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THE STANDARD OF REVIEW: UPDATE ON RECENT DEVELOPMENTS

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INTRODUCTION

Following the 1979 decision of Dickson J. (as he was then) in *Canadian Union of Public Employees, Local 963 v. New Brunswick (Liquor Corp.)*[1], the Supreme Court of Canada has been in constant conversation regarding the judicial review of an administrative tribunal's decision. Despite this discussion, the determination and application of the appropriate standard of review remains problematic. It is well established that the use of the pragmatic and functional analysis is determinative of the standard of review applicable; however, the terminology of these standards is well-defined, their application is less so. As such, the Court regularly sees the need to address the relevance of these standards and their application to administrative law decisions.

The recent Supreme Court decisions of *Council of Canadians with Disabilities v. Via Rail Canada Inc.*[2] and *Lévis (City) v. Fraternité des policiers de Lévis Inc.*[3], released in March 2007, are no exception. The entirety of the Court in *Via Rail* agrees on the definitional problem regarding the current standards of unreasonableness; however, the introduction by the majority of the idea of a "demonstrably unreasonable" standard this unanimity. Despite acknowledging the need to clarify the issue, the dissent refuses to engage the topic, believing the case to be an inappropriate forum for such a discussion.

Just as the substance of the standards of judicial review is a live issue, so is the use of multiple standards of review in addressing a single administrative decision. The majority in *Via Rail* supports one integrated standard of review as the appropriate

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[1] [1979] 2 S.C.R. 227 (hereinafter *C.U.P.E., Local 963*).
[2] [2007] S.C.J. No. 15 (hereinafter *Via Rail*).
[3] [2007] S.C.J. No. 14 (hereinafter *Lévis*).

analytic approach; however, the dissent decision supports segmenting the tribunal's ruling, exposing it to multiple standards of review. This minority opinion corresponds with the majority decision in *Lévis*, which champions a segmented standard of analysis. Only Abella J., writing a deferential dissent in this case advocates the use of a single, coherent standard of review.

These recent cases reveal a Court dissatisfied with the current standards of review in use. Despite this unrest, these cases do act to emphasize the consistent application of the pragmatic and functional approach by the Court when determining the deference to be accorded an administrative decision. As such, an analysis of the contrasts in *Via Rail* and *Lévis*, particularly in the context of the pragmatic and functional analysis, may provide guidance as to the factors influencing the Court's approach to curial review of administrative law.

OVERVIEW OF JUDICIAL REVIEW

In his 1979 landmark decision of *C.U.P.E., Local 963* Justice Dickson shifted the landscape of judicial review by advocating a deferential approach to the review of the administrative decision at hand. This case introduced the concept of the "patently unreasonable" standard of review, a highly deferential standard in which only a defect that is immediate or obvious will attract court interference[4]. Prior to this case judicial review applied only to a tribunal's interpretation of legislation, which was then evaluated on a standard of correctness: a court would apply its own reasoning to determine the correct answer to the question at hand.

[4] *C.U.P.E., Local 963*, *supra*, at 327.

It was not until 1997, in the case of *Canada (Director of Investigation & Research) v. Southam*[5], that the court developed a third standard of review, the standard of reasonableness *simpliciter*. The introduction of this standard acknowledged the need for a spectrum of judicial review, with the standards of correctness and patent unreasonableness at either end, with a standard of reasonableness in the middle. This standard, more deferential than that of correctness, determines that if an underlying decision-making process is reasonable, then it will stand whether or not the decision is one with which the court agrees.

In order to determine the standard of review applicable to an administrative decision, the Court introduced a pragmatic and functional analytic approach in *U.E.S. Local 298 v. Bibeault* that took into account:

> ...not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.[6]

The elements of the analysis have not changed substantially since, and it is by weighing these contextual factors that a court attempts to discern the legislative intent regarding the tribunal. Determining this intent directs the level of deference a tribunal's decision is accorded, and thus the standard of review applied (correctness, reasonableness *simpliciter* or patent unreasonableness).

The application of this pragmatic and functional approach is alive and well in administrative law jurisprudence. Recent 2006 and 2007 cases demonstrate that the

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[5] [1997] 1 S.C.R. 748.
[6] [1988] 2 S.C.R. 1048, at 1088.

Court continues to actively apply the elements of this test in order to determine the proper standard of judicial review[7]. However, the subjective nature of this analysis causes dissent amongst the members of the Court as to the appropriate level of deference due a tribunal. Tension regarding the amount of deference to show an administrative decision underlies both *Via Rail* and *Lévis*; however, these cases provide insight as to the prevailing attitude of the Court in its application of the pragmatic and functional analysis.

VIA RAIL

The issue before the Court in *Via Rail* was the Federal Court of Appeal's 2005 finding that the Canadian Transportation Agency had erred when directing Via Rail to implement accessibility measures on a number of its recently-purchased Renaissance cars.[8] The Council for Canadians with Disabilities (CCD) had applied to the Agency in December 2000, complaining that the cars provided undue obstacles to the mobility of persons with disabilities[9]. The Agency determined, following a lack of sufficient information from Via Rail proving otherwise, that Via Rail should be directed to modify 30 cars out of the 139 purchased. Following Via Rail's appeal, a majority of the Federal Court of Appeal found that while the Agency was within its jurisdiction to rule on the complaint, its decision was patently unreasonable and should be referred back for consideration.

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[7] *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] S.C.R. 256; *Mattel Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, *Via Rail, supra,* note 2, *Lévis, supra,* note 3.

[8] *Via Rail Canada Inc. v. Canadian Transportation Agency*, [2005] F.C.J. No. 376 (F.C.A.).

[9] *Application by the Council of Canadians with Disabilities pursuant to subsection 172(1) of the* Canada Transport Act, *S.C. 1996, c. 10.*

Following CCD's appeal to the Supreme Court the majority held, in a five to four ruling, that the Agency's decision should be restored. The majority of the Court determined that the appropriate standard of review for the Agency's decision was that of patent unreasonableness, and its decision was entitled to extreme deference. The court ruled that the decision of the Agency, with respect to cost and undue hardship to Via Rail, was not unreasonable and should not be interfered with.

Via Rail is notable for the frustration expressed by the Court with the current standards of unreasonableness. Abella J. comments that the difference between the two standards of unreasonableness is too subjective, making it too difficult to differentiate between them:

> I appreciate that it is a conceptual challenge to delineate the difference in degrees of deference between what is patently unreasonable and what is unreasonable. Both, it seems to me, speak to whether a tribunal's decision is demonstrably unreasonable, that is, such a marked departure from what is rational, as to be unsustainable.[10]

The introduction by the majority of the idea of a "demonstrably unreasonable" standard was disputed by the dissent; however, it has intrigued practitioners as to the future viability of the current standards of review. *Via Rail* also highlights a Court unwilling to apply multiple standards of review to an tribunal decision, unlike the Court in *Lévis*.

LEVIS

In *Lévis*, a municipal police officer pleaded guilty to several criminal offences (among them domestic violence and firearm offences) and was subsequently dismissed

[10] *Via Rail*, supra, at para. 102.

from the force. As a municipal officer he was subject to the separate sanctions of two Acts, the Police Act (PA) and the Cities and Towns Act (CTA). The PA allowed for sanctions other than automatic dismissal if the officer could demonstrate specific circumstances that justified these alternate sanctions. The CTA did not provide this recourse. As a result, following the grievance of the dismissal by the officer's union, the presiding arbitrator found it necessary to rule on the compatibility of the two Acts. The arbitrator determined that the PA, rather than the CTA, was applicable. He then ruled that the officer be reinstated, as the family and alcohol issues of the officer constituted specific circumstances under which an automatic dismissal was inapplicable. The Superior Court of Quebec set aside the arbitration decision, considering it patently unreasonable[11]; however, the Court of Appeal of Quebec upheld the original decision and reinstated the officer.[12]

Following the appeal to the Supreme Court of Canada, the Court ruled that two standards of review were needed, given the presence of clearly defined questions that engaged differing concerns under the pragmatic and functional approach. The Court ruled that the compatibility of the legislation was a question of pure law and therefore subject to a standard of review of correctness. The arbitrator's interpretation of the provision of the PA, and its application to the conduct of the officer, was considered by the court to be a question of mixed fact and law and thus subject to a standard of review of reasonableness. This willingness to apply multiple standards of review to the Arbitrator's decision is in contrast to the hesitant approach to segmentation seen in the

[11] [2003] J.Q. 13008 (QL).
[12] [2005] J.Q. No. 8450 (QL), 2005 QCCA 639.

majority opinion from *Via Rail*. Such reticence is reflected by the lone dissent on the issue written by Abella J., who advocates an integrated standard of assessment.

ANALYSIS

Abella J.'s dissatisfaction in *Via Rail* with the current standards of unreasonableness echoes recent Supreme Court discussion of the issue, describing the distinction between the two standards as nebulous. As stated by LeBel J. (writing with Deschamps J.) in *Toronto (City) v. C.U.P.E., Local 79*[13]: "It is difficult to show the two standards as analytically, rather than semantically different."[14] LeBel J. opines the lack of direction provided by the two unreasonableness standards, and seems to advocate a unified standard of unreasonableness. Writing, again with Deschamps J., in the following years' *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* LeBel J. reiterates this sentiment:

> [I]t is time for this Court to re-evaluate the appropriateness of using the patent unreasonableness and reasonableness simpliciter standards. Patent unreasonableness is an inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practise from reasonableness simpliciter.[15]

The majority decision in *Via Rail* appears to champion LeBel J.'s stance in *Toronto v. C.U.P.E.* and *Voice Construction*. Abella J. advocates the simplification of the standards of review currently in use. The decision is indicative that the Court may be inclined

[13] [2003] 3 S.C.R. 77 (hereinafter *Toronto v. C.U.P.E.)*
[14] *Toronto v. C.U.P.E., supra,* at para. 103.
[15] [2004] 1 S.C.R. 69, at para. 40 (hereinafter *Voice Construction*).

toward collapsing the two unreasonableness standards into one unified standard of demonstrable unreasonableness.

This approach is in direct opposition to that championed by Iacobucci J., who developed the third and intermediate standard of reasonableness *simpliciter*, and who has been a strong proponent of the current system of review. He believes that introducing a fourth standard is unnecessary, and that "...the existing standards provide the necessary flexibility and sophistication for courts to exercise their reviewing functions responsibly."[16] Unlike the majority, the dissent's decision in *Via Rail* accords with this approach. The dissent frames Abella J.'s decision as an addition to the lexicon of standard of review terminology. Notably it is Deschamps J., writing with Rothstein J., though dissatisfied with the standards of unreasonableness in prior decisions, who comments in *Via Rail* that such an addition to the vocabulary of review is unnecessary and confuses an already complex area of law.[17]

Despite the dissent's objection to the term "demonstrably unreasonable", there is no objection to Abella J. noting the conceptual challenge associated with differentiating between reasonableness *simpliciter* and patent unreasonableness. Deschamps and Rothstein JJ. agree that clarifying the standards of unreasonableness is required given that it is often "difficult to determine the degrees of differences" between them[18]. Despite dispute regarding the terminology of "demonstrably unreasonable", the Court does acknowledge that current jurisprudence is unsatisfactory and that the development and clarification of these standards of review is necessary.

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[16] Hon. Frank Iacobucci, 'Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis' (2002) 27 Queen's L.J.. 859 at para. 31.
[17] *Via Rail, supra*, at para. 279.
[18] *Via Rail, supra,* at para. 279

Eliminating the spectrum currently employed in standard of review determination would reintroduce the analytic approach available immediately following 1979's *C.U.P.E., Local 963*: determining whether or not deference ought to be demonstrated. A unification of the standards of unreasonableness, or merely the continuation of the current state of confusion places an inevitable emphasis on the Court's use of the pragmatic and functional approach. The contextual factors integral to determining the deference shown to an administrative decision include (as reviewed succinctly in *Dr. Q v. College of Physicians and Surgeons of British Columbia*): the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal; the purpose of the legislation or provision at issue and the nature of the question at hand[19]. Given the inevitable primacy of the pragmatic and functional approach in the future of judicial review, clarifying the approach of the Court in its analysis of these contextual factors would be a useful exercise. However, the approach taken by the majority and the dissent decisions in *Via Rail* and *Lévis* differ markedly at first glance, indicating that clarity may not be readily achieved.

In *Via Rail*, the majority are influenced most strongly by the contextual factors of tribunal expertise and legislative mandate. As such, they accord the Agency's decision a "single, deferential, standard of review."[20] This emphasis on expertise and legislative direction leads to the application of the deferential standard of patent unreasonableness to the whole of the Agency's decision. Considerations of the presence of a statutory right of appeal, or the nature of the question at issue are clearly secondary: "[t]he Agency made a

[19] [2003] S.C.J. No. 18 at para. 26.
[20] *Via Rail, supra,* at para. 100.

decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate."[21]

Justice Abella is obviously concerned with the emphasis that the application of the pragmatic and functional approach could place on the Agency's jurisdiction. She opines that an emphasis on jurisdiction may act to undermine the authority imparted to the tribunal by Legislature. Abella J. states that the consequence of focusing on the nature of the questions at hand, thus segmenting an administrative decision into various parts causes a tribunal's expertise "...to defer to a court's generalism rather than the other way around."[22] Jurisdiction, an issue of the nature of the question at hand, is secondary to the Agency's legislative mandate and the expertise it requires to meet this mandate.

The majority judgement emphasizes the Agency's capacity to make a rational decision and cautions against such undue intervention by the courts:

> Where an expert and specialized tribunal has chartered an analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.[23]

The contextual factors of mandate and expertise stressed by the Majority in its pragmatic and functional analysis are indicative of a highly deferential attitude, reminiscent of Dickson J.'s caution against an undue focus on jurisdiction:

> The question of what is and what is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as

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[21] *Ibid.*
[22] *Ibid,* at para. 96.
[23] *Ibid,* at para. 104.

> jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.[24]

Deference to the decision-making capacity of the tribunal informs the majority's application of the pragmatic and functional approach. This respectful attitude to judicial review directs the emphasis on the contextual factors of legislative purpose and tribunal expertise. Such emphasis creates legitimate context for the application of a single standard of review. In contrast, the dissent in *Via Rail* adopts a more interventionist approach to the pragmatic and functional analysis. They focus on the nature of the question, rather than the mandate and expertise of the tribunal. Consequently, the dissent decision is able to parse the tribunal decision and advocate the application of multiple standards of review.

The dissent decision in *Via Rail* is significantly less deferential than the majority decision. A willingness to intervene underlies the application of the pragmatic and functional approach. The nature of the question is the primary contextual factor considered, which allows the parsing of the decision into distinct units with distinct standards of review. According to the dissent the Agency is called upon to answer two legal questions, a question as to its jurisdiction and the determination of the appropriate human rights principles. Thus, the standard of review for both these questions of law is that of correctness. The dissent in *Via Rail* criticizes a single standard of review as unable to "...account for the diversity of questions under review"[25] and writes that multiple standards of review are necessary:

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[24] *C.U.P.E., Local 963, supra,* at 233.
[25] *Via Rail, supra,* at para. 278.

> A tribunal's decision must...be subject to segmentation to enable a reviewing court to apply the appropriate degree of scrutiny to the various aspects of the decisions which call for greater or lesser deference.[26]

After determining the nature of the question answered by the tribunal, the dissent then considers the expertise of the Agency. This expertise is weighed in the context of what has been determined to be the court own expertise (questions of law); as such, the dissent is dismissive of the expertise of the tribunal, and this factor does not direct the dissent toward a deferential standard of review.

The focus on the nature of the question at issue serves to highlight the significance of the precedential value of the question. The dissent notes that "...this being the first opportunity that a court has had to interpret these questions, the resolution...will have an important precedential value. This calls for an exacting standard of review."[27] As in *Chieu v. Canada (Minister of Citizenship and Immigration)*, this factor appears to play a significant role in the decision of the Dissent to apply a more searching standard of review and is permissive toward the application of multiple standards of review.[28]

If *Via Rail* had been released singly, practitioners may have been able to take some direction from the judgement. The Court clearly acknowledges the need to address the current standards of judicial review and the majority's application of the pragmatic and functional approach is founded in a predisposition toward deference. However, *Via Rail* was released one day after *Lévis*. In *Lévis*, the majority advocates the application of

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[26] *Ibid.*
[27] *Ibid,* at para. 282.
[28] [2002] 1 S.C.R. 84.

multiple standards of review to the administrative decision at issue. The lone dissenting voice on the issue of segmentation is that of Justice Abella, who advocates an integrated, deferential approach to the standard of review applicable to the arbitrator's decision. She writes alone against the application of multiple standards of review. While the interventionist approach is so keenly opposed by the majority in *Via Rail*, the majority in *Lévis* is keen to intervene. This contrast causes uncertainty in predictions as to the level of deference with which the Court will review an administrative decision.

Unlike *Via Rail*, but akin to its dissent, in *Lévis* the nature of the question is determinative of the majority's application of the pragmatic and functional approach:

> ...whether there is the possibility of more than a single standard of review under the pragmatic and functional approach will largely depend on whether there exists questions of different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways.[29]

The similarity to the dissent in *Via Rail* lies in an interventionist attitude that seems to predispose the majority toward a willingness to review. This willingness is reflected in the application of the pragmatic and functional analysis which then emphasizes the nature of question at hand. Consequently, the considerations of expertise and mandate lose their impact. Putting the nature of the question first also allows the majority to directly address questions it believes to be of general importance, questions with potential precedential value.

The majority does express some caution regarding its interventionist approach, stating that the ability to apply multiple standards of review should not mean that an

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[29] *Lévis, supra,* at para. 19.

administrative decision is subject to "heightened scrutiny" by the courts[30]. However, the underlying concern that applying a single, integrated standard of review will "subsume questions into one broad standard of review"[31] is determinative of the majority's non-deferential approach in *Lévis*. The use of one standard for the entirety of a tribunal decision, despite Abella J.'s staunch support, is not considered sufficiently nuanced. This reticence regarding the application of a single, standard may be indicative of a court sensitive to its constitutional role to protect the rule of law. The deferential approach of Abella J. may not adequately address the need for the courts to have the ability to thoroughly review an administrative law decision.

The ability to readily extricate the distinct questions from the whole of the arbitrator's decision is decisive in the Majority's choice in *Lévis* to segment their review. The majority emphasize that the "separate findings" of the arbitrator are open to different standards of review, relying on jurisprudence that allows the legislative interpretation of an arbitrator to be reviewable on a different standard from the remainder of the decision[32]. Even Abella J. acknowledges in her dissent that if a "...legal issue is genuinely external to the adjudicator's mandate or expertise and [is] easily differentiated from other issues in the case", then segmentation of review is appropriate.[33] The differential factor between the majority and dissent lies in the a willingness to apply multiple standards of review. Abella J. decries this "unduly interventionist" approach[34],

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[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid,* at para. 115.
[34] *Ibid,* at para. 111.

given that some "legal issues ought not to be declared readily extricable when they are legitimately and necessarily intertwined with...mandate and expertise."[35]

In both cases the whole of the Court acknowledges the potential for the extrication of distinct questions from a tribunal decision, and the potential necessity for this parsing. However, guidance as to when a decision should be subject to segmentation appears to be an issue of predisposition. The level of deference accorded a decision seems to factor in *prior* to the application of the pragmatic and functional approach. This prevailing attitude influences the contextual factors emphasized in the pragmatic and functional analysis. A court that is willing to parse a decision may be less inclined to focus on the expertise or mandate of the tribunal instead emphasizing the nature of the question at hand. Consequently, if there are questions of law and of determinative import, the standard of review applied will be less deferential, demonstrative of the willingness to intervene.

CONCLUSION

While one can only speculate when attempting to reconcile the difference between the administrative decisions in *Lévis* and *Via Rail*, perhaps it lies in their complexity. *Lévis* is a decision in which the competing interests of two parties are pitted against one another in an adversarial manner. This type of bipolar opposition is akin to the judicial system; as such, the courts will feel more comfortable intervening. However, a decision considered to be "polycentric" is approached with more diffidence. A polycentric decision is one that "...requires the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits

[35] *Ibid,* at para. 112.

and costs for many different parties."[36] A court will tread lightly when a tribunal decision exercises a balance between different constituencies, rather than merely establishing rights as between parties. This was the case in *Via Rail* in which Abella J. describes the Agency as being created to balance competing interests and as being perfectly capable of making a complex decision with "...with many component parts." Perhaps the factor that determines the predisposition of the Court to apply the pragmatic and functional analysis in a deferential manner is the extent of the polycentric nature of the administrative decision.

Via Rail also shows a Court continuing to acknowledge the conceptual difficulty of differentiating between the two unreasonableness standards of judicial review. This insufficiency in the jurisprudence has yet to be addressed by the Court; however, with the expressed willingness to do so, perhaps practitioners can expect clarification in the near future...

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[36] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 36.