship.

64 The legislation that the Act replaced focused on the safety of workers in workplaces such as factories, shops, offices, mines and construction sites. While I think it is evident that the scope of the present Act is not confined to industrial or commercial sites of that nature, it is instructive to keep those roots in mind. In any event, the emphasis of the present Act is clearly on protecting the safety of workers in the workplace, a purpose that was confirmed by this Court in *R. v. Timminco Ltd.*, at para. 22:

> The broad purpose of the statute is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace.

65 It follows that it is not part of the purpose and objective of the Act to protect non-workers. The focus is on the worker, the employer and the workplace, and injuries that pose a risk in that connection.

Conclusion and Disposition

66 For the reasons I have explained, the interpretation given to s. 51(1) of the Act by the Board and the Divisional Court was unreasonable. Therefore it cannot stand. I would interpret s. 51(1) to provide that the Ministry must be notified of a death or critical injury at a site, and the requisite report provided, where there is some reasonable nexus between the hazard giving rise to the death or critical injury and a realistic risk to worker safety at a workplace. A workplace is where (i) a worker is carrying out his or her employment duties at the time the incident occurs, or, (ii) where a worker might reasonably be expected to be carrying out such duties in the ordinary course of his or her work.

67 It may be that a literal reading of s. 51(1) would suggest a broader interpretation. In spite of that, however, the decisions below would lead to absurd results and accordingly do not "[fall] within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law": *Dunsmuir*, at para. 47. The interpretation I adopt conforms to the purpose and objective of the Act and is consistent with the provisions of the Act read as a whole, even if the words of s. 51(1) alone may suggest the alternative interpretation: *Boma Manufacturing Ltd.*, at para. 109.

68 Accordingly, I would allow the appeal, set aside the decision of the Divisional Court and allow the application for judicial review. In the result, the order of inspector Den Bok requiring Blue Mountain to report to the Ministry the death of the Blue Mountain guest in the swimming pool on December 24, 2007, is also set aside.

69 The appellant is entitled to its costs of the appeal, payable by the respondent Ministry of Labour, and fixed in the amount of $5,000 inclusive of disbursements and all applicable taxes. There will be no costs with respect to the Board or the intervenors.

***J.C. MacPherson J.A.*:**

I agree

***R.P. Armstrong J.A.*:**

I agree

Appeal allowed.

End of Document

TAB 4

2008 SCC 9, 2008 CSC 9
Supreme Court of Canada

Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008 *
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

Subject: Labour; Tax — Miscellaneous; Employment; Public

Annotation

The Supreme Court of Canada recently handed down a decision, in *New Brunswick (Board of Management) v. Dunsmuir*, reviewing the proper approach to judicial review of administrative decision makers. The Court decided that judicial review should now only include two standards: correctness and reasonableness.

At first blush one might believe this would strengthen the arguments of those from the immigration bar who try to convince the Federal Court that there should be reluctance to defer to the decision making of immigration tribunals or officers. Previously the standards of review also included the standard of patent unreasonableness and the corresponding high degree of deference. So, if those are taken out of the equation, then surely that should make it easier to attract judicial attention?

A careful reading of the case, however, suggests that our Department of Justice colleagues will be able to rely on parts of this decision when arguing that the Court ought to defer to the decision of a decision maker.

Mr. Dunsmuir was employed by the Province of New Brunswick. His employment was terminated and he commenced a grievance process as allowed for under the *Public Service Labour Relations Act*. That grievance was denied and then referred to adjudication. A preliminary issue arose as to whether the adjudicator was authorized to determine the reasons underlying the province's decision to terminate. The adjudicator concluded that he could make such a determination and decided that Mr. Dunsmuir's termination was void *ab initio*. He also decided that Mr. Dunsmuir was entitled to and did not receive procedural fairness.

On judicial review the Court of Queens Bench applied the correctness standard and quashed the adjudicator's preliminary decision. On the merits the Court found that Mr. Dunsmuir had received procedural fairness. The Court of Appeal held that the proper standard with respect to the adjudicator's statutory authority was reasonableness *simpliciter*, not correctness, and that the adjudicator's decision was not unreasonable. It agreed with the reviewing judge that Mr. Dunsmuir's right to procedural fairness had not been breached.

The Supreme Court dismissed the appeal, but when doing so, reconsidered the system of judicial review in Canada. All members of the Court agreed that the appeal should be dismissed, but there were three sets of reasons.

Bastarache and LeBel JJ. wrote reasons on behalf of themselves and McLachlin C.J. and Fish and Abella JJ.

The Justices noted that the current approach to judicial review involves three standards of review which range from correctness, where no deference is shown, to patent unreasonableness, which is the most deferential to the decision maker; the standard of reasonableness *simpliciter* lying, theoretically, somewhere in between. They concluded that there ought to be two standards of review — correctness and reasonableness.

In *Dunsmuir* the Court acknowledged that the operation of the three standards of review have resulted in practical and theoretical difficulties. For example, the difference between patent unreasonableness and reasonableness *simpliciter* was in many ways "illusory". [1] The conclusion they reached was that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review, the result being a system of judicial review comprising two standards — correctness and reasonableness.

The Court went on to try to define more clearly what reasonableness means. They stated that reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process; and concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [2] They cautioned that the move towards a single reasonableness standard does not pave the way for a more intrusive review by the courts. [3] The standard of correctness must be maintained in respect of jurisdictional and some other questions of law. In questions of fact, discretion or policy, deference will usually apply. That same standard should apply to the review of questions where the "legal and factual issues are intertwined with and cannot be readily separated". [4]

Binnie J. offered his own reasons that no doubt reflect his considerable experience in private practice. He pointed to the very practical problems of litigating against a backdrop of uncertainty of which standard of review is to be considered. As he put it " . . . the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features". [5] But the reduction of two standards of review does not mean the judge should necessarily consider his or her own view of reasonableness. Rather the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose. As he put it, "'[r]easonableness' is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making". [6] The presumption from the outset should be that the reasonableness will be the standard of review. Moreover it should also be presumed that the decision under review is reasonable until the applicant shows otherwise. [7]

According to Binnie J. a legal question may not always attract the correctness standard. The correctness standard will apply when the decision rests on an error in the determination of a legal issue not codified to the administrator.

So what has changed? The Court was of the view that the existing scheme for judicial review was unnecessarily complicated. They were of the view that reducing the standards of review from three to two would help diminish unhelpful and unproductive intellectual exercises. Although there may not now be any "patent unreasonableness" standard, it is clear that the Court is still of the view that in many instances deference ought to be given to administrative decision makers. As for reasonableness *simpliciter*, a judge will have to identify and consider a range of possibilities.

In the context of immigration in particular, perhaps the practical consequences for our clients may not end up being so significant. Decisions are made by immigration tribunals and officers and when our clients are unhappy with those decisions they can retain us to ask the court to review the decisions or the decision-making process. There is no privative clause that comes into play. Notwithstanding the sophisticated intellectual and legal reasoning that underpins a case such as *Dunsmuir*, some will have the view that the reality is that if a judge decides that the decision being reviewed is a wrong-headed one, then the judge may cite an appropriate standard of review, but it is a visceral response that is dictating the ultimate decision rather than an intellectual exploration of legal terrain where the right decision is discovered.

Time will tell whether this decision adds clarity to a difficult area of the law.

Randolph K. Hahn

Dunsmuir is a very important decision for at least four reasons:

Two standards of review, not three

First, *Dunsmuir* attempts to simplify the logic-tree for judicial review by merging the two deferential standards of review, thereby reducing the number of standards from three to two. From now on, the single deferential standard will be "reasonableness" (not "patent unreasonableness" as was the case pre-*Southam*).

What is "reasonable" will depend on the context, which may require greater or lesser deference. This concept of "reasonableness" is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process, and with whether the decision falls within a range of possible outcomes (and, therefore, is different from the concept of "reasonableness *simpliciter*" in *Ryan*, which focused solely on the reasoning process used by the statutory delegate). The deferential reasonableness standard will usually apply where there is a privative clause; the question is one of fact, discretion, or policy; where the decision-maker is interpreting its own statute or statues closely connected to its function with which it will have particular familiarity; or where the administrative tribunal has developed particular expertise in the application of a common law or civil law rule in relation to a specific statutory context. As Justice Binnie notes, this concept of "reasonableness" is a "big tent". Might we not end up with much the same arguments as before, just dressed up in different rhetoric?

The explicit merging of the two deferential standards into "reasonableness" should accomplish what was implicit in *Voice*. From now on, submissions and judicial attention should focus squarely on the particular manifestation in which it is alleged that a particular decision is unreasonable, and will remove the possibility that a decision might be said to be "unreasonable" but not "patently unreasonable". Although the abolition of the "patently unreasonable" standard will probably disquiet members of the labour bar in particular (who pushed back strongly against the implication in *Voice* that the "patently unreasonable" standard of review should be rarely if ever used), the Court has signalled that the movement to the new, single deferential standard is not to be taken as an invitation for greater judicial scrutiny.

Precedent may determine the standard of review

Secondly, the Court has made it clear that there does not necessarily need to be an analysis of all four of the *Pushpanathan* factors in every case. Over time, precedent may exist to determine the standard of review with regard to a particular category of question in a particular statutory context. If not, then various contextual factors will need to be analyzed, but some factors may be determinative about the application of either the correctness or the reasonableness standard.

Possible deference on some questions of law

Thirdly, there is some uncertainty about the circumstances in which the courts should defer on a question of law (not being clearly jurisdictional in nature). The majority decision contemplates that deference may be appropriate where the decision-maker is interpreting its own statute *unless the question is one of general law that is both of central importance to the legal system and outside the adjudicator's specialized area of expertise* (in which case correctness would apply). Justice Binnie thinks that the exception expressed in the italicized words in the previous sentence is too deferential-correctness should apply to all

questions concerning the common law and the interpretation of a statute (with the exception of an interpretation of the statutory delegate's enabling-or "home"-statute, or a rule or statute closely connected with it, which requires the expertise of the statutory delegate). In addition, it is clear that Justice Binnie and Justice Deschamps contemplate that correctness should be the standard of review where there is a full statutory right of appeal; it is not clear whether the majority would defer on some questions of law where there is a full statutory right of appeal.

Unresolved issues about the standards of review

In addition to the working out of these three aspects of the court's discussion of standards-of-review analysis, *Dunsmuir* still leaves a number of unanswered questions. For example, the majority's direction to stop using the phrase "pragmatic and functional approach" (which comes from *Bibeault*) does not provide an alternative method for determining whether a particular matter is "jurisdictional" (in the narrow sense of having jurisdiction to embark on the matter at hand) or otherwise subject to the correctness standard, as opposed to having been intended by the legislator to be left to the statutory decision-maker (and, therefore, subject to the deferential reasonableness standard). If the court's approach is necessarily contextual, shouldn't the appraisal of that context be done in a pragmatic and functional manner to determine the intention of the legislator? Similarly, it is not clear whether the majority contemplates that all issues in administrative law will engage one or other of these two standards of review. Although Justice Binnie raises this issue, surely he errs in suggesting that the correctness standard should be applied to questions of natural justice and procedural fairness, because such questions are answered by reference to whether the process used was "fair" (not "correct", and not "reasonable"). Other issues in administrative law may also raise other concerns which are not easily addressed by the "correctness" or "reasonableness" standards of review (such as malice, discrimination, abuse of discretion, abuse of public office, contractual or tortious liability of public authorities, and the problem of concurrent jurisdictions). Finally, although each judgment refers frequently to "expertise", *Dunsmuir* does not clarify what is meant by this concept, or how the courts know or determine if a statutory delegate has expertise with respect to a particular matter. Although there are hints that experience might equate to expertise, is this always the case-or could a statutory delegate consistently and over a long period of time incorrectly interpret a provision of its constating legislation?

Procedural fairness does not apply to contracts of employment merely because they have a statutory backdrop or also involve holding a public office

Fourthly, *Dunsmuir* makes it clear that the principles of procedural fairness do not apply to the termination of employment contracts just because there is a statutory backdrop to the contract or the person also holds a statutory office. This significantly restricts the application of the decision in *Knight v. Indian Head*, which had previously extended procedural safeguards to these circumstances. This makes imminent good sense in the circumstances of this particular case, where the New Brunswick Legislature had specified that the common law rules for terminating employment contracts were to be applied to non-unionized public employees. However, not all statutes governing public employment or the holding of a public office specify the terms under which that status may be terminated. If the statute does not contain such a provision, does it follow that all holders of a public office also have a contractual employment relationship with some governmental authority? Must there be specific statutory authority to enter into a contractual employment relationship with the holder of a public office (assuming the employment contract is not inconsistent with the statutory provisions governing the office)? Is the nature of at least some public offices incompatible with the concept of a separate employment contract — for example, is the nature of the public office of Conflict of Interest Commissioner of Parliament or a provincial legislative assembly sufficiently important that it would be inappropriate for there to be a contract of employment between the commissioner and some representative of the executive (as opposed to statutory provisions)?

David Phillip Jones, Q.C.

APPEAL by employee from judgment reported at *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), dismissing employee's appeal from decision allowing employer's application for judicial review.

POURVOI formé par un employé à l'encontre d'un jugement publié à*New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.), ayant rejeté l'appel interjeté par l'employé à l'encontre d'une décision ayant accueilli la demande de contrôle judiciaire de l'employeur.

***Bastarache, LeBel JJ.*:**

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded

to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator

may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1)

and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range 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. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within

its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed

as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 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.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. 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.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. 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: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), 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., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both 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*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper

understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

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.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para. 21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.), a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)). In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]
>
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'"

and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790 (B.C. S.C.); *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (Ont. C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151 (Man. C.A.); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83 (Sask. C.A.); *Hanis v. Teevan* (1998), 111 O.A.C. 91 (Ont. C.A.); *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (N.B. C.A.)).

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (U.K. H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B. Q.B.) aff'd (1991), 118 N.B.R. (2d) 306 (N.B. C.A.). Similarly, physicians working in the public health system may

or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40 (Sask. Q.B.)).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.).

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000, at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. (2004), p. 1192 "pleasure appointment"). Because of this relative insecurity it was

seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment.
>
> [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *Southeast Kootenay School District No. 5 v. B.C.T.F.* (2000), 94 L.A.C. (4th) 56 (B.C. Arb. Bd.)). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority

cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the

case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. Conclusion

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

***Binnie J.* (concurring):**

119 I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system as a whole.
>
> . . . . .
>
> The time has arrived to reexamine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called "the standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene i)

122 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: for example a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g., *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.).

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 14: 2210.

125 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.

A. Limits on the Allocation of Decision Making

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". 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 (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

B. Reasonableness of Outcome

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087(emphasis in original deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from

Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1947] 2 All E.R. 680 (Eng. C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation...?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (para. 53), and *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. The Need to Reappraise the Approach to Judicial Review

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making.

The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. Degrees of Deference

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), or policy decisions arising out of decisions of major administrative tribunals, as in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.)) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.)).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be

taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. Multiple Aspects of Administrative Decisions

142 Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.)). In the jargon of the judicial review bar, this is known as "segmentation".

G. The Existence of a Privative Clause

143 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.

H. A Broader Reappraisal

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single

"correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case, command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test *of irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*Judicial Review of Administrative Action* (5th ed., H. Woolf and J. Jowell, 1995), para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. 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.

I. Judging "Reasonableness"

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> 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. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate", *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to

be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Ryan v. Law Society (New Brunswick)*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. Application to This Case

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

***Deschamps J.* (concurring):**

158 The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said (p. 5):

> An employee to whom section 20 of the Civil Service Act and section 100.1 of the PSLR Act apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons.

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that

the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1:

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25:

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended:

> **97**(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.
>
> . . . . .
>
> **100.1**(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.
>
> **100.1**(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.
>
> . . . . .
>
> **100.1**(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . . . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Footnotes

* Corrigenda issued by the Court on March 10, 11, 2008, and April 17, 2008 have been incoporated herein.

1 Para. 41

2 Para. 47

3 Para. 48

4 Para. 53

5 Para. 133

6 Para. 144

7 Para. 146

End of Document

TAB 5

2000 CarswellOnt 1072
Ontario Court of Appeal

TransCanada Pipelines Ltd. v. Beardmore (Township)

2000 CarswellOnt 1072, [2000] 3 C.N.L.R. 153, [2000] O.J. No. 1066, 137 O.A.C. 201, 186 D.L.R. (4th) 403, 96 A.C.W.S. (3d) 191

Her Majesty the Queen in Right of Ontario as represented by the Minister of Municipal Affairs and Housing, Appellant and TransCanada Pipelines Limited, The Corporation of the Township of Beardmore, The Corporation of the Town of Geraldton, The Corporation of the Town of Longlac, The Corporation of the Township of Nakina, Long Lake 58 First Nation, Nishnawbe-Aski Nation and Ginoogaming First Nation, Bob Gray, Commissioner of the Greenstone Restructuring Commission, and The Transition Board of the Greenstone Restructuring Commission, Respondents

Borins J.A., Goudge J.A., Weiler J.A.

Judgment: April 5, 2000
Heard: April 13, 1999
Heard: April 14, 1999
Docket: CA C29876

Proceedings: reversing *TransCanada Pipelines Ltd. v. Beardmore (Township)* (1997), 106 O.A.C. 30, 1997 CarswellOnt 5056, 44 M.P.L.R. (2d) 250, [1998] 2 C.N.L.R. 240 (Ont. Div. Ct.)

Counsel: *Dennis W. Brown, Q.C.*, *R. Tzimas* and *J. Mitchell*, for Appellant.
Richard N. Poole and *J. Bradford Nixon*, for Respondent, TransCanada Pipelines Limited.
Alan Pratt, for Respondent, Long Lake 58 First Nation.
H.W.R. Townshend, for Respondents, Nishnawbe-Aski Nation and Ginoogaming First Nation.
A. Roman, for Respondent, Bob Gray, Commissioner of the Greenstone Restructuring Commission.

Subject: Public; Constitutional; Property; Municipal

APPEAL by Crown from judgment reported at (1997), 1997 CarswellOnt 5056, [1997] O.J. No. 5316, 106 O.A.C. 30, 44 M.P.L.R. (2d) 250, [1998] 2 C.N.L.R. 240 (Ont. Div. Ct.) quashing final proposal and order of commission; CROSS-APPEAL by First Nation and First Nation representative organization for declaration that commission's final proposal and order infringed Aboriginal rights.

***Borins J.A.*:**

1 This appeal by Her Majesty the Queen in Right of Ontario on behalf of the Minister of Municipal Affairs and Housing (the "MMAH" or the "Minister") arises out of the Final Proposal and Order of the Greenstone Restructuring Commission. The commission was established by the Minister under s. 25.3(1) of the *Municipal Act*, R.S.O. 1990, c. M. 45.

2 The Order, which implemented the Final Proposal, amalgamated the Townships of Beardmore and Nakina and the Towns of Geraldton and Longlac into a single municipality to be known as the Municipality of Greenstone. The Order also annexed to the newly created municipality unorganized townships contiguous to the boundaries of Beardmore, Geraldton and Longlac, and non-contiguous unorganized territory represented by the Caramat Local Roads Board, comprising approximately 930 square miles.

3 Three applications for judicial review were brought to the Divisional Court. Sitting as a single judge of that court, O'Driscoll J. quashed the Final Proposal and Order of the commission for reasons reported in (1997), [1998] 2 C.N.L.R. 240 (Ont. Div. Ct.). This appeal, brought with the leave of this court, seeks to set aside the judgment of O'Driscoll J. In addition, there is a cross-appeal by two of the respondents, described below as NAN and GFN, for a declaration that the Final Order and Proposal of the commission infringe Aboriginal rights confirmed and protected by s.35(1) of the *Constitution Act, 1982*.

The Parties

4 As I have indicated, the Crown has appealed on behalf of the Greenstone Restructuring Commission (the "commission"). The Crown's appeal is supported by Bob Gray, who was the sole commissioner of the commission. In addition, Mr. Gray has asked this court to state that O'Driscoll J.'s personal criticisms of him in his reasons for judgment were unwarranted.

5 The first respondent is TransCanada Pipelines Limited ("TCPL"), which owns and operates four natural gas pipelines which run through the geographic area which is the subject of this appeal, as well as three compressor stations located in this area. TCPL has traditionally paid municipal realty taxes to Beardmore, Geraldton and Longlac, and provincial land tax in respect to the portions of its pipelines which pass through the unorganized territory. It has received virtually no municipal services from Beardmore, Geraldton and Longlac. As for the unorganized territory, for the most part, it is wilderness, and is largely unoccupied. It is the position of TCPL that the result of the commisson's Final Proposal and Order will be a significant tax, or revenue, windfall for the proposed Municipality of Greenstone ("Greenstone"). TCPL has characterized the restructuring as a "tax grab".

6 Nishnawbe-Aski Nation ("NAN") and Ginoogaming First Nation ("GFN") are joint respondents. NAN is an umbrella organization representing 47 First Nations in Northern Ontario regarding common interests arising from Treaty 9 and other matters. GFN is an individual First Nation and is a member of NAN. The territorial application of Treaty 9 includes lands within Greenstone, and purports to guarantee to its beneficiaries, who are represented by NAN, land for reserves and for hunting, trapping and fishing, which are constitutionally protected rights under s.35(1) of the *Constitution Act, 1982*. On February 24, 1986, the Governments of Canada and Ontario signed a Memorandum of Understanding ("MOU") with NAN, which commenced a process of negotiation to implement self-government for the NAN First Nations, including land claims.

7 NAN and GFN take the position that the proposed restructuring may result in the infringement of First Nation constitutionally protected rights and may impede, delay or thwart future land claims negotiations dependent on the MOU.

8 The final respondent is Long Lake 58 First Nation ("LL58"), a First Nation which is affiliated with NAN, but not a member of it. LL58 comprises about 1,000 members, about 400 of whom reside on the habitable portion of a reserve northeast of Thunder Bay. In response to LL58's request for an addition to the reserve for community expansion, in 1990 the Government of Ontario stated that it was prepared to enter negotiations with LL58 to provide a larger land base for the reserve as a first step to entering into comprehensive negotiations on a wide range of items, including land claims and self-government. It is the position of LL58 that, if its lands form part of Greenstone, this would create obstacles to the settlement of its land claim and the expansion of its reserve and that traditional Aboriginal treaty and other rights may be adversely affected.

Legislative Scheme for Municipal Restructuring

9 Pursuant to Schedule M of the *Savings and Restructuring Act*, S.O. 1996, c. 1, the *Municipal Act* was amended by repealing s. 25 and substituting ss. 25, 25.1, 25.2, 25.3 and 25.4 for the purpose of streamlining the process of municipal restructuring. These amendments were intended by the Ontario Government to provide municipalities with the mechanism necessary to restructure to better cope with new municipal responsibilities. The new responsibilities arise from the Government's policy of giving greater responsibility to the municipal sector for the costs of a number of services, including policing, sewer and water, transit, public health and social housing.

10 As pointed out by Osborne J.A., on behalf of this court, in *Bruce (Township) v. Ontario (Minister of Municipal Affairs & Housing)* (1998), 41 O.R. (3d) 309 (Ont. C.A.), at 312:

Before 1996, municipal restructuring took place by application to the Ontario Municipal Board under the *Municipal Act*, through the process established by the *Municipal Boundary Negotiations Act, 1981*, S.O. 1981, c. 70, or by special Act of the legislature. The 1996 *Municipal Act* amendments substantially changed the process for municipal restructuring.

11 The 1996 amendment removed the Ontario Municipal Board ("OMB") from the restructuring process and introduced two restructuring processes — a restructuring proposal developed by a municipality or a local body under s. 25.2 and a restructuring proposal developed and implemented by a commission under s. 25.3, as occurred in this appeal. Under s. 25.4, the Minister may establish restructuring principles that shall be considered by municipalities, local bodies and a commission when developing a restructuring proposal.

12 The purposes of the restructuring legislation, as contained in s. 25.1, are:

25.1 The purposes of sections 25.2 to 25.4 are,

(a) to provide for a process which allows municipal restructuring to proceed in a timely and efficient manner;

(b) to facilitate municipal restructuring over large geographic areas involving counties or groups of counties, local municipalities in counties and in territorial districts and unorganized territory; and

(c) to facilitate municipal restructuring of a significant nature which may include elimination of a level of municipal government, transfer of municipal powers and responsibilities and changes to municipal representation systems.

13 In s. 25.2(1), "restructuring" is defined as follows:

"restructuring" means,

(a) annexing part of a municipality to another municipality,

(b) annexing a locality that does not form part of a municipality to a municipality,

(c) amalgamating a municipality with another municipality,

(d) separating a local municipality from a county for municipal purposes,

(e) joining a local municipality to a county for municipal purposes,

(f) dissolving all or part of a municipality, and

(g) incorporating the inhabitants of a locality as a municipality;

14 Section 25.3 provides for the development of a restructuring proposal by a commission and stipulates the procedure that it must follow. As most of the provisions of s. 25.3 are relevant to this appeal, it is helpful to reproduce them:

25.3 (1) The Minister may establish a commission on or before December 31, 1999 at the request of a municipality in a locality or at the request of 75 or more residents of an unorganized territory in a locality. *The purpose of the commission is to develop a proposal for restructuring municipalities and unorganized territory* in the locality or in such greater area as the Minister may prescribe.

(2) The commission *shall develop a restructuring proposal* for the prescribed locality or for such part of it as the commission considers advisable.

(3) A restructuring proposal *shall not provide for a type of restructuring other than a prescribed type of restructuring*.

(4) The commission *shall consult* with each municipality in the prescribed locality when developing the restructuring proposal and *may consult* with such other bodies and persons as the commission considers appropriate.

(5) The commission *shall prepare a draft of the restructuring proposal* and shall give a copy of the draft to each municipality in the prescribed locality and make it available for inspection by members of the public in the prescribed locality.

(6) The commission *shall hold at least one public meeting* at which any person who attends is given an opportunity to make representations about the draft.

(7) The commission *shall invite written submissions about the draft* and shall establish a deadline for receiving them. The commission shall make the submissions available for inspection by each municipality and by members of the public in the prescribed locality.

(8) The commission *shall notify each municipality in the prescribed locality of its opportunity to make representations* and shall advise them where they can inspect written submissions received by the commission.

(9) The commission *shall give notice* to the public in the prescribed locality advising them of the opportunity,

(a) inspect the draft;

(b) to make representations at the public meeting and to give written submissions by the deadline; and

(c) to inspect the written submissions received by the commission.

(10) *After considering the representations and submissions about the draft*, the commission *shall finalize the restructuring proposal* and shall give a copy of it to each municipality in the prescribed locality and make it available for inspection by members of the public in the prescribed locality.

(11) The commission *shall give notice to the public in the prescribed locality* advising them of the opportunity to inspect the restructuring proposal.

. . . . .

(13) The commission *may make orders to implement the restructuring proposal*. For the purposes of implementing the proposal, the commission has the powers under a regulation made under subsection 25.2 (11).

. . . . .

(18) *The Minister may, for the purposes of this section, make regulations*,

(a) establishing a commission;

(b) providing for the *composition* of the commission, which may be composed of one person;

(c) describing the locality for which the commission *shall develop a restructuring proposal*;

. . . . .

(e) *establishing types of restructuring*;

(20) The Minister may require that a commission follow such procedures as the Minister may provide, in addition to the procedures set out in this section. [Emphasis added.]

15 O. Reg. 143/96, made under the *Municipal Act*, contains the powers of the Minister or a commission for the implementation of a restructuring proposal. Of relevance to this appeal is s. 2, which states:

2. The Minister or a commission may,

(a) annex part of a municipality to another municipality;

(b) annex a locality that does not form part of a municipality to a municipality;

(c) amalgamate a municipality with another municipality;

(d) separate a local municipality from a county for municipal purposes;

(e) join a local municipality to a county for municipal purposes;

(f) incorporate the inhabitants of a locality as a municipality.

16 In my view, this legislative scheme discloses that the role of a restructuring commission is not adjudicative, in the sense that it does not establish a process for the resolution of a dispute between opposing parties involving a hearing in which parties present evidence. As I discuss in detail subsequently, the commission was intended by the legislature to supersede the adjudicative role performed previously by the OMB in municipal restructuring. The role of the commission in this process, which is the restructuring of political boundaries is a political process and, therefore, is essentially legislative, and neither quasi-judicial nor administrative. The commission is required to comply with the procedural conditions precedent contained in s. 25.3. In addition, it is limited to proposing the types of restructuring stipulated in s. 25.2(1) of the Act and s. 2 of O. Reg. 143/96, as well as O. Reg. 253/97 and the commission's Terms of Reference to which I will refer subsequently.

17 As s. 25.3 makes abundantly clear, a commission is given a broad mandate and very little discretion. As s. 25.3(2) provides, it "shall develop a restructuring proposal" for the locality prescribed in the regulation that creates the commission. It cannot refuse to do so. That is its legislated task. Its discretion is limited to whether the restructuring proposal will encompass the whole of the prescribed locality, or part of it, and to the type of restructuring as prescribed by s. 2 of O. Reg. 143/96, and, in this appeal, by s. 3 of O. Reg. 253/97, which established the Greenstone Commission.

Background

18 There is an extensive history of attempts to achieve a restructuring of the geographic area in issue in this appeal leading up to the appointment of the commission. The following summary contains the relevant background.

19 In 1974, the Town of Geraldton applied to the OMB to annex four unorganized townships. The application was dismissed.

20 In 1987, Geraldton applied to the OMB to annex ten unorganized townships. After a two and one-half week hearing, which was adjourned at Geraldton's request, the application was withdrawn.

21 In 1992, Geraldton applied to the OMB to annex seven unorganized townships, which are located within the boundaries of the proposed Municipality of Greenstone. The application was opposed by a number of parties including TCPL, NAN, GFN, LL58, as well as residents of Geraldton and the impacted unorganized townships. The Ministry of Municipal Affairs appeared as a party and presented evidence in support of the application. After a seven-week hearing in 1993, the OMB released its decision on March 11, 1994. It dismissed the application, but permitted annexation of a significantly smaller area of built-up neighbourhoods in close proximity to Geraldton's then boundaries.

22 Before the OMB, TCPL opposed the application on the ground that there was no conceivable planning justification for such a large transfer of land, and argued that the real reason for the application was to increase assessment and, thus, tax revenues originating from the presence of pipelines through four of the five townships identified in the application.

23 The First Nations opposed the application on the ground that it was premature because it was contrary to agreements signed between the First Nations and the provincial and federal governments in respect to land claims and control over resources asserted by the First Nations over lands throughout Northern Ontario. They argued that the application should not be considered until the negotiations were concluded because parts of the territory to be considered for annexation were subject to their claims.

As well, the First Nations objected to the fact that they had not been consulted as part of the annexation process. In summary, their position was that the annexation would adversely affect rights acquired by them under Treaty 9, offend agreements reached with federal and provincial governments and adversely affect outstanding land claims.

24 In its reasons for decision, the OMB stated that "in the absence of one overwhelming reason to justify annexation, the application [should] be looked at as a balancing act between the various stances of each party, through the help of a series of 'filters' which assist the Board in weighing the evidence before it". The Board then went on to explain this approach, known in the Board's jurisprudence as the "three filters" test. The three filters are:

> (1) The greatest common good — a consideration of the evidence of all the parties with a view to making a determination which, while attempting to address individual concerns, focuses on how best to serve the greatest common good.
>
> (2) Common sense — taking a long term view and reflecting on how a specific solution at this time will assist in preventing future planning problems and in facilitating other local government pursuits.
>
> (3) Fairness — a consideration of whether the impact of the Board's decision will unfairly affect one or more of the parties.

25 Applying the three filters test, the OMB found that an annexation of a portion of the unorganized territories around Geraldton was warranted, but not to the extent applied for by the town. In its analysis, the OMB considered the concerns raised by TCPL and the First Nations.

26 In its reasons, the OMB addressed the concern of TCPL as follows:

> The question of the assessment generated by the inclusion of a significant portion of the TransCanada Pipelines was raised and warrants some consideration by the Board. If only to reaffirm what other panels of this Board have said on the matter, *this Board wants to make clear that it would not support an annexation that would be based solely on the financial benefit to the Town of bringing in pipeline-related assessment*. There is no doubt that there is a natural tendency on the part of some northern communities where business or commercial assessment is limited and often very difficult to increase, to look at pipeline assessment as some kind of providential manna. It is after all, for the most part, a large revenue generator with little requirement for services. In this Board's opinion, it is only to the extent that there is some planning or development merit to an annexation application that it becomes justifiable to support boundaries reflecting an appropriate annexed area, including pipelines. *Just as there is no rationale to annex strictly for the purpose of a tax grab, there is no reason to exclude pipeline lands when new boundaries have been drawn*. [Emphasis added.]

27 As for the concerns raised by the First Nations, the OMB accepted that there was a formal commitment between the First Nations and the federal and provincial governments to a negotiation process which included negotiations pertaining to control over lands and resources, that the process was well-established and, although progressing slowly, was making progress. The OMB recognized that it was reasonable for the First Nations to advocate that the Board should not approve annexation of territory which included their lands until the process of land claims had been completed. It also recognized that the First Nations had a reasonable concern regarding the ambiguity of the province's position with the Ministry of Municipal Affairs actively supporting the application without considering its effect on the land claims process.

28 The OMB went on to conclude:

> This being said, this Board, given its legislated authority, is empowered and has an obligation to deal with the application. While the Board could have decided to defer consideration of the matter for an indefinite period of time, *it would only have done so if it had been convinced that important information was missing or that its decision would create a prejudicial situation to the First Nations which would jeopardize the rights of its members or put to question the whole negotiation process which is underway*.
>
> The Board, in order to assess the degree of impact of its decision, has regard for sound planning principles. It also has regard for fairness by trying, whenever it is possible and practical to do so, to mitigate any undue adverse impact of its

> decision on any party. In this present case, it has considered the interest of First Nations, both as communities and as individuals, the long term pursuits they have in relation to land and their own evidence in terms of the perceived impact of annexation. It has heard from some of the native witnesses that they choose not to carry out their traditional activities in built-up or municipally organized lands. *Annexing a large amount of land would thus have a direct impact not only on the land negotiations but, more importantly, on their current practices*. This is largely why the Board has chosen to exclude from the annexation decision any land which is not immediately adjacent to the current town, is not already built-up or otherwise permanently occupied or used by non-natives. On that basis, *the Board is satisfied that it is not taking away anything which would prejudice whatever other negotiation process is currently underway or impacting too much, if at all, the acquired right of individual members of First Nations to carry out their traditional activities over Crown land*. [Emphasis added.]

29 Subsequent to the amendment of the *Municipal Act* in 1996, municipal officials from Beardmore, Geraldton, Longlac and Nakina began to investigate restructuring options in the form of the "Working Group for the Evaluation of Restructuring Options in the Beardmore/Geraldton/Longlac/Nakina Areas". In March 1997, the Working Group issued a report outlining the benefits of restructuring, including the resultant increased pipeline assessment. In this regard, the report stated:

> The predominant source of savings from these restructuring options derives from increased assessment that would result from enlarging the four municipalities. It is estimated that pipeline assessment within the four municipalities would increase by approximately 6.7 times. This would have the effect of increasing the total assessment of the four municipalities combined by approximately 121%. These estimates do not take into account the additional assessment associated with compressor stations as a result of upgrading these facilities for cogeneration.
>
> Taxes from pipeline assessment currently provides [*sic*] about 77% of total own-purposes tax revenue of Beardmore, 25% of total own-purposes tax revenue of Geraldton, 2% of total own-purposes tax revenue of Longlac and no tax revenues for Nakina. Pipeline assessment currently generates 24% of the combined tax revenues of all four municipalities. Following restructuring, all other things being equal, that proportion would rise to 63%.

30 In April 1997, the municipalities submitted a restructuring proposal to the Minister under s. 25.2 of the *Municipal Act* entitled "The District of Grand Proposal". It was opposed by the respondents. TCPL, NAN, GFN and LL58 each wrote to the Minister objecting to the proposed restructuring. In his letter to the Minister, the Grand Chief of NAN intimated that he represented the interests of LL58 when, in fact, he did not. On May 14, 1997, the Ministry advised the four municipalities that it would not implement the proposal.

31 On June 11, 1997, the Mayor of Geraldton wrote to the Minister requesting the appointment of a commission under s. 25.3 of the *Act*. Subsequently, Beardmore and Longlac withdrew their support for the restructuring proposal for the District of Grand.

32 On June 26, 1997, at a meeting with Charles Harnick, then the Attorney General for Ontario and the Minister Responsible for Native Affairs, representatives of NAN requested that there be a meeting between the MMAH and NAN, the Union of Ontario Indians and First Nations with interests in the Greenstone area. It appears that NAN received no response to its request.

Appointment of the Greenstone Restructuring Commission

33 On July 2, 1997, O. Reg. 253/97, made June 26, 1997, was filed establishing the Greenstone Restructuring Commission. The Minister appointed Mr. Bob Gray as the sole commissioner. Omitting the Schedule referred to in s. 1, as well as s. 4, the Regulation stated:

> 1. A commission is established to develop a restructuring proposal for the locality described as the Town of Geraldton, Town of Longlac, Township of Beardmore and the Township of Nakina and the unincorporated areas described in the Schedule in the Territorial District of Thunder Bay.
>
> 2. The commission shall be composed of one member to be appointed by the Minister.

3. (1) The following are the types of restructuring that may be included in the restructuring proposal to be developed by the commission:

1. Annexing part of a local municipality to another local municipality.

2. Amalgamating local municipalities.

3. Incorporating a local municipality.

4. Dissolving all or part of a local municipality.

5. Annexing unorganized territory to a municipality.

6. Incorporating a county.

(2) Subsection (1) does not include a restructuring that results in,

(a) an increase in the number of local municipalities;

(b) any part of a county not being part of a local municipality;

(c) any part of a local municipality being part of a county if any other part of the local municipality is not part of the county;

(d) a county consisting of a single local municipality;

(e) territory becoming unorganized territory;

(f) *unorganized territory becoming part of a municipality that is incorporated under paragraph 3 of subsection 3 (1)*.

(3) Subsection (1) does not include a restructuring of a municipality outside the locality described in section 1. [Emphasis added.]

34 On June 27, 1997, the Minister issued Terms of Reference for the Greenstone Restructuring Commission which are largely procedural and are based, for the most part, on the provisions of s. 25.3 of the Act, ss. 2 of O. Reg. 143/96 and " A Guide to Municipal Restructuring" published by the MMAH in August, 1996.

35 The relevant provisions of the Terms of Reference are the following:

Purpose

The purpose of the Commission is:

To develop a proposal for restructuring the Township of Beardmore, the Town of Geraldton, the Town of Longlac and the Township of Nakina including the surrounding unincorporated territory in the locality prescribed.

To define the most appropriate form of municipal government for this area in terms of municipal structure, boundaries, organization, administration and responsibilities.

To develop a restructuring proposal that resources and meets the needs for local governance in an efficient and effective manner, while respecting sense of community and providing appropriate access and representation.

To commence an orderly and timely transition period.

. . . . .

Mandate

The Commission is appointed with a mandate to undertake the following process:

1. **Review previous studies** — The Commission shall review all applicable studies and information available with regard to the local governance issues in the defined locality including those materials submitted in support of the request for restructuring by the municipalities within the locality.

2. **Restructuring proposal** — The Commission shall develop a restructuring proposal for the prescribed locality or for such part of it as the Commission considers advisable.

3. **Limitation** — A restructuring proposal shall not provide for a type of restructuring other than a prescribed type of restructuring as set out in the Regulation establishing the Commission.

4. **Consultation** — The Commission shall consult with the municipalities involved and members of the public in the prescribed locality when developing the restructuring proposal and may consult with such other bodies and persons as the Commission considers appropriate.

5. **Draft proposal** — The Commission shall prepare a draft of the restructuring proposal and shall give a copy of the draft to affected municipalities in the prescribed locality and make it available for inspection by members of the public in the prescribed locality.

6. **Public meeting** — The Commission shall hold at least one public meeting in each affected municipality at which any person who attends is given an opportunity to make representations about the draft.

7. **Written submissions** — The Commission shall invite written submissions about the draft and shall establish a deadline for receiving them. The Commission shall make the submissions available for inspection by affected municipalities and by members of the public in the prescribed locality.

8. **Notice to municipalities** — The Commission shall notify the municipalities in the prescribed locality of its opportunity to make representations and shall advise them where they can inspect written submissions received by the Commission.

9. **Notice to the public** — The Commission shall give notice to the public in the prescribed locality advising them of the opportunity,

(a) to inspect the draft restructuring proposal;

(b) to make representations at the public meeting and to give written submissions by the deadline; and

(c) to inspect the written submissions received by the Commission.

10. **Final proposal** — After considering the representations and submissions about the draft, the Commission shall finalize the restructuring proposal and shall give a copy of it to the municipalities in the prescribed locality and make it available for inspection by members of the public in the prescribed locality.

. . . . .

13. **Commission orders** — The Commission may make an order to implement the restructuring proposal. For the purposes of implementing the proposal, the Commission has the powers under the regulations made under subsection 25.2(11) of the *Municipal Act* and the regulation establishing the Commission. The order shall be drafted by MMAH Legal Branch under the direction of the Commissioner.

. . . . .

Principles

The following principles are to be considered on a province-wide basis in regard to local government restructuring. These principles will be taken into consideration by the Commission within the context of local circumstances when developing a restructuring proposal for the designated locality.

Less Government

— fewer municipalities

— fewer elected representatives

— reduced special purpose bodies

Effective Representation System

— accessible

— accountable

— representative of population served

— size that permits efficient priority-setting

Best Value for Taxpayer's Dollar

- efficient service delivery
- reduced duplication and overlap
- ability to capture the costs and benefits of municipal services within the same jurisdiction
- clear delineation of responsibilities between local government bodies

Ability to Provide Municipal Services From Municipal Resources

— local self reliance to finance municipal services

— ability to retain and attract highly qualified staff

Supportive Environment for Job Creation, Investment and Economic Growth

— streamlined, simplified government

— high quality services at the lowest possible cost

Legislative Framework

The Commission shall ensure that the impacts of the provincial government's recent legislative and administrative initiatives affecting municipal government shall be considered prior to the issuance of the Commission's order. The Commission's order shall establish a municipal government structure that will be well positioned to accommodate future changes to municipal government in Ontario.

Timing

The Commission shall begin its work on July 2, 1997.

The Commission shall finalize its proposal and issue an order to implement a restructuring proposal on or before September 1, 1997.

The Commission shall assist the municipalities with the establishment of a transition process by September 30, 1997.

The Work of the Commission

36 O'Driscoll J. made several findings concerning the manner in which the commission carried out its mandate, a number of which informed the conclusions that he reached. Before outlining these findings, it is helpful to provide an overview of the evidence contained in the six-volume record which the parties filed in the Divisional Court. Subsequently, I will discuss whether certain of the affidavits filed by the parties were properly before the Divisional Court and properly considered by O'Driscoll J.

37 The appellant filed an affidavit of Douglas Barnes, the Director of the Local Government Policy Branch of the MMAH, which described the restructuring process under the 1996 amendments to the *Municipal Act*. In addition, the appellant filed an affidavit sworn by Ian Douglas Smith who, since 1986, was the manager in the Northwestern Regional Office of the Regional Operations Branch of the MMAH, located in Thunder Bay. This is a lengthy document which, with its attached exhibits, comprised 867 pages. It contained in substantial detail the background leading up to the appointment of the Greenstone Restructuring Commission together with the process followed by the commission. Finally, the appellant filed the affidavit of Robb Anderson, Municipal Advisor to the MMAH, who provided support to the commission, including acceptance, compilation and distribution of submissions, the provision of notices, the arrangement of meetings, the recording of proceedings and the preparation and distribution of commission reports. The focus of his affidavit is the extent of consultation between the commission and the representatives of the First Nations.

38 TCPL filed five affidavits. Richard Johnston's affidavit indicated that the proposed Municipality of Greenstone will receive a significant revenue windfall at no cost to it by virtue of the fact that TCPL would receive no municipal services from the realty tax it would be required to pay. It was his opinion that the intent of the restructuring proposal is to raise additional realty tax revenue from TCPL. A similar opinion was expressed by Enid Slack in her affidavit. She was retained by TCPL because of her extensive experience in municipal finance and governance in Ontario. She testified on behalf of TCPL at the OMB hearings initiated by Geraldton in 1993. She also expressed the opinion that Geraldton's 1993 application was motivated by its desire to obtain significant new realty tax revenue from TCPL. Based upon her review of the evidence before the Greenstone Restructuring Commission, she concluded that the commission failed to conduct a financial impact study and was of the opinion that neither the four municipalities, nor the commission, was able to demonstrate any significant cost savings resulting from restructuring. She concluded: "It is my opinion that this municipal restructuring, through amalgamation and annexation, is a 'tax grab'."

39 Robert Lehman, a registered land use planner, has been retained by TCPL since 1988. He prepared two reports in 1993 arising from Geraldton's application before the OMB, which form part of his affidavit. He also conducted a study of all applications for annexation in Northern Ontario dealt with by the OMB prior to May 1996, from which he discerned that the OMB had identified, and applied, four "justifiable reasons" for the enlargement of municipal boundaries. Like Ms. Slack, he extensively attacked the commission's restructuring proposal on planning principles, as well as on what he perceived to be the commission's failure to apply the principles prepared by the Minister to guide municipal restructuring contained in the Commission's Terms of Reference.

40 In addition, TCPL filed affidavits from Bruce Hall, a consulting land use planner, and Dana Anderson, a registered professional planner, retained by TCPL. In general, they are critical of the restructuring proposal for a number of reasons which include the commission's rejection of the vast majority of the oral and written submissions opposed to its draft proposal and the belief that the premise of the proposal was to expand municipal boundaries for the purpose of increasing municipal assessment and tax revenues derived from TCPL to offset the perceived costs of provincial downloading of service delivery responsibility.

41 As I will discuss when I analyze the issues presented by this appeal, in my view, it is clear that the purpose of the very substantial body of evidence which TCPL placed before the Divisional Court was to attempt to demonstrate that the commission's restructuring proposal was either incorrect, or patently unreasonable.

42 NAN and GFN filed the affidavits of the Grand Chief of NAN, Charles Fox, Peter Moonias, Lawrence Towegishig and Chief Gabriel Echum of GFN.

43 Grand Chief Fox provided evidence concerning Treaty 9 and ongoing self-government and land claims negotiations. He expressed his concern that the restructuring proposal "may affect" the constitutionally protected rights of First Nation members to use the lands encompassed by the proposal for the traditional purposes of hunting, trapping and fishing, and that the proposal " will make more difficult" the ongoing negotiations. He stated that the proposed municipality of Greenstone may pass by-laws regulating, or prohibiting, the discharge of firearms which will affect the use of the land by First Nation members, with the result that they will have to assume the expense of constitutionally challenging any such by-law. Peter Moonias, the Chairman of the Matawa Tribal Council, Chief Echum, and Lawrence Towegishig, the Deputy Chief of GFN, also expressed their concerns about possible infringements of constitutionally protected rights. In addition, Deputy Chief Towegishig expressed his concern that the inclusion of traditional aboriginal burial sites in the proposed municipality would sever the link which members of the GFN have with the land.

44 Grand Chief Fox, Mr. Moonias and Chief Echum provided evidence respecting their consultation with the commission. Grand Chief Fox stated that the only consultation he had on behalf of NAN was a meeting with the commission on July 6, 1997 to convey NAN's opposition and a letter to the commission of July 28, 1997, following the receipt of its draft report, expressing NAN's opposition to it. In his view, "this amount of consultation was inadequate since the amount of the affected land and the importance of the rights of the Nishnawbe-Aski should require more in depth consideration". The only consultation with NAN of which Mr. Moonias was aware was a meeting with the commission in Thunder Bay which he attended with Grand Chief Fox. He felt that the views of NAN were not considered seriously by the commissioner whom, he believed, had essentially made up his mind about restructuring as illustrated by the fact that the commissioner was speaking about a transition team. Chief Echum said that the only consultation which his First Nation had with the commission was the same meeting attended by Grand Chief Fox and Mr. Moonias.

45 The evidence tendered by LL58 focused on the impact of the restructuring proposal on its land claim which was launched in 1995. Frank Onabigon, an elected member of the Council of LL58, described the land claim in considerable detail, including the historical facts supporting it. He described its purpose as securing a negotiated agreement that would formalize LL58's ownership of, and its governance over, lands within its traditional territory. He explained that LL58's aspirations for self-government would be complicated and hampered by the extension of municipal jurisdiction into areas that have traditionally been free of municipal organization. He stated that the commission made no attempt to involve LL58 in its work, and that LL58 did not participate in any of the consultation sessions it arranged. In his opinion, the commission completely failed to take into account the interests of the members of LL58 in making its restructuring proposal.

46 Paul Williams is a lawyer who, since 1982, has acquired significant experience in First Nations land rights, or claims. Based on his experience, it was his opinion that an Aboriginal claimant involved in negotiations concerning land which is within a municipality is at a distinct disadvantage compared to a claimant negotiating in respect to land which is without municipal organization. Mr. Williams provided extensive reasons for his opinion, and concluded as follows:

> The extension of municipal boundaries will "create" financial and political reasons which did not exist before to prevent the Ojibway people form securing their just rights. The extension would also allow a provincial government and federal governments to find refuge from their legal and fiduciary obligations.

47 In addition to the extensive documentary record, the record before the Divisional Court also contained transcripts of the cross-examinations of most of the deponents, as well as the examination of Christopher Rees, a consultant retained by the commission.

48 The appellant presented no evidence which refutes the evidence tendered by the First Nation respondents in support of their objections to a restructuring proposal which placed the lands that they occupy within a newly created municipality and subject to municipal governance.

49 In dealing with O'Driscoll J.'s findings in respect to the workings of the commission, I intend to review only his findings concerning the assistance provided to the commissioner by certain individuals, the consultation undertaken by the commissioner with representatives of the First Nation respondents and the response made to the draft restructuring proposal by TCPL and NAN. These findings are relevant to a number of the conclusions reached by the commissioner in the reasons he provided for the Final Proposal and Order.

50 I have confined my findings to these areas because, as I will explain in my analysis of the grounds of appeal, I am satisfied that the commissioner complied fully with the procedural requirements contained in the legislative scheme governing the process of the commission. In this regard, it is to be remembered that s. 25.3 (2) to (15) of the *Municipal Act* contain a procedural code of conditions precedent to a commission exercising its powers to develop a restructuring proposal, which are supplemented by s.25.4 of the Act, O. Reg. 143/96 and O. Reg. 253/97. I accept, as accurately demonstrating that the commissioner complied with the relevant procedural requirements, Appendix " A" to the factum filed by counsel for Bob Gray.

51 As for the assistance provided to the commissioner, before embarking on his mandate, Mr. Gray retained a consultant, Christopher Rees. Mr. Rees prepared the commissioner's draft and final proposals by following the commissioner's instructions concerning their contents. He did so with some assistance from Robb Anderson and Ian Smith, who were employees of the MMAH. Mr. Anderson read and provided comments with respect to the draft proposal. The Final Proposal and Order were finalized during two meetings attended by the commissioner, Mr. Rees, Mr. Anderson, Mr. Smith and Ms. Yeta Herscher, a lawyer employed by MMAH, who was counsel to the commission.

52 Mr. Anderson, who kept the records of the commission at the MMAH office in Thunder Bay, spent the majority of his time in July and August 1997, working with the commission. He attended most of the public meetings and statutory consultations undertaken by the commissioner. As well, Mr. Anderson drafted portions of the draft and final proposals. Mr. Smith provided the commissioner with selected documents used during the 1993 OMB hearing. However, he did not provide him with the reports prepared for the hearings on behalf of TCPL by Ms. Slack and Mr. Lehman, on which the OMB relied in reaching its decision. Although the commissioner asked Mr. Smith to contact "the aboriginal groups in the area", he did not contact LL58. In this regard, it was agreed by the parties on the argument of this appeal that Mr. Smith was of the mistaken belief that NAN represented LL58.

53 As for the consultation which the commissioner had with representatives of the respondent First Nations, O'Driscoll J. found that on July 6, 1997 he met with Grand Chief Fox, Chief Echum and Mr. Moonias representing NAN and GFN. Nobody on behalf of LL58 attended this meeting. Grand Chief Fox informed the commissioner that there were outstanding legal questions concerning Aboriginal and treaty rights that could not be resolved by the commission, and requested a meeting with the Minister. No information was ever provided to the commission respecting LL58's treaty rights or land claim, nor was LL58 ever provided with the opportunity to make submissions in respect to the draft proposal.

54 O'Driscoll J. also found that the commission made no contact with the Ontario Native Affairs Secretariat, which is responsible for native land claims in Ontario, nor with the Ministry of Natural Resources, to determine the status of LL58's land claim or other outstanding issues with the Ontario government.

55 By his letter of July 28, 1997, Grand Chief Fox of NAN provided his comments on the draft proposal to the commissioner. He said, in part:

> The Commissioner's Restructuring Proposal does not indicate any due consideration for treaty and aboriginal rights, rights which the Treaty 9 Parties submit were required to be considered by the Commissioner. Ontario is a signatory to Treaty 9, but the Commissioner's Restructuring Proposal fails to recognize Ontario's obligations under the Treaty. The Proposal does

> not strive to interfere with treaty and aboriginal rights as little as possible, as required pursuant to s. 35 of the *Constitution Act*. ...
>
> The Commissioner's Restructuring Proposal was also developed without regard to the province's fiduciary obligation to the Treaty 9 Parties. No consideration whatsoever is given to the fact that Ontario is a signatory to Treaty 9, a Treaty which the Treaty 9 signatories submit was intended to promote sharing of the lands and resources by aboriginal and non-aboriginal parties in the area, not to permit, as set out in the Restructuring Proposal, a wholesale takeover by municipalities of a vast area of land within our treaty territory. In the view of the Treaty 9 Parties, Ontario has a fiduciary obligation to ensure that the Treaty obligations are met, including provision of reserve lands in accordance with that Treaty and respecting the Treaty rights to hunt, trap and fish; this obligation is clearly paramount to any discretionary expansion of municipal territory to include significant portions of the Treaty territory.

56 On July 28, 1997, counsel for TCPL provided the commissioner with his client's response to the draft proposal. His letter stated, in part:

> TCPL owns and operates 7,460 kilometres of pipeline in the province of Ontario; 5,329 kilometres run through Northern Ontario. TCPL annually pays approximately $50 million in property taxes in the province of Ontario; $30 million of these taxes, including provincial land tax, are paid in Northern Ontario.
>
> TCPL is a significant investor throughout Northern Ontario and is a significant ratepayer in the Township of Beardmore and the Town of Geraldton. In 1996, TCPL paid municipal taxes of $580,580 to the Township of Beardmore and $685,670 to the Town of Geraldton. ...
>
> The Draft Restructuring Proposal is completely devoid of the necessary financial analysis required for the Commission to fulfil its mandate. There is no estimate of the financial impact of the restructuring options. There is no estimate of the financial impact of recent provincial government initiatives. There is no estimate of the impact of this restructuring upon the economic viability of these municipalities nor any consideration of the proposed provincial property tax reform. There is no analysis of the impact of this restructuring on the efficiency and costs of the delivery of services and municipal administration.

Final Restructuring Proposal and Order

57 The commissioner released his Final Proposal and Order on August 29, 1997. Although not required to do so, he provided extensive reasons in support of the Final Proposal. At the outset, he observed that the commission's mandate required "that it determine the most appropriate form of municipal government for the area in terms of municipal structure, boundaries, organization, administration and responsibilities". Subsequently he added:

> The Commission interprets its mandate to create the simplest, most flexible, directly accountable form of municipal government to meet the challenges of the future particularly in the light of recent and proposed future changes in responsibilities attached to all levels of government [announced by the Government of Ontario].

58 After outlining the commission process, background information, the size and extent of the area, the local economy and current local government structures and relationships, the commissioner described "the principal issues raised by the consultation". Among the issues raised which are relevant to this appeal, are the following:

> 5. What should be the Commission's response to the position of TransCanada Pipelines?
>
> 6. What should be the Commission's response to the position of the Nishnawbe Aski Nation and the Treaty 9 Parties?

59 The commissioner then proceeded to consider the views expressed by individuals and municipalities in response to the draft proposal. He extensively considered the objections of TCPL and NAN.

60 It is helpful to reproduce in its entirety the commissioner's response to the concerns raised by TCPL:

> The Commission can understand the frustration of TransCanada Pipelines with respect to the way in which it pays property taxes in the Province of Ontario, particularly in Northern Ontario where its lines run through large amounts of unincorporated territory. The assessment of the pipelines is a natural temptation to all municipalities to enlarge their boundaries to capture that assessment and thereby increase tax revenues - particularly at a time when many municipalities are facing increased responsibilities. TransCanada Pipelines will do all it can to resist municipal expansion which it interprets simply as a "tax grab". On the other hand, municipalities have an obligation to their residents to manage the municipality in the best way they can and they would be remiss if they did not consider all opportunities for enlarging their assessment base. *The Commission can state, nevertheless, that capturing more pipeline assessment must not be the primary reason or fundamental basis for municipal restructuring*. For this reason, while the Commission is prepared to extend external municipal boundaries in the Orient Bay (populated, presence of numerous businesses, economic development potential, need for services such as fire protection), it does not see the justification for extending eastwards to the Klotz Lake area.
>
> The Commission understands that the Province is currently reviewing the way in which TransCanada Pipelines (TCPL) pays property taxes and that changes may occur in the future. However, for the present, the Commission can simply acknowledge the existing system and the antagonism it generates between TCPL and some municipalities.
>
> This being said, TCPL contends that "municipal restructuring may properly be addressed without necessarily expanding municipal boundaries". The Commission agrees that such a case may be possible *but points out that its mandate is precisely to consider all options and make its restructuring decision — including whether or not boundaries need to be changed — in the best interests of all parties — not just the interests of one of them. The Commission can state categorically that the principles of the greatest common good, common sense and fairness has* [*sic*] *guided its decision*.
>
> TCPL further admonishes the Commission for the lack of financial analysis required for the Commission to fulfill its mandate: financial impact of restructuring options; financial impact of recent government initiatives; impact of restructuring upon the economic viability of the municipalities; consideration of the proposed provincial property tax reform; impact of restructuring on the efficiency and cost of the delivery of services and municipal administration.
>
> *The Commission has a mandate to " review all applicable studies and information available with regard to the local governance issues .....". The Commission has done so including studies and information of which it was already aware as well as those referenced during the consultations. Whenever the Commission has identified the need for further financial impact analysis beyond existing studies and information, it has held appropriate consultations to investigate likely parameters*.
>
> The Commission, however, is not under the illusion that it can know all of the financial impacts in advance of any option that is selected or in advance of a measure actually being implemented. It must use its best judgment and the Terms of Reference for the Commission state only that it " shall ensure that the impacts of the provincial government's recent legislative and administrative initiatives affecting municipal government shall be considered (emphasis added) prior to the issuance of the Commission's order".
>
> The Commission has to the best of its ability considered such impacts and makes its decision on the basis of its consideration. [Emphasis added.]

61 The portion which I have italicized in the third paragraph of the commissioner's reasons is a statement of the "three filters" guideline formerly applied by the OMB in considering applications for municipal restructuring. The paragraph from the commissioner's reasons that I have reproduced in paragraph 57 is the final paragraph of the commissioner's response to the concerns of TCPL.

62 As for the opposition to the draft proposal raised by NAN, the commissioner responded as follows:

The Grand Chief of the Nishnawbe-Aski Nation (NAN) prepared a submission to the Restructuring Commission. The submission draws attention to the decision of the Ontario Municipal Board of 1994 with respect to an annexation application by Geraldton, wherein it is stated that the Board:

> .... has regard for fairness by trying, whenever it is possible and practical to do so, to mitigate any undue adverse impact of its decision on any party. In this present case, it has considered the interest of First Nations, both as communities and as individuals, the long term pursuits they have in relation to land and their own evidence in terms of the perceived impact of annexation. It has heard from some of the native witnesses that they choose not to carry out their traditional activities in built-up or municipally organized lands. Annexing a large amount of land would thus have a direct impact not only on the land negotiations, but, more importantly, on their current practices. *This is largely why the Board has chosen to exclude from the annexation decision any land which is not immediately adjacent to the current town, is not already built-up or otherwise permanently occupied or used by non-natives. On that basis, the Board is satisfied that it is not taking away anything which would prejudice whatever other negotiation process is currently underway or impacting too much, if at all, the acquired right of individual members of First Nations to carry out*. [Emphasis added in submission by Treaty 9 Parties.]

The Commission agrees with this summation by the OMB and indeed agrees that the existence of two different systems to transfer land from the Province to municipalities on the one hand and to First Nations on the other "creates a great deal of confusion and anxiety for all the local groups involved." The establishment of the Commission process has further simplified and speeded up the manner in which municipal restructuring can occur without providing any improved process for First Nations land negotiation.

Furthermore, the Commission notes that area municipalities and First Nation communities have been able to work cooperatively in an atmosphere of mutual trust as evidenced by existing service sharing agreements, for instance for water, sewer and landfill. The Commission believes that such agreements are in the best interests of all parties and is mindful in its decision to further facilitate their establishment and application.

Nevertheless, the Commission finds itself in a similar position to the OMB. *It has been mandated by the Province to prepare a restructuring proposal and order and has no authority "to defer consideration of the matter for an indefinite period of time". The Commission has considered the OMB principles, as stated above, in its decision and has tried to appropriately reflect them. However, it does not consider that it has created a prejudicial situation to the First Nations which would jeopardize the rights of its members. Existing treaty rights and guarantees, land claims and fiduciary obligations will be unaffected by municipal restructuring*. [Emphasis added.]

63 The commissioner then stated "four initial conclusions" based on a consideration of the principal issues that he had identified previously, two of which were the commission's response to concerns raised by TCPL, NAN and the Treaty 9 Parties. One of the "initial conclusions" was stated in this way:

> The Commission has been convinced of the desirability of extending the municipal boundaries as compared to those set out in the draft proposal, particularly to protect the area's natural environment and partially to provide a reasonable basis for future economic development initiatives. *However, the Commission rejects the notion that capturing increased pipeline assessment can be the primary reason for extending boundaries. Also, while the Commission is convinced that municipal restructuring will not adversely affect First Nation treaty rights and guarantees, land claims and fiduciary obligations*, it must deal with the perception by NAN that it does so and in consequence limit boundary extensions to what is defensible for the reasons referred to above. [Emphasis added.]

64 Next, the commissioner referred to the three restructuring options he had stated in the draft proposal — individual municipal expansion, creation of an upper tier, and amalgamation and stated:

> As a preamble to reconsidering the options, the Commission wishes to emphasize that "the window of opportunity" to act decisively is now. The Province has vastly streamlined the restructuring process permitting an initial voluntary approach

> while providing for expediency and at low cost. No one can be certain of future Provincial policy direction but we do know that the prior process of hearings before the Ontario Municipal Board were [*sic*] frustrating, extremely time-consuming and very expensive.
>
> The Commission intends to avail itself of the current window of opportunity and act decisively to put forward a comprehensive municipal restructuring proposal which has a clear long-term perspective.

I assume that "the window of opportunity" is a reference by the commissioner to s. 25.3(1) of the Act which precluded the Minister from establishing a restructuring commission at the request of a municipality after December 31, 1999.

65 The commissioner rejected the first two restructuring options and accepted the third option — amalgamation — as representing the only realistic long-term option. In his reasons for doing so, he made no reference to the position of TCPL or NAN. His justification for a single amalgamated municipality was, as he put it, that "it meets the Restructuring Principles in the following manner", which consisted of a recitation of the principles contained in the Terms of Reference which are reproduced in paragraph 35 of these reasons.

66 I note that one of the reasons given by the commissioner for rejecting the option of individual municipal expansion was: "The appearance of a 'tax grab' of TCPL assessment *would appear more evident*." [Emphasis added.]

67 Finally, the commissioner addressed the specifics of the structure of the new municipality, such as its name and boundaries, wards and councillors and area rating, and then addressed such subjects as a transition board, elections and official plans. With respect to the official plan, he made the following recommendation:

> It is further recommended that the provisions of any new official plan adopted by the new municipality acknowledge the treaty and aboriginal rights of First Nations, indicating that nothing in the plan affects those rights. As an example of the intent of the Commission, it is recommended that the Section 3.9 of the Geraldton and Suburban Planning Area Official Plan be incorporated into the official plan of the new municipality.
>
> **Aboriginal Land Use Activities**
>
> It is a policy of the Planning Board to recognize the importance of the traditional Aboriginal resource values wherever they have been identified in the Rural Area to exist. This includes recognition of licensed trap lines and traditional native land use activities such as wild rice harvesting, gathering of plants for medicinal or ritual purposes and resource management activities.

The Applications for Judicial Review

68 It is helpful, in considering the reasons of the Divisional Court, to place them in the context of the grounds for judicial review advanced by the respondents. Each of the respondents applied for judicial review under ss. 2 and 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

69 TCPL relied on the following grounds in seeking an order to quash the Final Proposal and the Order which implements it:

> (a) The Final Proposal and implementation Order are *ultra vires* the authority of the Commissioner as being contrary to the provisions of the *Municipal Act* and O. Reg. 143/96 as amended by O. Reg. 577/96.
>
> (b) The Final Proposal and implementation Order are *ultra vires* the objects and policy of the Act.
>
> (c) The Final Proposal and implementation Order are patently unreasonable.
>
> (d) The Final Proposal and implementation Order are contrary to the principles of municipal restructuring contained in the Commission's Terms of Reference.

(e) The Commission failed to conduct the appropriate and necessary investigations and analysis to fulfill its statutory mandate.

(f) The Commission ignored, or discarded, the principles of municipal reorganization historically established in that its Final Proposal is not in the greatest common good and prejudicially affects the interests of TCPL.

(g) The Commissioner failed in his duty to act fairly in exercising his statutory powers under the *Municipal Act*.

70 In addition to seeking an order quashing the Final Proposal and Order, NAN and GFN asked for a declaration that the Final Proposal and Order infringed s. 35 of the *Constitution Act, 1982*, and are therefore of no force and effect. In addition to relying on the grounds for judicial review advanced by TCPL, NAN and GFN relied on the additional ground that the commissioner did not adequately consult with them, or other aboriginal governing bodies with regard to the restructuring proposal and that he did not intend to do so. As well, NAN and GFN submitted that the Final Proposal and Order "*may affect* potential or existing aboriginal land claims or aboriginal governance negotiations which are in progress or contemplated by the applicants", " *may affect* the exercise of treaty and aboriginal rights, particularly rights regarding hunting, fishing, trapping and gathering" and "*may affect* the current use of lands and resources for traditional purposes by Aboriginal persons who are represented by the Applicants". [Emphasis added.]

71 In its application for judicial review, in addition to seeking the relief requested by TCPL, NAN and GFN, LL58 sought, in the alternative, an order varying the Final Proposal and Order, to establish, as the boundaries of the Municipality of Greenstone, the boundaries of the four municipalities, that is, to exclude the unorganized territory from the Municipality of Greenstone.

72 LL58 adopted the grounds relied on by TCPL in its application for judicial review. In addition, it relied on the following grounds:

3. The First Nation has an unresolved claim based on aboriginal rights and title, or alternatively based on treaty land entitlement or alternatively based on the Crown's failure to give the First Nation an opportunity to enter into Treaty No. 9 in 1906;

4. The existing Reserve of the First Nation would be completely surrounded by the proposed Municipality of Greenstone if its boundaries are not altered;

5. The resolution of the Land Claim of the First Nation will likely involve the transfer of significant amounts of Crown land to the First Nation within an area reasonably proximate to the existing Reserve of the First Nation and the enormous expansion of municipal boundaries will create severe impediments to the transfer of such land;

6. Traditional activities of members of the First Nation will come under municipal jurisdiction and regulation, including taxation, if the boundaries of Greenstone are not altered.

7. The First Nation was not accorded procedural fairness in connection with the work of the Commission;

8. The Order of the Commission does not give reasons for the annexation of previously unorganized territory to the Municipality of Greenstone, or in the alternative, such reasons as are given are insufficient in law to justify the annexation of that territory;

9. The provisions of the *Constitution Act, 1982*, as amended, particularly section 35(1);

The Reasons for Judgment of the Divisional Court

73 As I have noted, the reasons for judgment of O'Driscoll J. are reported in (1997), [1998] 2 C.N.L.R. 240 (Ont. Div. Ct.). Following an extensive review of the substance of the applications for judicial review, the parties, the personnel of the MMAH, previous annexation applications, the legislative scheme which established the commission, the workings of the commission

and the reasons of the commissioner in support of the restructuring proposal at p. 272, O'Driscoll J., commenced his analysis of the issues raised by the applicants.

74 He concluded that the court's "jurisdiction" to hear the applications is to be found in the definition of "statutory power of decision" in s. 1 of the *Judicial Review Procedure Act*, and in s. 2 of the Act. He then described the ambit of review which applied to the court's review of the commission's Final Proposal and Order. In doing so, he adopted as the appropriate standard of review the reasoning of the Divisional Court (*per* Archie Campbell J.) in *Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 (Ont. Div. Ct.), at 44, on an application for judicial review of an order of the Health Services Restructuring Commission. At pp. 272-3 O'Driscoll J. stated:

> My review of the Final Proposal and Order is confined to whether the Commission:
>
> (i) contravened the law, or
>
> (ii) exceeded its jurisdiction, or
>
> (iii) acted in such a way as to lose its jurisdiction, or
>
> (iv) failed to exercise its jurisdiction

In his endorsement expressing the unanimous opinion of the Divisional Court, Campbell J. wrote:

> The court's role is very limited in these cases. The court has no power to inquire into the rights and wrongs of hospital restructuring laws or policies, the wisdom or folly of decisions to close particular hospitals, or decisions to direct particular hospital governance structures. *It is not for the court to agree or disagree with the decision of the Commission*. The law provides no right of appeal from the Commission to the court. *The court has no power to review the merits of the Commission's decisions. The only role of the court is to decide whether the Commission acted according to law in arriving at its decision*. [Emphasis added.]

Thus, O'Driscoll J. concluded that the power of the court to review a decision of the commission was limited to deciding "whether the Commission acted according to law in arriving at its decision".

75 The Divisional Court applied the standard of review articulated in *Pembroke* in a subsequent judicial review of another order of the Health Services Restructuring Commission in *Russell v. Ontario (Health Services Restructuring Commission)* (1998), 13 Admin. L.R. (3d) 196 (Ont. Div. Ct.). An appeal from that decision to this court was dismissed: (1999), 175 D.L.R. (4th) 185 (Ont. C.A.); leave to appeal to the Supreme Court of Canada was refused on February 17, 2000: (2000) (S.C.C.). In *Russell* there was no consideration given by this court to the appropriate standard of review, nor was there any reference to the standard of review articulated in *Pembroke*. I note, as well, that the *Pembroke* standard of review was also applied in *Wellesley Central Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 3 Admin. L.R. (3d) 137 (Ont. Div. Ct.) and in *Lalonde v. Ontario (Commission de restructuration des services de santé)* (1999), 181 D.L.R. (4th) 263 (Ont. Div. Ct.).

76 As I understand his reasons for judgment, O'Driscoll J. allowed the three applications for judicial review on five grounds. Some of the grounds are common to all of the applications, while others are unique to TCPL's application and the applications of the First Nation respondents. What follows is a review of each of the grounds.

(1) The legality of the restructuring proposal and order

77 In a ground that is common to all of the respondents, O'Driscoll J. concluded that in ordering the amalgamation of the towns of Geraldton and Longlac and the townships of Beardmore and Nakina as a town under the name " The Corporation of the Municipality of Greenstone" and annexing thereto the unorganized territory, the commissioner exceeded his statutory jurisdiction. His reasons for this conclusion are found in the following brief passage at p. 275:

> Ontario Regulation 253/97, (filed July 2, 1997), which established the Commission states:

> 3. (1) The following are the types of restructuring that may be included in the structuring proposal to be developed by the commission: ...
>
> 3. Incorporating a local municipality. ...
>
> (2) Subsection (1) does not include a restructuring that results in, ...
>
> (f) unorganized territory becoming part of municipality that is incorporated under paragraph 3 of subsection 3(1). ...

Section 25.3(3) of the *Municipal Act* states:

> A restructuring proposal shall not provide for a type of restructuring other than a prescribed type of restructuring.

In my view, the Final Proposal and Order proposes the incorporation of a new municipality (Greenstone) and purports to annex unorganized territory to Greenstone. The annexation of such unorganized territory is directly contrary to Ontario Regulation 253/97 and, therefore, the *annexation provision* of the Final Proposal and Order is null and void and of no force and effect. [Emphasis added.]

As I understand it, the effect of this conclusion is that the unorganized territory inhabited, in part, by the First Nation respondents, was excluded from the restructuring proposal, much as the OMB had decided in 1994.

(2) Failure to consult with First Nations

78 In a ground that is common to the First Nation respondents, at p. 276 O'Driscoll J. found that "the Commission lost its jurisdiction when it failed to consult at all with LL58 and failed to properly, adequately and meaningfully consult with NAN and GFN" because these respondents "would have been impacted the most by the annexation". He appears to have based this finding on certain conclusions reached by Wilson J. and Dickson J. in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), which are relevant to the facts of that case, and on certain passages from the reasons of Dickson C.J.C. and La Forest J. in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) which, when read in context, are part of their analysis in respect to the burden that rests on the government when government action or legislation is challenged on the ground that it has infringed or has a negative effect on any Aboriginal right protected under s. 35(1) of the *Constitution Act, 1982*. Section 35(1) reads:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

79 As well, O'Driscoll J. based this conclusion on his findings drawn from the evidence presented by the First Nation respondents, to which I have referred, that these respondents have "*bona fide* unresolved [land] claims" and "have genuine, well grounded fears that they will be adversely affected if the Crown lands are brought under a municipal cover". In addition, he found that the "land claims of LL58 would be made more difficult and NAN and GFN would lose some of their traditional hunting grounds to municipal strictures". He appeared to be critical of "the Minister Responsible for Native Affairs and all his counsel and solicitors" for not "protecting/explaining the position of the aboriginal people" to the commission.

80 On this ground, O'Driscoll J. concluded at p. 277:

> .... in view of the history of what has transpired between one branch of the Government of Ontario and these First Nations regarding claims and treaty rights, the Commission failed to carry *out its duty to consult with and protect these aboriginal peoples from threats to aboriginal rights and interests that were being proposed and propounded by another branch of the same government*. [Emphasis added.]

As I interpret this finding, the judge superimposed on the legislative scheme a duty on the commission to consult with Aboriginal people whose constitutionally protected rights or land claims *might* be affected by a restructuring proposal.

(3) Failure to apply the "three filters" test

81 The third ground on which the applications for judicial review were granted was the failure of the commissioner to apply the "three filters" test, applied previously by the OMB when it had jurisdiction over municipal restructuring, in deciding an application for municipal restructuring. O'Driscoll J. rejected the submission of counsel for the Crown that the *Municipal Act* does not require that the commission consider principles previously applied by the OMB in its decision-making process under different legislation and that the amendments to the Act establishing a restructuring commission, together with the principles to be considered contained in the commission's Terms of Reference, were intended to replace any criteria for restructuring that had been established previously. O'Driscoll J. reached this conclusion at p. 279:

> The amendments, regulations, guidelines and terms of reference state that "these principles will be taken into consideration". Nothing has been pointed out to me in the "new regime" that says "only these principles" will be taken into consideration.
>
> . . . . .
>
> In my view, the touchstones and benchmarks in restructuring and annexation that still apply are the "filters" described by the OMB:
>
> (i) the greatest good,
>
> (ii) common sense, and
>
> (iii) fairness.
>
> Nowhere in the "new process" do I see that it is to be "restructuring by ministerial or commission fiat". Surely, the Respondents do not contend that the "three filters" are obsolete and inapplicable.

82 As I interpret this, and the following ground, O'Driscoll J. was engaged in a review of the merits of the commission's decision which, as the Divisional Court had stated in the passage from *Pembroke* that he had quoted earlier, was beyond the role of the court on an application for judicial review of the commission's decision.

(4) The restructuring proposal constituted a "tax grab"

83 The fourth ground on which the judicial review was granted pertains to the application of TCPL. This ground bears the sub-title "The 'Filters' and TCPL". O'Driscoll J.'s analysis considered, and applied, the evidence of the experts retained by TCPL, Mr. Lehman and Ms. Slack, to which I referred earlier, as well the following statement of the OMB in the reasons given by it following Geraldton's 1993 application for restructuring: "There is no rationale to annex strictly for the purpose of a tax grab". Referring to this statement, at p. 279 O'Driscoll J. concluded: "In my view, that principle remains because it complies with the 'three filters'."

84 On the basis of Mr. Lehman's evidence, O'Driscoll J. found that nothing had changed since the reasons given by the OMB's decision of March 11, 1994. As well, he accepted Ms. Slack's opinion that there had been insufficient analysis by the commissioner to enable him to make an informed decision as to the financial impact of the contemplated restructuring and that "this municipal restructuring, through amalgamation and annexation is a 'tax grab'." Finally, he referred to *Canadian National Railway v. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23 (B.C. C.A.) in which a by-law had been quashed on the ground that it had been passed without jurisdiction because its purpose was solely to create a tax base.

85 O'Driscoll J. expressed his conclusions with respect to this ground at pp. 281-2:

> 3. In my view, the Commission acted without any evidence upon which to base its annexation order. It had no financial analysis or report that would in any way give credence to the annexation order.
>
> The Commission viewed this as a "window of opportunity" to order the annexation that the OMB had consistently referred to as a "tax grab" because it did not qualify under the "three filter test".

> In my view, the Final Proposal is deceptive. It claims to adhere to the " three filters" of the OMB but then turns about and comes to the opposite result on the same set of facts.
>
> . . . . .
>
> In my view, the Commissioner lost jurisdiction and credibility when he closed his eyes to a "tax grab" and then opened his eyes, looked through a "window of opportunity" and, on the same facts, saw the basis for annexation.

(5) Reasonable apprehension of bias

86 The fifth ground on which the applications for judicial review succeeded was that there was a reasonable apprehension that the commissioner was biased. O'Driscoll J. referred to a speech made by the Minister in 1996 in which he stated that the legislation was to be amended to provide for the determination of municipal restructuring by "an independent third party", and to his earlier review of the workings of the commission, and made the following findings at p. 282:

> 3. In my view, the review shows beyond all doubt that MMAH was anything but a disinterested party to the outcome of this Commission. The Commission had its office in the office of MMAH, Mr. Rees "collaborated" with the Commissioner and "crafted" the Draft Proposal. The Draft Proposal did not go out until after the Commissioner met with MMAH staff and went over the text. Everything was filtered through Mr. Robb Anderson, Mr. Ian D. Smith or Mr. Rees. Mr. Ian D. Smith passed on documents from the OMB hearing that he felt were relevant. The Commissioner travelled with and socialized with MMAH personnel.
>
> 4. It would not be unfair to say that if you saw the Commissioner, there would be someone from MMAH with him.
>
> 5. The bottom line question is this: were the Applicants treated fairly in view of the conduct of the Commission? My answer is: "No".
>
> It is difficult to ascertain whether the Commissioner was a willing or an unwilling captive of MMAH but it makes no difference. Either way, the perception of an informed spectator had to be that the Commissioner was simply doing the bidding of MMAH and doing it on a fast track.

87 After quoting Dickson J. in *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.), at 630 dealing with principles of natural justice which apply to administrative tribunals, including the duty of the tribunal to act fairly, O'Driscoll J. arrived at this conclusion at p. 283:

> I hold that the Commission lost jurisdiction through the appearance of bias and thereby denied fairness to the Applicants.
>
> It is not my duty or place to comment upon how a Commission under s. 25.3 of the *Municipal Act* should be conducted. However, I am constrained to say that this case could be used as a text book of how it should not be conducted.

(6) Violation of Aboriginal or treaty rights

88 O'Driscoll J. expressly declined to consider the request of NAN and GFN that the Final Proposal and Order be quashed on the ground that they infringed their rights guaranteed by s. 35 of the *Constitution Act, 1982*, for the following reason found at p. 277:

> In view of the fact that the Applications succeed on other grounds, I do not find it necessary to go through the extensive analysis as set out in *R. v. Sparrow* (*supra*):
>
> (i) was there an infringement?
>
> (ii) if yes, was it reasonable?
>
> (iii) did it impose undue hardship?

(iv) did it deny the aboriginal people the preferred means of exercising their rights?

Therefore, these reasons are neutral on the question of whether or not there has been an infringement of "existing aboriginal and treaty rights" of NAN and/or GFN contrary to s. 35(1) of the *Constitution Act, 1982*.

Issues

89 In my view, the overriding issue presented by this appeal is the extent of the supervisory jurisdiction of the court in an application for judicial review of a restructuring proposal made by a restructuring commission appointed under s. 25.3 of the *Municipal Act* to carry out a legislative function in a political process. On the basis of the findings and conclusions of the Divisional Court and the record before it, this issue can be best discussed by an analysis of the following sub-issues:

(1) The role of the court on judicial review of a restructuring proposal ordered by a restructuring commission.

(2) The standard of review in reviewing the Final Proposal and Order of a restructuring commission.

(3) Whether the Divisional Court, in the exercise of its supervisory role, was correct in quashing the Final Proposal and Order on the grounds that the commission:

(a) exceeded its jurisdiction in ordering a restructuring proposal that was precluded by the applicable legislation;

(b) lost its jurisdiction by failing to consult with NAN, GFN and LL58;

(c) erred in failing to apply the "three filters" test developed and applied by the OMB when it had jurisdiction over municipal restructuring;

(d) erred in ordering a municipal restructuring which constituted, or resulted in, a "tax grab";

(e) performed its statutory role in a manner which gave rise to an appearance of bias on its part, thereby denying fairness to the respondents.

(4) Whether this court should express disapproval of allegedly *ad hominem* remarks about the commissioner made by O'Driscoll J.

(5) The cross-appeal of NAN and GFN.

90 There is an additional issue arising from the cross-appeal of NAN and GFN asking that the judgment of the Divisional Court be varied to include a declaration that the commission's Final Proposal and Order infringed rights guaranteed by s. 35 of the *Constitution Act, 1982* and are therefore of no force and effect.

91 As I will explain, I would allow the appeal on the ground that the Divisional Court erred in respect to each of the grounds on which it quashed the Final Proposal and Order. As well, it is my view that it is inappropriate for this court to consider the issue raised by the commissioner concerning the comments made about him personally. As for the cross-appeal of NAN and GFN, this issue was not suitable for resolution in a summary manner by the Divisional Court on the basis of the record before it and, for the same reason, cannot be considered by this court.

Analysis

92 Before considering the issues that I have identified, I find it helpful to elaborate on my earlier comments concerning the nature, purpose and process of a restructuring commission appointed pursuant to s. 25.3(1) of the *Municipal Act*.

93 As for the nature of the commission, unlike a tribunal such as the OMB which, as a creature of statute, has an ongoing function, a commission under s. 25.3 is created as needed. When the commission has developed its restructuring proposal and

made its order, it is at an end. Unlike the OMB, the members of which are long serving and have developed an expertise in matters within its jurisdiction the person, or persons, appointed to a commission do not necessarily have expertise in municipal restructuring. Indeed, such persons may serve on a commission but once. Unlike the OMB, a commission is not required to hold an adversarial hearing in which opposing parties present evidence and in which a decision is reached by the application of substantive rules. At most, it is required to consult with certain parties, may consult with others and must give persons living and carrying on business in the impacted geographic area the opportunity to respond to its draft proposal. It must provide its Final Proposal by a stipulated date and, as I read the applicable legislative scheme, there is no statutory requirement that it provide reasons supporting its Final Proposal. No appeal lies from the Final Proposal and Order of a commission. No privative provision is contained in the legislative scheme that applies to a commission.

94 Therefore, a commission does not engage in an adjudicative process. In my view, the nature of the decision required of the commission is clear and is stipulated by s. 25.3(2) of the Act read together with s. 1 of O. Reg. 253/97, which created it. Section 25.3(2) states:

> 25.3 (2) The Commission *shall develop* a restructuring proposal for the prescribed locality or for *such part* of it as the Commission considers advisable. [Emphasis added.]

The "prescribed locality" is the geographic area described in the Schedule referred to in s. 1 of the Regulation. Thus, the commission had no discretion to refuse to develop a restructuring proposal. Its discretion was limited to whether the proposal encompassed all, or part, of the prescribed locality.

1. Judicial review of a restructuring proposal ordered by a restructuring commission

95 In the context of the above background, I will consider the scope of judicial review of a restructuring proposal ordered by a restructuring commission in the exercise of its statutory powers. There is nothing which I can add to the opinion of Campbell J. on behalf of the Divisional Court in *Pembroke, supra*, in commenting on the role of the court in reviewing a decision of the Health Services Restructuring Commission appointed under the *Ministry of Health Act*, R.S.O. 1990, c. P. 40 to restructure health care services throughout Ontario. Each commission was established with a broad mandate to effect restructuring - the Health Services Restructuring Commission to restructure health services in Ontario, and a restructuring commission to develop a proposal for municipal restructuring. As well, each commission was clothed with the power to issue directions or an order in the place of the relevant Minister, and was given a relatively short period of time to complete its task. Because of the similarity of the tasks of the Health Services Restructuring Commission and a restructuring commission appointed under s. 25.3 of the *Municipal Act*, I am of the view that the opinion of Campbell J. applied to the role of the Divisional Court in this appeal. For the sake of convenience, I will repeat what was said by Campbell J. at p. 44:

> The court's role is very limited in these cases. The court has no power to inquire into the rights and wrongs of hospital restructuring laws or policies, the wisdom or folly of decisions to close particular hospitals, or decisions to direct particular hospital governance structures. It is not for the court to agree or disagree with the decision of the Commission. The law provides no right of appeal from the Commission to the court. The court has no power to review the merits of the Commission's decisions. The only role of the court is to decide whether the Commission acted according to law in arriving at its decision.

96 These principles are quite clear and, as noted previously, were applied in *Russell, Wellesley Central Hospital* and *Lalonde* . Indeed, early in his reasons O'Driscoll J. appeared to adopt them and stated that his review of the Final Proposal and Order was confined to whether the commission contravened the law, exceeded its jurisdiction, lost its jurisdiction or failed to exercise its jurisdiction.

97 As well, it is helpful to refer to the reasons of the Divisonal Court in *Lalonde* in which the directions issued by the Health Services Restructuring Commission were attacked on constitutional and administrative law grounds. In rejecting the administrative law attack, at p. 295 the Divisional Court stated that it "has repeatedly emphasized the limited scope for judicial

review of directions given by the Commission" for the reasons stated by Campbell J. in *Pembroke*. After quoting Campbell J.'s reasons which I have quoted, the court added at p. 296:

> This role reflects the very broad public policy mandate assigned to the Commission by the Government for the purpose of restructuring the system of health care in Ontario. The Court can interfere only when the Commission has not acted according to law in arriving at its decision.

After pointing to the many submissions received and considered by the commission, as well as the consultations in which it engaged, the court continued at p. 296:

> It acted on evidence and materials provided to it and applied its policy criteria regarding the quality, accessibility and affordability of health care services in the Region. The Commission's decisions are fundamentally matters of judgment. Moreover, as the *Pembroke Hospital* case reminds us, they are made in a context which "engages strong feelings with the community". Reasonable people can differ on the solutions to be applied.

In my view, these observations apply to the circumstances of this appeal.

98 I would also observe that in *Lalonde* the parties were in agreement that the court could review the directions issued by the commission on the ground that they were "patently unreasonable" or "clearly irrational". Without commenting on whether this constituted the appropriate standard of review, the Divisional Court found that the evidence failed to establish that the commission based its directions on irrelevant considerations, and, at p. 297, rejected the argument that the directions " should be set aside on ordinary administrative law grounds because they are patently unreasonable or based upon irrevelant considerations".

99 I cannot say, that in principle, O'Driscoll J. was wrong in describing the limited nature of the judicial review of the commission's Final Proposal and Order. The review is limited to a consideration of whether the commission properly exercised the powers conferred on it by the *Municipal Act* and the Regulations. In other words, the judicial review is limited to whether a restructuring commission, as a creature of statute, properly exercised the powers conferred on it by the legislature. Its exercise of its statutory powers is reviewable to the extent of determining whether its actions are *intra vires*. Such a review does not encompass a consideration of the merits of the restructuring proposal, or agreement or disagreement with it. Regrettably, O'Driscoll J. strayed from the narrow path of the review that he had charted. Perhaps because the respondents had invited him to examine the large amount of evidence which they had filed in support of their applications, as I will explain it is difficult to escape the conclusion that he applied the "three filters" test formerly applied by the OMB, assessed the merits of the restructuring proposal and substituted his own opinion for that of the commission.

2. Is there a standard by which the court, on judicial review, can review the merits the restructuring proposal?

100 In my view, prior to the decision of the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.) the short answer to this question would have been "no". There was some argument by counsel about whether the appropriate standard of review was correctness, patent unreasonableness, or reasonableness *simpliciter*. However, this analysis generally applies to judicial review of an adjudicative tribunal, and the commission was not such a tribunal. Clearly, it did not engage in, nor was it required to engage in, the three-step process inherent in adjudicative decision-making: finding the facts; identifying or declaring the applicable legal rule or principle; and applying the rule or principle to the facts as found. The commission was not required to make a decision at all. As I have pointed out, under s.25.3(2) the commission was given a responsibility it could not refuse: "The Commission *shall* develop a restructuring proposal for the prescribed locality or for such part of it as the Commission considers advisable."

101 In my opinion, the statutory grant of power to the commission comes within the category of what has been described as "hard to review" administrative action: Donald J.M. Brown and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, (1998) Canvasback Publishing 15-61 to 15-65. As Brown and Evans point out at 15-62, the courts have narrowly circumscribed judicial review of administrative action because of its political, policy or legislative nature. In this regard, in *Pembroke, supra*, at p. 46, in discussing the Health Services Restructuring Commission, Campbell J. described

that commission as the surrogate of the Minister, adding: "The Commission stands in the shoes of the Minister and exercises the Minister's powers. On the spectrum between political decision-making and judicial decision-making, the Commission is close to the extreme political/legislative end of the spectrum." Although it may not be that the restructuring commission stands in the Minister's shoes, it is not far removed from them as its statutory role is political, policy and legislative in nature. A similar opinion was expressed by this court in *Bruce (Township) v. Ontario Minister of Municipal Affairs and Housing*, *supra*, in which judicial review was sought of a municipally generated restructuring proposal under s. 25.2 of the *Municipal Act*. In a comment at p. 320 which has application to this appeal, Osborne J.A. stated: " It is not for the courts to second guess the restructuring decision made by County Council."

102 Historically the courts have limited their review of the type of administrative action at issue in this appeal to an assessment of whether the commission acted according to law in arriving at its restructuring proposal or directions as illustrated by the series of cases dealing with directions issued by the Health Services Restructuring Commission. This would exclude any consideration of the merits of the proposal or directions.

103 It is arguable that after *Baker* a reviewing court may go beyond this to scrutinize the administrative action using the standard of review that is appropriate to the administrative action under review. See the contrasting views of Brown and Evans at pp. 15-66 to 15-68 and Robertson J.A. in *Suresh v. Canada (Minister of Citizenship & Immigration)* [(2000), 183 D.L.R. (4th) 629 (Fed. C.A.)], a judgment of the Federal Court of Appeal released January 18, 2000, at paragraphs 129-141. In this appeal, the highly specialized task given to the commission together with the nature of the task, centered as it is on policy formulation, require the greatest deference of a reviewing court. As I have pointed out, this was the approach which the Divisional Court was prepared to take in *Lalonde* without considering *Baker* . In my view, unless the restructuring proposal developed by the commission is patently unreasonable, the court will not interfere.

104 The restructuring proposal developed by the commission can by no stretch be said to be patently unreasonable. It is not, in the language of *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), irrational. The commission's reasoning, reproduced earlier in these reasons, is clear and is there for all to see. Even if a reviewing court, after *Baker* , can apply a standard of review to the restructuring proposal put forward by the commission, no intervention is warranted.

105 I would, however, add the caveat that non-adjudicative administrative action is subject to review on the grounds that it is arbitrary, discriminatory, or not taken in good faith which, in my view, would include bias on the part of the commission.

3(a) The legality of the commission's Final Proposal and Order

106 The Divisional Court found that the Final Proposal and Order was "null and void and of no force and effect" because it contravened s. 3(2)(f) of O. Reg. 253/97, which is the Regulation that established the commission. The court found that the Final Proposal and Order proposed "the incorporation of a new municipality 'Greenstone' and purports to annex unorganized territory to Greenstone", which was found to be contrary to s. 3(2)(f).

107 Under s. 3(1) of the Regulation the commission was empowered to include in a restructuring proposal six types of restructuring including, *inter alia*, amalgamating local municipalities, incorporating a local municipality and annexing unorganized territory to a municipality. However, it was precluded by s. 3(2)(f) from including in a restructuring proposal the annexation of an unorganized territory to a municipality that is incorporated under s. 3(1).

108 It appears that O'Driscoll J. misinterpreted the nature of the commission's Order of August 29, 1997, which is two parts. Under the first part, the Towns of Geraldton and Longlac and the Townships of Beardmore and Nakina were "*amalgamated* as a town under the name 'The Corporation of the Municipality of Greenstone'." Under the second part, the unorganized territory was " *annexed* to" Greenstone. As the first part of the Order did not *incorporate* a municipality, it follows that O'Driscoll J. operated on a misinterpretation of the nature of the Order when he declared it to be null and void. The Order did not, as he believed, annex unorganized territory to a newly incorporated municipality.

109 Therefore, O'Driscoll J. erred in finding the Final Proposal and Order to be illegal on the ground that the commission did not have the power to make it.

3(b) The duty of the Crown to consult with First Nations

110 O'Driscoll J. held that the commission lost its jurisdiction when it failed to consult with LL58, and did not consult "properly, adequately and meaningfully" with NAN and GFN. In doing so he purported to apply the reasoning of the Supreme Court of Canada in *Sparrow* , *supra*. This holding was informed by his findings that First Nations had "*bona fide*, unresolved [land] claims" which, as a result of the restructuring proposal, would be "made more difficult", and that NAN and GFN would lose some of their traditional hunting grounds to "municipal strictures". It was informed, as well, by his belief that "the Minister Responsible for Native Affairs" had not performed his duty to advocate "the position of the Aboriginal people" before the commission.

111 Apart entirely from my view that O'Driscoll J.'s findings, which inform his conclusion, were not available on the record before him, it is my opinion that he erred in concluding that the commission had lost its jurisdiction when it failed to consult with the First Nation respondents. It will be recalled that under s. 25.3(4) of the *Municipal Act* the commission was required to consult only with each municipality in the geographic area in question. As for additional consultation, s. 25.3(4) provides that the commission "*may* consult with such other bodies and persons as the commission considers appropriate". Therefore, under the Act no obligation was placed on the commission to consult with First Nations whose people lived on land situate within the geographic area. It follows, that even if the commission had no consultation with the First Nations, it could not lose its jurisdiction through any failure to comply with s. 25.3(4). Accordingly, any obligation that the commission may have had to consult with the First Nations had to derive from another source.

112 In my view, O'Driscoll J. incorrectly applied the concept of the Crown's duty to consult with First Nations in setting aside the restructuring proposal on the ground of loss of jurisdiction. As I will explain, he elevated the Crown's duty to consult with First Nations from merely being one, of several, justifactory requirements to be met by the Crown when a challenge is mounted to a law, or government action, on the ground that it unduly interferes with Aboriginal rights or treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, to an independent ground on which such a law, or government action, may be challenged.

113 The starting point is the proposition that Aboriginal rights and treaty rights are recognized and affirmed by s. 35(1). The case in which the Crown's duty to consult with a First Nation first was discussed is *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). At issue in that case was the constitutionality of federal fishing regulations imposing a permit requirement and prohibiting certain methods of fishing. The Musqueam First Nation argued that the federal fishing requirements interfered with their Aboriginal fishing rights and were invalid pursuant to s. 35(1). At trial, the Musqueam proved that salmon is not only an important source of their food, but also plays a central role in Musqueam cultural identity.

114 The Supreme Court of Canada found for the Musqueam First Nation, holding that Aboriginal rights recognized and affirmed by s. 35(1) include practices that form an integral part of an Aboriginal community's distinctive culture. What emerged from this case is that where a First Nation, in challenging the constitutionality of a law, or governmental action, establishes a *prima facie* infringement of a right recognized and affirmed by s. 35(1), it is for the government, where it intends to respond to the challenge, to establish that the law in question meets certain articulated justificatory standards. This process is similar to that applied where a law is challenged on *Charter* grounds and the government seeks to justify it under s. 1 of the *Charter*.

115 In *Sparrow* , one of the articulated justificatory requirements is that the Crown consult with Aboriginal people prior to introducing natural resource conservation measures that interfere with the Aboriginal right to fish. At p. 1119 the Supreme Court held that the constitutionality of fish conservation regulations that interfere with the exercise of an Aboriginal right to fish would depend, in part, "on whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented".

116 In two subsequent decisions the Supreme Court indicated that the Crown is under a duty to consult with Aboriginal people in the event of an infringement of a treaty right recognized and affirmed by s. 35(1) and where the Crown seeks to interfere with rights associated with Aboriginal territorial interests.

117 In the first decision, *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.), the issue was whether the Treaty 9 right to hunt provided a defence under Alberta's wildlife legislation which prohibited hunting out-of-season and hunting without a license. After finding that the right to hunt was a treaty right within the meaning of s. 35(1), the Supreme Court held that the Crown can abridge treaty rights provided the law in question meets justificatory standards similar to those that operate in relation to laws that interfere with the exercise of Aboriginal rights, which includes a duty to consult.

118 In the second decision, *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), hereditary chiefs of two First Nations claimed Aboriginal title to 58,000 square kilometers of the interior of British Columbia. The Supreme Court ruled that Aboriginal title is protected by s. 35(1). The court stated at p. 1113 that where it is established that there has been an interference with rights associated with Aboriginal title, "[t]here is always a duty of consultation" which forms part of the inquiry into " whether the infringement of Aboriginal title is justified"

119 In my view, what these cases decide is that the duty of the Crown to consult with First Nations is a legal requirement that assists the court in determining whether the Crown is constitutionally justified in engaging in a particular action that has been found to *prima facie* infringe an existing Aboriginal or treaty right of a First Nation. It is only after the First Nation has established such infringement through an appropriate hearing that the duty of the Crown to consult with First Nations becomes engaged as a factor for the court to consider in the justificatory phase of the proceeding. Thus, as Sonia Lawrence and Patrick Macklem point out in their helpful article, *From Consultation to Reconciliation: Aboriginal Rights And The Crown's Duty To Consult* (2000), 70 Can. Bar Rev. 252 at 255:

> ... Properly understood, the duty to consult also acts as a prelude to a potential infringement of an Aboriginal or treaty right. Consultation requirements ought to be calibrated according to the nature and extent of Aboriginal interests and the severity of the proposed Crown action in order to provide incentives to the parties to reach negotiated agreements. In most cases, the duty requires the Crown to make good faith efforts to negotiate an agreement with the First Nation in question that translates Aboriginal interests adversely affected by the proposed Crown action into binding Aboriginal or treaty rights.

120 As Lawrence and MacKlem point out at p. 262, "in most cases involving the assertion of Aboriginal or treaty rights, the First Nation in question is simultaneously attempting to establish the existence of its rights and prevent interference with those rights by the Crown or a third party." As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

121 Although NAN and GFN challenged the commission's Order on both the administrative law ground, based on the failure of the Crown to consult, and on the ground that the Final Proposal and Order infringed s. 35(1) of the *Constitution Act, 1982*, because of his finding on the administrative law ground O'Driscoll J. concluded that there was no need to deal with this issue. I note, however, that NAN and GFN based their constitutional challenge to the proposal on the ground that it *may* result in the infringement of constitutionally protected Aboriginal rights. Because it bears on my disposition of the cross-appeal of NAN and GFN, I find it convenient at this time to observe that if O'Driscoll J. had dealt with the constitutional challenge to the restructuring proposal, it appears to me that the evidence before him did not conclusively establish the requisite treaty or Aboriginal rights. Moreover, from this inadequate evidentiary record, in my view, it is speculative whether such treaty or Aboriginal rights, should they exist, will be impacted adversely by the restructuring proposal.

122 As well, to the extent that it is relevant, there was also a serious deficiency as to the particulars of the First Nation respondents' land claims, including the status of the negotiations and precisely how the creation of a new municipality would in fact impede, or jeopardize, the resolution of the claims. There was no evidence that this would prevent the land claims from continuing. The land claims may, or may not, succeed in whole or in part. In my view, nothing in the record enables this court to even predict their outcome.

123 In summary, for the reasons I have given, O'Driscoll J. erred in setting aside the commission's Final Proposal and Order on the ground that the commission lost its jurisdiction when it failed to consult the First Nation respondents. In coming to this conclusion, I have found it unnecessary to deal the position taken by the appellant, that, if the commission were under a duty to consult, there was a reciprocal duty on the First Nations to engage in the consultative process, which they had not fulfilled. However, in my view, I am bound to say that there is considerable merit to this position: see, *e.g.*, *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C. C.A.), at 718 *per* Finch J.A..

3. (c) Was the commission required to apply the "three filters" test?

124 The Divisional Court was of the view that the commission should have applied the "three filters" test formerly applied by the OMB when considering applications for municipal restructuring. O'Driscoll J. concluded that it was required to do so. It appears, as well, that he felt the commission was bound to follow the result reached by the OMB in 1994 on Geraldton's restructuring application. It appears that he then examined the merits of the Final Proposal and Order and concluded, in essence, that the commission should not have developed the restructuring proposal. In examining the merits of the proposal, he took into consideration evidence which TCPL had filed and seemingly applied the "three filters" test.

125 In my view, the commission was not required to apply the "three filters" test. There are two reasons why I have reached this conclusion. The first reason is that the statutory scheme under which the commission operated did not require that it do so. The second reason is that at common law the commission was not required to follow the approach taken by the OMB, nor was it bound to reach the same conclusion which the OMB reached in 1994 on Geraldton's restructuring application. Thus, the Divisional Court's opinion that the "three filters" test ought to have been applied by the commission was not relevant to the commission's jurisdiction on judicial review where, as I have explained, the issue was whether the commission had properly exercised its statutory powers.

126 Dealing with the first reason, as I have explained earlier, the legislation which provided for the appointment of a commission to develop a restructuring proposal was new legislation intended to replace the role of the OMB in respect to municipal restructuring. It did not require the commission to apply the " three filters" test in developing its restructuring proposal. Consequently, O'Driscoll J. was incorrect in interpreting the statutory scheme as containing "the touchstones and benchmarks ... described by the OMB". The principles of restructuring prescribed by the Minister were new and different. In any event, in that portion of the commissioner's reasons which are reproduced in paragraph 60, he stated that he took into consideration principles which were identical to the "three filters" in carrying out his mandate and in arriving at a restructuring proposal that was "in the best interests of all parties ... not just the interests of one of them". This passage from the commissioner's reasons was included in his response to the concern of TCPL that the restructuring proposal amounts to a "tax grab", which is the next issue I will consider.

127 I do not take from the commissioner's comments, read in the context of the totality of his reasons, that he undertook to apply these principles exclusively, or in the same manner as had the OMB. Unlike the process and restructuring principles that are prescribed by the statutory scheme, the " three filters" are not prescribed by law as conditions precedent. As well, the OMB applied the "three filters" test while performing an adjudicative role that required it to resolve competing interests. As I have explained, the commission was not engaged in an adjudicative exercise.

128 As for the second reason, the commission was not required by the principle of *stare decisis* to follow the decisions of the OMB. Rather, it was required to apply its own judgment, unfettered by previous decisions of the OMB, particularly its 1994 decision respecting Geraldton's application. O'Driscoll J. asked, rhetorically, whether anything had changed since the OMB's reasons of March 11, 1994. Whether anything had changed was a matter for consideration by the commission and not by the court, and any determination in respect to changed circumstances is not reviewable by the court on judicial review.

129 Moreover, there is a well-accepted principle of administrative law that *stare decisis* does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it. See, *e.g.*, *Evans v. Canada (Public Service Commission)*,

[1983] 1 S.C.R. 582 (S.C.C.); *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)* (1993), 105 D.L.R. (4th) 385 (S.C.C.).

130 Thus, the Divisional Court erred in holding that the commission was required to apply the "three filters" test, that it was bound by the 1994 OMB decision and in substituting its own view of the merits of the restructuring proposal.

3 (d) Did the Final Proposal and Order constitute a "tax grab"?

131 As I have indicated previously, it is difficult to separate this issue from the previous issue because O'Driscoll J., in concluding that the restructuring proposal amounted to a "tax grab" at the expense of TCPL, purported to apply the "three filters" test in substituting his own decision for that of the commissioner. In doing so, he took into consideration the evidence of Robert Lehman, a land use planner, and Enid Slack, who is experienced in municipal finance and governance, which formed part of the material filed by TCPL. Based on this evidence, he concluded that "the commission acted without any evidence upon which to base its annexation order". He concluded:

> In my view, the Commissioner lost jurisdiction and credibility when he closed his eyes to a "tax grab" and then opened his eyes, looked through a "window of opportunity" and, on the same facts, saw the basis for annexation.

It appears that O'Driscoll J.'s conclusion that the annexation of the unorganized territory amounted to a "tax grab" was derived from *Canadian National Railway v. Fraser-Fort George (Regional District)* (1996), 140 D.L.R. (4th) 23 (B.C. C.A.).

132 As I interpret what is at the heart of the position of TCPL, it has submitted that the restructuring proposal unfairly affects its economic position because it will be required to pay more taxes to the new municipality than it had paid to the province in the past. It submitted, if the commission had before it the evidence which it presented on its application for judicial review, that it would have recognized this unfairness and proposed a form of restructuring that excluded the land on which its pipelines are situated. Thus, its challenge to the restructuring proposal was on its merits.

133 I begin my analysis of this issue by repeating my conclusion that it was not open to the respondents, by way of judicial review, to challenge the proposal on its merits. Whether a particular restructuring proposal is or is not "timely and efficient", or is or is not consistent with "the greatest good of society", do not represent questions of law answerable on judicial review. These are policy issues that the legislature intended the commission, not the court, to decide. To reiterate what I have stated earlier, on judicial review, the court has no authority to decide such questions, nor to quash the commission's order if it differs from the judge's personal opinion, or that of the OMB in an earlier case, as to what form of municipal restructuring achieves " the greatest good". Indeed, with respect, the court had no institutional expertise in arriving at political, economic and social compromises in restructuring the boundaries and the infrastructure of municipalities and unincorporated areas.

134 Moreover, the statutory scheme that applied to the jurisdiction of the commission makes no reference to the level of taxes to be paid by any particular resident, or business, in any municipality or unorganized territory — nor, indeed, to Aboriginal land claims. The commission was given a broad mandate to consider and balance a number of competing interests, which included those of taxpayers. There was no requirement that the restructuring proposal developed by the commission be tax neutral. It will be for the new municipality to determine the taxes to be paid by residents and businesses, who will have available to them the statutory means to challenge the assessment on which their municipal taxes are based.

135 The Divisional Court's view of the merits of the restructuring proposal was informed by the affidavits of Mr. Lehman and Ms. Slack. It was Ms. Slack, in her affidavit, who provided the opinion that the annexation of the unorganized territory ordered by the commission was a "tax grab". The court accepted this opinion and concluded that the commission, instead of carrying out its duty to weigh all of the competing interests, was motivated entirely, or primarily, by an improper desire to impose a large tax on TCPL. To repeat what has been said earlier, it was not for the court on judicial review of the commission's restructuring proposal and order to weigh the credibility of the experts who provided evidence for TCPL against the credibility of the commission on substantive matters such as planning or the sufficiency of financial analysis.

136 O'Driscoll J. relied on *Canadian National Railway* to support his finding that the annexation order was a "tax grab". However, that case is clearly distinguishable on its facts. The decision in that case was based on evidence that a municipality had deliberately created boundaries that were "eccentric and gerrymandered" for the purpose of imposing a tax burden on the railway. In this appeal, there is no evidence that the annexation of the unorganized territory was for the purpose of imposing a tax burden on TCPL. Although an improper motive may permit the court to intervene on judicial review where there is a proper evidentiary foundation, in this appeal there was no evidence of a precise tax increase, if any, and no evidence of bad faith on the part of the commission, such as that it had artificially included a narrow strip of land in the annexation order for no purpose other than to capture tax revenues. Whether a complex municipal restructuring will have some income redistributive effects, with some taxpayers paying more, and others, less, is not relevant to the jurisdiction of the commission.

137 Although O'Driscoll J. placed great reliance on a purported "tax grab", in my view, it is essentially a rhetorical expression to which no legal meaning was assigned. I believe that it can fairly be stated that by alleging a "tax grab", TCPL was claiming that the annexation order was discriminatory. In this regard, I would refer to *Gander (Town) v. Tulk* (1990), 1 M.P.L.R. (2d) 123 (Nfld. T.D.), in which it was held that an extension of municipal boundaries which resulted in different levels of service to taxpayers within a town was not reviewable as being discriminatory.

138 It is my opinion that the decision of the Supreme Court of Canada in *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106 (S.C.C.) affords a complete answer to the position of TCPL. In that case, the appellants alleged that an Order in Council of the federal Cabinet extending the limits of St. John Harbour had been passed for improper motives to increase harbour revenues. By way of background, the Governor in Council had passed an Order in Council extending the limits of the port of St. John. As a result, the water lot of the appellants was brought within the limits of the port. Consequently, harbour dues were claimed from the appellants in respect to their ships that used their water lot. The appellants challenged the validity of the Order in Council extending the harbour limits on the ground, *inter alia*, that it was passed for improper motives, namely, to permit the National Harbours Board to collect harbour dues from the appellants without offering any service in return. The appellants said that this amounted to "bad faith" on the part of the Governor in Council.

139 The Supreme Court rejected the position of the appellants. Accepting that Dickson J., who delivered the judgment of the Supreme Court, was speaking about the powers of the federal Cabinet, there are passages from his reasons that apply to this appeal. It is important to recognize that in passing the Order in Council, the federal Cabinet, like the commission, was acting under statutory authority.

140 In commencing his analysis of the appellants' position, Dickson J. stated at p. 111:

> The mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond judicial review: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at p. 748. I have no doubt as to the right of the courts to act in the event that statutorily prescribed conditions have not been met and where there is therefore fatal jurisdictional defect. Law and jurisdiction are within the ambit of judicial control and the courts are entitled to see that statutory procedures have been properly complied with: *R. v. National Fish Co.*, [1931] Ex. C.R. 75; *Minister of Health v. The King (on the Prosecution of Yaffe)*, [1931] A.C. 494 at p. 533. Decisions made by the Governor in Council in matters of public convenience and general policy are final and not reviewable in legal proceedings. Although, as I have indicated, the possibility of striking down an order in council on jurisdictional or other compelling grounds remains open, it would take an egregious case to warrant such action. This is not such a case.

141 Dickson J. continued at p. 112:

> Counsel for the appellants was critical of the failure of the Federal Court of Appeal to examine and weigh the evidence for the purpose of determining whether the Governor in Council had been motivated by improper motives in passing the impugned Order in Council. We were invited to undertake such an examination but I think that with all due respect, we must decline. It is neither our duty nor our right to investigate the motives which impelled the federal Cabinet to pass the

> Order in Council, *Attorney-General for Canada v. Hallet & Carey Ld.*, [1952] A.C. 427, at p. 445; *Reference re Chemical Regulations*, [1943] S.C.R. 1, at p. 12. ...

142 Dickson J. went on at pp. 114-115 to observe that in the Federal Court there was evidence from which one could conclude that the collection of harbour dues was not an unimportant consideration in the decision to extend the harbour boundaries, but that there was ample evidence that the expectation of increased revenues was not the only reason for doing so. He also observed that the appellants had not been denied an opportunity to be heard. Dickson J. then concluded at p. 115:

> I have referred to these several pieces of evidence, not for the purpose of canvassing the considerations which may have motivated the Governor in Council in passing the Order in Council but to show that the issue of harbour extension was one of economic policy and politics; and not one of jurisdiction or jurisprudence. The Governor in Council quite obviously believed that he had reasonable grounds for passing Order in Council P.C. 1977-2115 extending the boundaries of Saint John Harbour and we cannot enquire into the validity of those beliefs in order to determine the validity of the Order in Council.

143 As I observed earlier, the commissioner indicated that he was convinced that it was desirable to extend the municipal boundaries to protect the area's natural environment and to provide a reasonable basis for future economic development. This illustrates that the prospect of increased tax revenues for the new municipality was not the exclusive reason for the restructuring proposal. As well, as discussed earlier, the statutory scheme did not require the commissioner to hold a hearing and the commissioner fulfilled his mandate in respect to consultation.

144 There is one final point that should be addressed. In my view, affidavit evidence should not have been received by the Divisional Court in respect to this issue. Whether the "tax grab" aspect of the commission's Final Proposal and Order is characterized as an excess of jurisdiction, or a failure to exercise jurisdiction, it is clear that the evidence was presented to supplement the record before the commission for the purpose of demonstrating that the court should substitute its decision for that of the commission. It is precisely to avoid these kinds of non-jurisdictional, non-legal debates on judicial review that this court has held inadmissible affidavit evidence which adds to the record of the tribunal being reviewed without showing jurisdictional error: *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.), leave to appeal to S.C.C. refused (1980), 35 N.R. 85n (S.C.C.).

145 For the foregoing reasons, the Divisional Court erred in quashing the commission's Final Proposal and Order on the ground that it constituted a " tax grab".

3. (e) Was the commission biased?

146 O'Driscoll J. found that there was a reasonable apprehension that the commission was biased. He based this conclusion on the evidence that the commissioner received considerable assistance from staff members of the Ministry which, to him, showed "beyond all doubt that MMAH was anything but a disinterested party to the outcome of this Commission". He found it " difficult to ascertain whether the Commissioner was a willing or unwilling captive of MMAH", and concluded that, either way, "the perception of an informed spectator had to be that the Commissioner was simply doing the bidding of MMAH". Consequently, he held "that the Commissioner lost jurisdiction through the appearance of bias and thereby denied fairness to the Applicants." In my view, neither the test to be applied where it is alleged that a tribunal such as this commission was biased, nor the evidence relevant to that test, established bias.

147 As the Supreme Court of Canada explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at 636, 638-39, the test to be applied to determine whether bias exists, which would be sufficient to nullify a decision of a tribunal, is a flexible one, which will vary with the nature and function of the decision-making body. As I have stated, the commissioner's role required that he make a policy decision after taking into account broad social and economic factors. He was not performing an adjudicative role in the resolution of a dispute between competing parties. The applicable test to determine whether the commission acted with bias is the "closed mind" test: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), at 1197.

148 In my view, the opinion of Cory J. in *Newfoundland Telephone* states the test that the Divisional Court should have applied. That case concerned comments made by a member of a public utilities board responsible for regulating the telephone company. After noting at p. 636 that "all administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine", he reviewed the spectrum approach to determining bias in administrative law, and the test applied in cases involving municipal councillors, such as *Old St. Boniface*. In cases, where elected councillors are involved as members of a board, "dealing with planning and development", Cory J. outlined the appropriate bias test as follows at pp. 638-39:

> ... the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

149 Since the commissioner was not engaged in an adjudicative process, the test, therefore, is not whether bias can be reasonably apprehended, but whether, as a matter of fact, the requirement of open-mindedness had been lost to the extent that it can reasonably be said that he had pre-determined the nature of the restructuring proposal he was by statute mandated to develop. In other words, the reason for not imposing on the commissioner the adjudicative standard of impartiality, namely, a reasonable apprehension of bias, is that the statutory scheme under which he operated contemplates the necessity that he develop a restructuring proposal in respect to all, or part, of the geographic area stipulated in his mandate. See *Zündel v. Canada (Attorney General)* (1999), 175 D.L.R. (4th) 512 (Fed. T.D.), at 521-525.

150 Applying the closed mind test, and recognizing that it was incumbent on the commissioner to develop a restructuring proposal, the evidence does not support a finding that the commissioner was biased in the sense that his mind was closed to the concerns expressed by the respondents. A review of his reasons indicates that he was alert to their concerns.

151 Moreover, the evidence does not support the finding that the commissioner was the "captive" of the Ministry. There was no evidence that the Ministry had expressed its view respecting the nature of the restructuring proposal and that the commissioner merely rubber-stamped it. The commissioner fulfilled his statutory duty to consult with the municipalities, conduct meetings and entertain submissions concerning his draft proposal, and to consult with others at his discretion. Although the commissioner was provided with the assistance of Ministry staff in gathering information and drafting his reasons for the restructuring proposal, there was no evidence that these persons interfered with the integrity or independence of the commission's decision-making process. Indeed, the evidence was to the contrary and is capable of supporting a finding that the commission came to an independent decision.

152 For the foregoing reasons, it is my opinion that the Divisional Court erred in quashing the Final Proposal and Order on the ground of bias.

4. Should this court indicate its disapproval of certain remarks made about the commissioner by O'Driscoll J.?

153 The commissioner, through his counsel, maintained that the Divisional Court in its reasons made unnecessary, harshly critical and disrespectful comments about him, which stand to have adverse consequences for his career and livelihood. In his factum, counsel for the commissioner referred to seven passages from the reasons of O'Driscoll J. that it was submitted were both gratuitous and unfair to the commissioner, as well as harmful to his reputation. Counsel invited this court to state clearly in its reasons that the personal criticisms of the commissioner were unwarranted. We were given no authority for why we should do so.

154 Given the reasons which I have outlined in finding that there were no grounds on which the Divisional Court could have interfered with the commissioner's restructuring proposal and order, it is possible to understand that the commissioner may feel that the comments were unfair. No doubt the commissioner will draw some comfort from the result of this appeal. In all other respects, however, I do not feel that it is appropriate for this court to comment further about the remarks that the commissioner feels are unfair.

5. The cross-appeal of NAN and GFN

155 As mentioned previously, NAN and GFN have cross-appealed in the event that the appeal is allowed. They ask this court to declare that the Final Proposal and Order of the commission infringe Aboriginal rights of hunting, fishing and trapping guaranteed by Treaty 9, and, therefore, infringe Aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. The Divisional Court found it unnecessary to deal with this issue in light of its decision to quash the restructuring proposal and order on the ground that the commissioner failed to consult with NAN and GFN.

156 In my view, on the basis of the record before this court, it is impossible for this court to consider the cross-appeal. Because O'Driscoll J. considered it unnecessary to deal with this issue, he made no findings and rendered no decision for this court to review. Generally speaking, it is not for this court to act as a court of first instance and resolve issues that the court below has failed, or declined, to resolve.

157 It is important to keep in mind that there is a significant difference between judicial review of the restructuring proposal and order on administrative law principles, where the attack is on executive or administrative conduct rather than legislative enactment, which was the focus of the applications before the Divisional Court, and an attack on the restructuring proposal and order on constitutional law principles based on their effect on Aboriginal rights and treaty rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. As the case law illustrates, whether a constitutional attack is launched by a proceeding seeking a declaration of constitutional invalidity of legislation or governmental action, or whether it is raised as a defence to a criminal, or quasi-criminal, charge, the process in which the court of first instance must engage is usually complex and lengthy. This process is well illustrated by cases like *Sparrow* and *Badger* . Those who launch a constitutional attack on s. 35(1) grounds must establish an existing treaty or Aboriginal right and a *prima facie* infringement by government action. Should the government seek to justify its action, it must receive the opportunity to do so. O'Driscoll J. considered none of these issues. In light of the fact that the Divisional Court did not consider these issues, they cannot be litigated *de novo* before this court. This is not intended as a criticism of O'Driscoll J. Having quashed the Final Proposal and Order on the ground that the commissioner had failed to consult with the First Nations, he was justified in not considering the constitutional issue.

158 Because of its complexity, the constitutional issue may not be easy to decide. It would likely require the court to consider whether the legislature, in creating a restructuring commission, has provided the commissioner with an acceptable process for recognizing and affirming Aboriginal and treaty rights and for developing a proposal which does not adversely affect the process of ongoing land claims. This legislative scheme, unlike that in *Halfway River*, is completely silent in respect to these subjects. In other words, the legislative scheme is silent on how the commission is to approach the accommodation of competing claims and uses — on the one hand, established Aboriginal rights and treaty rights, and, on the other hand, the government's policy with respect to municipal restructuring. These, and other possible issues, illustrate that the constitutional question is both complex and difficult.

159 There is a further observation to be made arising from the fact that the cross-appeal raises what, in my view, is an important constitutional issue. The issue concerns the impact of a restructuring proposal made under s. 25.3 of the *Municipal Act* on Aboriginal and treaty rights affirmed by s. 35(1) of the *Constitution Act, 1982*. This issue may affect many persons in Ontario in addition to the respondents NAN and GFN and the appellant. There has been no finding of the constitutional facts required to resolve this issue. As Dickson J. stated in *Northern Telecom Ltd. v. Communications Workers of Canada* (1978), [1980] 1 S.C.R. 115 (S.C.C.), at 139-140:

> I am inclined toward the view that, in the absence of the vital constitutional facts, this Court would be ill-advised to essay to resolve the constitutional issue which lurks in the question upon which leave to appeal has been granted. One must keep in mind that it is not merely the private interests of the two parties before the Court that are involved in a constitutional case. By definition, the interests of two levels of government are also engaged. In this case, the appellant did not apply to the Court, pursuant to Rule 17 of the *Supreme Court Rules*, for the purpose of having a constitutional question stated. If the appellant had intended to raise a question as to the constitutional applicability of the *Canada Labour Code*, then the obligation was upon the appellant to assure that the constitutional issue was properly raised. As no constitutional question

> was stated nor notice served upon the respective Attorneys General, the Court lacks the traditional procedural safeguards that would normally attend such a case and the benefit of interventions by the governments concerned.

This view was followed in *Stoney Creek Indian Band v. British Columbia* (1999), 179 D.L.R. (4th) 57 (B.C. C.A.)in which the Court of Appeal declined to deal with a constitutional issue in the absence of a proper constitutional record from the court below. At p. 72 Southin J.A. stated:

> It is not, in my opinion, in the broad public interest with which this Court must always be concerned, that a profoundly important question of constitutional law should be decided without the vital facts, both those *inter partes* and constitutional.

160 It is likewise, not in the public interest for this court to deal with the constitutional issue raised by the cross-appeal in the absence of a proper constitutional record. As well, the record before us is silent in respect to whether NAN and GFN have served on the Attorney General of Canada and the Attorney General of Ontario the notice of a constitutional question required by s. 109(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

161 This raises the question of how the court is to dispose of the cross-appeal. The matter could be referred back to the Divisional Court to make the required findings of fact, if it is able to do so in a summary manner on the basis of a paper record, and consider arguments on the constitutional question. However, I do not think this would be an appropriate disposition of the cross-appeal. As in *Stoney Creek*, I very much doubt that the Divisional Court would be able to make a finding of the constitutional facts on what is, in essence, a summary application. Moreover, more than two and a half years have passed since the commissioner released his Final Proposal and Order. It would work a serious injustice on the municipalities affected by the restructuring proposal, and their residents, if the matter were to be referred back to the Divisional Court for a determination of the constitutional issue.

162 As I am satisfied that this court is in no position to give a definitive answer to the constitutional question raised by the cross-appeal and that it would not be helpful to refer this question back to the Divisional Court for a re-hearing, I believe that the better course to follow is to dismiss the cross-appeal. I do so, however, without prejudice to NAN and GFN raising the constitutional issue in a subsequent proceeding, if so advised.

Conclusion

163 For the foregoing reasons, I would allow the appeal and set aside the judgment of the Divisional Court quashing the commission's Final Proposal and Order. The Crown is entitled to its costs of the hearing before the Divisional Court and this court from TCPL, NAN, GFN and LL58. The cross-appeal of NAN and GFN is dismissed with costs of the cross-appeal payable to the Crown. The commissioner is neither entitled to costs, nor responsible for the payment of costs.

***K.M. Weiler J.A.*:**

I agree.

***S. T. Goudge J.A.*:**

I agree.

Appeal allowed; cross-appeal dismissed.

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2000 CarswellOnt 4248
Supreme Court of Canada

TransCanada Pipelines Ltd. v. Beardmore (Township)

2000 CarswellOnt 4248, 2000 CarswellOnt 4249, [2000] 4 C.N.L.R. iv (note), [2000] S.C.C.A. No. 264, 142 O.A.C. 397 (note), 266 N.R. 196 (note)

TransCanada Pipelines Limited, The Corporation of the Township of Beardmore, The Corporation of the Township of Nakina, The Corporation of the Township of Longlac, Long Lake 58 First Nation, Nishnawbe-Aski Nation and Ginoogaming First Nation v. Her Majesty the Queen in Right of Ontario as Represented by the Minister of Municipal Affairs and Housing, Bob Gray, Commissioner of the Greenstone Restructuring Commission

Iacobucci J., Major J., McLachlin C.J.C.

Judgment: October 19, 2000
Docket: 27950

Proceedings: Leave to appeal refused 2000 CarswellOnt 1072, 186 D.L.R. (4th) 403, [2000] O.J. No. 1066 (Ont. C.A.); Reversed 106 O.A.C. 30, 1997 CarswellOnt 5056, 44 M.P.L.R. (2d) 250, [1998] 2 C.N.L.R. 240 (Ont. Div. Ct.)

Counsel: None given.

Subject: Public; Municipal

***Iacobucci J.*, *Major J.*, *McLachlin C.J.C.*:**

1 The motion for stay of execution and the applications for leave to appeal are dismissed with costs.

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TAB 6

2017 ONSC 4090
Ontario Superior Court of Justice (Divisional Court)

Ontario Medical Association v. Ontario (Information and Privacy Commissioner)

2017 CarswellOnt 10068, 2017 ONSC 4090, 280 A.C.W.S. (3d) 866

ONTARIO MEDICAL ASSOCIATION, SEVERAL PHYSICIANS AFFECTED DIRECTLY BY THE ORDER and AFFECTED THIRD PARTY DOCTORS (Applicants) and INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, THE HONOURABLE ERIC HOSKINS, MINISTER OF HEALTH AND LONGTERMCARE, THE MINISTRY OF HEALTH AND LONG-TERM CARE and THERESA BOYLE (Respondents)

Kiteley J., Nordheimer J., D. Edwards J.

Heard: June 19, 2017; June 20, 2017
Judgment: June 30, 2017
Docket: Toronto 305/16, 306/16, 312/16

Proceedings: application for judicial review refused *Ontario (Ministry of Health and Long-Term Care), Re* (2016), 2016 CarswellOnt 21914 ((Ont. Information & Privacy Comm.))

Counsel: J.J. Colangelo, for Applicant, Ontario Medical Association
C. Dockrill, for Applicants, Several Physicians Affected by the Order
L. Galessiere, for Applicants, Affected Third Party Doctors
L. Murray, for Respondent, Information and Privacy Commissioner of Ontario
K. Chatterjee, for Respondents, Honourable Eric Hoskins, Minister of Health and Long-Term Care and the Ministry of Health and Long-Term Care *
I. Fischer, for Respondent, Theresa Boyle

Subject: Public; Municipal

APPLICATION for judicial review of order of Information and Privacy Commissioner of Ontario directing Ministry of Health and Long-Term Care to disclose to reporter information concerning certain physicians under provincial health insurance program.

***Nordheimer J.*:**

1 There are three applications for judicial review of an order dated June 1, 2016 ("the Order") of the respondent Information and Privacy Commissioner of Ontario ("IPCO") directing the respondent Ministry of Health and Long-Term Care ("Ministry") to disclose to the respondent Theresa Boyle, the names, annual billing amounts, and medical field of specialization, if applicable, of the top one hundred physicians, for their billings to the Ontario Health Insurance Program ("OHIP") for each of the 2008 through 2012 fiscal years. [1]

2 Ms. Boyle is a reporter employed by the Toronto Star. She has written articles about the medical system in this Province including articles relating to those physicians who are the top one hundred billers to OHIP. In furtherance of these articles, Ms. Boyle made a request, dated April 11, 2014, to the freedom of information officer of the Ministry to disclose the amount billed, medical specialty and names of the top one hundred OHIP billers for the five years preceding her request.

3 The Ministry refused to disclose the identities of these physicians but did disclose the amounts paid in rank order, although all names and some areas of specialty were omitted. That disclosure showed that, in 2012, the top physician received payments totalling $6,190,181.22 and the one hundredth physician received payments totalling $1,424,199.18.

4 On November 24, 2014, Ms. Boyle appealed the decision of the Ministry to the IPCO. The appeal, although originally assigned to the Commissioner, was ultimately assigned to John Higgins (the "Adjudicator") for the purpose of inquiry and adjudication. The Adjudicator had retired as an adjudicator with IPCO in 2012 but recently returned as an adjudicator on a contract basis.

5 The Adjudicator issued his order on June 1, 2016. In the order, he held that the information requested was not "personal information" and the privacy exemption in s. 21(1) of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*") did not apply. The Adjudicator therefore ordered that the records be disclosed in full.

6 The Order sets out the process that was followed by the Adjudicator on the appeal. I borrow that recitation from paragraphs 10 to 14 of the Order:

> 10 The adjudicator initially assigned to this appeal identified that a large number of physicians may be affected by this appeal. He sent notification letters to approximately 160 physicians, notifying them of the appeal and inviting them to contact this office if they were interested in receiving more information or participating in the appeal. A large number of the physicians who received notification letters indicated their interest in participating in this appeal.
>
> 11 The adjudicator then sent a Notice of Inquiry to the ministry and the notified physicians who had indicated their interest in participating. He also sent it to organizations ("interested organizations") that represent the interests of some or all of the notified physicians, as they may be able to present useful information to aid in the determination of this appeal.
>
> 12 The ministry, the interested organizations, and many of the notified physicians (the "affected parties") provided representations. The appeal was subsequently transferred to me to complete the inquiry. As a result of the representations received, I added the mandatory exemption at section 17(1) of the Act (third party information) as an issue in this appeal.
>
> 13 I then sent a Notice of Inquiry to the appellant inviting her to provide representations, and provided her with the complete representations of the ministry and one of the interested organizations, as well as a summary of the main non-confidential arguments made by the ministry, the interested organizations and affected parties. The appellant responded with representations.
>
> 14 Subsequently, I sent a Reply Notice of Inquiry to the ministry, the interested organizations and the affected parties, inviting them to provide reply representations. With the Reply Notice of Inquiry, I included a complete copy of the representations of the appellant, the ministry and one of the interested organizations, as well as a copy of the summary of non-confidential arguments made by the ministry, the interested organizations and affected parties that I had previously sent to the appellant. A number of affected parties and one of the interested organizations provided reply representations. The ministry indicated that it would not provide reply representations.

7 Ultimately, the Adjudicator made the following determinations (Order paras. 21-22):

> In this order, I have determined that:
>
> • the record does not contain personal information, and therefore cannot be exempt under section 21(1);
>
> • the information in the record was not "supplied" to the ministry, and the evidence does not support a conclusion that the harms in section 17(1) could reasonably be expected to occur; for these reasons, section 17(1) does not apply; and
>
> • in the alternative, if the exemptions in section 21(1) and/or 17(1) had been found to apply, the public interest override in section 23 would also apply.

In the result, I am ordering the ministry to disclose the record in full.

8 The applicants seek a review of the Order. They contend that the Order is unreasonable and an invasion of their individual privacy. They ask that the Order be set aside.

Analysis

9 At the outset, I should note that there is agreement among the parties that the standard of review applicable to the Order is reasonableness.

10 I start my analysis with reference to certain provisions from the *FIPPA* beginning with its purpose as found in s. 1, that reads:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

11 There is no dispute that the presumption under *FIPPA* is that information that is in the possession of provincial government institutions will be disclosed. As s. 1(a)(ii) makes clear, "exemptions from the right of access should be limited and specific". It is also clear, however, that the well-recognized right of individuals to privacy must be protected. Consequently, there are specific provisions in *FIPPA* that protect personal information.

12 The next relevant provision is the definition of "personal information" that is found in s. 2(1). Personal information is defined as:

> ... recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and

> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

13 Section 2(3) is also relevant to this definition. It reads:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

14 The principal finding made by the Adjudicator was that the information that was sought by Ms. Boyle was not personal information. In reaching that conclusion, the Adjudicator relied on the two step test set out in *Order PO-2225; Ontario (Rental Housing Tribunal)*, [2004] O.I.P.C. No. 8 (Ont. Information & Privacy Comm.) . In that decision, Assistant Commissioner Mitchinson referred to prior decisions of the IPCO that had dealt with the definition of personal information. The Assistant Commissioner noted, at para. 23, that these prior decisions had determined that there was:

> ... a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" ...

15 Assistant Commissioner Mitchinson then described a two-step analysis for determining whether a person's name would reveal other personal information about the individual. The two steps or questions are:

> (i) in what context do the names of the individuals appear?
>
> (ii) is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?

16 Applying that two step procedure in this case, the Adjudicator first determined that the names of the physicians arose in the context of providing medical services. He found that that constituted a professional or business activity. The Adjudicator then concluded that the act of submitting bills to OHIP, and receiving payment in return, occurred in a business or professional context that is "removed from the personal sphere". The applicants do not appear to take issue with that conclusion.

17 The Adjudicator then went on to consider the second step. He pointed out that many of the affected parties had submitted that OHIP payments did not portray actual income to the physician because allowable business expenses have not been deducted from those amounts. The affected parties submitted, however, that the public might not appreciate that distinction and assume that the numbers reflected income and a distorted picture would result. Indeed, this argument was also advanced before this court by the applicant, O.M.A. [2]

18 The Adjudicator concluded that, because the monies received by the physicians is in relation to a business or profession and given that it does not reflect actual income, as the physicians themselves argued, the monies received from OHIP did not reveal "other personal information about the individual". Specifically, the Adjudicator said, at para. 77:

> Payments that are subject to deductions for business expenses are clearly business information. Since it is not an accurate reflection of personal income, it does not reveal anything that is 'inherently personal in nature'.

19 It is this latter conclusion with which the applicants take exception. One of their principal attacks on this point is that the Adjudicator ignored earlier decisions of the IPCO that had concluded that payments from OHIP to physicians were personal information. The applicants criticize the Adjudicator for not following these earlier decisions. They complain that all that the Adjudicator did to justify his departure from these earlier decisions was to simply say that he was not bound by the principle of *stare decisis*.

20 I do not view the applicants' criticism on this point to be a fair one. I first note that the Adjudicator was correct when he said that he is not bound by the principle of *stare decisis*. As Iacobucci J. said in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.) , at para. 14:

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.

21 I should add, on this point, that the applicants' efforts to discern a departure from the principle enunciated in *Weber* by reference to the decision in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770 (S.C.C.) does not withstand scrutiny. Not only do the paragraphs cited by the applicants from the decision of Abella J. not establish any such departure, the submission fails to recognize that Abella J.'s reasons on this point were expressly not endorsed by the majority in that case (see para. 70).

22 Contrary to the suggestion of the applicants, however, the Adjudicator did not simply move from that correct proposition to decide the issue before him without reference to the prior decisions. In fact, the Adjudicator made specific reference to those earlier decisions. In doing so, he observed that there appeared to be a dichotomy in the manner in which IPCO had dealt with payments to physicians and payments made to other professionals. He expressed concern about the "anomaly" that resulted from the differences in approach reflected in these various decisions. I should note that the Adjudicator was not the only one to identify this anomaly. An earlier decision by Assistant Commissioner Liang identified the same concern. [3]

23 It is in this latter context that the Adjudicator mentioned that he was not bound by *stare decisis*. He then dealt head on with the concern about departing from those earlier decisions and explained why he had concluded that he should do so. He said, at para. 71:

> In my view, the divergent approach to professional fees noted by Assistant Commissioner Liang in Order PO-3435 provides a compelling rationale for applying the same template across the board in determining whether information is properly considered "personal information" in a business, professional or official context.

24 The adjudicator then added, at para. 72:

> Although applying the template in Order PO-2225 to physicians' billing information is a departure from the approach taken in a number of previous orders of this office, which could be seen as a form of inconsistency, this approach actually supports consistency of decision-making, which is also seen as a valuable objective in judicial commentary on tribunal adjudication.

25 In my view, it was open to the Adjudicator, having identified this anomaly, to address it. In doing so, the Adjudicator approached the reconciliation of these varying decisions in an appropriate fashion. He was not bound to follow those earlier decisions but, rather than simply embarking on his own path, he explained the reasons why he was departing from them. The Adjudicator then applied the established two part test — a test that the applicants do not take issue with — in reaching his decision on the central issue.

26 On that central issue, the Adjudicator had to be satisfied that disclosing the names of the physicians "would reveal other personal information about the individual" in order for the names to fall within the definition of "personal information". He concluded, for the reasons that he set out, that the payments made by OHIP to physicians did not reveal personal information. Rather, he found that they revealed professional information. That conclusion was open to the Adjudicator on the record that was before him.

27 The next challenge to the Adjudicator's conclusion is that he failed to follow the decision in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (Ont. C.A.) , that is described by the applicants as "authoritative and binding". I would make two observations with respect to this challenge. First, the issue in *Pascoe* was not the name of the physician so it does not directly address the issue raised here. Indeed, the requestor in that case was not seeking the name of the physician involved. Hence, the decision in *Pascoe* does not provide any binding answer to the question that the Adjudicator had to answer here. Second, both this court and the Court of Appeal found that the conclusion of IPCO (that the information sought, namely "disclosure of the

medical procedures charged by the highest billing general practitioner in Toronto in 1998-99", was not personal information) was a reasonable one.

28 Two other arguments advanced by the applicants should be mentioned. One argument is the considerable emphasis placed by the O.M.A. on a report by retired Justice Cory prepared for the Minister of Health in 2005 (the "Cory Report") that resulted in amendments to the *Health Insurance Act*, R.S.O. 1990, c. H.6.

29 It is difficult to criticize the Adjudicator for not referring to, or relying on, the Cory Report since none of the parties provided that report to the Adjudicator. In addition, the thrust of that report dealt with how physicians' billings to OHIP are reviewed. That is not the issue that is raised in this application nor does it assist in determining that issue. It confuses two entirely different issues of concern.

30 In any event, the Adjudicator did reference s. 38 of the *Health Insurance Act* that the O.M.A. had emphasized, among others. The Adjudicator quite appropriately noted that the obligation of secrecy established by s. 38 respecting payments made by OHIP to physicians was expressly made subject to *FIPPA*. Consequently, the issues that surrounded the Cory Report and that led to the amendments to the *Health Insurance Act* clearly were not intended to circumscribe the analysis under *FIPPA* and, consequently, they do not assist in addressing the issue here.

31 The other argument made by the applicants is that Ms. Boyle had failed to establish a proper rationale for why the information that she sought ought to be disclosed to her. In other words, Ms. Boyle had failed to establish a pressing need for the information or how providing it to her would advance the objective of transparency in government.

32 Two observations can be made on this argument. The first observation is that Ms. Boyle does not need a reason to obtain the information. *FIPPA* mandates that information is to be provided unless a privacy exception is demonstrated. Once it is determined that the information is not personal information, there is no statutory basis to refuse to provide it.

33 The second observation is that this argument ignores the well-established rationale that underlies access to information legislation. That rationale is that the public is entitled to information in the possession of their governments so that the public may, among other things, hold their governments accountable. As La Forest J. said in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.) at para. 61:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.

and further at para. 63:

> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

34 The proper question to be asked in this context, therefore, is not "why do you need it?" but rather is "why should you not have it?".

35 In the end result, the Adjudicator conducted a thorough analysis of the issues. His conclusion that the information in question is not personal information as defined under *FIPPA* is a reasonable one, that is, it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". [4]

36 In light of that conclusion, it is unnecessary to deal with the subsidiary arguments regarding the application of s. 17 or s. 23 as other justifications for disclosure of the information sought.

37 One final issue needs to be addressed. The applicants, other than the O.M.A., submitted that there was a reasonable apprehension of bias on the part of the Adjudicator. This complaint arises in the context where originally this matter was going to be determined by Commissioner Beamish. However, Commissioner Beamish made certain statements, that were reported in the

media, that led the objecting applicants to complain that he had prejudged the matter. It should be noted that the Commissioner has express statutory authority, under s. 59 of *FIPPA*, to comment on privacy protection implications; engage in public education; and provide information concerning *FIPPA* and the Commissioner's role and activities. The Commissioner's statements must be viewed in that context. However, as a consequence of the concerns raised, and without accepting that they were valid, Commissioner Beamish recused himself and the matter was referred to the Adjudicator.

38 In my view, assuming for the purposes of this submission that a reasonable apprehension of bias existed as it related to the involvement of the Commissioner, there is no merit to the submission that there remained a reasonable apprehension of bias that attached to the Adjudicator. For one thing, no such issue was raised by the objecting applicants with the Adjudicator at any time up to and including the release of the Order. It was only after the Order was received that the complaint was extended to the Adjudicator.

39 For another, there is no basis upon which it could be concluded that because the Commissioner made some statements, to which objection was taken, that every other decision-maker associated with IPCO is equally "tainted". If that were the result, IPCO would be effectively precluded from deciding the issue at all, a result that would be absurd. If there was a problem arising from the Commissioner's public statements, it was fully addressed when the Commissioner recused himself. The fact is that there is no reason or foundation to conclude that the Adjudicator reached anything other than his own personal decision based on the record that was before him. Indeed, the Adjudicator said precisely that in his reasons.

40 I would add that there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one. [5] It is not even approached, much less met, in this case.

41 Finally, on this point, I would only add that because of this issue, the record of proceedings that was produced by IPCO for this judicial review application included in it material relating to the bias issue, but which did not form part of the material upon which the Adjudicator reached his decision. While I understand why IPCO chose to include this material in the record of proceedings given that the bias issue was raised, in future, if the inclusion of such material proves to be necessary, it ought to be contained in a separate volume apart from the material upon which the decision was reached, so that the delineation between the two is clear, not only to the court but to the parties.

Conclusion

42 The application for judicial review is dismissed.

43 In accordance with the agreement of the parties, there will be no order for costs in favour of the respondents, Information and Privacy Commissioner of Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care or the Ministry of Health and Long-Term Care. The applicants will pay to the respondent, Theresa Boyle, costs in the agreed amount of $50,000 inclusive of disbursements and H.S.T.

***Kiteley J.*:**

I agree

***D. Edwards J.*:**

I agree

Application for judicial review dismissed.

Footnotes

* Although counsel appeared for the respondents, The Honourable Eric Hoskins, Minister of Health and Long-Term Care and the Ministry of Health and Long-Term Care, those respondents did not participate in the hearing.

1 *Ontario (Ministry of Health and Long-Term Care), Re*, [2016] O.I.P.C. No. 99 (Ont. Information & Privacy Comm.)

2 Factum of the Ontario Medical Association, para. 46.

3 Order PO-3435; *Ontario (Ministry of Health and Long-Term Care), Re*, [2014] O.I.P.C. No. 294 (Ont. Information & Privacy Comm.)

4 *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.) at para. 47

5 *Clayson-Martin v. Martin* (2015), 127 O.R. (3d) 1 (Ont. C.A.) at para. 71

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2018 ONCA 673
Ontario Court of Appeal

Ontario Medical Association v. Ontario (Information and Privacy Commissioner)

2018 CarswellOnt 13021, 2018 ONCA 673, 294 A.C.W.S. (3d) 680, 427 D.L.R. (4th) 67

Ontario Medical Association (Applicant / Appellant) and Information and Privacy Commissioner for Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, The Ministry of Health and Long-term Care and Theresa Boyle (Respondents / Respondents)

Several Physicians Affected Directly By the Order (Applicants / Appellants) and Information and Privacy Commissioner for Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, The Ministry of Health and Long-term Care and Theresa Boyle (Respondents / Respondents)

Affected Third Party Doctors (Applicants / Appellants) and Theresa Boyle (Requestor), Information and Privacy Commissioner of Ontario, The Honourable Eric Hoskins, Minister of Health and Long-Term Care, (Respondent Head), Ministry of Health and Long-term Care (Institution) (Respondents / Respondents)

Alexandra Hoy A.C.J.O., Paul Rouleau, M.L. Benotto JJ.A.

Heard: June 12, 2018
Judgment: August 3, 2018
Docket: CA C64567, C64568, C64569

Proceedings: affirming *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)* (2017), 2017 ONSC 4090, 2017 CarswellOnt 10068, D. Edwards J., Kiteley J., Nordheimer J. (Ont. Div. Ct.); refusing application for judicial review *Ontario (Ministry of Health and Long-Term Care), Re* (2016), [2016] O.I.P.C. No. 99, 2016 CarswellOnt 21914, John Higgins Adjud. (Ont. Information & Privacy Comm.)

Counsel: Joseph Colangelo, Jennifer Gold, for Ontario Medical Association
Chris Dockrill, for Several Physicians Affected Directly By the Order
Linda Galessiere, for Affected Third Party Doctors
Paul Schabas, Iris Fischer, Skye Sepp, for Theresa Boyle
Heather Burnett, for Minister of Health and Long-Term Care
William Challis, for Information and Privacy Commission of Ontario

Subject: Public; Municipal

APPEAL by Ontario Medical Association and physicians from judgment reported at *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)* (2017), 2017 ONSC 4090, 2017 CarswellOnt 10068 (Ont. Div. Ct.), upholding decision requiring disclosure of physicians who billed most to Ontario Health Insurance Plan.

***Per curiam*:**

Overview

1 A reporter for the Toronto Star requested access to information from the Ministry of Health and Long-Term Care (the "Ministry") pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "Act"). She sought access to the names of the top 100 physician billers to the Ontario Health Insurance Program ("OHIP") for the 2008 to 2012 fiscal years and a breakdown of the physicians' medical specialties and the dollar amounts billed.

2 An adjudicator assigned by the Information and Privacy Commissioner (the "IPCO" and the "Adjudicator") directed the Ministry to disclose the physicians' names, the amounts billed and the physicians' fields of specialization, if applicable. The Divisional Court upheld the Adjudicator's order on judicial review.

3 The Ontario Medical Association ("OMA") and two groups of physicians now appeal. They argue that a physician's name is "personal information" and thereby exempt from disclosure by s. 21(1) of the Act.

4 Section 21(1) states, in part: "A head shall refuse to disclose *personal information* to any person other than the individual to whom the information relates" (emphasis added). Section 21(1)(f) of the Act permits disclosure of personal information "if the disclosure does not constitute an unjustified invasion of personal privacy."

5 Section 2(1) of the Act defines "personal information" as follows:

> 2 (1) In this Act,
>
> "personal information" means recorded information about an identifiable individual, including,
>
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > . . .
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

Decisions Below

6 The Adjudicator determined that the requested information did not constitute "personal information" within the meaning of s. 2(1) and, therefore, the s. 21(1) exemption from disclosure did not apply.

7 In analyzing whether the records at issue constituted personal information, the Adjudicator applied the two-step test set out in *Ontario (Rental Housing Tribunal), Re*, [2004] O.I.P.C. No. 8 (Ont. Information & Privacy Comm.):

> (1) In what context do the names of the individuals appear?
>
> (2) Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?

8 At the first step, the Adjudicator determined that the context was the provision of medical services. He concluded that this was a professional or business activity because submitting bills to OHIP, and receiving payment, occurred in a context removed from the personal sphere.

9 At the second step, the Adjudicator concluded that the information did not reveal something of a personal nature about the physicians. He emphasized that the payments received were in relation to a business or profession and the amounts billed and received do not reflect actual personal income.

10 The Divisional Court determined that the Adjudicator's decision was reasonable and dismissed the application for judicial review.

Analysis

11 On appeal to this court, the appellants agree that the standard of review is reasonableness and that it was appropriate for the Adjudicator to apply the two-step test from *Ontario (Rental Housing Tribunal)*.

12 They submit, as they did before the Divisional Court, that the Adjudicator's application of the two-step test was unreasonable because: (i) he departed from long-standing IPCO decisions concluding that physicians' names are personal information and therefore did not apply *stare decisis*; (ii) he failed to consider a report the Honourable Peter deC. Cory prepared for the Minister of Health and Long-Term Care in 2005 (the "Cory Report"), which resulted in amendments to the *Health Insurance Act*, R.S.O. 1990, c. H.6; (iii) he failed to consider *Charter* values; and (iv) the presumption of prejudice in s. 21(3) of the Act makes it clear that disclosure of a name in conjunction with an individual's finances is prohibited.

13 We do not accept these submissions.

14 We agree with the Divisional Court's conclusion that the Adjudicator was not bound by the principle of *stare decisis.* As Iacobucci J. explained in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), at para. 14:

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.

15 We also agree with the Divisional Court that the Adjudicator did not ignore the prior IPCO decisions. He made specific reference to these earlier decisions and observed that there was a split in the IPCO's jurisprudence. His decision addressed this dichotomy.

16 We reject the appellants' argument that this court's decision in *Ontario (Attorney General) v. Pascoe* (2002), 166 O.A.C. 88 (Ont. C.A.) stands for the proposition that a physician's identity cannot be disclosed. In that case, the IPCO was not satisfied that information as to the top ten items billed by the highest paid general/family practitioner in Toronto was "personal information". The Divisional Court and this court agreed that the IPCO's decision was reasonable.

17 The appellants submit it is implicit in the courts' decisions that had the physicians' names been requested, this would have constituted personal information. We do not agree. The particular information at issue in *Pascoe* was different from the information sought in this case. The courts' analyses are therefore inapplicable.

18 The appellants raised the Cory Report for the first time on appeal to the Divisional Court. It was not provided to the Adjudicator, nor argued before him. We agree with the Divisional Court that it is therefore difficult to criticize the Adjudicator for not referring to or relying on it. In any event, the Cory Report dealt with audits of physicians' billings. That issue is not raised in this appeal, nor does it assist in this appeal's determination.

19 The appellants further rely on the Adjudicator's failure to consider *Charter* values. They argue that the protection of privacy is a fundamental value and the disclosure of physicians' names would be inconsistent with this privacy value.

20 As the Supreme Court made clear in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.), at para. 62, when interpreting a statute, *Charter* values are only considered in circumstances of "genuine ambiguity". Far from being ambiguous, the purposes of the Act are clearly set out in s. 1:

> 1. The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and

> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

21 The balancing of access to information against the protection of individuals' privacy with respect to personal information is therefore already built into the Act.

22 Lastly, the appellants submit that the Adjudicator erred by failing to implement the presumption in s. 21(3)(f) that information about a person's finances is private. That section provides:

> Presumed invasion of privacy
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

23 Essentially, the appellants argue that, while s. 21(3) only applies to "personal information" as defined in s. 2(1), it informs the interpretation of "personal information" and the Adjudicator erred by failing to have regard to it. They submit that the billing information sought describes a physician's finances or income and, because s. 21(3)(f) provides that disclosure of such information is presumptively an unjustified invasion of personal privacy, the only reasonable interpretation is that the billing information is "personal information" as defined in s. 2(1). They say that it is of no moment that the billing information reflects the gross revenue of the physician's practice, and not the physician's actual, personal income.

24 We do not agree.

25 The Adjudicator applied the second step of the test from *Ontario (Rental Housing Tribunal)* which involves looking to the nature of the information to determine if it would "reveal something of a personal nature about the individual". The information sought was the affected physicians' gross revenue before allowable business expenses such as office, personnel, lab equipment, facility and hospital expenses. The evidence before the Adjudicator indicated, however, that, in the case of these 100 top billing physicians, those expenses were variable and considerable. As a result, applying the second part of the *Ontario (Rental Housing Tribunal)* test, the Adjudicator concluded that disclosure of this billing information would not reveal something of a personal nature about the physician and was therefore not personal information.

26 In our view, where, as here, an individual's gross professional or business income is not a reliable indicator of the individual's actual personal finances or income, it is reasonable to conclude not only that the billing information is not personal information as per s. 2(1), but also that it does not describe "an individual's finances [or] income", for the purpose of s. 21(3)(f). As a result, we are not persuaded that s. 21(3)(f) demonstrates that the Adjudicator erred in concluding that the billing information was not personal information.

Conclusion

27 For these reasons, the appeal is dismissed with costs of $25,000.00 all-inclusive to the respondents in accordance with the agreement between the parties.

Appeal dismissed.

2019 CarswellOnt 5577
Supreme Court of Canada

Ontario Medical Association, et al. v. Information and Privacy Commissioner of Ontario, et al.

2019 CarswellOnt 5577, 2019 CarswellOnt 5578

Ontario Medical Association v. Information and Privacy Commissioner of Ontario, Honourable Eric Hoskins, Minister of Health and Long-Term Care, Ministry of Health and Long-Term Care and Theresa Boyle

Several Physicians Affected Directly by the Order v. Information and Privacy Commissioner of Ontario, Honourable Eric Hoskins, Minister of Health and Long-Term Care, Ministry of Health and Long-Term Care and Theresa Boyle

Affected Third Party Doctors v. Information and Privacy Commissioner of Ontario, Honourable Eric Hoskins, Minister of Health and Long-Term Care, Ministry of Health and Long-Term Care and Theresa Boyle

Per curiam

Judgment: April 11, 2019
Docket: 38343

Proceedings: Leave to appeal refused, 2018 CarswellOnt 13021, 294 A.C.W.S. (3d) 680, 427 D.L.R. (4th) 67, 2018 ONCA 673 (Ont. C.A.)Affirmed, 2017 CarswellOnt 10068, 280 A.C.W.S. (3d) 866, 2017 ONSC 4090 (Ont. Div. Ct.)Application for judicial review refused, 2016 CarswellOnt 21914, [2016] O.I.P.C. No. 99 (Ont. Information & Privacy Comm.)

Counsel: Counsel — not provided

Subject: Municipal; Public

Per curiam:

1 The motion for leave to intervene by the Association québécoise des pharmaciens propriétaires is dismissed. The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Numbers C64567, C64568 and C64569, 2018 ONCA 673, dated August 3, 2018, is dismissed with costs to the respondent, Theresa Boyle.

TAB 7

2012 ABCA 78
Alberta Court of Appeal

Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)

2012 CarswellAlta 379, 2012 ABCA 78, [2012] A.W.L.D. 2212, [2012] A.W.L.D. 2213, [2012] A.W.L.D. 2214, 522 A.R. 118, 544 W.A.C. 118

Thompson Brothers (Construction) Ltd., Appellant (Applicant) and Appeals Commission for the Alberta Workers' Compensation and the Workers' Compensation Board, Respondents (Respondents)

Frans Slatter J.A., J.D. Bruce McDonald J.A., Myra Bielby J.A.

Heard: January 31, 2012
Judgment: March 12, 2012
Docket: Edmonton Appeal 1103-0076-AC

Proceedings: reversing in part *Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)* (2010), 2010 ABQB 705, 2010 CarswellAlta 2523 (Alta. Q.B.)

Counsel: K.W. Penonzek, for Appellant
S.R. Hermiston, for Respondent, Appeals Commission, for the Alberta Workers' Compensation
R.C. Goltz, for Respondent, Workers' Compensation Board

Subject: Occupational Health and Safety; Employment; Public; Civil Practice and Procedure

APPEAL by employer from decision reported at *Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)* (2010), 2010 ABQB 705, 2010 CarswellAlta 2523 (Alta. Q.B.), which dismissed employer's appeal and application for judicial review of decision of Appeals Commission.

Per curiam:

1 The appellant employer challenges a ruling of the Workers' Compensation Appeals Commission that an injured worker was entitled to temporary disability payments under the *Workers' Compensation Act*, RSA 2000, c. W-15. The issues before the Appeals Commission were whether the worker was eligible for benefits, and particularly whether he had a pre-existing condition that was aggravated by the workplace accident. The appellant also argued that there was unfairness in the way the hearing was conducted by the Appeals Commission, and raised specific procedural issues.

Facts

2 In April 2007 the worker suffered a hernia when he tried to lift a water pump while his feet were stuck in the mud. The Board accepted that he had a right abdominal groin strain, and a left inguinal hernia, and awarded him temporary total disability benefits.

3 On May 10, 2007 the worker underwent laparoscopic surgery, and on May 16, 2007 he went on a pre-booked vacation. The appellant employer challenged the worker's entitlement to disability benefits, on the basis that (a) at certain times he was fit for modified employment, and (b) he was not entitled to benefits while he was on vacation. The appellant also argued that in any event it should not be"charged"with a compensable injury, because the inguinal hernia was related to a congenital weakness or vulnerability, and not to the incident at the workplace.

4 The dispute about the ability of the worker to perform modified duties arose because the medical record was somewhat unclear; there was no definitive medical opinion as to exactly when the worker was fit for modified work. The worker testified that he was not able to do any work any sooner than May 31, 2007. On June 7, 2007, after the worker had returned from his vacation, his family physician indicated that he was fit for modified work"as previous". The appellant employer argued that this meant that the worker was fit for modified duties before he left on vacation, and that since there was no medical evidence to the contrary, the Board was in error in concluding otherwise.

5 The dispute about the entitlement to disability benefits while the worker was on vacation arose from s. 25(2) of the *Act*:

> 25(2) If an accident disables a worker for longer than the day of the accident,
>
> (a) the employer shall pay compensation to the worker in respect of the day of the accident in accordance with subsection (1)(a), and
>
> (b) the Board shall pay compensation to the worker in respect of every day after the day of the accident to which the worker is entitled under this Act to receive that compensation, excluding any day on which the worker would not have worked in the normal course of the worker's employment, or for which the worker would not have been paid.

The appellant employer argued that since the worker was on holidays he either"would not have worked", or"would not have been paid". The worker argued that since he was on paid vacation time, and since the Board's policy on"insurable earnings" includes"holiday pay", he did not fall within the exclusion.

6 The third issue was whether the appellant should be charged with a compensable accident, which would have an effect on the premiums charged to the appellant for future coverage. This issue depended on whether the hernia was an aggravation of a previously existing condition, or should be entirely attributed to the workplace incident. The appellant relied on medical evidence that inguinal herniae often exist from birth, but can be aggravated or become symptomatic as a result of heavy lifting. The appellant argued that the Board's conclusion on this issue was either incorrect, or else it involved a change in the interpretation of the Board's Policy 03-02, Part 1, *Aggravation of a Pre-Existing Condition*.

The Decisions Below

7 After some adjustments and corrections, the Dispute Resolution and Decision Review Body concluded that the worker was entitled to benefits until May 30, 2007. The Review Body concluded that this was the date when the worker was scheduled to return from vacation, and would have been fit for modified duties. The Review Body decided that the injury was due to the workplace incident, and denied the appellant any cost relief. The appellant then appealed the various underlying decisions to the Appeals Commission.

8 At the Appeals Commission some procedural issues arose. The appellant (represented at that stage by a consultant without legal training) wanted to introduce a medical opinion ("Document 25") from a doctor on another worker's file to demonstrate that inguinal herniae exist from birth. The Appeals Commission concluded that the proposed use of this document potentially violated privacy interests, that the document was in any event irrelevant, and directed that the offending document be removed from the file.

9 Further, the appellant employer had introduced new evidence before the Appeals Commission, as authorized by s. 13.2(6)(a) of the *Act*, on the issue of whether an inguinal hernia qualified as a pre-existing condition under the Board policy. That provision allows"all persons with a direct interest" to present new evidence. The Board decided to call one of its medical consultants, Dr. Magnan, to respond to that evidence. The appellant took the position, based on prior decisions, that the Board is not considered a person with a direct interest under s. 13.2(6)(a) of the *Act*, and so cannot call new evidence.

10 The Appeals Commission did not directly dispute the appellant employer's argument, but concluded that Dr. Magnan could give his evidence under s. 13.2(6)(c), which authorizes the Board "to make representations, in the form and manner that the Appeals Commission directs"on the proper application of policy. The Appeals Commission concluded that Dr. Magnan

could give evidence on the interpretation of Policy 03-02 in a factual and medical context, and in that context also give evidence as to the origins of herniae.

11 Then, when the appellant's consultant attempted to cross-examine Dr. Magnan based on an opinion letter he had given in a previous matter regarding another worker with a pre-existing condition, she was not allowed to do so. Her general entitlement to cross-examine on Dr. Magnan's opinions without using the letter was not limited, although her failure to cross-examine may indicate she did not realize that.

12 The Appeals Commission considered all of the evidence and submissions before it, and agreed with the Review Body on all of the issues: the worker was capable of modified duties on May 30, 2007, he was entitled to receive benefits while on holiday, the worker's inguinal hernia is not the type of pre-existing condition for which benefits would be denied pursuant to Policy 03-01, and that the appellant was not entitled to any premium relief as a result.

13 The appellant appealed and applied for judicial review of the decision of the Appeals Commission. The chambers judge rejected the challenge: *Thompson Brothers (Construction) Ltd. v. Alberta (Workers' Compensation Board Appeals Commission)*, 2010 ABQB 705 (Alta. Q.B.). The chambers judge concluded there had been no breach of procedural fairness in removing Document 25 from the record, or in allowing the Board to call evidence, or in restricting the opportunity of the appellant's consultant to cross-examine Dr. Magnan using his previous opinion letter. He also found no reviewable error in the substantive decision to grant the worker temporary disability benefits, and to deny the appellant cost relief.

The Standard of Review

14 The standard of review of decisions of the Appeals Commission was summarized in *Gahir v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2009 ABCA 59 (Alta. C.A.) at para. 13, (2009), 1 Alta. L.R. (5th) 290, 448 A.R. 135 (Alta. C.A.):

> a. Findings of fact, credibility and mixed fact and law are reviewed for reasonableness.
>
> b. Interpretations of workers' compensation policies, and the application of policies to particular fact situations are reviewed for reasonableness. Whether a particular employee is entitled to compensation, and the level of that compensation, generally falls into this category.
>
> c. The interpretation of sections of the *Act* lying within the expertise of the Board or the Appeals Commission are reviewed for reasonableness, as is the application of that law to particular fact situations.
>
> d. True jurisdictional issues are reviewed for correctness.

Where the standard of review has been established, a fresh analysis is not required in every appeal.

15 In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), the Supreme Court of Canada confirmed that superior courts should extend deference to the decisions of administrative tribunals. The most recent pronouncements from the Supreme Court confirm that the general standard of review is reasonableness. Apart from true issues of jurisdiction (a very narrow category), and issues that are clearly of importance to the legal system as a whole, virtually all questions of interpretation of the"home statute"by an administrative tribunal like the Appeals Commission will be reviewed for reasonableness: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 34, 39. Many of the issues before the Appeals Commission related to the admissibility of evidence, the weight to be given to evidence, the interpretation of Board compensation policy, whether the employee was entitled to compensation, and the interpretation of the Appeal Commission's home statute. These are all issues within the core mandate of the Appeals Commission, and the standard of review is reasonableness.

16 The standard of review that the Appeals Commission should apply to decisions of the Review Body requires an analysis of the role of the various tribunals within the entire system: *Newton v. Criminal Trial Lawyers' Assn.*, 2010 ABCA 399 (Alta. C.A.) at paras. 43, 57, (2010), 493 A.R. 89, 38 Alta. L.R. (5th) 63 (Alta. C.A.). The appellant argued that the Appeals Commission

was obliged to review the decision of the Review Body for correctness. But merely because the *Act* gives a right of appeal, does not signal a correctness standard of review: *Newton* at paras. 52-6. It was not inappropriate for the Appeals Commission to accord some deference given the issues, the expertise of the Review Body, and the respective roles of the Review Body and the Appeals Commission in the system.

17 The *Act* contains detailed provisions regarding the form and content of hearings before the Appeals Commission. It is therefore not necessary to resort to the factors in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) in order to determine the appropriate standards of fairness required: *Johnson v. Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 345 (Alta. C.A.) at paras. 12-5. Where the Appeals Commission is interpreting and applying its procedural rules (including those in the *Act*), the standard of review is reasonableness. Whether the overall conduct of the hearing met an acceptable standard of fairness is reviewed for correctness: *Armstrong v. B.B.F., Local 146*, 2010 ABCA 326 (Alta. C.A.) at para. 15, (2010), 35 Alta. L.R. (5th) 238, 493 A.R. 259 (Alta. C.A.).

Issues on the Appeal

18 The following issues are raised for decision:

a) Did the Appeals Commission commit a reviewable error in the way it dealt with the letters from the files of other workers?

b) Did the Appeals Commission commit a reviewable error in allowing the Board to call further evidence (the testimony of Dr. Magnan) at the appeal hearing?

c) Was the Appeals Commission's interpretation of the policy on pre-existing conditions unreasonable?

d) Was the finding that the worker was entitled to compensation unreasonable?

e) Was the overall conduct of the hearing unfair?

Letters From Other WCB files

19 The consultant representing the appellant employer attempted to use letters from files of other workers on two different occasions:

a) she attempted to use a letter from the file of another worker ("Document 25"), in order to demonstrate that inguinal herniae are a congenital defect; and

b) she attempted to use a previous opinion of Dr. Magnan in relation to another worker when cross-examining him.

While the context in which the letters were to be used differed, some common issues arise.

20 The Appeals Commission prevented the use of Document 25 partly because they thought it raised privacy issues under the *Personal Information Protection Act*, SA 2003, c. P-6.5. Document 25 was an opinion letter prepared by a doctor with respect to the compensation claim of another worker, but all of the information identifying that worker had been redacted. The appellant noted that Document 25 therefore did not meet the definition of"information about an identifiable individual" required by the *Personal Information Protection Act*. In the alternative, the use of the information might be permissible under other provisions of the *Personal Information Protection Act*, such as s. 17(d) relating to investigations and legal proceedings.

21 There is force to the appellant's arguments. However, even if Document 25 and the previous opinion of Dr. Magnan did not fall under the *Personal Information Protection Act*, the Appeals Commission had legitimate reasons to be concerned about the confidentiality, privacy, and integrity of Board files. It appears that the consultant representing the appellant had obtained these two documents because of previous retainers. The record suggests that it was while she was working on the files of the two workers whose cases are discussed in the letters, that she had access to those documents. She obviously kept copies, or had

continuing access to the letters. When she concluded they might be useful in this dispute, she redacted the personal information, and attempted to enter them on this record.

22 Consultants and lawyers representing employers and workers obviously must have access to Board files. However, there must be an implied understanding on the part of all concerned that the privacy of the files will be respected. Access to the files is provided for the purpose of resolving the underlying dispute only, and not for the general advantage or convenience of the consultant. That is not to say that there is an absolute prohibition on using information in the manner attempted. However, it is within the purview of the Appeals Commission to regulate that use, and it was not unreasonable for the Appeals Commission to have regard to privacy considerations in deciding whether to leave Document 25 on the record.

23 The Appeals Commission also concluded that Document 25 was irrelevant. Once all of the personal information was redacted from the letter, it contained an apparently generic statement about the root causes of inguinal herniae. Taken at its face value, it read much like a medical encyclopedia or dictionary might read on the subject. But since the statements were contained in a letter about a specific worker, it was not unreasonable for the Appeals Commission to conclude that the relevance of the letter was minimal. A physician writing an entry in an encyclopedia would make sure that the comments being made were generally applicable, and would insert any appropriate provisos or conditions. A physician writing a letter about a particular worker would do so in the context of that workers age, circumstances, injury, prognosis, and treatment. It was not unreasonable for the Appeals Commission to hold that such a letter was an unreliable source of information about the injury in general, especially since the author was not available for cross-examination. In any event, the appellant entered other evidence to the same effect, so the decision to exclude Document 25 did not result in the appellant being unable to enter evidence contrary to Dr. Magnan's current opinion on the cases of inguinal hernia.

24 The appellant also argued that it was a reviewable error for the Appeals Commission to remove Document 25 from the record, because the consideration of that document is mandatory. Section 13.2(2) of the *Workers' Compensation Act* provides:"In considering an appeal from a decision under section 46, the Appeals Commission shall consider the records of the claims adjudicator and the review body relating to the claim". Section 13.2(6)(a) allows an interested party to place new evidence on the record, and the appellant argued that once Document 25 was tendered, it had to be considered. The short answer is that even if Document 25 is the kind of"record"or"evidence" contemplated, it was considered by the Appeals Commission. The Appeals Commission concluded, after the document was considered, that it had little probative value and raised privacy issues, but the document was considered. The section does not require the Appeals Commission to give any particular weight to any evidence. The fact that the Appeals Commission directed that the document be removed from the record, rather than just giving it no weight, is of no consequence.

25 Similar issues arose with respect to Dr. Magnan's prior opinion letter that the consultant wanted to use in cross-examination. The Appeals Commission was entitled to conclude that it also raised privacy issues. Further, that opinion was obviously given in the context of a particular worker, and it does not follow that Dr. Magnan would be obliged to give a similar opinion with respect to every worker who had a hernia. In any event, it seems to have been acknowledged by all concerned that the Board's interpretation of a pre-existing condition had evolved over time, and the fact that Dr. Magnan had given an opinion under the previous interpretation of the policy was not particularly helpful in examining the present interpretation of the policy. Finally, while the consultant was not allowed to use the letter, no other restrictions were placed on her ability to cross-examine Dr. Magnan, although she may not have understood that to be the case given her failure to cross-examine on these issues. The exclusion of this document did not itself restrict the appellant in making the argument about the proper interpretation and application of the policy on pre-existing conditions.

26 In summary, the appellant has not demonstrated any reviewable error in the way that the Appeals Commission dealt with and weighed the two letters that originated from other Board files.

The Evidence of Dr. Magnan

27 Appeals to the Appeals Commission are based largely on the record, but the *Act* allows interested parties to introduce new evidence:

> 13.2(6) In the hearing of an appeal under this section, the Appeals Commission
>
> (a) shall give all persons with a direct interest in the matter under appeal an opportunity to be heard and to present any new or additional evidence,
>
> (b) is bound by the board of directors' policy relating to the matter under appeal,
>
> (c) shall permit the Board to make representations, in the form and manner that the Appeals Commission directs, as to the proper application of policy determined by the board of directors or of the provisions of this Act or the regulations that are applicable to the matter under appeal, ...

Pursuant to this section, the appellant employer provided new evidence to the Appeals Commission, in the form of an 84 page study on herniae from the British Columbia Workers' Compensation Board which recommended that herniae be treated as the aggravation of a pre-existing condition.

28 The Board concluded that it should provide further input to the Appeals Commission on the application of the Alberta policy on *Aggravation of a Pre-Existing Condition* to herniae. It was common ground that the appellant was a"person with a direct interest"entitled to introduce new evidence under s. 13.2(6)(a). The Appeals Commission, however, assumed that the Board was not an interested person under s. 13.2(6)(a), and would only be entitled to provide new input under s. 13.2(6)(c). The Appeals Commission proceeded on the assumption that it was obliged to follow the decision in the unreported reasons in *Greer v. Workers Compensation Board* (February 25, 2008), Doc. Edmonton 0703-12157 (Alta. Q.B.). That decision came to the conclusion that because the Board was specifically mentioned in s. 13.2(6)(c), it was not intended that it be included under s. 13.2(6)(a) as well.

29 Firstly, it can be noted that s. 13.2(6) is a part of the Appeal Commission's home statute. While the interpretation of that section in *Greer* is not unreasonable, that does not mean that is the only reasonable interpretation. It would be open to the Appeals Commission to adopt a different meaning of the section, and so long as that interpretation was also reasonable, its decision would not be subject to judicial review: *Essex (County) Roman Catholic Separate School Board v. O.E.C.T.A.* (2001), 56 O.R. (3d) 85 (Ont. C.A.) at paras. 29-30, (2001), 150 O.A.C. 2 (Ont. C.A.); *Pacific Press Ltd. v. Vancouver-New Westminster Newspaper Guild, Local 115* (1989), 34 B.C.L.R. (2d) 339 (B.C. C.A.); *Irving Oil Ltd., Refining Division v. C.E.P., Local 691* (1995), 163 N.B.R. (2d) 306 (N.B. C.A.) at paras. 13-21; *Ottawa Police Assn. v. Ottawa Police Services Board* (2008), 233 O.A.C. 51 (Ont. Div. Ct.) at paras. 30-31; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at pp. 796-7. Therefore, just because the decision of the Appeals Commission to allow Dr. Magnan to testify appears at some level to be inconsistent with *Greer* does not make it unreasonable.

30 To that end, it can be seen that the proper interpretation of s. 13.2(6) is not without difficulty. The concept of an "interested person" is used in slightly different contexts in ss. 13.2(1), 13.2(6) and 13.4(1). It is possible that s. 13.2(6)(c) is not intended to reflect any limitation in the scope of s. 13.2(6)(a), but is merely there to confirm that the Board is entitled to provide input on the meaning of its policies. In other words, while s. 13.2(6)(b) provides that the Appeals Commission is bound by the Board's policies, that does not mean that the Board is only entitled to rely on the bare written policy itself. Section 13.2(6)(c) could be designed to make it clear that the Board can supplement the policy itself with other information that suggests the proper interpretation of the policy.

31 Counsel for the Appeals Commission reminded the Court of the history of this section. Prior to 1988 there were few appeal rights in the *Act*, opportunities for judicial review were limited, and the workers' compensation system was criticized for being too insular. In that year the Legislature created the Appeals Commission and provided for a new level of appeal: *Workers' Compensation Amendment Act, 1988*, SA 1988, c. 45. That appeal right, however, was subject to two important limitations. Firstly, s. 8(7) of the *Act* provided that the Appeals Commission was bound by the policies of the Board. Secondly, that section provided that if the Appeals Commission allowed an appeal, but the Board considered that it had"not properly applied that policy", the Board could refer the matter back to the Appeals Commission with directions to give"fair and reasonable"consideration to the policy. This latter provision obviously limited the independence of the Appeals Commission.

32 With the benefit of experience under the new appellate system, further amendments were made in 2002: *Workers' Compensation Amendment Act*, *2002*, SA 2002, c. 27. In particular, what is now s. 13.2 was added. Section 13(5), which allowed "all interested parties"to call fresh evidence, was carried forward as s. 13.2(6)(a). The provision that the Appeals Commission is bound by Board policies was carried forward into s. 13.2(6)(b), but the provision allowing the Board to refer matters back to the Appeals Commission with directions was deleted. It was in this context that s. 13.2(6)(a) was carried forward, and new s. 13.2(6)(c) was added to the statute. It may therefore be that s. 13.2(6)(c) was not intended to limit the previously existing 13.2(6)(a), but was intended to be a substitute for the former ability to refer matters back with directions.

33 Section s. 13.2(6)(c) might also simply be directed at the rule in *Northwestern Utilities Ltd., Re* (1978), [1979] 1 S.C.R. 684 (S.C.C.). That decision held that just because a tribunal is deemed to be a"party", does not mean that it has a full right to participate in the hearing. So this particular provision might just be included to delineate the scope of the Board's participation in the hearing, without intending to mean that it is not an"interested person"under s. 13.2(6)(a).

34 In this case the Appeals Commission did not directly permit the Board to call new evidence under s. 13.2(6)(a), but the appellant argues that it effectively did so by allowing Dr. Magnan to testify under s. 13.2(6)(c) as to"the application of the cost relief policy in a factual and medical context", and on"his medical opinion as to the origin of herniae". Of course, s. 13.2(6)(c) is itself a part of the home statute, and the Appeals Commission's interpretation of what is included in"the proper application of policy"is also entitled to deference. Even if that interpretation implicitly permitted some fresh evidence under s. 13.2(6)(a), that does not necessarily demonstrate reviewable error.

35 The decision of the Appeals Commission to allow Dr. Magnan to testify was not unreasonable. The interpretation placed on s. 13.2(6)(c) was within the scope of reasonable interpretations available in law. As the Appeals Commission pointed out, if the Board had no ability to rebut fresh evidence called by the employer, the options of the Appeals Commission would be severely limited. In any case where the appellant introduced new evidence, the Appeals Commission would either have to accept that evidence at face value and without rebuttal, or submit the matter back to the Review Body for reconsideration. That would be very inefficient, and contrary to the expectation that the appeal would be on the record supplemented by fresh evidence.

36 In summary, the reception of the new evidence from Dr. Magnan did not itself reflect any reviewable error.

Interpretation of the Policy on Pre-Existing Conditions

37 The workplace accident in question either activated or made symptomatic a pre-existing hernia, or a pre-existing enhanced disposition to a hernia. Such situations are dealt with under the Board's policy on *Aggravation of a Pre-Existing Condition*. The policy is stated as follows:

> When an accident causes a pre-existing condition or disease to deteriorate or become symptomatic to the point where a worker is no longer able to perform all aspects of the job, the WCB shall allow entitlement on the basis of an aggravation factor....
>
> A pre-existing condition is any pathological condition which, based on a confirmed diagnosis or medical judgment, pre-dated a work-related injury....

The Review Body concluded that the worker's injury should be treated as arising from a workplace accident, but the appellant employer argued that it should be categorized as arising wholly or partly from pre-existing causes, and that it should be responsible at most for"aggravation"of the injury.

38 It would appear that the appellant's request for cost relief under the *Aggravation of a Pre-Existing Condition* policy was based on the historical interpretation of that policy. The appellant argued that the decision in this case was inconsistent with prior decisions regarding similar workers with similar injuries, and that it was an error for the Appeals Commission to change the interpretation of the policy.

39 There is, however, no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact situations. Section 17(4) of the *Act* provides that the Board is not bound by previous decisions. The existence of allegedly conflicting decisions by a tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable: *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, 2001 SCC 4 (S.C.C.) at para. 28, [2001] 1 S.C.R. 221 (S.C.C.).

40 Dr. Magnan testified at length about the proper interpretation of the policy, and whether this worker's injury fell within it. He particularly commented on the meaning of"pathological". The appellant employer challenged his evidence, and disputed the proper interpretation of what is"pathological". The appellant argues that the Appeals Commission erred in concluding that this worker's prior condition was not pathological.

41 The interpretation, and application of the policy on *Aggravation of a Pre-Existing Condition* to the injury of this particular worker was within the core expertise of the Appeals Commission. That applies to whether the worker's injury arose from a pre-existing condition, and particularly whether it was"pathological"in nature. The decisions that the injury did not fall within the policy, that the worker was entitled to full compensation, and that the injury should be charged to the appellant employer, were available on the facts and the law and therefore were not unreasonable. It is not the role of a reviewing court to reinterpret the policies of the Board.

The Reasonableness of the Decision to Award Compensation

42 When the worker was fit for modified duties is within the core expertise of the Appeals Commission. It is entitled to accept the evidence of the worker on when he was fit to return to work; it is not required to have medical evidence, nor even to accept medical evidence over that of the worker. Exactly what the family physician meant by his letter is to be determined by the Appeals Commission. This aspect of the decision is reasonable and therefore demonstrates no reviewable error.

43 The interpretation of s. 25(2) of the *Act*, and the interplay between disability benefits under the *Act* and vacation pay, raise issues that are also within the core jurisdiction of the Appeals Commission. The interpretation of s. 25(2) is a question of law reviewed for reasonableness. The application of that law to a fixed set of facts is a mixed question of fact and law also reviewed for reasonableness. Coordinating the provisions of the statute with the Board's policies on vacation pay raises a mixed question of fact, law, and policy. The ultimate decision of the Appeals Commission is reviewed for reasonableness. The conclusion of the Appeals Commission that the worker should be treated as if he"would have worked"and"would have been paid"during the period he was on paid vacation is one that was reasonably available on the facts and the law. No reviewable error has been demonstrated.

Overall Fairness of the Process

44 The final issue is whether overall the hearing met the necessary standards of fairness. A party involved in a hearing before an administrative tribunal is entitled to fair notice of the case to be met, and (under the *Act*) is entitled to introduce fresh evidence on appeal.

45 In this case the appellant's attempt to introduce fresh evidence was somewhat frustrated. The appellant's consultant wanted to introduce Document 25 as expert medical evidence on the causes of herniae. When that document was ruled inadmissible, the appellant was arguably left partly without a factual base from which to argue.

46 The appellant was also, to some extent, faced with unanticipated evidence from Dr. Magnan. The appellant had a viable argument that his evidence should not be admitted. When it was admitted, it appeared the appellant's consultant was not fully prepared to cross-examine him. This problem was compounded when she was not permitted to use the previous opinion letter he had prepared in cross-examination. While she might have requested an adjournment at this stage, that was not done.

47 More importantly, however, the appellant was not given fair advance notice of what Dr. Magnan would say. When the Board indicated that it proposed to call Dr. Magnan, the appellant's consultant not only objected to his evidence, but in the

alternative asked for disclosure of what he proposed to say. In a letter responding to the consultant's disclosure request, counsel for the Board dealt at length with the issue of whether Dr. Magnan was entitled to testify, putting forward the argument that he was entitled to comment under s. 13.2(6)(c) on the proper interpretation of the policy on *Aggravation of a Pre-Existing Condition*. However, on the subject of his evidence, counsel merely said that Dr. Magnan did not have a presentation, that the consultant could cross-examine him and call her own medical evidence, and that if she was taken by surprise she could ask for an adjournment.

48 This response did not adequately address the appellant's inquiry. It is unclear how the consultant could know what medical evidence to call in rebuttal, without knowing what Dr. Magnan was going to say. Counsel for the Board did not even advise that for the first time the term"pathological"would be of primary importance. The option of asking for an adjournment if she was taken by surprise would hardly be conducive to the efficient resolution of the dispute. It must have been apparent to counsel for the Board that Dr. Magnan was going to advance an interpretation of the policy different from the one historically applied, and that this was going to be the key issue at the hearing. In all the circumstances, it was incumbent on the Board to prepare and provide a summary of what Dr. Magnan was going to say about the policy, and about the meaning of"pathological". In the end, the hearing process did not meet the minimum requirements for fairness.

49 It should be noted that these problems, in part, likely arose because the consultant representing the appellant was not legally trained. The absence of legal training is not an excuse for inadequacies in representation, but it must be recognized that factors relating to economics and expertise often make it necessary for non-lawyers to appear before the Appeals Commission. While workers' compensation consultants may lack legal expertise, they have other expertise and knowledge that is of value. It would not necessarily be desirable or proper to insist on legal representation at every stage of the workers' compensation system. The Board and the Appeals Commission have access to trained counsel, and there is some onus on them to ensure that the proper procedural platform is in place to ensure a fair and efficient hearing.

Conclusion

50 In conclusion, the appeal is allowed in one respect only. Given the inadequacies in the fairness of the hearing, the appeal is allowed on the issue of the appellant's right to cost relief, and the matter of the application of the policy on *Aggravation of a Pre-Existing Condition* is remitted to the Appeals Commission for reconsideration. The form and content of that rehearing is in the hands of the Appeals Commission.

51 For clarity, the appeal with respect to the other issues is dismissed: i.e., whether the two letters from the other files are admissible, when the worker was available for modified work, the issue respecting vacation pay, and the ability of the Board to call fresh evidence.

52 The appellant has been successful on only one of many issues argued. In addition, the need for a new hearing arises in part because of the appellant's consultant's failure to cross-examine Dr. Magnan on critical issues, but also because of the Board's failure to provide an informative description of the nature of Dr. Magnan's expected evidence in response to her disclosure request. Counsel are invited to settle the matter of costs, failing which they may approach the panel for further direction.

Appeal allowed in part.