

## Standards of Judicial Review : Is it Time to Change our Analysis ?

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Article abstract

The notion of a pragmatic and functional analysis has become a mantra in administrative law, producing three technical standards of review, one of which is selected at the start of virtually every case. All technical concepts tend to outlive their utility and, it is suggested that the current one should now be reconsidered. There is no doubt that courts must apply different degrees of judicial deference to various types of decisions. However, just as the old distinction between judicial and administrative acts ceased to be helpful in most matters, without ever totally disappearing, the present categories are losing their utility and, if unmodified, might produce an unduly technical and formalistic system of law.

It is, in particular, questionable whether these concepts work well in certain specific fields — in disciplinary law, for example and in disputes involving fundamental rights. The issue of „expertise“ in such matters is far from easy and may often generate injustice.

## Standards of Judicial Review : Is it Time to Change our Analysis ?

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Julius H. GREY\*

*The notion of a pragmatic and functional analysis has become a mantra in administrative law, producing three technical standards of review, one of which is selected at the start of virtually every case. All technical concepts tend to outlive their utility and, it is suggested that the current one should now be reconsidered. There is no doubt that courts must apply different degrees of judicial deference to various types of decisions. However, just as the old distinction between judicial and administrative acts ceased to be helpful in most matters, without ever totally disappearing, the present categories are losing their utility and, if unmodified, might produce an unduly technical and formalistic system of law.*

*It is, in particular, questionable whether these concepts work well in certain specific fields — in disciplinary law, for example and in disputes involving fundamental rights. The issue of „expertise“ in such matters is far from easy and may often generate injustice.*

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*Le concept de l'analyse fonctionnelle et pragmatique est devenu un rituel en droit administratif et il a produit trois normes techniques de révision, dont l'une est choisie à l'amorce de chaque dossier. Tout concept technique tendant à survivre à son utilité, l'auteur suggère que la conception retenue doit maintenant être remise en question. Il ne fait aucun*

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\* Member of the Quebec Bar and sometime member of McGill Law Faculty.

*doute que les tribunaux doivent accorder différents niveaux de déférence aux divers organismes décisionnels. Néanmoins, comme l'ancienne distinction entre un acte administratif et un acte judiciaire n'est plus pertinente dans la plupart des cas, sans jamais disparaître complètement, les catégories actuelles perdent leur utilité et, si elles devaient demeurer inchangées, elles pourraient engendrer un système de droit indûment technique et formaliste.*

*L'application de ces normes techniques à certains domaines de droit est particulièrement discutable, par exemple en droit disciplinaire ou dans des dossiers touchant les droits fondamentaux. Dans ces domaines, la question de la « spécialité » d'un organisme est déjà difficile à traiter et elle pourrait facilement donner naissance à de graves injustices.*

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Determining the standard of review or the degree of deference to subordinate authorities has become a standard preliminary exercise in most cases in the field of administrative law<sup>1</sup>. A special vocabulary has sprung up on this issue, including the rather mysterious term “pragmatic and functional analysis”, and three recognized standards have been established by the Supreme Court — correctness, unreasonableness and manifest unreasonableness.

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1. This is so despite the disapproval of the use of the terminology of preliminary or collateral question in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 (hereafter : “*CUPE*”). Preliminary or collateral questions were used for purposes very similar to the standard of review today.

In *Chamberlain v. Surrey School District No. 36*<sup>2</sup>, McLachlin C.J.C. formulated the present theory as follows :

In order to assess the Board's decision, we must first determine the appropriate standard of review. My colleague LeBel J. in effect questions whether the pragmatic and functional approach should apply to this case, holding that as an elected body, the Board's decision should be assessed on the basis of whether it is contrary to the statute and hence patently unreasonable. In my view, the usual manner of review under the pragmatic and functional approach is necessary. It is now settled that all judicial review of administrative decisions should be premised on a standard of review arrived at through consideration of the factors stipulated by the functional and pragmatic approach. This is essential to ensure that the reviewing court accords the proper degree of deference to the decision-making body. To apply the analysis that my colleague proposes, is first, to adopt an approach for which no one argued in this case ; and second, to return to the rigid and sometimes artificial jurisdictional approach which the more flexible function and pragmatic approach was designed to remedy.

The pragmatic and functional approach applicable to judicial review allows for three standards of review : correctness, patent unreasonableness and an intermediate standard of reasonableness.

The standard of "correctness" involves minimal deference : where it applies, there is only one right answer and the administrative body's decision must reflect it. "Patent unreasonableness", the most deferential standard, permits the decision to stand unless it suffers from a defect that is immediately apparent or is so obvious that it "demands intervention by the court upon review": *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at p. 237. The intermediate standard of "reasonableness" allows for somewhat more deference : the decision will not be set aside unless it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination" *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56 ; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 63 ;

In the following paragraph, McLachlin C.J.C. deals with the relationship between the concept of "discretion" and deference as though they were the same :

Which of the three standards is appropriate in a given case depends on the amount of discretion the legislature conferred on the delegate. The relevant amount of discretion is evidenced by four factors, which often overlap ; (1) whether the legislation contains a privative clause (2) the delegate's relative expertise ; (3) the purpose of the particular provision and the legislation as a whole ; and (4) the nature of the problem. (See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 ; *Southam*, supra ; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 ;

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2. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 par. 4-6 (hereafter : "*Chamberlain*").

However, while broad discretion certainly does imply relatively little judicial review<sup>3</sup>, the two concepts are somewhat different. All discretion necessarily has limits<sup>4</sup> and is subject to a variable degree of deference, but non-discretionary decisions can also be treated with great respect and benefit from a degree of insulation from review. For instance, jurisdiction is not normally a discretionary issue, yet this did not defer Dickson J. from saying in *CUPE*<sup>5</sup> :

The courts, in my view, should not be alert to brand as jurisdictional and therefore subject to broader curial review, that which may doubtfully be looking so...

Thus, a degree of deference is imported into an area of law with jurisdiction which was always considered to be the domain "par excellence" of the superior courts<sup>6</sup>.

The current state of the jurisprudence as stated in the extract from *Chamberlain*<sup>7</sup> cited above makes it clear that not all lower court and tribunal decisions can be treated in the same way and lists many of the factors which must be taken into account in every case. These things are no longer controversial.

However, a number of serious questions remain about the current theory. Firstly, one must look at the criterion used by the courts to determine standard of review and consider their importance and the possibility that there may be other, as yet unformulated ones. Secondly, one must ask whether it applies to all judicial review, including review for unfair proce-

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3. See J.H. GREY, "Discretion in Administrative Law", (1979) 17 *Osgoode Hall L.J.* 107. See also *Baker v. Canada*, [1999] 2 S.C.R. 817 (hereafter : "*Baker*") for a recent statement of this correlation.
  4. The classical statement on this topic is found in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140: "In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."
  5. *CUPE*, *supra*, note 1, 233. This is probably the seminal dictum in modern administrative law, even if it is not always recognized as such.
  6. See D.P. JONES, *Recent Developments in Administrative Law*, speech to National Administrative/Labour and Employment Law Section, Canadian Bar Association, Ottawa, 22 November 2002 at p. 14 and ff.
  7. *Chamberlain*, *supra*, note 2.

sure or whether it is limited to the debate about the “reasonableness”, of the substantive result in each case. Thirdly, one can question what is left of the notion of jurisdiction, which was central to traditional administrative law. Finally, and most fundamentally, one must query the continued utility of three specific standards of review, when what we seem to have is a spectrum going from almost unreviewable to easily reviewable for any error, however minor.

### 1 The criteria for standard of review

It is not difficult to list the leading cases dealing with standard of review, even though almost every judicial review case now has a section devoted to the issue.

The leading cases are *Pezim v. British Columbia*<sup>8</sup>, *Canada v. Southam Inc.*<sup>9</sup>, *Pushpanathan v. Canada*<sup>10</sup>, *Baker*<sup>11</sup>, *Ivanhoe Inc. v. United Food and Commercial Workers Local 500*,<sup>12</sup> and *Chamberlain*<sup>13</sup>. These cases were not revolutionary innovations, but followed from a long line of jurisprudence and doctrine dealing with judicial restraint, especially in the field of labour relations<sup>14</sup>. A number of criteria have become standard tests.

The presence or absence of a privative clause and the wording used have been a significant issue since *CUPE*<sup>15</sup>. It is clear, however, that the presence of a privative clause need not always be decisive against review because the decision impugned might be manifestly unreasonable or because the rest of the context may dictate a lesser standard. Similarly, the absence of a privative clause may not be decisive in favour of more generous curial intervention. In *Ivanhoe*<sup>16</sup>, Arbour J. stated this very clearly, basing herself on *Pushpanathan*<sup>17</sup> and *Pasiechnyk*<sup>18</sup>.

8. *Pezim v. British Columbia*, [1994] 2 S.C.R. 557 (hereafter: “*Pezim*”).

9. *Canada v. Southam Inc.*, [1997] 1 S.C.R. 745 (hereafter: “*Southam*”).

10. *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982 (hereafter: “*Pushpanatan*”).

11. *Baker*, *supra*, note 3.

12. *Ivanhoe Inc. v. United Food and Commercial Workers Local 500*, [2001] 2 S.C.R. 565 (hereafter: “*Ivanhoe*”).

13. *Chamberlain*, *supra*, note 2.

14. *Canada v. PSAC*, [1993] 1 S.C.R. 941; *Blanchard v. Control Data*, [1984] 2 S.C.R. 476 (hereafter: “*Blanchard*”); *CUPE*, *supra*, note 1; B. LASKIN, “Certiorari to Labour Boards: The Apparent Futility of Privative Clauses”, (1952) 30 *R. du B. can.* 986. See J.H. GREY, “The Ideology in Administrative Law”, (1983) 13 *Man. L.J.* 35, for this writer’s views twenty years ago.

15. *CUPE*, *supra*, note 1.

16. *Ivanhoe*, *supra*, note 12.

17. *Pushpanathan*, *supra*, note 10.

18. *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890, par. 17.

It is significant in *Pezim*<sup>19</sup>, *Southam*<sup>20</sup> and *Baker*<sup>21</sup> that considerable deference was imposed on tribunals or courts which were exercising powers of statutory *appeal* without a privative clause<sup>22</sup>. It would appear that the privative clause issue is not only not decisive, but is perhaps relatively unimportant as compared to expertise.

The primordial significance of expertise is seen in *Southam*<sup>23</sup>, where Iacobucci J. postulated a great degree of deference to experts, even in situations where there is no privative clause or, more surprisingly, where there is an appeal tribunal and not one performing judicial review. Iacobucci J., in this case, was preoccupied not only with the importance of expertise, but also with defining the specific field of expertise as well as with the subtle notion of “relative expertise”. Even where courts have some arguable expertise, they should defer to tribunals with more specialized knowledge.

Expertise may be a reason for deference because the naming of experts could be interpreted as a signal from the legislator that judicial review is to be restricted. It may also be a ground for restraint because experts tend to be more competent than the superior courts in dealing with the technical issues and the courts are reluctant to impose their views in such circumstances. Certainly, a comparison between the expertise of the Court and the lower tribunal is frequently made when considering the standard of review<sup>24</sup>.

However, it is far from obvious what constitutes expertise and how far it extends. It is no longer clear, as it was in the days of *McLeod v. Egan*<sup>25</sup> that no subordinate body might claim expertise in the interpretation of statutes of general application<sup>26</sup>. Expertise has become a factor even in the interpretation of statutes, especially if the statute is not completely unconnected with the subject matter central to the hearing.

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19. *Pezim*, *supra*, note 8.

20. *Southam*, *supra*, note 9.

21. *Baker*, *supra*, note 3.

22. See also *Barreau du Quebec v. Tribunal des professions*, 200 D.L.R. (4th) 470.

23. *Southam*, *supra*, note 9, par. 15-18. On the notion of *relative* expertise, see *Kastner v. Canada (Attorney General)*, 2004 F.C. 773 (Beaudry J.), a decision of June 4, 2004 (hereafter: “*Kastner*”).

24. *Chamberlain*, *supra*, note 2, par. 10; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342; D.P. JONES, *loc. cit.*, note 6.

25. *McLeod v. Egan*, [1975] 1 S.C.R. 517.

26. *Pushpanathan*, *supra*, note 10, par. 34. Also see *CUPE*, *supra*, note 1.

Expertise is a very different concept where the subject matter is not accessible to the courts without an expert and where there is nothing esoteric about the issues to be decided. For instance, courts have been reluctant to intervene in decisions involving academic evaluation<sup>27</sup>. How is a court to judge the reasonableness of a physics or mathematics thesis<sup>28</sup>? Whenever a tribunal possesses the type of knowledge which a court does not have, it is a salutary rule to intervene as little as possible, and only when the error or injustice is beyond doubt<sup>29</sup>. However, a “specialized” tribunal does not necessarily have inaccessible knowledge when it deals with matters like discipline or like refugee status. That is why, in academic matters, the deference is not nearly as great when discipline or misconduct is at stake<sup>30</sup>. Indeed, *Kane v. U.B.C.*<sup>31</sup> is a case dealing with fairness. Dickson J. enunciated the following general principle which is incompatible with total deference<sup>32</sup>:

A high standard of justice is required when the right to continue in one’s profession or employment is at stake. *Abbott v. Sullivan*, at p. 198; *Russell v. Duke of Norfolk*, supra, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity “for correcting or contradicting any relevant statement prejudicial to their views”. *Board of Education v. Rice*, at p. 182; *Local Government Board v. Arlidge*, supra at pp. 133 and 141.

However, disciplinary tribunals, especially in professional law are also frequently referred to as having expertise<sup>33</sup>. Often, the “specialization” in such a case is rather a matter of collegiality and self-government than specialized knowledge<sup>34</sup>.

The difference between these concepts of expertise was noted by Arbour J. in *Moreau-Bérubé v. New Brunswick*<sup>35</sup>. Arbour J. said:

27. *Boyer c. Barreau du Québec*, (1993) J.E. 94-88; *Su c. Foster*, [1996] R.J.Q. 170 (Tellier J.).

28. Of course, a law faculty thesis may be easier for the Court to evaluate but, even then, the theory of restraint applies.

29. Note the stress on knowledge of economics in *Southam*, supra, note 9. Courts do not often have very extensive training or background of this type.

30. See further *Zompa c. Comité de révision des décisions disciplinaires concernant les étudiants*, [2003] R.J.Q. 509 (Hurtubise J.), under appeal.

31. *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (hereafter: “*Kane*”).

32. *Id.*, 1113.

33. *Barreau du Québec v. Tribunal des professions*, note 22.

34. *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869.

35. *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 par. 32 (hereafter: “*Moreau-Bérubé*”).



A tribunal charged with the task of disciplining provincial court judges does not fit into the more traditional specialized against non-specialized dichotomy for purposes of evaluating the appropriate standard of review.

She explains this at greater length<sup>36</sup> :

Thus, in the present case, the purpose and expertise issues present themselves in a unique fashion. On the one hand, the Judicial Council is in a sense a highly specialized tribunal required to deal with constitutionally protected rights — such as judicial independence and security of tenure of judges and the right of persons who come before the courts to a fair trial by an impartial tribunal — in the overall public interest. On the other hand, the tribunal is composed primarily of members of the judiciary. This might invite little deference, since, arguably, no more “specialization” exists in the judges sitting as Council members than in their colleagues sitting in court. The idea that specialization leads to deference is based on the more typical scenario, where a tribunal is composed of people who are not judges and who have a specialized expertise superior to that of judges who are, on the whole generalists.

In short, the issue here is not specialized *knowledge*, but the specialized *functions* and the presumed intention of the legislator. However Arbour J. went on to connect this type of “specialized function” with the more traditional expertise<sup>37</sup>. She then imposed a high standard of defer-

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36. *Id.*, par. 22-34. The issue of “peer” review as related to the expertise is directly brought up in *Therrien (Re)*, [2001] 2 S.C.R. 3 (hereafter: “*Therrien*”) at par. 148; this is textually cited at par. 38 of *Moreau-Bérubé*: “the legislature has chosen to assign the important responsibility of determining whether the conduct of a provincial court judge warrants a recommendation for removal from office exclusively to the Court of Appeal, under s. 95 C.J.A. This is a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects. Accordingly, this Court should only review the assessment made by the Court of Appeal if it is clearly in error or seriously unfair.”

37. *Moreau-Bérubé*, *supra*, note 35, par. 36-37: “The Council also has in fact a certain degree of specialization over that of the reviewing court. Gonthier J. noted in *Therrien*, *supra* at para. 147 (with reference to the Friedland Report, *supra*, at p. 80-81), that “before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office”. In making such a determination, issues surrounding bias, apprehension of bias, and public perceptions of bias all require close consideration, all with simultaneous attention to the principle of judicial independence. This, according to Gonthier J., creates “a very special role, perhaps a unique one, in terms of both the disciplinary process and the principles of judicial independence that our Constitution protects” (para. 148). Although this is clearly not the type of tribunal that develops an expertise from the sheer volume of cases before it, the fact that the Council is engaged in this special and unique role gives it some degree of specialty not enjoyed by ordinary courts of review who have never, historically, been involved in such matters.”

ence on the basis of the purpose and function of the lower tribunal ; she treats it not necessarily as having greater specialization than the Courts but as having “equal or better qualifications”. Thus, special functions may be as important as special knowledge in promoting deference.

What is often overlooked, however, is the danger lurking in peer review and indeed in excessive respect for expertise. Peer review is not an unmixed blessing. It is part of the human condition that minority schools of thought are often victims of injustice, that many are fearful or envious of those who might seem better than they are or who challenge their authority. It is not an accident that our legal tradition settled for a “generalist” superior court as an ultimate arbiter, not a plethora of specialized tribunals. It is not an accident, either, that despite all the pronouncements about deference, litigation in the academic and the professional spheres continues unabated. Our belief in peer review is often rooted in a narrow assumption of constant good faith which, unfortunately, is sometimes lacking<sup>38</sup>.

Technical expertise has its downside as well, despite its undoubted utility and indeed necessity. An expert can hardly have the detachment and the neutrality with respect to his discipline that a less committed judge will often display. It would be difficult to respect an “expert” who after years of intensive work in a field of human endeavour had no strong feelings about any controversy in that field. A reading of jurisprudence will show us how often experts disagree, how such expertise is sometimes a matter of the use of language, and how regularly a court will reject an expert’s views. Obviously, a court would be foolhardy to disregard expert views when they are not in a position to check the expert’s analysis through other expert assistance. However, a certain degree of scepticism, side by side with respect and deference, would probably improve the quality of justice<sup>39</sup>.

A third type of expertise, in addition to technical knowledge and “peer autonomy” in what may be called “political expertise” where those making the decisions are elected and thus presumably invested with the majority’s mandate<sup>40</sup>. In *Chamberlain*<sup>41</sup> we see that a school board is seen as being

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38. Ritchie J.’s dissent in *Kane*, *supra*, note 31, was an example of this narrow assumption. Fortunately, the majority of the Court did not follow him.

39. For instance, this writer remains firmly convinced that despite the interesting analysis found in those cases, both *Moreau-Bérubé*, *supra*, note 35, and *Therrien*, *supra*, note 36, were wrongly decided and should be reconsidered by the Supreme Court.

40. Deference to parliament or to provincial assemblies would be an illustration of this.

41. *Chamberlain*, *supra*, note 2, par. 10.

more appropriate to determine the preoccupation of the collectivity than courts. This is perhaps in order to preserve the non-political nature of courts.

Whenever deference is invoked with respect to municipal by-laws, school-board decisions, or indeed laws of general application, this broad discretion of persons elected to office must be weighed against the dangers represented by majorities and the many ways in which our society has adopted to protect citizens against majorities and unbridled populism, of which the *Canadian Charter of Rights and Freedoms* and similar provincial Charters are undoubtedly the best example.

As *Chamberlain*<sup>42</sup> makes clear the issue of “expertise” must be evaluated with respect not only to the tribunal as such, but with respect to each question before it. Moreover, no matter what the expertise of the tribunal, decisions which touch fundamental human rights should not be treated with great deference. In *Chamberlain*, we see this stated explicitly; however even in the field of human rights, different types of issues require different degrees of deference. Nevertheless, the entire field of fundamental rights is seen as having a particularly “judicial” character.

Human rights trump other considerations and, moreover, are singularly unsuitable for decisions by majorities since constitutional protections are often intended to shield citizens from majority opinion. It follows that the more one can present a case as one of basic rights or freedoms, the less difficult will it be to obtain judicial redress, if the Court disagrees with the original decision-maker. Further, and with the possible exception of human rights tribunals, subordinate bodies will not be successful in asserting claims to greater expertise in human rights than the reviewing courts.

In recent years, the Supreme Court has insisted that lower tribunals and, in particular, labour arbitrators should be able to apply the various charters of law and the Superior Court should not use its supervising powers so as to preclude them from doing so in advance<sup>43</sup>. *Chamberlain*<sup>44</sup> and other similar judgments will palliate this to a considerable degree by making judicial review relatively easy in such matters. In short, the arbitrators will make a first decision, but it will be set aside if the courts disagree without a requirement of unreasonableness;

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42. *Id.*, par. 9. See also *Pushpanathan*, *supra*, note 10, par. 33, and *Barrie Public Utilities v. Canadian Cable Television Association*, 2003 SCC 28.

43. See for instance: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360.

44. *Chamberlain*, *supra*, note 2, par. 10.

It is likely, too, that decisions involving constitutional law or other matters of great public importance will be reviewed with relative alacrity. Courts are unlikely to abdicate their stewardship of the constitution.

The two remaining criteria stipulated in *Pushpanathan*<sup>45</sup> and *Chamberlain*<sup>46</sup>, the purpose of the act as a whole and of the impugned provision in particular and the “nature of the problem” are variations on the same themes. In *Pushpanathan*<sup>47</sup> we read that there is a connection between the purpose of a statute and the expertise of the decision-makers created under it.

The purpose of an enactment is in any event a very significant factor in its interpretation<sup>48</sup> and it is discovered by taking into account virtually every type of consideration. In judicial review, the expertise of the subordinate tribunal is simply one of the major factors.

The fourth criterion — the nature of the problem and whether the issue is one of fact or law — is also related to the expertise. However, certain very specific questions arise, and, in particular, the difficulty of determining what is fact and what is law.

In *Canada v. Mossop*<sup>49</sup>, L’Heureux-Dubé J. said :

In general, deference is given on questions of fact because of the “signal advantage” enjoyed by the primary finder of fact. Less deference is warranted on questions of law, in part because the finder of fact may not have developed any particular familiarity with issues of law. While there is merit in the distinction between fact and law, the distinction is not always so clear. Specialized boards are often called upon to make difficult findings of both fact and law. In some circumstances, the two are inextricably linked. Further, the “correct” interpretation of a term may be dictated by the mandate of the board and by the coherent body of jurisprudence it has developed. In some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law.

*Pushpanathan*<sup>50</sup> further added that no clear line can be drawn between fact and law and that many questions are a mixture of fact and law.

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45. *Pushpanathan*, *supra*, note 10.

46. *Chamberlain*, *supra*, note 2.

47. *Pushpanathan*, *supra*, note 10, par. 31 et 36.

48. See *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 and *Re Multimalls Inc. et al. and Minister of Transportation and Communications et al.*, (1977) 14 O.R. 2d 49 (Ont. C.A.). The purpose of an enactment is important both in private and in public law.

49. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 594-600. Cited *in extenso* in *Pushpanathan*, *supra*, note 10. See also *Kastner*, *supra*, note 23, on this point.

50. *Pushpanathan*, *supra*, note 10, par. 33.

These difficulties are not limited to judicial review or to statutory appeals like classes in *Southam*<sup>51</sup>. In the ordinary courts, appellate instances are reluctant to set aside findings of fact or credibility<sup>52</sup>. It is a compelling argument against intervention, that the judge who saw witnesses is in a better position to determine facts and credibility than one who merely reads a transcript<sup>53</sup>. This argument is conceptually similar to the claim that an expert can better decide a point than a generalist. Moreover, the non-verbal factors in determining credibility can be very significant and, without a video an appellate court has no access to them.

The classical explanation of the difference between judicial review and appeal is that in appeal the court may substitute its opinions while in judicial review it only determines the “legality” of the decision. Given the standard of review and the considerable deference manifested by appellate courts, the difference is far less evident in practise than in theory.

While the Supreme Court has consistently applied the above four criteria and pointed out how much they overlap, its language made it clear that there is an infinite number of other issues, which might affect the standard of review in any given case. These issues are, like the four “official ones”, necessarily inter-connected. They include the importance of the question and its precedential value<sup>54</sup>. The degree of injustice resulting from failure to review is also a factor<sup>55</sup>, although often instead of lowering the standard of review, the courts might simply find that a strikingly unjust decision is manifestly unreasonable<sup>56</sup>.

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51. *Southam*, *supra*, note 9.

52. See: *Fletcher v. Manitoba Public Insurance Company*, [1990] 3 S.C.R. 191; *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554.

53. The deference disappears or is substantially attenuated when the appeal court hears witnesses *D'Artagnan v. R.*, [1978] C.A. 172.

54. See *Ivanhoe*, *supra*, note 12. See especially *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 (hereafter: “*Dr. Q*”) where we read at par. 34: “My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court’s unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)”

55. The celebrated case *Rex v. Northumberland Compensation Tribunal ex parte Shaw*, [1951] 1 K.B. 711, was surely decided largely because of flagrant injustice.

56. As in: *Stein v. A.G. Que.*, [1999] R.J.Q. 2416; *Boussetta v. Corporation professionnelle des médecins*, S.C.M. 500-05-014449-885, not reported (Tannenbaum J.).

We should underestimate the importance of the “spirit of the times” or the type of results which are considered reasonable in each epoch in decisions on judicial review. Deference and judicial activism are not new concepts at all, but in each period, they apply to different things<sup>57</sup>. For instance, interventionism favourable to the employer, was the rule in labour relations for many decades<sup>58</sup>. Today, labour law is the area where judicial restraint is most in vogue<sup>59</sup>. On the other hand, it is unlikely that a court in the 1950s would have been as open to review in carceral law, immigration law or other areas involving individual rights as today’s courts<sup>60</sup>. In short, it is very possible that, in another period, the results of *Southam*<sup>61</sup>, *Pushpanathan*<sup>62</sup> and *Chamberlain*<sup>63</sup> would have been reversed, not because there is more or less deference in our times, but because the deference is reserved for different issues.

There is thus no doubt that different standards of review are applied and no doubt that the criteria set out by the Supreme Court are the most significant at present. On the other hand, this is no easy formula and the words “pragmatic and functional” do not change the open-ended, subjective and constantly evolving nature of the classification.

## 2 Do standards of review apply to all questions in the realm of judicial review law or only to the concept of the “unreasonable decision” ?

At one time, it appeared that judicial review was available only to matters of jurisdiction in the strict sense, such as constitutional questions or to the procedure in quasi-judicial matters<sup>64</sup>. Dicta abounded which denied judicial review on all matters of substance. This was obviously unsatisfactory, both because it made it possible to evade review by scrupulous, if dishonest observance of procedure and because it was very difficult to draw a line between questions with a jurisdictional dimension and those without one. Some form of review of substance became essential<sup>65</sup>.

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57. See J.H. GREY, *loc. cit.*, note 14.

58. B. LASKIN, *loc. cit.*, note 14.

59. *Ivanhoe*, *supra*, note 12; *Canada (Labour Relations Board) v. International Longshoremen’s Association, local 269*, [1983] 1 S.C.R. 245.

60. Today’s courts, it must be stated, have the *Charter* and other human rights instruments to assist them.

61. *Southam*, *supra*, note 9.

62. *Pushpanathan*, *supra*, note 10.

63. *Chamberlain*, *supra*, note 2.

64. *Martineau v. Inmate Disciplinary Board, Matsqui Institution*, (1978) 40 C.C.C. (2d) 325 (C.A.F.). Fortunately, this decision was reversed in *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602.

65. See J.H. GREY, “Can Fairness be Effective?”, (1982) *McGill L. J.* 360.

It was established in the 1980s that unreasonable decisions both in fact and law are subject to review<sup>66</sup>. The different standards of review and the establishment of relative judicial restraint evolved in response to this development. One can thus view this development as more of a broadening and then a narrowing of the scope of judicial review, despite the prevalence of restrictive language. Before 1980, many of the applications for review that are now dismissed after a lengthy discussion of standards of review would have been peremptorily thrown out as “unreviewable”.

However, many cases discuss standards of review as a matter of course even if the issue of unreasonableness is absent. Moreover, *CUPE*<sup>67</sup> has taught us that “jurisdictional” is neither a clear concept nor one unconnected with judicial restraint and deference to specialized decision-makers. Therefore the precise area to which the standards of review must be applied is often difficult to determine ;

However, it cannot be maintained that, in a clear case of ultra vires, one need worry about standard of review<sup>68</sup>. On matters of natural justice *Moreau-Bérubé*<sup>69</sup> would seem to have settled the issue, with the words of Arbour J. at par. 74 where she explicitly excluded issues of natural justice from the jurisprudence on standards of review.

As usual, what appears categorical and clear, is less so after analysis. If standards of review form no part of natural justice and fairness which, after *Cardinal and Oswald v. Director of Kent Institution*<sup>70</sup>, always give

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66. *Blanchard, supra*, note 14; *Miriam Homes v. Canadian Union of Public Employees (Local 211)*, [1985] 1 S.C.R. 137. See also J.H. GREY and L.-M. CASGRAIN, “Jurisdiction, Fairness and Reasonableness”, (1988) *Dalhousie Law Journal*, Vol. 10, no. 3, January 1987.

67. *CUPE, supra*, note 1.

68. See *Shell Canada Products Ltd. v. Vancouver (City)*, *supra*, note 50; *Salomon c. Barreau du Québec*, 500-09-008571-994 (C.A.).

69. *Moreau-Bérubé, supra*, note 35, par. 74.

70. *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643 (hereafter: “*Cardinal and Oswald*”) where Le Dain J. said at para. 14: “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: *Nicholson v. Halimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735. In *Martineau (No. 2)*, *supra*, the Court held that the duty of procedural fairness applied in principle to disciplinary proceedings within a penitentiary. Although administrative segregation is distinguished from punitive or disciplinary segregation under s. 40 of the *Penitentiary Service Regulations*, its effect on the inmate in either case is the same and is such as to give rise to a duty to act fairly.”

rise to review if violated, it is also true that there are different standards of fairness applied in administrative law<sup>71</sup>. In Canada, the definitive judgment is still that of Dickson J. in *Coopers and Lybrand*<sup>72</sup> where we read :

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determination inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or ad hoc adjudication ; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.

This spectrum is not very different from the standards of review. Moreover, the criteria are very similar. *Baker*<sup>73</sup> deals both with natural justice in the form of bias and with unreasonable decisions, but does not approach the two differently as to the deference due to immigration officers. In other words, the greater the discretion, the less the involvement of fundamental rights<sup>74</sup>, the greater the technical specialization of the tribunal, the less available is judicial review both for procedure and substance<sup>75</sup>.

What clearly cannot be injected into natural justice following *Moreau-Bérubé*<sup>76</sup> is the three technical standards used for reasonableness. The issue of *degree* of review and of restraint is present nonetheless.

### 3 What is left of jurisdiction ?

Jurisdiction used to be the central concept of administrative law, so much so that, even in matters of “natural justice” the language of jurisdiction was used to justify curial intervention<sup>77</sup>.

71. *Quebec (Labour Relations Board) v. Canadian Ingersoll-Rand Co. Ltd.*, [1968] S.C.R. 695, which stated that an oral hearing is not always available ; see also *C.C.S.U. v. Minister for Civil Service (H.L.(E.))*, [1985] 1 A.C. 374.

72. *Canada (Minister or National Revenue) v. Coopers and Lybrand Ltd.*, [1979] 1 S.C.R. 495, 505 (hereafter : “*Coopers and Lybrand*”).

73. *Baker*, *supra*, note 3.

74. For instance, Beetz J. connected fundamental rights and the need for an oral hearing in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

75. It is, however, possible that a privative clause has less effect in the case of unfair procedure.

76. *Moreau-Bérubé*, *supra*, note 35.

77. *Anisminic Ltd. v. The Foreign Compensation Minister and another*, [1969] 1 All E.R. 208.



In Canada the use of jurisdiction for virtually all kinds of reviewable error ceased to make sense after *Harelkin*<sup>78</sup>, where errors as to natural justice were held to be voidable rather than void. Truly jurisdictional errors now refer to lack of initial jurisdiction, not of its loss through unfairness or unreasonable review.

At about the same time as *Harelkin*<sup>79</sup>, *CUPE*<sup>80</sup> pointed out that whether or not something is jurisdictional is often a debatable matter, and the opinion of the specialized decision-maker should be given some weight on this issue. However, nothing has ever supplanted Beetz J.'s statement in *Re Syndicat des Employés de production du Québec et de l'Acadie and Canada Labour Relations Board v. C.L.R.B.*<sup>81</sup> that once a question has been classified as jurisdictional, the courts will review all errors, even "reasonable" ones.

Some ultimate residue must remain in the old concept of jurisdiction for a number of reasons. First of all, jurisdiction is part of constitutional law as well as administrative law and it is surely unthinkable to apply "standards of review" to the division of power. The court must decide whether the authority in question acted *intra vires* or *ultra vires* and an excess of power of this kind must be struck down without deference.

It cannot however be gainsaid that there is much less litigation about the division of power than there was in the days when the Privy Council was the ultimate tribunal<sup>82</sup>. The Supreme Court of Canada has tended, with a few well-known exceptions to permit parallel federal and provincial legislation with federal predominance.

In the same vein, judicial review for excess of jurisdiction is to a certain degree constitutionally guaranteed<sup>83</sup>. However we may attenuate the concept, something of it must remain.

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78. *Harelkin v. U. of Regina*, [1979] 2 S.C.R. 561.

79. *Ibid.*

80. *CUPE*, *supra*, note 1.

81. *Re Syndicat des Employés de production du Québec et de l'Acadie and Canada Labour Relations Board v. C.L.R.B.* (1984) 14 D.L.R. (4th) 457 at p. 479-480.

82. See, however, *Attorney General of Quebec v. Attorney General of Canada (In the matter of the reference regarding the constitutionality of Sections 22 and 23 of the Employment Insurance Act)*, REJB 2004-52999.

83. *Crevier v. Québec (Attorney General)*, [1981] 2 S.C.R. 220.

In *Stinchcombe v. Law Society of Alberta*<sup>84</sup>, the Alberta Court of Appeal said:

With respect to the jurisdiction issue, the Chambers Judge was required to apply a standard of correctness: *Dickson v. University of Alberta*, [1992] 2 S.C.R. 1103 (SCC); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. If the Committee was not properly constituted under the governing legislation, it had no jurisdiction to proceed with a hearing into the Charges.

It would follow that there still exists a fairly narrow category of matters where the notion of jurisdiction dictates judicial review on the basis of correctness and where there can be no deference to the original decision-maker<sup>85</sup>.

#### 4 Are the three standards of review still useful ?

It might appear bold to question the utility of the three standards of review when the Supreme Court and all other courts discuss them constantly. Nevertheless, it is difficult to avoid the impression that the three standards are now little more than a formula which can at times obscure the real issues, however “functionally or pragmatically” one applies them.

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84. *Stinchcombe v. Law Society of Alberta*, [2002] A.J. 544, par. 30. See also *Barrie Public Utilities v. Canadian Cable Television Association*, *supra*, note 42. However, the recent decision of *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, appears to apply the notion of standard of review to decisions involving the independence of the judiciary, which is a constitutional matter. It found the nomination to be manifestly unreasonable and set it aside.

85. The limited utility of such concepts as jurisdiction was reaffirmed, although weakly, by the Supreme Court of Canada in *Dr. Q*, *supra*, note 54, where we read at par. 24: “Just as the categorical exceptions to the hearsay rule may converge with the result reached by the Smith analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L’Heureux-Dubé J. invoked the old *Associated Provincial Picture Houses Ltd. v. Wednesday Corporation*, [1948] 1 K.B. 223 (C.A.), categorical approach to discretionary decisions as a reflection that ministerial decisions have classically been afforded a high degree of deference (see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at paras. 29-30), but acknowledged that the principled approach must now prevail. Similarly, as Binnie J. recognized in *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41, at para. 54, that under the pragmatic and functional approach, even “the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness”. The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.”

There is of course no doubt possible that there exist different degrees of deference applied to Tribunals and to decisions, depending largely on the criteria set out by the Supreme Court in defining the three standards.

There is also no doubt that the court has tried to close the door for new standards. In *Law Society of New Brunswick v. Ryan*<sup>86</sup>, Iacobucci J. said :

In the Court's jurisprudence, only three standards of review have been defined for judicial review of administrative action (*Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, at para. 5, per McLachlin C.J. ; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 55 ; see also *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 589-590 ; *Canada (Director of Investigation and Research), v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 30 ; *Pushpanathan*, supra, at para. 27. The pragmatic and functional approach set out in *Bibeault*, supra, and more recently in *Pushpanathan*, supra, will determine, in each case, which of these three standards is appropriate. I find it difficult, if not impracticable to conceive more than three standards of review. In any case, additional standards should not be developed unless there are questions of judicial review to which the three existing standards are obviously unsuited.

Save for the reservation contained in the last sentence, this is quite categorical. It is even more difficult to challenge when one adds the two paragraphs which follow<sup>87</sup> in which Iacobucci J. explains that one of the purposes of restricting the number of standards is to avoid technical or unavoidable distinctions.

At first glance, the court is as closed to an argument that the standards are merely a spectrum, as it is to a multiplicity of standards. Iacobucci J. responds to the spectrum argument as follows<sup>88</sup> :

This argument must be rejected. If it is inappropriate to add a fourth standard to the three already identified, it would be even more problematic to create an infinite number of standards in practice by imagining that reasonableness can float along a spectrum of deference such that it is sometimes quite close to correctness and sometimes quite close to patent unreasonableness. This argument rests on a mistaken extension of the metaphor of a spectrum.

But soon it became clear that it is not the *spectrum* which is rejected, but, once again, the notion of new and different standards of review. Para. 45 makes this clear<sup>89</sup> because Iacobucci J. is willing to accept a spectrum of deference only no spectrum of standards.

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86. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, par. 24 (hereafter : "Ryan").

87. *Id.*, par. 25, 26.

88. *Id.*, par. 44.

89. *Id.*, par. 45.

The spectrum is still useful to show that the degree of deference varies inside each of the three standards, not with respect to the *definition* or the *criteria* used, but with respect to the *result*<sup>90</sup>.

The issue of “spectrum” arose once before in the history of judicial review. In the 1960s and 1970s, the distinction between “administrative” and “quasi-judicial” was becoming as sacramental a formula as the three standards and far more abusive. According to this, those quasi-judicial decisions were reviewable for natural justice and administrative ones were not<sup>91</sup>. It is to get around this distinction that the courts created a third standard fairness, which arguably was intended as a “half-way house” between the two concepts<sup>92</sup>. Gradually<sup>93</sup>, the utility of determining in each case whether fairness or full natural justice applied, came to be questioned. In *Coopers and Lybrand*<sup>94</sup>, the spectrum theory was adopted in the celebrated paragraph quoted in extenso at footnote 74, *supra* ;

Similarly, in *St-Hilaire v. Bégin*<sup>95</sup>, L’Heureux-Dubé J.A. doubts the utility of any further distinction between administrative and quasi-judicial functions in the light of the new flexibility.

Not that completely new standards were intended or that all reference to quasi-judicial or administrative disappeared<sup>96</sup> or became heretical. Rather, judges no longer needed to refer to the standard just as a practised violinist no longer needs frets. This result was definitively formulated in *Cardinal and Oswald*<sup>97</sup> and procedural fairness ceased to be a major preoccupation as a theoretical issue in administrative law<sup>98</sup>. Instead attention

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90. *Id.*, par. 46. Perhaps this is the ultimate sense to be given to the words “pragmatic and functional”. The result is often a matter of common sense, not learned analysis.

91. See: *The King v. Electricity Commissioners*, [1924] 1 K.B. 171 ; *Nakkuda Ali v. M.F. De Jayarathe*, [1951] A.C. 66 ; *Martineau v. Matsqui Institution (No. 1)*, [1978] 1 S.C.R. 118. The most extreme expression of this view is found in the Federal Court of Appeal decision of *Martineau v. Matsqui Institution (No. 2)*, (1978) 40 C.C.C. (2d) 325 (F.C.A.), fortunately overturned in *Martineau v. Matsqui Institution (No. 2)*, [1980] 1 S.C.R. 602.

92. This is the expression used by Laskin J. in *Nicholson v. Haldimand Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. It is also implicit in: *Ridge v. Baldwin*, [1964] A.C. 40 ; *Re H.K.(An Infant)*, [1967] 2 Q.B. 617 ; and *Canada (Minister of Manpower and Immigration) M.M.I. v. Hardayal*, [1978] 1 S.C.R. 470.

93. Starting perhaps with *Wiseman v. Borneman*, [1969] 3 All E.R. 275.

94. *Coopers and Lybrand*, *supra*, note 72.

95. *St-Hilaire v. Bégin*, [1982] C.A. 25.

96. See J.H. GREY and L.-M. CASGRAIN, *loc. cit.*, note 66.

97. *Cardinal and Oswald*, *supra*, note 70.

98. Although its application continued to generate considerable jurisprudence. See *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 and *Baker*, *supra*, note 3.

turned to review of substance and therefore to the degree of deference to be given to decisions on the merits. This is the debate which spawned the three standards of review.

In *Dr. Q.*<sup>99</sup> and *Ryan*<sup>100</sup>, the Supreme Court treats the matter as definitively settled, yet it keeps coming back several times every year. The application is not nearly as settled as the theory.

The possibility of a total review of the theory of standards of review has now been confirmed dramatically in *Toronto v. CUPE*<sup>101</sup>.

Mr. Justice LeBel, speaking for a concurring minority raised doubts about the entire scheme of review. He questioned<sup>102</sup> whether the distinction between patent unreasonableness and unreasonableness simpliciter has much rational or easily definable basis. He reserved for the future any jurisprudential change made necessary by his conclusions.

He ended his judgment with what was essentially a question<sup>103</sup>. This was natural because the majority chose not to debate standards of review. However, the terms used by Arbour J. also seem to presage a coming modification of the current dogma concerning standards and a departure from the prevailing rigidity and formality. Such a modification will be a welcome development.

Mr. Justice LeBel continued his philosophical queries in another concurring judgment<sup>104</sup> in which he put in doubt the distinction<sup>104</sup> between manifestly unreasonable decisions and merely unreasonable ones. He sought to restore the clarity and elegance of Dickson, J's decision, *CUPE V. New Brunswick Liquor Corp.*<sup>105</sup>. This decision was also applied by McLachlin CJC in *Chamberlain*<sup>106</sup>. This later, unusually brief decision makes it very clear that a significant review of administrative law terminology and substance is needed, in the interest of simplicity and transparency.

As with fairness, it is impossible to imagine an end to litigation as to the details. Indeed, in all areas of law, litigation continues even if the basic principles of law are established. However, the theoretical argument would

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99. *Dr. Q.*, *supra*, note 54.

100. *Ryan*, *supra*, note 88.

101. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.)*, [2003] 3 S.C.R. 77.

102. *Id.*, par. 44.

103. *Id.*, par. 78.

104. *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23.

105. *CUPE*, *supra*, note 1.

106. *Chamberlain*, *supra*, note 2.

become less common if, as after *Coopers and Lybrand*<sup>107</sup> in the case of fairness, less attention was paid to the standards and more to the particular situation in each case. Law has been plagued by technicalities and pica-yune distinctions and lawyers have often been in ill repute because of them. Technicalities can only be tolerated so long as they are useful in explaining concepts or resolving disputes. Indeed, the most fundamental technical rules have a history of sudden and sweeping reversal and, if this were not so, the common law would have ceased to evolve centuries ago. It is submitted that the theoretical arguments on standards of review have ceased to be useful or fruitful and that public law should move to other issues<sup>108</sup>.

At all times one must strive to maintain justice and fairness in the result. It does not enhance the reputation of the legal system when absurd or oppressive results are attained through technical analysis. Nor does it augur well for a legal system if the superior courts invoke deference to abandon their duty of supervising the application of fundamental questions of law<sup>109</sup>.

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107. *Coopers and Lybrand*, *supra*, note 72.

108. A few questions — the independence of decision makers, the deference to state security, the limits of discretion, and administrative law and the Charter are becoming very relevant in our times and may indicate the future of public law. It is also evident that a number of substantive areas — professional law, dissenting workers in labour law and the rights of parents and school boards are unsettled and will be litigated in the future. This writer is very concerned with undue deference towards professional associations and submits that *Therrien*, *supra*, note 36, *Moreau-Bérubé*, *supra*, note 35, *Ryan*, *supra*, note 86, and *Dr. Q*, *supra*, note 54, will have to be revisited soon.

109. It would probably be best if there were no deference of questions of law of a general and fundamental nature. For a less critical view of the pragmatic and functional approach and a greater appreciation of the virtues of judicial deference than that proposed here see S. COMTOIS, *Vers la primauté de l'approche pragmatique et fonctionnelle : précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs*, Cowansville, Éditions Yvon Blais, 2003.