CHALLENGING TRIBUNAL DECISIONS:
THE STANDARD OF REVIEW

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I. INTRODUCTION

The success or failure of a judicial review application or an appeal will often depend on the particular standard of review employed by the Court.

II. WHAT IS MEANT BY THE STANDARD OF REVIEW

The standard of review means the degree of intensity with which the Courts will examine the decision of an administrative tribunal. Will the Court examine the decision to determine if it is correct in the Court's view? Or will the Court defer to the decision of the tribunal? (Jones and deVillars, *Principles of Administrative Law*, 3rd edition, p. 446)

III. THE DEVELOPMENT OF THE TWO "TRADITIONAL" STANDARDS OF REVIEW: CORRECTNESS AND PATENT UNREASONABILITY

The high-water mark of deference - *CUPE, Local 963 v. New Brunswick Corp.* (1979) 97 D.L.R. (3d) 147 (S.c.c.). After *CUPE*, the standard of review was either correctness at one end or patent unreasonability at the other.

IV. THE MEANING OF "PATENT UNREASONABILITY"

A tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported by the relevant legislation. (*C.A.IM.A. W., Local 14 v. Paccar of Canada* (1989) 62 D.L.R. (4th) 437 (S.C.c.)»)
V. THE FUNCTIONAL AND PRAGMATIC TEST

- In the post-CUPE era, Courts characterized certain issues as preliminary or collateral from a jurisdictional perspective which meant that on these types of issues the tribunal had to be correct. The artificiality of this characterization led to the development of the new functional and pragmatic test to be used to establish the standard of review. This test asked which matters did the legislature intend to be within the exclusive jurisdiction of the tribunal? In order to determine the legislative intent, the following factors are to be considered:

(1) The presence or absence of a privative clause.

(2) The expertise of the tribunal.

(3) Purpose of the Act as a whole and of the provision in particular.

(4) The nature of the problem.


VI. THE APPLICATION OF THE FACTORS IN THE FUNCTIONAL AND PRAGMATIC TEST

- The central inquiry in determining the standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed. This legislative intent is determined by assessing the factors below none of which is determinative:

1. **Privative Clause**

Is there a "full" privative clause declaring decisions of the tribunal to be final and conclusive with no right of appeal and excluding all forms of judicial review (*Pasiechnyk*, at para. 17). Or is there a "partial" privative clause that does not have the preclusive effect of a full privative clause? (See for example *United Brotherhood

2. The Expertise of the Tribunal

Expertise has been described as the most important factor in settling on a standard of review (Southam at para. 50; Bradco at p. 335). Has the tribunal been constituted with a particular expertise with respect to achieving the aims of the legislation whether because of specialized knowledge of the decision-makers, special procedures, or a non-judicial means of implementing the legislation? In considering the expertise issue, the Court must:

(a) Characterize the expertise of the tribunal in question.

(b) Consider the Court's own expertise relative to that of the tribunal, and

(c) Identify the nature of the specific issue before the administrative decision-maker relative to this expertise.


3. Purpose of the Act as a Whole and the Provision in Particular

The appropriateness of judicial scrutiny is reduced where the legislation requires the tribunal to delicately balance the interest of different constituencies as opposed to primarily establishing rights as between parties. Judicial deference is appropriate where there are a large number of interlocking and interacting policy interests and considerations. (Pushpanathan at para. 36)

4. The Nature of the Problem

Pure questions of law may, although not necessarily, lead to less deference. Deference is less likely to be paid to issues of highly generalized questions of law.
Deference is typically afforded on questions of fact because of the "signal advantage" of the primary trier of fact. (See Pushpanathan)

VII. THE DEVELOPMENT OF A SPECTRUM OF STANDARDS OF REVIEW

- Prior to the Supreme Court of Canada's decision in Pezim, the standard of review was either correctness or patent unreasonability. In Pezim the Court developed the concept of a spectrum of standards of review:

"Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. ..

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in questions, as for example in the area of human rights."

(Pezim v. British Columbia (Superintendent of Brokers) [1994] 2 S.C.R. 557 at p. 590)

VIII. THE INTERMEDIATE STANDARD OF REVIEW - REASONABLENESS SIMPLICITER

- In Southam the Supreme Court articulated a third standard of review — reasonableness simpliciter. (Canada (Director of Investigation & Research, Competition Act) v. Southam Inc. (1997) 50 Admin. L.R. (2d) 199 (S.C.C.)) Reasonableness simpliciter sits somewhere between the more exacting and the more deferential ends of the
spectrum. The difference between "unreasonableness" and "patent unreasonableness" lies in the immediacy or obviousness of the defect. *(Southam at p. 219-220)*

The Court in *Southam* described the theoretical distinctions as follows (at paragraph 56):

"An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the unreasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it."

A trial judge, attempting to put the theory into practice, commented:

"In attempting to follow the Court's distinction between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all."


IX. **THE SPECTRUM APPLIES TO BOTH APPEALS AND APPLICATIONS FOR JUDICIAL REVIEW**

- After the Courts' decisions in *Pezim* and *Southam* it was unclear whether the spectrum of review would be applied to judicial review applications in addition to appeals. The Court's decision in *Pushpanathan* made it clear that the concept of the spectrum of review applies to both. *(Pushpanathan v. Canada (Minister of Citizenship & Immigration) (1998) 160 D.L.R. (4th) (S.C.C.)*}
X. THE STANDARD OF REVIEW FOR ABUSE OF DISCRETION

• Traditionally administrative law has approached the review of decisions classified as discretionary separately from decisions interpreting the rules of law. In Baker the Supreme Court of Canada departed from this approach holding that the standard of review of discretionary decisions is best analyzed through the framework of the functional and pragmatic test and the spectrum. *(Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 17 at para. 15)*

• The Court went on to state:

  "However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter." *(para. 56)*

• *Baker* represents the creation of an almost unified theory of judicial review encompassing within its analytical framework applications for judicial review, appeals, and review of discretionary decisions.

XI. THE STANDARD OF REVIEW FOR ALLEGED BREACHES OF PROCEDURAL FAIRNESS AND NATURAL JUSTICE

• The typical standards of review of correctness or patent unreasonableness do not really fit this ground of review. It has been suggested that the proper test is as follows: Would a reasonable person, reasonably knowledgeable about all the facts, reasonably perceive that the process is unfair. *(Jones and deVillars at p. 514)*
XII. CONCLUSION

- Every judicial review application and every appeal of a decision of an administrative tribunal needs to include a separate and distinct analysis of the applicable standard of review.

- Good advocacy in administrative law requires a thorough knowledge of the history of the development of the standard of review.