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EVOLUTION OR DEVOLUTION: JUDICIAL SCRUTINY OF THE STANDARD OF REVIEW

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"If you're not confused, you're not paying attention."

Thomas J. Peters

OVERVIEW

Standard of review analysis on a judicial review application is an ever-changing/ever-nuanced point of frustration and confusion for many. Virtually unconsidered 25 years ago, the phrase is now common parlance in the legal community. Despite its increased prominence in the working lives of lawyers, judges, and others, the topic is, and continues to be, a moving target or framework of analysis.

At present, although lawyers and courts appear to be directed to apply the pragmatic and functional approach to determine the level of scrutiny a court is to apply in its review of an administrative decision, there are serious concerns regarding the ability of lawyers and courts to follow the approach in practical, cost-effective and efficient ways. The "pragmatic and functional" approach has achieved a level of abstraction and complexity that can cause some to call into question the very workability and reliability of the approach. It has been suggested that the reasoning in factums, and in some decisions, resembles "a run through an obstacle course", a run conducted for the purpose of working one's way through the Supreme Court's analytical framework rather than getting at the real issue: the level of curial deference the legislature intended the courts to give to a particular decision of an administrative decision-maker. Adding to the confusion is the annual release by the Supreme Court of Canada of several new decisions considering the standard of review analysis, incorporating subtle new nuances to the analysis and the framework for analyzing when courts will interfere with an administrative decision.[1] Standard of review analysis continues to be under scrutiny by that court.[2]

Evidence that members of the judiciary are beginning to take a fresh look at the law of judicial review and, in particular at the standard of review analysis is encouraging as reconsideration or consolidation of standard of review framework is long overdue. As an area of law with broad

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[1] D. Stratas, "Public Law Remedies: The Next Five Years", paper presented at the educational seminar of the Court of Appeal for Ontario, May 28, 2004 at 35, (hereinafter "Public Law Remedies: The Next Five Years").

[2] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 (hereinafter "*Mugesera*"); *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 per LeBel J. (hereinafter "C.U.P.E."); *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 per LeBel J. (hereinafter "*Voice Construction*").

implications, the law governing the review of administrative decision-makers must be predictable, workable and coherent.[3] In the words of Justice LeBel, "the Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law."[4]

This paper surveys recent case law as it relates to both identifying three (or two) standards of review as well as to the application of the pragmatic and functional approach to determining which particular standard (once possible options have been identified) is applicable. This paper surveys the development of the different standards as used in the course of the review of administrative decisions and concludes by outlining two concurring decisions of Justice LeBel in which he challenges the courts to move away from the unwieldy three standards of review to focus on employing a more pragmatic two standards approach. As discussed below, it is the view of Justice LeBel that the standard of "not patently unreasonable" is effectively indistinguishable from the standard of "reasonableness". By way of these two decisions, it is fair to say that Justice LeBel has put the traditional three-standard approach on notice.

With respect to the "pragmatic and functional approach", this paper examines the recent Supreme Court of Canada decision in *Mugesera v. Canada (Minister of Citizenship and Immigration)*[5]. For reasons that will be discussed, *Mugesera* poses interesting questions as it seems to indicate a renewed prominence of statutory language in determining what standard of review is required. Whereas in the wake of *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*[6] a statutory right of appeal had been "relegated" to the realm of

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[3] *C.U.P.E., supra* note 2, at para 64.

[4] *C.U.P.E., supra* note 2. See Justice LeBel's references to the following critiques: D.J. 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 26; J.G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section meeting, Ontario Bar Association, January 21, 2003 at 28; F.A.V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at 32-33; *Miller v. Workers' Compensation Commission* (Nfld.) (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.) at para 27: "In attempting to follow the court's distinctions 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."

[5] *Mugesera*, *supra* note 2.

[6] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (hereinafter "*Southam*").

considerations taken into account in the course of determining the deference to be owed an administrative decision-maker, *Mugesera* may reinvigorate the prominence of such provisions to a pre-*Southam* era.

PART I: A SPECTRUM OF STANDARDS…OR PERHAPS JUST TWO?

The law of judicial review is laden with concern for protecting procedural and substantive rights while permitting administrative decision-makers to perform their functions effectively and efficiently within the framework of their developed technical and industry specific expertise. The fundamental tension that underlies the law of judicial review involves balancing the legislature's express delegation of power to specialized agencies with the courts' overarching obligation to ensure that administrative bodies comport themselves in accordance with the rule of law. The standard of review is an element of this balancing.

Effectively, the purpose of identifying a "standard of review" is to determine when, and to what extent, a decision rendered by an administrative decision-maker may deviate from a single "correct" answer. If an administrative decision-maker is not entitled to be wrong, the standard of review is "correctness". If, however, a decision-maker is permitted to err, the analysis centers around the scope or extent of the "right to be wrong" and the degree of deference to be afforded to such decisions and decision-makers. Practically speaking, is the difference anything other than a matter of semantics? Does the determination at present simply amount to an analysis of the degree to which a reviewing court considers it must intervene to affect a decision and/or effect a different result? It is the standards of review the courts apply in these latter situations, situations requiring the courts grant decision-makers some degree of deference, that has caused concern and confusion. In particular, there has been growing unrest as to the difference in application, or lack thereof, between the standard of "reasonableness *simpliciter*" and "patently unreasonable".

Addressing the growing concerns of academics, lawyers and members of the judiciary, in *Toronto (City) v. C.U.P.E., Local 79*[7] and *Voice Construction Ltd. v. Construction & General*

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[7] *C.U.P.E., supra* note 2.

Workers' Union, Local 92,[8] Justice LeBel questioned the appropriateness of the standard within the context of the current three standard framework and raised the question of whether reviewing courts should move to a two standard system of judicial review.

A Spectrum of Standards…

By way of contextual background, historically, administrative decisions were reviewed on the "appellate review" standards of "correct" or "not patently unreasonable". Depending on the nature of the question being addressed by the administrative decision-maker, the court would either review the board's decision on an exacting standard of "correctness", or conversely, review on a more relaxed standard of "not patently unreasonable".

Such was the situation up until a unanimous Supreme Court of Canada, in *Pezim v. British Columbia (Superintendent of Brokers)*, paved the way for dramatic changes by articulating what has become one of the most important developments in standards of review jurisprudence: the concept of a "spectrum of standards of review" applicable in the context of both judicial review and statutory appeals.[9]

In *Pezim*, the court considered the appropriate standard of review for an appellate court reviewing a decision of a tribunal (a securities commission) not protected by a privative clause where there existed a statutory right of appeal and where the case turned on a question of interpretation. A review of the appropriate factors led the Court to conclude that the securities commission was entitled to "considerable deference" in its determination of what constituted a material change for purposes of public disclosure, notwithstanding the decision was the subject

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[8] *Voice Construction*, *supra* note 2.

[9] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at para 62 (hereinafter "*Pezim*"): "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." That said, it should be noted that while the standards did not change prior to *Pezim*, there were developments in the jurisprudence as to what sorts of factors were taken into consideration in the course of determining the appropriate standard to apply. See e.g. *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24, (distinction between judicial or quasi-judicial and purely administrative decisions); *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756, (distinction between preliminary and collateral questions); *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*, [1979] 2 S.C.R. 227, (distinction between preliminary and collateral question); *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, (distinction between jurisdictional and non-jurisdictional questions).

of a statutory right of appeal. Of particular import were the remarks of Justice Iacobucci who, writing for the Court, noted:

> 61. From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.
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> 62. 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...
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> 63. 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 question…[10]
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> (emphasis added)

The recognition of a "spectrum" provided courts with the flexibility needed to move away from the earlier approach of forcing them to review administrative decisions on the rigid basis of either "correct" or "not patently unreasonable". Roughly three years later, in *Southam*, Justice Iacobucci, again writing for the Court, considered whether a decision of the Competition Tribunal was entitled to curial deference in the context of a statutory appeal. The Federal Court of Appeal had concluded the tribunal's findings were not owed any deference. The Supreme Court disagreed. Justice Iacobucci concluded that the tribunal should be held to the standard of reasonableness *simpliciter*.

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[10] *Pezim*, *supra* note 9, at paras 61-63.

The Court considered the words of the Tribunal's constating statute, the purpose of the statute, the nature of the issue before the tribunal, and the area of the tribunal's expertise and created a new "middle ground":

> 54 In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.
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> 55 I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test and, as I have said, the statutory right of appeal puts the jurisdictional question to rest. See Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, at p. 237. But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.
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> 56 I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. 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 reasonableness 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. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.
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> 57 The difference between "unreasonable" and patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's

> decision is patently unreasonable. But if it takes some significant searching or resting to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963 "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly"'. This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.
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> 58 The standard of reasonableness simpliciter is the same standard that was applied in Pezim, and for good reason: the parallels between this case and that one are obvious. Pezim involved the decision of a securities commission, one of whose tasks was to be sensitive to and enhance capital market efficiency; this appeal involves the decision of the Tribunal, one of whose tasks is to recognize and in its own way to promote the efficiency of the Canadian economy. In Pezim, appeals from decisions of the securities commission lay as of right; in this case, appeals from decisions of the Tribunal lie as of right. The questions in Pezim were entirely within the competence of the commission to answer; the question in this appeal is entirely within the competence of the Tribunal to answer. The principal difference between Pezim and this case is that Pezim involved what were called questions of law. However, as I have already explained, the questions in that case were questions of law only in a somewhat attenuated sense. The difference between the questions in the two cases is therefore not as great as it might at first seem.[11]
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> (emphasis added)

As a result of the decision in *Pezim*, the door had been opened for the development/recognition of different standards of review in the face of a myriad of different administrative decision-makers.[12] Indeed, around the time *Southam* was decided and the reasonableness *simpliciter* standard emerged as a fundamental expert of standard of review analysis, a fourth standard of review, lying somewhere between reasonableness *simpliciter* and patently unreasonable, was

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[11] *Southam*, *supra* note 6, at paras 54-58.

[12] See *Southam*, *supra* note 6, (where the Court adopted the intermediate standard of "reasonableness *simpliciter*"); *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Association*, [1997] F.C.J. No. 1543 (F.C.A.), (where the Court identified a "fourth" standard between reasonableness *simpliciter* and patently unreasonable).

posited. In *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Association*, the Federal Court of Appeal held:

> 3 The Canadian International Trade Tribunal is clearly an expert body but Parliament has not protected its decisions with a true privative clause, rather it provided a right to apply for judicial review. Nonetheless, great deference is to be shown to the Tribunal's decisions particularly when dealing with questions that go to the heart of its expertise. It is trite law that more judicial deference is accorded to decisions of tribunals that arrive at this Court by way of application for judicial review than by way of appeal. It follows that there is a fourth standard of review that falls between reasonableness simpliciter and patent unreasonableness which is reserved for those cases where a decision has been rendered by an expert tribunal on an issue within its field or expertise and has arrived at a higher Court by way of application for judicial review. This fourth standard of review requires more deference to a tribunal's findings than that given to expert tribunals containing a statutory right of appeal but slightly less deference than that given to tribunals protected by a true privative clause. Having determined the appropriate degree of judicial deference to be given to the Canadian International Trade Tribunal's decision, I will address the arguments of the Applicants. On the issue of whether the Tribunal erred in applying the appropriate test as by asking itself the wrong legal question, we are all of the view that, while not at all times very specific, the tribunal did have regard to all of the relevant and material factors and therefore there are no grounds to interfere with its decision on that basis.
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> (emphasis added)

As noted in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, the range of standards was described as a "spectrum" with a "more exacting end" and a "more deferential end".[13] That said, the "open-door" policy to judicial recognition of various standards of review was all but closed by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*[14] and *Dr. Q v. College of Physicians and Surgeons of British Columbia*.[15] In those cases, the Court confirmed that the "spectrum" was no more than a metaphor describing a recognition that there is a continuum of deference, but not of standards upon which an administrative decision is to be reviewed. To the contrary, the standards of review are to be understood as signposts on the judicial deference spectrum. Again writing for a unanimous court, Justice Iacobucci concluded:

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[13] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at 1005, (hereinafter "*Pushpanathan*").

[14] *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, (hereinafter "*Ryan*").

[15] *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, (hereinafter "*Dr. Q*").

> 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.
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> … It is not clear that there is helpful language to describe a conceptually distinct fourth standard that would be less deferential than reasonableness simpliciter but more deferential than correctness. At this point, the multiplication of standards past the three already identified would force reviewing courts and the parties that appear before them into complex and technical debates at the outset. I am not convinced that the increase in complexity generated by adding a fourth standard would lead to greater precision in achieving the objectives of judicial review of administrative action.[16]
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> (emphasis added)

The Supreme Court's decision in *Ryan* limited the recognized standards of review to three: correctness, the lowest standard of deference to the tribunal and, therefore the most intensive review; reasonableness, greater deference and less intrusive review; and patent unreasonableness, almost complete deference and very restrictive review.[17]

At first blush, the inclusion of a third intermediate standard to the historical two-standard approach appeared to afford reviewing courts an enhanced ability to tailor the degree of deference to each particular situation. Such was its purpose. However, as noted by Justice LeBel, experience has demonstrated that the advantages to having three standards have been in large part outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between two of the standards: patent unreasonableness and reasonableness *simpliciter*.[18]

... Or Perhaps Just Two

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[16] *Ryan*, *supra* note 12, at paras 24-25.

[17] *Ibid*. at para 20, (note that the "fourth" standard articulated by the Federal Court of Appeal was not one of the "recognized" standards of review).

[18] *C.U.P.E., supra* note 2, at para 126. See e.g. *C.A.I.M.W. v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, (although the Court agreed on that the standard was patent unreasonableness, the Court split three ways, determining the decision was patently unreasonable, was not patently unreasonable, or was correct); *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, (six members of the Court decided the school board's decision on same-sex parent books was unreasonable, two determined it was reasonable, and one found that it was patently unreasonable); *Canada Safeway Ltd. v. R.W.D.S.U (Local 454)*, [1998] 1 S.C.R. 1079, (the majority held that a board of arbitration's decision that a reduction in work hours constituted a "constructive layoff" was patently unreasonable, while the dissent did not).

In *C.U.P.E.* and *Voice Construction*, Justice LeBel, in two concurring opinions, challenged the current acceptance of three standards of review. The majority view in *C.U.P.E.*, as enunciated by Justice Arbour, was that it would not be desirable to comment on a departure from the current review framework within the context of that case. She stated:

> 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.[19]

In the concurring judgement (Justice Deschamps concurring), Justice LeBel reviewed the standard of patent unreasonableness in relation to the reasonableness *simpliciter* standard on the basis that, in his view, the two standards are, effectively, indistinguishable in theory and practice.

The central issue, in his opinion, was that:

> …the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. …it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.[20]

To begin his consideration of the matter, Justice LeBel noted that both the patent unreasonableness and reasonableness *simpliciter* standards of review share a common guiding principle: there can be many different solutions to a legal dispute, and many different interpretation of legislation.

The argument is this: the standard of "not patently unreasonable" arose prior to the development of the pragmatic and functional approach and, more telling, before the formulation of the reasonableness *simpliciter* standard. Initially developed in response to the standard of "correctness", the principle defining the scope of the standard of "not patently unreasonable" was that "there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators

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[19] *Ibid.* at para 12.

[20] *Ibid.* at para 66.

may, in many circumstances, be better equipped than courts to choose between the possible interpretations."[21]

Problematically, the validity of multiple interpretations became the underlying principle for the new reasonableness *simpliciter* review as well.[22] That this newer standard shared the same guiding principle as the pre-existing "patently unreasonable" standard was further evidenced in *Ryan* where, in discussing the reasonableness *simpliciter* standard the Court noted:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.[23]

Justice LeBel noted that it was unsurprising that there is difficulty in distinguishing the standards analytically, rather than merely semantically.[24] He continued to consider whether the two standards can, in practice, be applied with sufficient distinction.

First, a distinction between the two cannot be understood on the basis of the "magnitude" of the defect necessary to render a decision patently unreasonable. With reference to Justice Cory's definition of "patently unreasonable" in *Canada (Attorney General) v. Public Service Alliance of Canada*,[25] Justice LeBel noted that the courts have often attempted to delineate patently unreasonable decisions from unreasonable decisions on the basis that the former represents a "clearly irrational" decision, while the latter, presumably, is characterized by a "merely irrational" conclusion. In a manner of speaking, Justice LeBel found such a distinction absurd. There is no practical utility, he found, to attempting to delineate degrees of rationality, especially

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[21] *Ibid*. at para 101.

[22] *Ibid*. at para 102.

[23] *Ryan, supra* note 14, at para 51.

[24] *C.U.P.E.*, *supra* note 2, at paras 102-103.

[25] *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-964.

on the basis of the term "clearly".[26] In the words of Professor Mullan, "like uniqueness, irrationality either exists or it does not. There cannot be shades of irrationality."[27]

Second, Justice LeBel considered whether the two standards could be distinguished on the basis of the "immediacy or obviousness" of the defect. The language used in this analysis references the remarks of Justice Iacobucci in *Southam*, where he wrote:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.[28]

Efforts to differentiate between the standards on this basis, however, is problematic in two key respects. The first is the difficulty of determining "how invasive a review is invasive enough, but not too invasive, in each case."[29] There has been much criticism that the "somewhat probing examination" criterion, considered in relation to the reasonableness *simpliciter* standard and set out in *Southam*,[30] is not clear enough. Justice LeBel references remarks to the effect that the distinction between a "somewhat probing examination" and a "probing examination" is a fine one: too fine to permit lawyers or the courts to differentiate clearly among the standards.[31]

The second difficulty flows from the ambiguity as to the intended meaning of "immediacy or obviousness". Is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonablness review, or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The ambiguity in the case law on this point makes the matter anything but clear.

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[26] *C.U.P.E., supra* note 2, at paras 104-105.

[27] Mullan, David J. "Recent Developments in Standard of Review", in *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners*. Canadian Bar Association (Ontario), October 20, 2000.

[28] *Southam*, *supra* note 6, at para 57.

[29] *C.U.P.E., supra* note 2, at para 111.

[30] *Southam*, *supra* note 6.

[31] *C.U.P.E., supra* note 2, at para 112, citing D.W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 Sask. L. Rev. 469, at 486-487.

Justice LeBel cited *Ryan*[32] in support of the proposition that the focus is on the obviousness of the defect's magnitude once it has been identified, only to then cite *Ryan*[33] as evidencing support for the contrary position. Such ambiguity is problematic for lawyers and the judiciary and evidences a need to re-evaluate the current state of the standards of review, and, in particular, the utility of a patently unreasonableness standard.

Under Scrutiny

There is a perception that the jurisprudence in relation to judicial review needs fresh consideration. In *C.U.P.E.* Justice LeBel, concurred with by Justice Deschamps, undertook to review the current state of affairs in the absence of either a "live" issue in the case or submissions from counsel.[34] As recognized by Justice LeBel, parties to litigation often have no personal stake in assuring the coherence of the standards of review jurisprudence as a whole and the consistency of their application. Their purpose is to show how the positions that they advance conform with the law as it stands, rather than suggest improvements of the law for the benefit of the common good. Consequently, the task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary.[35] In an appropriate case, however, the door is open for a consideration of the issue by the Supreme Court of Canada on the basis of a full record and submissions. In *C.U.P.E.* Justice LeBel concluded his opinion with the following words:

> Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts,

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[32] *Ryan, supra* note 14, at para 52.

[33] *Ibid*. at para 53.

[34] *C.U.P.E., supra* note 2, at para 64, (Justice LeBel notes that the parties appearing in this appeal made no submissions as to the state of the standard of review jurisprudence. The consideration of the case law, is undertaken on his own volition).

[35] *C.U.P.E., supra* note 2, at para 64.

> building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review?[36]

In the context of standards of review, two members of the Court put the standard of patently unreasonable on notice.

PART II: A GREATER FOCUS ON STATUTORY LANGUAGE?

Quite apart from discussion or debate concerning the identification of the standards of review (are there three or perhaps should there be only two?), there is also currently judicial debate with respect to how a court should determine what the appropriate standard of review is (i.e. the pragmatic and functional approach). An evolution (or perhaps devolution) of the articulation of the functional and pragmatic analysis by the Supreme Court of Canada can be traced from *Union des employés de service, Local 298 v. Bibeault*,[37] through *Pezim* to *Pushpanathan*. The analysis may be described as an analytical framework that determines the appropriate amount of judicial interference in, or deference to be afforded to, a decision by an administrative decision-maker as informed by a contextual and purposive view. Obviously, the goal is to determine the correct standard for each particular case as well as for each particular question at issue in each case. (Different standards of review may, of course, apply to different issues being considered within a single application[38].)

Though no list of considerations is exhaustive, the courts have identified several factors that are considered relevant in the course of a pragmatic and functional analysis.[39] In *Pushpanathan*, Justice Bastarache clarified that the relevant factors can be divided into four categories: i) the nature of the particular issue on which review is being sought; ii) the expertise of the decision-maker; iii) the presence or absence of a privative clause; and iv) the overall statutory purpose of the enabling legislation. [40]

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[36] *C.U.P.E.*, *supra* note 2, at para 134.

[37] *Union des employés de service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

[38] *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 at paras 23-24, 51.

[39] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para 79.

[40] *Pushpanathan*, *supra* note 13, at paras 29-38.

While seemingly straightforward, these factors frequently prove unwieldy, if not burdensome and, possibly, artificial. However, as previously mentioned, some view the factors as nothing more than "an obstacle course" through which counsel and the judiciary must run. Others question whether it is counterproductive to delineate an intricate test "that serves as an invitation for endless quibbling" when what is really at issue is a broad determination of the appropriate amount of deference to be owed administrative bodies. Then there are those who suspect that the factors serve as nothing more than a smokescreen through which courts, when in their experience they see a decision that warrants interference, are able to justify intervention. Whatever the comment, it is agreed upon that the pragmatic and functional approach, as currently developed, is anything but.[41]

The Implications of *Mugesera*

In *Mugesera*, the Supreme Court considered whether the Federal Court of Appeal had erred in overturning a decision of the Immigration and Refugee Board (Appeal Division) considering the extradition of Mr Léon Mugesera – a permanent resident of Canada alleged to have incited murder, hatred, genocide, and a crime against humanity, in his native country of Rwanda.

The Board in *Mugesera* had upheld the decision of an adjudicator operating under the *Immigration Act*,[42] concluding that the allegations against Mr Mugesera were valid and worthy of deportation. The decision was subject to judicial review in the Federal Court and subsequently appealed to the Federal Court of Appeal. The Court of Appeal allowed the appeal and quashed the deportation order, reversing several findings of fact made by the Board.

On appeal from the Federal Court of Appeal, the Supreme Court of Canada pointed to its decision in *Dr. Q*. for the proposition that the role of appellate courts reviewing judicial review decisions is "limited to determining whether the reviewing judge has chosen and applied the

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[41] Public Law Remedies: The Next Five Years, *supra* note 1, at 35-36: "If the 'pragmatic and functional' approach is indeed pragmatic and functional, why does it so often create sharp debate in courts, sometimes as if nothing has ever been written on the subject before? A truly pragmatic and functional test would not have to be considered and refined by the Supreme Court so often, and so often in the same contexts."

[42] *Immigration Act,* R.S.C. 1985, c. I-2.

correct standard of review." Accordingly, the Court turned its mind to the appropriate standard of review to be applied in the *Mugesera* case.

It could be argued that at this point the Supreme Court proceeded to signal an intention to elevate the importance of statutory language relating to rights of appeal in determining the applicable review standard. The intention to elevate referred to arises from the Court's treatment of subsection 18.1(4) of the *Federal Courts Act*.[43] The provisions of subsection 18.1(4) circumscribe grounds of review applicable to judicial review proceedings under the *Act*:

> Grounds of review
>
> 18.1(4) The Federal Court may grant relief under subsection (3) [judicial review] if it is satisfied that the federal board, commission or other tribunal
>
> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
>
> (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
>
> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (f) acted in any other way that was contrary to law.

In *Mugesera*, the Court pointed to paragraphs 18.1(4)(c) and (d) of the *Act* in assessing the appropriate standard of review. It concluded that the applicable standard was correctness for questions of law and patent unreasonableness in relation to questions of fact. Interestingly, however, there seems to have been no indication that the Court conducted a pragmatic and functional analysis in coming to its conclusion.[44] The Court simply stated:

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[43] *Federal Courts Act,* R.S.C. 1985, c. F-7.

[44] One might argue that the Court's mention of *Dr. Q* was sufficient to indicate that the pragmatic and functional approach was implicitly being applied, or the case may simply have been cited for the proposition that an appellate court's role is limited to determining whether the reviewing judge has chosen and applied the correct standard of review.

> Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (*c*) and (*d*) of s. 18.1(4), in particular, allow the Court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness.
>
> On questions of fact, the reviewing court can intervene only if it considers that the IAD "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it" (*Federal Court Act*, s. 18.1(4)(*d*)). The IAD is entitled to base its decision on evidence adduced in the proceedings which it considers credible and trustworthy in the circumstances: s. 69.4(3) of the *Immigration Act*. Its findings are entitled to great deference by the reviewing court. Indeed, the FCA itself has held that the standard of review as regards issues of credibility and relevance of evidence is patent unreasonableness: *Aguebor v. Minister of Employment & Immigration* (1993), 160 N.R. 315, at para. 4.[45]
>
> (emphasis added)

The fact that the Supreme Court of Canada does not appear to have applied the pragmatic and functional approach in *Mugesera* seems at odds with its own earlier pronouncements. In *Dr. Q*, Chief Justice McLachlin writing for a unanimous Court wrote:

> That brings us to the second erroneous assumption – that because the Act grants a right of appeal, the matter could be dealt with without recourse to the usual administrative law principles pertaining to standard of review.
>
> …
>
> In a case of judicial review such as this, the Court applies the pragmatic and functional approach that was established by this Court…The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal.
>
> …
>
> To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review.[46]

Dr. Q unequivocally states that the pragmatic and functional approach is to be applied in all assessments of the appropriate standard of review.[47] Yet, in *Mugesera*, the Court arrived at the

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[45] *Mugesera, supra* note 2, at paras 37-38.

[46] *Dr. Q., supra* note 15, at paras 20-22.

[47] *Ibid*. at para 21, (the pragmatic and functional approach is to be undertaken by a reviewing judge "in every case where a statute delegates power to an administrative decision-maker").

standard of review with merely reference to the *Federal Courts Act*. Under *Mugesera*, a reviewing court (in the context of the *Federal Courts Act* either the Federal Court or the Federal Court of Appeal) would apply a standard of correctness with respect to errors of law and overturn only those findings of fact made in a perverse or capricious manner. Aside from an error of law or an erroneous finding of fact, findings are otherwise entitled to "great defence by the reviewing court". Areas of review under section 18.1(4)(a) and (b) (jurisdiction errors and breaches of natural justice), while not considered in the court such errors would, presumably be reviewed on the basis of a correctness standard. The pragmatic and functional approach has, generally, not been applied to questions of procedural fairness, which are reviewed as questions of law.[48]

There seem to be three possible reasons why the Court did not follow its earlier instructions in Dr. Q:

- First, it may be suggested that the Court did apply the approach, albeit implicitly, by reference to *Dr. Q* earlier in the judgement.
- Second, the Court may be understood as recognizing that certain standards of review under the *Federal Courts Act* may now be understood as settled law.
- Third, it could be argued that the Court was signalling that the provisions of the *Federal Courts Act*, as interpreted in *Mugesera*, are either to be highly prominent in the course of a pragmatic and functional approach, or determinative as to standard of review in respect of reviews conducted under that act.

The suggestion that the Court implicitly applied the pragmatic and functional approach seems doubtful in light of the Court's unequivocal comments in *Dr. Q.*: "Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach."[49] While some appellate decisions may reduce the pragmatic and functional analysis to a brief touchstone in their reasons, it is unlikely that the Court simplified their reasons in such

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[48] *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392, at para 46 (hereinafter "*Skethcley*"): "The pragmatic and functional analysis does not apply, however, to allegations concerning procedural fairness, which are always reviewed as questions of law."

[49] *Ibid*. at para 25.

a manner. The Court's failure to reference the pragmatic and functional approach should, therefore, be seen as intentional.

As to the second suggestion, i.e. that the Court was recognizing certain standards of review under the *Federal Courts Act* as settled law, this too is highly unlikely for similar reasons to those mentioned above. The effect of *Dr. Q* is to mandate that reviews of all decisions are to be prefaced by the consideration of the pragmatic and functional approach so as to ensure the appropriate standard of review is employed in light of the context.[50] Courts are not to simply adopt standards applied in previous cases.

This leaves the third possibility, i.e. that the Court intended to signal either a greater willingness to consider statutory language in assessing the appropriate standards of review pursuant to the *Federal Courts Act*; or, alternatively, the Court was making such language determinative as to the appropriate standard of review. In either case, such a change to the jurisprudence would be substantial.

It arises out of *Mugesera* that the Court appears to indicate a readiness to consider the language of Parliament, at least in the context of the *Federal Courts Act*, as influential, if not conclusive, in determining the applicable standard of review. If this is the case, a significant simplification of judicial review law, at least as it pertains to federal administrative tribunals, will have occurred. By recognizing the language in the *Federal Courts Act* as directive and, therefore, determinative of the standard upon which an administrative decision is to be reviewed, there would be little concern on the part of counsel or the judiciary to burden itself with the common law developed pragmatic and functional approach. The upside of such a turn of events could, arguably, result in an increased efficiency and effectiveness in the context of judicial review applications. At a minimum, such an approach fulfills the need, espoused in by Justice Arbour in *C.U.P.E.* that the standard of review should be "predictable, workable and coherent".[51] It should

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[50] If a court were to adopt reasons that did not apply the pragmatic and functional approach they would be in error in following a decision that itself failed to consider the proper legal test. Alternatively, if a court simply chose to follow a prior pragmatic and functional analysis, it would be in error in failing to conduct its own as required by Dr. Q.

[51] *C.U.P.E., supra* note 2, at para 64.

enable parties to focus their energy on the alleged errors of the administrative decision-maker, rather than determining the appropriate standard upon which to review the decision.

A Continued Need For A Fulsome Pragmatic and Functional Approach?

Mugesera's departure from the *Dr. Q* jurisprudence is so dramatic that the courts remain hesitant to adopt the approach set out in the former. Justice Linden of the Federal Court of Appeal, in *Sketchley v. Canada (Attorney General)*, made the following comments in relation to the *Mugesera* decision:

> Despite the unqualified and seemingly unequivocal tenor of this passage from *Mugesera*, in my view it would nevertheless be wise, at least until this matter is clarified, to continue to use the pragmatic and functional analysis to determine the standard of review of legal issues in cases of judicial review under the Federal Courts Act. This is so, because the Supreme Court's clear direction in Dr. Q., that it remains necessary to apply the pragmatic and functional approach in every case in which the standard of review falls to be determined. [52]
>
> (emphasis added)

Sketchley was an appeal from an order of the Federal Court granting judicial review of a decision by the Canadian Human Rights Commission. The Commission had dismissed two complaints by the respondent that she had been forced from public service because of her medical disability.

In assessing the applicable standard of review, Justice Linden applied the pragmatic and functional approach and turned first to the presence or absence of a privative clause or statutory right of appeal. In doing so, he noted that the *Canadian Human Rights Act* contained "no legislative guidance as to appeals or reviews of this type of decision."[53] Instead, he further noted that the statute granting the court the jurisdiction to review CHRA decisions (the *Federal Courts Act*) was relevant.

In discussing the *Federal Courts Act*, Justice Linden pointed to subsection 18.1(4) and the decision in *Mugesera*, before offering the following opinion on the Supreme Court's reasoning:

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[52] *Sketchley*, *supra* note 48, at para 67.

[53] *Sketchley*, *supra* note 48, at para 63.

> In Mugesera v. Canada…the Supreme Court of Canada, without any analysis of the prior jurisprudence, appears to indicate a new readiness to consider the language of Parliament in the Federal Court Act as influential, if not conclusive, in determining the applicable standard of review with respect to questions of law…
>
> Despite the unqualified and seemingly unequivocal tenor of [paragraph 37] from Mugesera, in my view it would nevertheless be wise, at least until this matter is clarified, to continue to use the pragmatic and functional analysis to determine the standard of review of legal issues in cases of judicial review under the Federal Court Act. This is so, because of the Supreme Court's clear direction in Dr. Q, supra, that it remains necessary to apply the pragmatic and functional approach in every case in which the standard of review falls to be determined. [54]
>
> (emphasis added)

While the decision in *Sketchley* may disappoint those who had hoped the *Mugesera* reasoning would govern judicial reviews taken under the *Federal Courts Act*, *Mugesera* has the potential to create a significant distinction between judicial reviews conducted under federal jurisdiction and judicial reviews conducted within the provincial Superior Courts: at present, only one provincial statute contains provisions similar to 18.1(4),[55] while others contain alternative provisions which may affect grounds for relief,[56] and still others simply refer to the availability of judicial review generally.[57]

Second, it is important to recognize that *Mugesera* was concerned with a decision of the Immigration and Refugee Board (Appeals Division), and therefore operating within the context of the *Federal Courts Act*. Though obvious, it is worth restating that the jurisdiction of the Federal Courts is statutory. It is not, unlike provincial superior courts, a court of inherent jurisdiction.

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[54] *Ibid.* at paras 66-67.

[55] See: *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 4(1).

[56] See: *Code of Civil Procedure* Art. 846; *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

[57] See: Saskatchewan, *Rules of Practice and Procedure*, r. 664(1); Alberta, *Rules of Court*, r. 753.04(1); Manitoba, *Court of Queen's Bench Rules*, r. 68.01; New Brunswick , *New Brunswick Rules of Court*, r. 69.01; Nova Scotia, *Civil Procedure Rules*, r. 56.02; and Newfoundland and Labrador, *Rules of the Supreme Court*, r. 54.

Third, the subsection referred to by the Court in *Mugesera* was one concerning an error of law. As such the standard would, arguably, have been under the traditional pragmatic and functional approach as well as under the *Mugesera* analysis of correctness.

It may be stretching the decision in *Mugesera* too far to suggest that the Court intended to shift the law from a nationally recognized review method (the pragmatic and functional approach) to a jurisdiction by jurisdiction analytical framework dependant of the individual wording of different statutes governing judicial review. Indeed, short months after rendering *Mugesara*, the Supreme Court issued its reasons in *Zenner v. Prince Edward Island College of Optometrists*[58] and applied the pragmatic and functional approach without reference to Prince Edward Island's *Judicial Review Act* (an act couched in the same language as the *Federal Courts Act*).

Regardless, the *Mugesara* decision is one to be watched and considered in future application of the pragmatic and functional approach.

The Evolution Of An Approach

Assuming *Mugesera* does represent some sort of shift in the jurisprudence with respect to the significance placed on statutory rights of appeal in the course of applying the pragmatic and functional analysis, it is useful then to briefly consider the role such statutory rights played in the past.

A suitable starting point rests in a time when courts accorded significant weight to provisions granting a right of appeal. In many cases, the presence of such a right was considered by the Court as largely determinative of the deference to be afforded the administrative decision-maker. Effectively, in the presence of a right of appeal, courts would review the administrative decisions on a *de novo* basis.[59] A court reviewing a decision on statutory appeal was less deferential to the administrative body, than it would be if the review was a judicial review.[60]

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[58] *Zenner v. Prince Edward Island College of Optometrists*, [2005] 3 S.C.R. 645.

[59] Blais et. al. *Standards of Review of Federal Administrative Tribunals*, (Markham, ON: Butterworths, 2004) at 7.

[60] *Ibid*. at 18.

Over time, as evidenced in the Supreme Court of Canada's decision in *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*,[61] and its subsequent decisions in *Pezim* and *Southam Inc*., the courts were less willing to recognize statutory rights of appeal as something above and beyond that of another consideration to take into account in the course of determining the appropriate level of curial deference given administrative bodies. To be sure, the presence of a such a statutory right of appeal was recognized as "a factor suggesting a more searching standard of review",[62] however, it was, nonetheless, not determinative of the standard of review. As will be discussed, these decisions, in effect, reduced the influence that statutory rights of appeal had on determinations of the appropriate standard of review.

The mitigated import placed on rights to appeal has continued in the Supreme Court's more recent jurisprudence.[63] Arriving at the current case law, *Mugesera* could indicate a renewed prominence of statutory language in determining the amount of deference afforded an administrative decision-maker.

The Way Forward?

Despite the problems outlined above, the methodology employed in *Mugesera* may nonetheless prove relevant for administrative law practitioners. At a minimum, it emphasizes the fact that courts should place an emphasis upon statutory rights of appeal in the course of a pragmatic and functional analysis. To the extent that individual provinces enact their own legislation on judicial review, it would be beneficial for practitioners to become familiar with such legislation following *Mugesera*, and place emphasis on it within their submissions on the pragmatic and functional approach. If subsection 18.1(4) of the *Federal Courts Act* may simplify the assessment of standard of review as suggested in *Mugesera*, it seems unlikely that other legislation could not follow suit.

On a broader level, *Mugesera* might still be seen as the first tentative steps away from the complexities of the current standard of review assessment methodology and more in line with

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[61] *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

[62] *Pushpanathan, supra* note 13, at para 30.

[63] *Dr. Q, supra* note 15, at paras 26-33.

Justice LeBel's articulation of two, as opposed to three, applicable review standards. If such is the case and the issue is revisited by the Supreme Court in the future, practitioners might hope that an increased reliance on statutory wording will lead to decreased complexity in the review process. While the prospects of such codification may be unknown, it offers at least a glimpse of a procedural method that is pragmatic and functional in more than name only.

In a best case scenario, *Mugesera* obviates the need for the pragmatic and functional approach in certain contexts. However, the more likely result of the decision is that the courts are signalling, once again, that statutory language (such as statutory rights of appeal) will play a prevalent role, if not determinative, in determining the appropriate standard upon which to review administrative decision-makers.