Dalhousie Law Journal

Volume 25 | Issue 2 Article 3

10-1-2002

After the Revolution: Being Pragmatic and Functional in Canada's Trial Courts and Courts of Appeal

William Lahey
Dalhousie University

Diana Ginn
Dalhousie University

William Lahey and Diana Ginn*

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In a 1998 decision, Pushpanathan v. Canada, the Supreme Court of Canada synthesized and revised the previous jurisprudence on "pragmatic and functional analysis" — the approach used since the late 1980's to determine the appropriate standard of deference in substantive review of administrative decision making. The next year, in Baker v. Canada, the Court expanded the reach of the pragmatic and functional analysis by applying it to the exercise of administrative discretion. This paper examines approximately 275 lower court decisions to determine how courts across Canada are responding to and implementing the doctrinal change initiated by the Supreme Court. Patterns discerned in the detailed analysis of cases are then used as a basis for reflections about the current approach to substantive review and possible future directions.

Dans la décision Pushpanathan c. Canada, de 1998, la Cour Suprême du Canada a fait une synthèse de la jurisprudence sur "l'analyse pragmatique et fonctionnelle" — approche utilisée depuis la fin des années 1980 pour déterminer le degré de latitude approprié dans le contexte de l'examen matériel de la prise de décisions administratives. Dès l'année suivante, dans Baker c. Canada, la Cour a élargi le champ de l'analyse pragmatique et fonctionnelle à l'exercice de la discrétion administrative. Les auteurs examine environ 275 décisions des cours inférieures du Canada pour déterminer comment les cours canadiennes ont réagi au changement de doctrine préconisé par la Cour suprême et mis en application les nouveaux principes qui en découlent. À partir des tendances qui se dessinent au terme de cette analyse approfondie, les auteurs se livre à une réflexion sur l'approche courante vis-à-vis l'examen matériel et trace les orientations futures.

* Professors Lahey and Ginn are members of the Faculty of Law, Dalhousie University. We would like to thank Aubrey Hilliard (LL.B. candidate, May, 2004) for her dedicated assistance. We also wish to acknowledge the particularly helpful suggestions received from an external reviewer and from our Dalhousie colleague, Professor Brian Donovan. We also benefited greatly in the finalization of the paper from the lively discussion that followed our presentation of our findings and conclusions at a Faculty Seminar at Dalhousie Law School in March of 2003.

Introduction

No serious observer of the engagement of the Supreme Court of Canada with administrative law over the past twenty-five years would disagree with the assessment that the Court has basically reinvented administrative law in Canada, particularly relative to the review of the substance of administrative decisions. Most or perhaps all of the same observers would agree that the process of reinvention has been protracted, arduous, complex, confusing and at times fractious.[1] Further still, there would probably also be consensus among the same group of observers that the doctrinal framework for substantive review has now entered into a period of relative stability,[2] but that many loose ends and unanswered questions remain outstanding and that the Supreme Court seems poised to launch (or

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1. For example, similar characterizations of the jurisprudence appear in H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281 and in David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 51 [Mullan, *Administrative Law*].
2. Lorne Sossin, "Developments in Administrative Law: The 2000-2001 Term" (2001) 15 Sup. Ct. L. Rev. (2d) 31.

to be launched upon) another phase of further and perhaps fundamental doctrinal innovation.[3] Consensus along these general lines would probably be largely shared between those who applaud and those who regret the direction in which the Court has taken the law. That there has been extensive and fundamental change in administrative law is something with which all administrative lawyers would likely agree.

In this paper, we approach the evaluation of the Supreme Court's redesign of the substantive review branch of administrative law from a somewhat different perspective and with a different methodology than is the norm in the literature.[4] Rather than concentrating solely on our own understanding of what the Supreme Court has done to substantive review doctrine, we have set out to understand how trial judges and the judges of appellate courts beneath the Supreme Court of Canada understand what the Supreme Court has done to substantive review doctrine.[5] We have made the assumption that the range of those understandings will be revealed in how these judges apply the doctrine to specific cases. We have thus set out to discover how the doctrine that has attracted so much attention from the Supreme Court, and therefore from scholars, is being applied across the general run of substantive review cases that must, of necessity, be finally dealt with in the lower courts. In particular, we focus on the more than 275 substantive review cases decided in English between the decision of the Supreme Court in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[6] on June 3, 1998 and the Court's later decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*[7] on January 11, 2002. At the most general level, we have two goals: first, to obtain an understanding of the role that Supreme Court doctrine appears to play in how lower court judges approach substantive review questions, and second, to

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3. As reflected by the complex tapestry of substantive and procedural review under administrative and constitutional law in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 2002 SCC 1 [*Suresh*]. See David W. Elliot, "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65 Sask. L. Rev. 469; Lorne Sossin, "Developments in Administrative Law: The 2001-2002 Term" (2002) 18 Sup. Ct. L. Rev. (2d) 41. See also David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v. Canada" (2001) 51 U.T.L.J. 193.

4. See however, MacLauchlan, *supra* note 1.

5. A similar approach was taken on by MacLauchlan, *ibid.* at 281-98. He "conducted a quick search of decisions in which *Baker* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*]) has been cited since it was released in mid-1999" (see MacLauchlan *ibid.* at 291). In this paper, we review a larger body of cases and we believe we have undertaken a more in-depth review. Whereas a review of lower court behaviour was for MacLauchlan only part of a broader review of the development of administrative law by the Supreme Court, it is our exclusive focus.

6. [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 [*Pushpanathan*].

7. *Suresh*, *supra* note 3.

determine whether the objectives that have guided the development of doctrine in the Supreme Court, particularly curial deference, are also guiding the application of that doctrine in other courts.

It is our view that more attention should be paid to the substantive review jurisprudence of the lower courts, for a number of reasons. First, a sort of operational audit of the law across a large cross-section of cases seems overdue simply because of the degree of doctrinal change that has taken place over the past twenty-five years. The sheer quantity and complexity of doctrinal change that has been initiated by the Supreme Court over the last twenty-five years makes a compelling case for wanting to know more about how much success the lower courts have had in keeping pace. To put it mildly, the evolution of the law of substantive review over these years in the Supreme Court has been a difficult and challenging pro-

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8. Even a highly schematic and partial outline of the process of doctrinal evolution demonstrates the scope and complexity of that evolution. Curial deference has been extended from cases in which it is expressly mandated by a privative clause to cases in which it is based primarily on judicial recognition of the specialized expertise of administrative decision-makers. This extension can be tracked through *Bell Canada v. Canada (Canadian Radio-Television Commission)*, [1989] 1 S.C.R. 1722, 60 D.L.R. (4th) 682; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [*Pezim*]; and *Canada (Director of Investigation and Research) v. Southam* (1996), [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 [*Southam*]. The question that the pragmatic and functional analysis is engaged to answer has gone through various formulations. It started as follows: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" (see *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161 at para. 120 [*Bibeault*]) This question has often been stated as whether or not the legislator intended to confer upon the administrative agency the right to be wrong on the question in dispute (see e.g. La Forest J. in *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada*, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609 at para. 22). It became: "Was the question which the provision raises one that was intended by the legislator to be left to the exclusive decision of the board?" (see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, 149 D.L.R. (4th) 577 at para. 18 [*Pasiechnyk*]) The pragmatic and functional analysis is now applied in the Supreme Court as if the question were instead in the following form: what is the appropriate standard of review here? (*Southam*, *ibid.*; *Pushpanathan*, *supra* note 6) The very meaning of a jurisdictional question has been redefined from reflecting an inherent quality of "jurisdictionality" to being instead a label that is applied to questions falling under one rather than under other standards of review. In the process, it has been implied that issues going to jurisdiction are limited to those that must be answered at the beginning of the proceeding (see *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417 [*C.U.P.E.*]). It was later said that the interpretation of any statutory provision that defines or limits powers at any stage of the administrative process (see *Bibeault*, *ibid.*). Finally, it is now said to mean those issues on which the administrative decision-maker must be correct under the pragmatic and functional analysis (see *Pushpanathan*, *supra* note 6 at para. 28), while also including those questions that have an obvious jurisdictional quality that can be identified without the pragmatic and functional analysis (see *Regina Police Assn. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 183 D.L.R. (4th) 14, 2000 SCC 14 [*Regina Police*]; *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 1 S.C.R. 342, 183 D.L.R. (4th) 1, 2000 SCC 13 [*Nanaimo*]). The distinctions between judicial review and appeal cases, between questions of law, of mixed fact and law and of fact, and between legal interpretation and discretionary action, have all been diminished in importance and changed in function. Whereas each distinction has at one time or another been understood as a structural component of the law, dictating a mode of analysis and possible outcomes that were distinct from that used and those available on the other side of each juridical fence,

cess to follow.[8] As teachers of administrative law who annually watch students struggle with the daunting corpus of Supreme Court decisions in the area, we consider it valid to ask if lower court judges have managed to keep pace in the ways they conceptualize, think about and analyze substantive review cases with all (or most) of the doctrinal shifts, retrenchments, refinements and restatements that are part of that jurisprudence. In asking this question we acknowledge our skepticism as to the guidance that can be provided by a body of doctrine that professes functional pragmatism but that is as complex and as fluid as substantive review doctrine has become.

Our second reason for deciding to find out more about how substantive review doctrine is being applied in the lower courts is the large element of contextual dependency (and therefore of adjudicative latitude) that is now

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each now is simply a factor to be weighed with all others either for or against deference under a common analytical framework that is pragmatic and functional. Instead of the binary choice between correctness and patent unreasonableness, a spectrum of standards of review has been recognized that includes the intermediate standard of review for simple unreasonableness and that, until recently, was thought to possibly include additional standards of review (see *Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247, 223 D.L.R. (4th) 577, 2003 SCC 20 [*Ryan*]). The stages of this process have been something like this: the choice of available standards of review has gone from correctness and patent unreasonableness in cases governed by a privative clause and correctness alone in all other cases, to correctness and patent unreasonableness in cases involving a privative clause and a broader spectrum of standards of review that included ordinary unreasonableness for appeals and judicial review in cases not involving a privative clause, to correctness, unreasonableness and patent unreasonableness in all cases. The content of the standards of review has also been fluid and it remains somewhat opaque. For example, patent unreasonableness was originally defined as connoting a decision based on an error so without rationality that its irrationality was apparent on reading the decision (see *C.U.P.E., ibid.* at para 20, where Dickson J. asked, "...was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" See also the dissent of Wilson J. in *National Corn Growers v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 [*National Corn Growers*], and the definition of patent unreasonableness given by Cory J. in *Canada (A.G.) v. Public Service Association of Canada*, [1993] 1 S.C.R. 941 at 963-64, 101 D.L.R. (4th) 673 [*P.S.A.C.* cited to S.C.R.]). It was later clarified that application of this standard might require detailed analysis of the rationality of each of the components of the reasoning lying beneath the decision (see the majority opinion of Gonthier J. in *National Corn Growers, ibid.*, and the majority opinion of McLachlin J. in *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, 76 D.L.R. (4th) 389 [*Lester*]). It has been further clarified that this is not inconsistent with the standard being one that limits the court to intervening only if the perceived errors are so egregious that they appear more or less on the face of the administrative decision (see *Southam, ibid.*). More recently, review of the exercise of discretion has been moved from under a distinct analytical framework that looked for specific errors of reasoning (such as arbitrariness or failure to consider relevant factors, rather than for a general quality of correctness, unreasonableness or patent unreasonableness), to the same framework as questions of law, of fact and of mixed law and fact, making discretionary action open to review under whatever standard of review is determined to be appropriate under pragmatic and functional analysis (see *Baker, supra* note 5). Now, the Court appears to have decided that discretion will usually be reviewable only on a single standard of review (*patent unreasonableness*) that arguably places challenges to exercises of discretion essentially back where they started, albeit under changed terminology, which of course, creates a new set of doctrinal possibilities and questions (*Suresh, supra* note 3).

a core element of the doctrinal apparatus. To be sure, substantive review law has always and unavoidably conferred wide latitude on each judge called on to apply it. But the current law most certainly expands this latitude, if only in the extent to which it recognizes, tolerates and indeed celebrates contextualism. The standard of review is chosen from a spectrum of possible standards of review through a pragmatic and functional analysis that functions, at best, as a set of guidelines for the standard of review selection process.[9] The result is that analysis is, and must be, overwhelmingly driven by the circumstances particular to each case. If the standard of review is unreasonableness or patent unreasonableness, the judge decides what the difference between a mere reading of the decision and a "somewhat probing" analysis of the decision will mean in the specific context of the particular case before the court. Even if the standard of review is found to be the relatively straightforward one of correctness, the judge derives flexibility and discretion from at least the implication found in Supreme Court jurisprudence that even review in accordance with the standard of correctness can embody a certain degree of curial deference (or at least of "benevolence").[10]

The high degree of contextualism means that the impact of Supreme Court doctrine on substantive review law is particularly dependent on how the doctrine is understood and applied in the general run of cases that are decided in the lower courts. The real effect of substantive review law is therefore most likely to be fully revealed only in the patterns that are produced by the cumulative effect of the outcomes reached in cases that are likely to be more about application of the doctrine than in cases that are about further refinement of the doctrine. One way of beginning to identify and sort through these patterns is simply to read and analyze a large cross-section of recent cases for the purpose of asking if, when and how the judicial policies that inform the doctrinal framework are being implemented "in the field". In characterizing these policies, some writing stresses that

9. Specifically, the pragmatic and functional analysis involves the court in determining legislative intent as to whether the question is one for the agency or the courts by asking whether each of the four categories of factors point to high or low deference. These categories are the presence or absence of a privative clause, the nature and purpose of the provision at issue and of the Act as a whole, the relative expertise of the agency, the nature of the question and in particular, the issue of whether the question falls within agency or judicial expertise.

10. *Nanaimo, supra* note 8. See Lorne Sossin, "Developments in Administrative Law: The 1999-2000 Term" (2000) 13 Sup. Ct. L. Rev. (2d) 45 at 68-73.

the commitment to curial deference has become the defining feature of contemporary substantive review law.[11] If so, we believe a broad review of lower court decisions is a necessary part of understanding how much of the curial deference promised by the doctrine is actually delivered in cases that are primarily about the application of the doctrine. Other writing puts perhaps somewhat less emphasis on the binary choice between deference and intervention as global policy alternatives. Instead, it emphasizes that the objective of the doctrine is to facilitate sensitive calibration between the scope and intensity of review and the factual and legal context of each administrative decision that comes forward for review. On this view, the doctrine is as much about mandating intervention where appropriate (especially to protect fundamental values of transcending importance, such as those also protected in the *Charter*), as it is about mandating deference in other situations.[12] Again however, we believe a broad cross-sectional review of lower court decision-making is a necessary part of understanding how, or if, this sophisticated calibration exercise is taking place, and with what implications for the general extent and impact of judicial involvement with administrative decision-making.

This brings us to our specific rationale for starting our exploratory expedition through the lower courts with cases decided immediately after the Supreme Court decision in *Pushpanathan*. Apart from the need to start somewhere, our main reason for taking *Pushpanathan* as our point of departure is that it connects on several levels with the two rationales that we have given for selecting a cross-section of lower court cases for review and analysis. In our estimation, the opinion of Bastarache J. in *Pushpanathan* can reasonably be taken as the beginning of the Supreme Court's period of doctrinal stability and consensus, even though its influence is generally treated as greatly overshadowed by the seminal opinion of L'Heureux-Dubé in *Baker v. Canada (Minister of Citizenship and Immigration)*,[13] credibly described as the single most important administra-

11. For example, David J. Mullan, "Recent Developments in Administrative Law–The Apparent Triumph of Deference!" (1999) Can. J. Admin. L. & Prac. 191.

12. For example, see David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279; Dyzenhaus & Fox-Decent, *supra* note 3; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445; MacLauchlan, *supra* note 1.

13. *Supra* note 5.

tive law decision from the Supreme Court in the 1990s.[14] We say this because the significance of L'Heureux-Dubé's opinion, seen as a decision on substantive review, lies significantly in the extension of the pragmatic and functional analysis into the realm of discretionary action. But what was extended was the pragmatic and functional analysis as restated in *Pushpanathan* by Bastarache J. Through its comprehensiveness and in its confirmation that the function and content of the framework were the same in cases involving privative clauses as in other cases, the opinion of Bastarache J. brought together and consolidated many of the distinct but interrelated lines of development that were apparent in earlier cases. It has also become the authoritative account of the pragmatic and functional approach for later Supreme Court cases, including *Baker*.[15] By selecting *Pushpanathan* as our starting point, we eliminate the necessity of considering cases decided upon the basis of earlier criteria. We maintain as well our focus on cases decided under the long shadow of the complex process of doctrinal evolution that we have summarized above, because *Pushpanathan* can be seen as the culmination of that process and therefore as embodying the earlier stages of doctrinal evolution. It is, in fact, a decision that seeks to consolidate, rationalize and refine that process. In apply-

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14. D.J. Brown & J.M Evans, "Discretionary Justice: Reasons & Reasonableness", Case Comment on *Baker v. Canada (Minister of Citizenship and Immigration)*, online: Canvasback Publishing Case Comments <http://www.brownandevans.com/comment_01.html>. The significance of the characterization is obvious from the stature of the source, as well as from a moment's reflection on the other cases included in the 1990s, which must certainly qualify as the decade of administrative law's greatest attention from the country's highest court. These cases include, of course, *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 161; *National Corn Growers*, *supra* note 8; *Lester*, *supra* note 8 ; *Pezim*, *supra* note 8; *Southam*, *supra* note 8; *Pasiechnyk*, *supra* note 8; and the cases of the *Cuddy Chicks* line of authority, including *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121 [*Cuddy Chicks*]; and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, 140 D.L.R. (4th) 193 [*Cooper*]. Of course, the *Cuddy Chicks* and *Cooper* line of cases has now been overtaken by *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers Compensation Board v. Laseur* (2003), 310 N.R. 22, 4 Admin. L.R. (4th) 1, 2003 SCC 54.) The combined significance of these cases can be captured by saying that many of them would not only have changed how specific topics were taught in a course on administrative law but would have significantly changed the organization of administrative law courses. See also Dyzenhaus & Fox-Decent, *supra* note 3, where *Baker* is placed in the pantheon of great Canadian administrative law decisions with *C.U.P.E.*, *supra* note 8, *Nicholson v. Haldimand Norfolk (Regional) Police Commissioners* (1978), [1979] 1 S.C.R. 311, 88 D.L.R. (3d) 671 [*Nicholson*]; and *Roncarelli v. Duplessis*, [1959] S.C.R. 121. See also David Mullan, "*Baker v. Canada (Minister of Citizenship and Immigration)*—A Defining moment in Canadian Administrative Law" (1997) 7 *Reid's Admin. Law* 145.

15. *Pushpanathan*, *supra* note 6, was described by Evans J.A. of the Federal Court of Appeal in *Canada (Commissioner of Competition) v. Superior Propane*, [2001] 3 F.C. 185, 199 D.L.R. (4th) 130, 2001 FCA 104 at para. 60, as, "an important, comprehensive and general elaboration of the pragmatic and functional analysis for determining the standard of judicial review of administrative action."

ing *Pushpanathan*, (if they do in fact apply it) lower courts therefore apply a doctrinal framework that embodies the layers of doctrinal change that we have argued warrant closer attention to the experience of lower courts.

More specifically, we use *Pushpanathan* as our point of departure because, in our view, it is the case that best justifies our interest in determining how much of the total substantive review activity of the lower courts is taking place under each of the standards of review. It is the combined effect of *Southam*, *Pushpanathan* and *Baker* that makes each standard of review a possibility at the outset of every pragmatic and functional analysis, if only at a theoretical level. Or to put it somewhat differently, these cases have together prevented the weight that is appropriately given in most cases to specific and recurring variables from hardening into strict doctrinal boundaries that preclude contextualized analysis from taking the judge wherever seems appropriate for that case on the full spectrum. In our view, *Pushpanathan* is particularly significant in this regard because of the significance of the traditional dichotomy between cases involving statutes with and cases involving statutes without a privative clause. If it is too much to say that *Pushpanathan* broke down this dichotomy, it is certainly not too much to say that it greatly blurs it. Thus, when this consideration is added to the significance of *Pushpanathan* as the still prevailing articulation of the elements and methodology of the pragmatic and functional analysis, the rationale for starting from *Pushpnathan* is strong.

To some extent, we reversed this reasoning in deciding to end our reading of the general run of lower court cases with those decided just before the Supreme Court's ruling in *Suresh*, decided on January 11, 2002. Pragmatically, stopping at *Suresh* gave us a large enough cross-section of cases (approximately 275) to ensure a reasonably comprehensive picture of how Supreme Court jurisprudence is now generally understood and implemented in the lower courts. At the same time, the total number of cases involved remained manageable for a detailed analysis that extended beyond conclusions to underlying patterns of reasoning. But in addition, we stopped at *Suresh* (at least for now), because it seemed to fit with our decision to start with *Pushpanathan*. For just as *Pushpanathan* can be taken as the culminating event in the development of substantive review law considered as a separate branch of review, *Suresh* might arguably be taken as the beginning of the law's next phase of development, in which the line (if it still exists) between substantive and procedural review can be expected to become increasingly porous. Further, as we mention above, it is interesting that in *Suresh* the Supreme Court qualified *Baker* on precisely the point that makes *Baker* of a piece, at least as background for this paper, with *Southam* and *Pushpanathan*; that is, in its openness to leaving

the standard of review for discretion cases to individualized application of the pragmatic and functional analysis. Instead, in *Suresh*, the Court appears to have retreated to the laying down of a general principle that would direct judges in certain directions on the spectrum solely on the basis that the review was of discretion.[16] By framing our parameters as we have, we capture the lower court jurisprudence between *Baker* and *Suresh* and have an opportunity to determine whether it has anything to say about whether this retreat from *Baker* and, to some extent, from the general fluidity of the pragmatic and functional analysis, was premature or timely.

In Part I, we introduce our reading and analysis of the cases. We begin by first providing a summary of our findings that assumes familiarity with *Pushpanathan* and *Baker*. We then discuss our findings in more detail, dividing the discussion between the ways in which courts select, and then apply, standards of review. In Part II, our discussion of standard of review determination patterns is organized into sections that correspond to basic elements of the *Pushpanathan* framework. Each of these is introduced by a brief discussion of the relevant parts of *Pushpanathan*, both for those who do not have this background but also to make our own understanding of the framework clear to all readers. From this review, we piece together a picture of general fidelity not only to the form but to the substance of the Supreme Court's doctrinal framework. Our review demonstrates that Canadian courts generally do carry out substantive review by applying the pragmatic and functional analysis to select a standard of review from the spectrum of standards of review that is familiar from the Supreme Court jurisprudence. In roughly two-thirds of the cases that we reviewed for this study, the standard of review that results from the analysis limits the court to review for unreasonableness or for patent unreasonableness. Moreover, the application of the standard of review very frequently results in the challenged administrative decision being left undisturbed, often even where review has been for correctness. At the same time however, we find that older patterns of analysis strongly persist under this general fidelity to the unitary approach to substantive review that is now mandated by the Supreme Court. In addition, we find that the analysis used to justify one

16. *Supra* note 3 at paras. 34-35. See however, the Court's more recent decision in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599, 2003 SCC 19 [*Dr. Q.*], where, in the context of a general restatement of the pragmatic and functional analysis, McLachlin C.J. noted at para. 24 that review for even abuse of discretion may range from correctness to patent unreasonableness, citing and quoting from *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 200 D.L.R. (4th) 193, 2001 SCC 41 at para. 54.

standard of review over another or to apply a standard of review either for or against intervention is often very minimal and, sometimes, virtually non-existent. We find, in other words, a certain roteness in the application of the new doctrine that bespeaks the continuing influence of the kind of formalism that the pragmatic and functional analysis was intended to, and is often said to have, overcome.

In Part III, we step back from the detailed analysis of our cross-section of lower court cases to offer some reflections on what the analysis tells us about the efficacy and possibly the future of substantive review doctrine. Some of these reflections relate to the continuing centrality to judicial thinking of concepts of jurisdictionality, particularly as regards questions of law; others to the generally determinative importance that is still widely placed on the presence or absence of a privative clause in the conceptualization of substantive review questions; and others to the degree of reliance that Canadian judges place on the availability of an intermediate standard of review of unreasonableness as an alternative to the extremes of review either for correctness or patent unreasonableness. But beyond these large but specific issues, our aim in Part III is to reflect on what significance should be attached to the prevalent tendencies of Canadian courts, on the one hand, to deploy the language and concepts of Supreme Court jurisprudence to reach outcomes that are largely consistent with a posture of curial deference and, on the other hand, to do so fairly frequently with little or even no analysis of how the doctrine is connected to those outcomes by the circumstances of the particular administrative decision before the court. This appears to us to be at least odd and perhaps disconcerting given the supposed centrality of context to the doctrine that is ostensibly being followed and applied. It suggests either that essential steps in adjudicative analysis are not generally taking place or that some of those analytical steps are often found not to be useful, necessary or perhaps feasible by lower court judges. We conclude that doctrinal simplification may be in order, and that this simplification should at least involve the consolidation of the unreasonableness *simpliciter* and the patent unreasonableness standards of review.

I. *The Cases*

1. *Summary of Findings*

Of the approximately 275 lower court cases that we reviewed, judicial review cases outnumbered appeals almost 7:1. Approximately 40% of the judicial review cases involved a privative clause. The following table shows the number of times that courts used various standards of review, in these approximately 275 decisions. The figures add up to 329 because of decisions where a court applied different standards of review to different issues within the same case.

Table: Distribution of Cases by Standard of Review

Standard of review identified by court	Number of times used
Correctness	84
Between correctness and reasonableness *simpliciter*	7
Reasonablenesss *simpliciter*	107
Between reasonableness simpliciter and patent unreasonableness	11
Patent unreasonableness	84
Unclear what standard applied	29
Test from s. 18.4(1) of Federal Court Act, re error of fact	3
Pre-Baker approach to discretion	4

2. *Determining a Standard of Review*

To begin with, our review of the cases makes it apparent that Canadian judges generally accept the "unified field" theory of judicial review that reaches its most advanced form in the combined force of *Southam*, *Pushpanathan* and *Baker*.[17] The idea of a spectrum of standards of review that encompasses correctness, reasonableness and patent unreasonableness

17. For example, we found few indications, either explicit or implicit, that older approaches (such as error of law on the face of the record; review of factual findings on the basis that no legally sufficient evidence existed to support them; or review of discretionary action for failure to take account of relevant considerations) were being applied independently of the pragmatic and functional analysis.

is now generally accepted and applied. Most Canadian judges recognize the pragmatic and functional approach as the point of departure for all questions of substantive review, whether the issue at stake is characterized as a question of law or fact or an exercise of discretion. Thus, in the wake of the Supreme Court's decision in *Baker* which, for the first time, applied the pragmatic functional analysis to a discretionary decision, Canadian courts quickly adjusted their approach to the review of exercises of statutory discretion. With relatively few exceptions, we found that after *Baker*, such review was conducted by applying the pragmatic and functional analysis to determine which of the general standards of review was applicable. In other words, we found that the lower courts rapidly brought their review of discretionary action into line (at least methodologically) with their review of questions of law and of fact and of mixed law and fact.

Notwithstanding the general acceptance that the pragmatic and functional analysis is applicable to substantive review, whatever the nature of the question, this analysis was simply not performed in about 20% of the cases we reviewed. As indicated by the chart above, some cases proceeded with review of discretion in accordance with the pre-*Baker* approach or with review of a question of fact using the language of the *Federal Court Act*.[18] Otherwise, failure to use the pragmatic and functional analysis occurred most frequently in cases concerned with questions of law (sometimes also labeled by the court as jurisdictional issues). In some of these cases, it appeared that courts may dispense with the pragmatic and functional analysis because the jurisdictional quality of the particular question of law was regarded as self-evident or at least sufficiently obvious to permit such a characterization without the pragmatic and functional analysis. In others (approximately 5% of the cases), it was because the court regarded the administrative decision as so obviously correct or so obviously in need of quashing that the outcome would be the same, irrespective of the standard of review applied. In terms of subject matter, failure to perform a pragmatic and functional analysis occurred most frequently in immigration cases, where it was not unusual for the court simply to decide (in effect, *de novo*) the issue that was before the particular administrative decision maker (for instance the Convention Refugee Determination Division of the Immigration and Refugee Board or a visa officer).

In a smaller number of cases, the pragmatic and functional analysis was referred to and even sometimes briefly performed, but it was unclear

18. R.S.C. 1985, c. F-7, s. 18.1.

what standard of review had ultimately been chosen. Instead the court simply made reference to applying "some deference" or a level of scrutiny that was "close to correctness".

Even where there was greater effort to carry out the pragmatic and functional analysis leading to the selection of a specific standard of review, there were frequently significant elements of superficiality and even of roteness in how the courts performed this work. Often, considerably more attention was paid to quoting passages from the decisions of the Supreme Court that describe the framework and explain its rationale than to the application of that framework to the specific statutory and factual context of the decision being challenged. The standard of review often appeared in the reasons for judgment immediately or shortly after the quotations, as if it followed from and was even mandated by them and required little further analysis or explanation.

Having said that, we found that the courts used the pragmatic and functional framework, as required by *Pushpanathan*, to determine a standard of review for each question that was answered by the administrative decision-maker, rather than at the level of the decision as a whole. They seemed likewise to be generally aware of the possibility of different standards of review being appropriate for different components of one administrative decision.[19] Presumably even before *Pushpanathan*, this was the case in at least some contexts.[20] However, by stating, "[s]ome provisions within the

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19. Examples include: *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 269, 172 F.T.R. 93 (T.D.) (decision of the Convention Refugee Determination Division: law (correctness), mixed fact and law (reasonableness)); *Beazer East v. British Columbia (Environmental Appeal Board)* (2000), 84 B.C.L.R. (3d) 88, 36 C.E.L.R. (N.S.) 195, 2000 BCSC 1698 (Environmental Appeal Board: law (correctness), mixed fact and law (reasonableness)); *Eggertson v. Alberta Teachers' Assn.* (2001), 92 Alta. L.R. (3d) 82, 284 A.R. 139, 2001 ABQB 116 [*Eggertson*] (Professional Conduct Appeal Committee of the Alberta Teacher's Association: fact (patent unreasonableness or reasonableness), mixed fact and law, and law (correctness)); *Bradasch v. Yukon (Registrar of Motor Vehicles)* (2000), 6 M.V.R. (4th) 86, 2000 YTSC 528 (Review officer under the *Motor Vehicle Act*, R.S.Y 1997, c. 4: law (correctness), mixed fact and law, and fact (reasonableness)); *Magill v. Prince Edward Island (Minister of Community Affairs)* (1999), 182 Nfld. & P.E.I.R. 144 (P.E.I. S.C. (T.D.)) [*Magill*] (Human Rights Board of Inquiry: law (correctness), mixed fact and law, and fact (reasonableness)); *MacMillan Bloedel Ltd. v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 560 (S.C.) (QL) (Forest Appeal Board: law ("a standard approaching correctness" (*ibid.* at para 25)), mixed fact and law (reasonableness)), rev'd on other grounds (2000), 189 D.L.R. (4th) 281, 76 B.C.L.R. (3d) 71, 2000 BCCA 351; *3430901 Canada Inc. v. Canada (Minister of Industry)* (2001), [2002] 1 F.C. 421 C.P.R. (4th) 449, 2001 FCA 254 [*3430901 Canada*]: (Applications Judge: law (correctness), discretion (reasonableness *simpliciter*)), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 537.

20. For instance, if a party alleged that a decision-maker had made errors of law and of fact, then the latter were reviewed against the tests developed specifically for errors of fact. Similarly, where a tribunal decision was protected by a privative clause, judicial review of a decision might involve an application of the correctness standard to issues held to be jurisdictional and the standard of patent unreasonableness to other issues falling within the tribunal's jurisdiction.

same Act may require greater curial deference than others,"[21] Bastarache J. emphasized the possibility of more than one standard of review, whenever more than one error is alleged. This seems to follow logically from identification of the nature of the question as one of the elements of the pragmatic and functional analysis. Nevertheless, in about 10% of the cases we reviewed, reliance was placed on earlier cases that applied the same standard of review to the administrative body that made the decision (or to like bodies), even where the earlier case concerned a decision involving different questions of law.

It was also clear that not all lower courts have changed their understanding of jurisdictionality in light of Bastarache J.'s comment that a jurisdictional question is simply one to which the standard of review of correctness is applied. The cases reviewed reveal that a question's quality as jurisdictional was still frequently thought of as being the reason for the application of a correctness standard of review rather than as the label that was applied to the question because it was reviewed for correctness. We found that most often, jurisdictionality was a function of how the courts applied the fourth factor of the pragmatic and functional framework (that is, the nature of the question), particularly in relation to the second factor (the relative expertise of the administrator). Specifically, questions that were called jurisdictional tended to be those characterized as questions of law of a more general nature. But there was also a continuing tendency to associate jurisdictional questions with the idea that they are distinct in functional terms. Unlike other questions of law, they were perceived by courts as defining or limiting the scope of statutory authority, and the pragmatic and functional analysis was applied to separate the questions that perform this function from those that do not.

Whether or not courts continue to regard a privative clause as requiring a division of all questions into either jurisdictional or non-jurisdictional questions, they almost uniformly continue to regard such clauses as mandating either maximum deference or no deference. Thus, where the legislation under consideration included a privative clause, in the vast majority of cases either correctness or patent unreasonableness was the chosen standard of review, even when the courts dutifully referred to the full spectrum of standards of review, including the intermediate standard of reasonableness. Thus only about 5% of the cases in which reasonableness was selected as the standard of review involved a privative or finality clause. Where courts engaged in judicial review of an administrative deci-

21. *Pushpanathan*, *supra* note 6 at para. 28.

sion not protected by a privative clause, the reasonableness standard was applied most frequently (in approximately 50% of the cases), followed by the correctness standard, with the standard of patent unreasonableness being applied far less frequently.[22] Where the legislation before the court provided for an appeal, the standard of review was almost always either correctness or reasonableness, although patent unreasonableness was applied on occasion.[23]

Our review also found that substantive review cases during the four years covered by our study were more or less evenly distributed across the three standards of review. Almost 80% of the cases that applied the standard of correctness involved the review of an administrative decision maker's interpretation of law. Conversely, once an issue was identified as a question of law, it became highly likely that the correctness standard would be applied. The legal question was explicitly characterized as a jurisdictional question in a significant minority of these cases and when this occurred it was (not surprisingly) always the case that the standard of review was identified as correctness. Thus, there is a tendency among lower courts to equate questions of law with correctness review. Conversely, review for correctness was only rarely applied to questions that were characterized as factual determinations, to those characterized as being mixed law and fact or to decisions that were characterized as discretionary. A few examples of each of these applications of the standard were found, but all together these examples account for less than 5% of the cases in which the standard of correctness was selected. The intermediate standard of review for simple unreasonableness was applied in roughly equal proportions to cases found to involve the review of factual findings, those involving the review of findings of mixed fact and law and to those

22. For example, in the following cases the standard of patent unreasonableness was applied on judicial review involving legislation without a privative clause: *A.B.Z. v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 533 [*A.B.Z.*] (where it was applied to a question of fact before the Appeal Division of the Immigration and Refugee Board); *Apotex v. Alberta* (2001), 16 C.P.R. (4th) 208, 302 A.R. 80, 2001 ABQB 922 [*Apotex*] (where it was applied to a question of "scientific and medical complexity" (*ibid.* at para. 85) before an expert committee on drug evaluation); *AVS Technologies v. Canadian Mechanical Reproduction Rights Agency*, 257 N.R. 283, 7 C.P.R. (4th) 68 (Fed. C.A.) [*AVS Technologies*] (where it was applied to a question of law before the Copyright Board); *BC Landscape & Nursery Assn. v. Canada (A.G.)* (2000), 186 F.T.R. 62, 35 C.E.L.R. (N.S.) 169 (T.D.) (where it was applied to discretionary decision making by the Minister of Agriculture).

23. In terms of sheer numbers the standard of correctness showed up most frequently in judicial review (as opposed to appeal) decisions. This is largely a function of the fact that, overwhelmingly, substantive review of administrative decisions is performed by way of judicial review, not appeals. When this is taken into account it is clear that a significantly higher percentage of appeal decisions invoke the correctness standard than is the case on judicial review.

involving the review of discretionary decisions. Indeed, approximately one half of the cases that were identifiably concerned with challenges to discretionary decisions were dealt with under this standard of review. The reasonableness standard of review was applied relatively infrequently in cases found to involve a pure question of law.[24] A roughly similar pattern emerged among the cases that were reviewed for patent unreasonableness. This standard was applied to fairly equal numbers of cases concerned with questions of fact, questions of mixed law and fact, and the review of discretionary decisions. In contrast, it was applied less frequently when the case was characterized as concerning a question of law. Patent unreasonableness was also applied in a number of cases where the courts did not identify the nature of the issue before the administrative decision-maker and, occasionally, where the issue was simply described as being "within [the] 'home territory' [of the Board]"[25] or "squarely within the jurisdiction of [the Board]."[26]

Overall, we found that the pragmatic and functional approach was widely invoked and was carefully applied in some cases; we also found that it was frequently applied only in a rather *pro forma* way. A single factor was often taken to justify the selection of one standard rather than another, or the standard of review was taken to be "obvious" given the identity of the decision-maker, or was simply asserted as being consistent with the pragmatic and functional analysis or the general principle of deference. Further, even where courts profess to use the *Pushpanathan* and *Baker* approach to pragmatic and functional analysis, elements of older approaches are frequently still evident. Finally, we found that the pragmatic and functional approach was not used at all in a significant proportion of cases.

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24. For instance the reasonableness standard was applied to questions of law in *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)* (2000), 272 A.R. 36, 28 Admin. L.R. (3d) 298, 2000 ABQB 639 [*Alberta (Minister of Municipal Affairs)*]; and *Halifax Employers' Assn. v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2000 NSCA 86. In *Northwest Territories v. Union of Northern Workers*, [2001] 7 W.W.R. 374, 35 Admin. L.R. (3d) 104, 2001 NWTSC 27 [*Union of Northern Workers*], it was less clear which standard was applied to the decision of a labour arbitrator, but it appears to have been reasonableness.

25. *Assiniboine South Teachers' Assn. of the Manitoba Teachers' Society v. Assiniboine South School Division No. 3* (2000), 187 D.L.R. (4th) 385, 148 Man. R. (2d) 1, 2000 MBCA 9, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 435.

26. *Ontario (A.G.) v. Ontario Public Service Employees Union* (2000), 52 O.R. (3d) 77, 195 D.L.R. (4th) 376 (C.A.) at para. 11.

3. *Applying the Standards of Review*

One striking observation regarding the lower courts' application of the various standards of review is that the decision of the administrative decision maker was upheld at least two thirds of the time.[27] Beyond that, our review suggested a number of other trends as to how lower courts apply the standard of review, once determined, to the issues before them. First, it was noteworthy that in a significant number of decisions the courts provided little or no discussion of what the various levels of scrutiny mean and even where there was such discussion it usually consisted of quotes from previous Supreme Court cases rather than commentary from the lower court judges themselves. Equally striking was our sense that despite the importance ascribed by the Supreme Court to determining the appropriate standard of review, it was not always clear from reading lower court decisions whether the choice of a particular standard of review actually affected the result of the appeal or review. Finally, there was little consistency in the jurisprudence as to whether a deferential standard of review was seen simply as allowing an administrative decision-maker more latitude to deviate from the correct answer or whether choosing such a standard of scrutiny reflected a recognition that, in a particular context, there may not have been a single "correct" answer. In a significant number of cases, the former seemed to be the operating assumption, yet not all courts have taken this approach.

II. *Detailed Analysis*

1. *Introduction*

Having given a brief overview of our findings, we now examine in more detail how the lower courts have applied the current approach to substantive review of administrative decision-making. Again, we divide this into two subsections with a major focus on determining the standard of review and briefer comments on the application of the standard of review. In the first of these subsections, we analyse how lower courts are applying the doctrinal framework that can be said to have crystallized with *Pushpanathan*, and to have been extended by *Baker* into the review of exercises of discretion. First of all, we examine the consistency and thoroughness with which the pragmatic and functional analysis is applied and carried out. Then we look more specifically at how the courts apply the analysis in the context of a privative clause. We then focus on how the

27. In fact, when immigration and refugee cases were removed from the equation, the likelihood that the board or tribunal's decision would be upheld moved to between 70 and 75%.

courts address the relationship between expertise and the other factors of the pragmatic and functional analysis. Next, we look specifically at the application of the pragmatic and functional analysis in the review of findings of fact and then in the review of discretionary decision-making. In each case, we preface our examination of the application of the doctrine in the lower courts with a brief discussion of our understanding of what the Supreme Court has said to guide the courts in respect of each of these aspects of the doctrinal framework.

2. *Determining the Standard of Review*

a. *Application of the Pragmatic and Functional Analysis*

Until the decision of the Supreme Court in *Pezim*,[28] the use of the pragmatic and functional approach was limited to determining whether or not an issue was jurisdictional in cases involving a privative clause. It was well established that the standard of review that applied to jurisdictional questions was correctness while the standard of review that applied to questions within jurisdiction was patent unreasonableness. In *Pezim*, Iacobucci J. adapted the pragmatic and functional analysis for determining the standard of review in a statutory appeal that applied to questions of law. He concluded that the appropriate standard of review was one that was deferential and intermediate between the standards of patent unreasonableness and of correctness. In *Southam*,[29] Iacobucci J. built on *Pezim,* again for the purpose of answering the question of the appropriate standard of review in the case of a statutory appeal. He also gave a name to the intermediate standard of review that the Court had applied in *Pezim*, calling it the reasonableness *simpliciter* standard of review. Also, *Southam* elaborated on the concept of a spectrum of standards of review introduced in *Pezim*, confirming that it included at least the three standards of review: correctness, reasonableness *simpliciter* and patent unreasonableness. In choosing a standard of review from the full spectrum for a case that did not involve a privative clause, Iacobucci J. left open the possibility that the patent unreasonableness standard of review might apply even where review was not limited to jurisdictional error. While Iacobucci J. doubted the appropriateness of review for patent unreasonableness in appeal cases, he nevertheless selected a standard of review for that case from a spectrum that included patent unreasonableness.[30]

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28. *Supra* note 8.
29. *Supra* note 8.
30. *Ibid.* at paras. 31-32, 54-55.

In *Pushpanathan*,[31] Bastarache J. stated that in a case of judicial review involving a privative clause, the pragmatic and functional analysis should be applied for the same purpose as in *Pezim* and *Southam*, that is, to determine the appropriate standard of review, rather than to differentiate between questions of and questions within jurisdiction. He also confirmed that the standard of review in review under a privative clause was to be chosen from the full spectrum of standards of review set out in *Southam*. The choice in judicial review under a privative clause was therefore not limited, as it had been previously, to that between correctness and patent unreasonableness. Thus, the possibility was recognized that cases that might previously have been reviewed either for correctness or patent unreasonableness might in the future be reviewed under the intermediate standard of review. Particularly important in this regard were the comments of Bastarache J. to the effect that although the presence of a privative clause will normally entail a high level of deference and therefore review only for patent unreasonableness, the privative clause can be outweighed and a more interventionist standard applied if other factors point strongly toward lower deference.[32]

Additionally, Bastarache J. in *Pushpanathan* provided a comprehen-

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31. The issue in *Pushpanathan*, *supra* note 6, was the interpretation of Article 1F(c) of the *United Nations Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, incorporated into Canadian law by section 2(1) of the *Immigration Act*, R.S.C. 1985, c. I-2. Article 1F(c) provides that any person who is "guilty of acts contrary to the purposes and principles of the United Nations" is excluded from claiming refugee status. In deciding Mr. Pushpanathan's application for convention refugee status, the Convention Refugee Determination Division of the Immigration and Refugee Board held that, having been convicted of conspiracy to traffic in a narcotic, Mr. Pushpanathan had committed acts contrary to the purposes and principles of the United Nations. Therefore the Board rejected his application. Mr. Pushpanathan applied for judicial review of this decision. The Federal Court-Trial Division, upheld the Board's decision, but certified that there was a serious question of general importance involved, which permitted Mr. Pushpanathan to appeal to the Federal Court of Appeal. The Court of Appeal dismissed the appeal unanimously. At the Supreme Court of Canada, Bastarache J., writing for the majority of the Court, identified three key issues:

> First, what is the standard of review to be applied to the decision of the Immigration and Refugee Board? Second, how do the rules of treaty interpretation apply to the determination of the meaning of Article 1F(c)? Third, does the appellant's act of drug trafficking fall within the definition of "acts contrary to the purposes and principles of the United Nations"? (*Pushpanathan*, *ibid.* at para. 22)

While the Court divided on the third issue, with the majority holding that conspiracy to traffic a narcotic was not a violation of Article 1F(c), the Court was unanimous regarding the applicable standard of review. Applying a four-part pragmatic and functional analysis, which considered the existence of a privative clause, the purpose of the Act and the relevant provisions within it, the expertise of the Board, and the nature of the issue before it, the Court concluded that the Board should be held to a standard of correctness in interpreting Article 1F(c) of the Convention. Of primary importance in the Court's analysis was the determination that the expertise of the Convention Refugee Determination Division was largely limited to making findings of fact, while the question of whether narcotics trafficking was an act contrary to the purposes and principles of the United Nations was a general question of law with important human rights implications.

32. *Pushpanathan*, *ibid.* at para. 30.

sive restatement of the elements of the pragmatic and functional analysis. It is now authoritatively established that the factors to be considered are the presence or absence of a privative clause; the expertise of the administrative decision maker relative to that of the court, with both defined relative to the question at issue; the purpose of the Act as a whole and of the particular provisions that were applied in making the challenged decision; and the nature of the question and, in particular, whether it was a question of law or of fact and if a question of law, whether of a specific or general nature. As in earlier cases, Bastarache J. noted that expertise is the most important of the factors, but stressed at several points that no one factor is determinative but that rather, the combined effect of all of the factors will determine the standard of review. An indication of the kind of nuanced inquiry that this calls for is indicated by the various comments of Bastarache J. concerning the significance to be attached to the nature and scope of questions of law. Under "Nature of the Question," there will be less deference the more general the proposition that was decided by the administrative decision maker. But it is *also said* that findings of great precedential value with determinative import for future decisions may attract deferential review if that is indicated by other factors, such as the creation of a comprehensive legislative scheme, the creation of a highly specialized administrative decision maker, and the presence of a strong privative clause. Under "Expertise," the courts may show considerable deference even where highly generalized statutory interpretation is taking place where the statute being interpreted is the decision maker's constituent legislation. Further, under "Purpose of the Act as a Whole, and the Provision in Particular," the appropriateness of a lower standard of review can be indicated by the applicability of legal principles that are vague, open-textured, or that involve a "multi-factored balancing test." This impression of the need for a highly nuanced inquiry is, of course, quickly validated by even a reading of the cases in which the Supreme Court has itself applied this methodology, whether before or after *Pushpanathan*.

Thus, from *Pushpanathan* forward, it could be said that the jurisprudence of the Supreme Court required substantive review proceedings to begin with a determination of the standard of review in all settings except the exercise of discretion. The latter were, of course, brought under the same principle by *Baker*.[33] In that case, Madame Justice L'Heureux-Dubé not only brought the review of discretionary action under the pragmatic and functional analysis but also proceeded to select reasonableness *sim-*

33. *Supra* note 5.

pliciter as the appropriate standard of review on the clear assumption that correctness or patent unreasonableness might be the appropriate standard in other discretion cases. It can therefore be said that since *Pushapnathan*, (and since *Baker,* for review of exercises of discretion) the decisions of the Supreme Court have specified the availability in all settings of the full spectrum of standards of review, including at least correctness, reasonableness *simpliciter* and patent unreasonableness. It can further be said that since *Pushpanathan* (and since *Baker,* for review of exercises of discretion) the Supreme Court has mandated the universal application, across all settings, of a consistently structured pragmatic and functional analysis as the methodology for selecting a standard of review for each of the questions raised by a challenged administrative decision.

Turning then to the lower court decisions, we found that *Pushpanathan* was almost universally cited where a pragmatic and functional analysis was undertaken by the lower courts, whether on judicial review applications or on statutory appeals and that, in such cases almost every court listed the four factors set out by Bastarache J.[34] Differences appear, however, in terms of the degree of thoroughness with which the pragmatic and functional analysis was applied. Certainly quite a number of the cases gave at least some consideration to each of the four elements of the analysis even if, especially in the presence of a privative clause, there was frequently also a tendency to blend this discussion with the pre-*Pushpanathan* approach. In a number of cases, however, the portion of the decision devoted to the determination of the standard of review was very brief or somewhat confusing. In several cases, determining the appropriate standard of review was not even seen to be of any real significance.

Brevity on the issue of the appropriate standard of review was particularly apparent in a number of decisions under the *Immigration Act*.[35] At times, there may be an obvious precedential reason for such brevity; for instance where the Refugee Division of the Immigration Board made a decision regarding a general question of law which did not fall within its

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34. One of the exceptions is *Anderson v. Bear Hills Pork Producers Ltd.* (2000), 198 Sask. R. 229, 2000 SKQB 505 [*Anderson*], involving judicial review of a decision of the Executive Director of the Saskatchewan Labour Standards Board as to whether certain employees were exempt from the *Labour Standards Act*, R.S.C. 1978, c. L-1. Citing *Bibeault, supra* note 8, and *Pezim, supra* note 8, but not *Pushpanathan, supra* note 6, the Court stated: "In interpreting the provisions of the Act to determine the proper scope of his jurisdiction, the Executive Director's assessment of his jurisdiction is reviewable on the standard of correctness." (*Anderson, ibid.* at para. 12)

35. See *e.g. Bermudez v. Canada (Minister of Citizenship and Immigration)* (2000), 191 F.T.R. 72, 24 Admin. L.R. (3d) 65 (T.D.) [*Bermudez*]; *Chan v. Canada (Minister of Citizenship and Immigration)* (1999), 166 F.T.R. 271, 49 Imm. L.R. (2d) 11 (T.D.), rev'd [2000] 4 F.C. 390, 190 D.L.R. (4th) 128 (C.A.) [*Chan*]; *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327, 184 D.L.R. (4th) 14 (C.A.) [*Klinko*].

areas of specialized expertise, it was hardly surprising that the court simply referred to *Pushpanathan* as authority for applying a correctness standard on review. In some immigration or refugee cases, however, there was a reference to *Pushpanathan*, but little or no discussion of how the pragmatic and functional analysis pointed to one standard of review rather than to another. In such cases the identification of the appropriate standard of review was almost formulaic.

For instance, in *Lintner v. Canada (Minister of Citizenship and Immigration)*,[36] the Court characterized the question of whether to issue a visitor's visa as one of discretion, and as involving issues of fact and mixed fact and law, then stated, "[f]ollowing Baker ... and Pushpanathan ... the standard of review for such discretionary decisions is reasonableness". The Court went on to say, "[f]or simple findings of fact, the standard is, in my opinion, also reasonableness."[37] In *Chaudhry v. Canada (Minister of Citizenship and Immigration)*,[38] a case involving judicial review of a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board, the Court stated that in *Southam*, "the Supreme Court of Canada held that questions of mixed fact and law are to be reviewed on the standard of reasonableness simpliciter," and then immediately concluded, "I would be of the opinion that the same standard should apply to the review of factual findings."[39]

We describe this approach as formulaic because of the lack of consideration given to context. Instead, it appears to have been assumed that different kinds of issues (discretion and fact in *Lintner*, mixed fact and law and fact in *Chaudhry*) should be held to the same standard of review, whatever the expertise of the administrative decision-maker with regard to the particular question before it. The standard of review applied by the Supreme Court in cases such as *Baker* and *Southam* was treated as a virtual rule of law that a particular level of scrutiny must automatically apply in a wide range of contexts.

Paucity of analysis is also found outside the realm of immigration cases. For instance, in *British Columbia (Minister of Forests) v. Canadian Forest Products Ltd.*,[40] the Court referred to the *Pushpanathan* criteria, then stated, "...such an elaborate process is unnecessary in what I think was a clear

36. [2000] F.C.J. No. 99 (T.D.) [*Lintner*].
37. *Ibid.* at para. 8. See also *Powar v. Canada (Minister of Citizenship and Immigration)* (2000), 180 F.T.R. 271 (T.D.), aff'd (2001), 274 N.R. 360, 2001 FCA 153.
38. [2000] F.C.J. No. 708 (T.D.) [*Chaudhry*]. For a similar approach see also *Mahmood v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 737 (T.D.) [*Mahmood*].
39. *Chaudhry, ibid.* at para. 12.
40. (2000), 141 B.C.A.C. 100, 2000 BCCA 456.

misrepresentation of the Board's own powers."[41] Only slightly more discussion is offered in *National Ballet of Canada v. Glasco et al.*,[42] where the Court listed the four factors identified by Bastarache J., then discussed the appropriate standard of review in one paragraph:

> Here, the appeal concerns a question of law only. There is no greater expertise in the arbitrator than the courts in the application of the law relating to interlocutory injunctions. Therefore, the standard of review is correctness.[43]

A typical approach that provides slightly more analysis, but still deals with the choice of standard of review rather briskly, was found in *Brown v. Workers Compensation Board*,[44] where a fairly brief paragraph was devoted to each of the four *Pushpanathan* factors. At issue was the refusal of the Workers Compensation Board to place any physiatrists on a list of specialists from which a medical review panel would be established to determine whether the applicant was entitled to benefits. The entire pragmatic and functional analysis was as follows:

> Section 22(2) is a true and strong privative clause. It is a clear indication of the legislature's intention that the court not intervene where the Board has made a determination.
>
> The expertise of the Board is beyond question. It is a specialized tribunal and does nothing but adjudicate questions that arise under the *Act*. It has experience and knowledge which qualify it to carry out the demands of the *Act*. The expertise has received judicial recognition. See *Pasiechnyk et al. v. Procrane Inc. et al.*, [1997] 2 S.C.R. 890; 216 N.R. 1; 158 Sask. R. 81; 153 W.A.C. 81.
>
> The purpose of the *Act* is to create a system of compensation for workers who have been injured. While it is a no-fault system it is still necessary to have a mechanism to deal with questions which relate to entitlement to compensation. At the same time the process should proceed expeditiously and with minimal expense. All of this can be better achieved by a tribunal than a court. With this in mind the legislature in s.22(1) provided that "... all matters and questions arising from this *Act*..." are to be determined by the Board.

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41. *Ibid.* at para. 18.
42. (2000), 49 O.R. (3d) 230, 186 D.L.R. (4th) 347 (Sup. Ct. J.) [*Glasco*].
43. *Ibid.* at para. 43. See also *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)* (2001), 90 B.C.L.R. (3d) 299, 2001 BCSC 726, rev'd on other grounds (2002), [2003] 2 W.W.R. 279, 9 B.C.L.R. (4th) 1, 2002 BCCA 665, leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 83.
44. (1999), 176 Sask. R. 72 (Q.B.) [*Brown*]. See also *Moresby Explorers Ltd. v. Canada (A.G.)*, [2001] 4 F.C. 591, 208 F.T.R. 189, 2001 FCT 780 [*Moresby*].

> Finally, the problem which confronted the Board was that of deciding what medical speciality would be included in the list of specialists. That decision was mandated by s. 62 of the *Act* and no discretion rests with the Board. It must simply prepare the list as it deems appropriate.
>
> In the end, upon a consideration of the various factors, it is my conclusion that a great degree of deference should be accorded the decision of the Board. It follows that the standard of review should be patent unreasonableness.[45]

There were also a number of cases where the court made confusing or contradictory statements in the course of its pragmatic and functional analysis. For instance, in *Kirchmeir v. Edmonton (City)*,[46] a case which involved judicial review of a decision of the Edmonton Police Commission to hold an *in camera* meeting, the Court discussed the four factors from *Pushpanathan*, quoted a fairly lengthy passage from *Baker*, and then stated:

> Looking at the four factors identified by the Court, in my view, the reasonableness test ought to be adopted. It is clearly the least onerous standard of review which works in favour of the applicant and is predicated on the argument that under the circumstances, minimal deference ought to be shown by the Court towards decisions of the Commission as the Commission is not protected by a privative clause and is not making adjudicative decisions.[47]

The standard of review chosen by the Court in *Kirchmeir* seems quite appropriate: several factors of the pragmatic and functional analysis did point to deference (the Commission was recognized as engaged in balancing various interests and as having expertise in that balancing, and the decision did not affect specific entitlements) while the fact that there was no privative clause might dissuade a court from going as far as the patently unreasonable standard. However, the reasoning in the paragraph quoted is rather confusing. It is not clear why reasonableness was described as "the least onerous standard of review which works in favour of the applicant" or as involving "minimal deference," nor is it clear why the fact that the Commission was "not making adjudicative decisions" was seen as a factor favouring less deference.[48]

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45. *Brown*, *ibid.* at paras. 11-15.
46. (2001), 294 A.R. 306, 20 M.P.L.R. (3d) 44, 2001 ABQB 107 [*Kirchmeir*].
47. *Ibid.* at para. 39.
48. *Ibid.*

In *Medeiros v. Ginoogaming First Nation*,[49] a case involving the decision of an Indian band council, the Court stated that the issue being reviewed was a question of law, then went on to say that because the question had to be "appreciated in a specific factual context," this called for a "lower standard of deference."[50] If this means that the court should therefore be less deferential, this seems rather surprising, since usually the more a legal issue is interlaced with questions of fact, the more deference is called for.

In a number of other cases, the court indicated that identifying the appropriate standard of review was not really necessary, because the decision was correct and would therefore pass any level of scrutiny. Thus, in *2962188 Manitoba Ltd. (c.o.b. Concord Inn) v. Manitoba (Liquor Control Commission)*,[51] the Court of Appeal did not perform a pragmatic and functional analysis, although *Pushpanathan* and *Bibeault* were cited. In reviewing a decision of the Liquor Commission to suspend a liquor licence, the Court stated, "Not only was the Commission entitled to act as it did, it was correct in so doing."[52] A similar approach was found in *Rahim v. Canada (Minister of Citizenship and Immigration)*,[53] which involved an appeal from a decision of a citizenship judge, where the Court simply stated:

> After having reviewed the decision of the citizenship judge and the materials filed with the Court, I am of the opinion that the decision of the Citizenship Judge was correct.
>
> Although I have found that the Citizenship Judge was correct, it may well be that in light of the decision in ...[*Southam*] and in ...[*Pushpanathan*], the standard of review may be more deferential than correctness but it is not necessary that I make that finding in this case.[54]

In *Readyfoods, a Division of Golden Valley Farms v. United Food and Commercial Workers' Union, Local 832*,[55] on judicial review of an arbitration award, the Court remarked that before considering the law on standard

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49. (2001), 213 F.T.R. 221, 39 Admin. L.R. (3d) 50, 2001 FCT 1318 [*Medeiros*]. In this case, the applicants challenged a decision of Band Council which excluded them from receiving benefits under a Settlement Agreement entered into by Council.
50. *Ibid.* at para. 75.
51. (1999), 138 Man. R. (2d) 79 (C.A.).
52. *Ibid.* at para. 12.
53. (2000), 183 F.T.R. 139 (T.D.) [*Rahim*].
54. *Ibid.* at paras. 15-16.
55. (1999), 140 Man. R. (2d) 204 (Q.B.) [*Readyfoods*].

of review, it would be "useful to review what the arbitrator actually did."[56] After this review, the Court concluded that the arbitrator's interpretation of the relevant legislation had been correct, and later the Court stated "it is clear the arbitrator's interpretation is not only reasonable but correct."[57] In *Northwest Territories v. Union of Northern Workers*,[58] on judicial review of a decision of a labour arbitrator, the Court held that the test of reasonableness *simpliciter* should probably be applied; however, the Court went on to state: "But I need not be definitive on that point...The reason for that is that I think the arbitrator's decision was correct...and if it meets that test then it obviously meets any other test one wishes to apply."[59]

Conversely, and from the other end of the spectrum, Canadian courts have sometimes concluded that they do not have to make a definitive selection of a standard of review because the decision was so unreasonable that it could not withstand any level of scrutiny. Thus, in *Canadian Forest Products Ltd. v. British Columbia (Ministry of Forests)*,[60] a case which involved judicial review of a decision of the Ministry of Forests regarding stumpage fee assessments, the Court stated:

> While I tend to the view that there is a continuum in the standard of review from patently unreasonable to correctness and that an analysis such as that described by Bastarache J. in *Pushpanathan* would lead to the application in this case of a standard approaching correctness, I do not consider such an analysis to be necessary.
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> Wherever on the spectrum between error and unreasonableness the standard is found, the Board's decision cannot stand.[61]

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56. *Ibid.* at para. 11.
57. *Ibid.* at para. 25. The Court also stated: "If I am wrong in my assessment of the correctness of the arbitrator's position, then it is my view that on the appropriate standard of review, the arbitrator's decision should not be disturbed." (*ibid.* at para. 28) Only then did the court refer to *Pushpanathan* and briefly discuss the expertise of the arbitrator. The Court then concluded:
> It is my view that the standard of review should require the applicant to show that the arbitrator's decision is patently unreasonable. If I am wrong and the standard of review should not be quite that deferential, it should not move on this spectrum all the way to the standard of correctness (*ibid.* at para 34).
58. *Supra* note 24.
59. *Ibid.* at para. 15. See also *Bertold v. Canada (Minister of Citizenship and Immigration)* (1999), 175 F.T.R. 195, 2 Imm. L.R. (3d) 46 (T.D.). A similar approach was taken in *North Central Health District v. Saskatchewan (Government and Employees Union)* (1999), 176 Sask. R. 161 (Q.B.), aff'd (1999), 180 Sask. R. 81 (C.A.) [*North Central Health District*], involving judicial review of a labour board decision.
60. (1998), 55 B.C.L.R. (3d) 221, 9 Admin. L.R. (3d) 66 (C.A.) [*Canadian Forest Products*].
61. *Ibid.* at para. 16–17.

In *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)*,[62] the Appeals Tribunal of the Workplace Health, Safety and Compensation Commission held that drivers for take-out deliveries were employees for the purposes of the *Workplace Health, Safety and Compensation Act*.[63] On appeal, the New Brunswick Court of Appeal stated:

> One way of avoiding the standard of review issue altogether is to admit that the outcome of this appeal is not dependent on isolating the proper standard of review. In my respectful view, the Appeals Tribunal's decision is so fundamentally flawed that it could not survive even if the most deferential of standards were applied.[64]

We also found examples of cases where the court regarded a thorough pragmatic and functional analysis as necessary in order to determine the standard of review. For example, in *Saftner v. Northwest Territories and Nunavut (Workers' Compensation Board)*,[65] a significant portion of the decision was devoted to a fairly detailed discussion of each of the four *Pushpanathan* criteria. In *Garbo Creations v. Harriet Brown & Co.*,[66] the Federal Court Trial Division heard an appeal from a decision of the Registrar of Trademarks regarding the likelihood of confusion between two trademarks. Although earlier cases had set the standard of review for the Registrar at correctness, with perhaps some room for deference on fact-finding, the Court stated:

> In my opinion the standard of review applied to the Registrar's findings of confusion needs to be reformulated to take account of the pragmatic and functional analysis developed in contemporary administrative law jurisprudence for selecting the standard of review appropriate for the issue in dispute.[67]

The Court proceeded to a careful review of each of the elements of the *Pushpanathan* analysis. Similarly, in *Canada (Commissioner of Competi-*

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62. (2001), 201 D.L.R. (4th) 450, 239 N.B.R. (2d) 300, 2001 NBCA 17, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 425, 250 N.B.R. (2d) 400 [*Joey's Delivery Service*].
63. R.S.N.B. 1973, c. W-14.
64. *Joey's Delivery Service*, *supra* note 62 at para. 23.
65. (2001), 32 Admin. L.R. (3d) 212, 2001 NWTSC 11 [*Saftner*].
66. (1999), 3 C.P.R. (4th) 224, 23 Admin. L.R. (3d) 153 (F.C.T.D.) [*Garbo Creations*].
67. *Ibid.* at para. 16.
68. *Supra* note 15.

tion) v. Superior Propane,[68] the Court conducted a thorough analysis before concluding that an appeal from the competition tribunal should be held to a correctness standard.

b. *The Impact of a Privative Clause*

Until *Pushpanathan*, it was accepted doctrine that where the decision of a board or tribunal was challenged on the basis of an alleged error of law, the existence of a privative clause necessitated the classification of the issue in question as either "jurisdictional" or as "falling within jurisdiction". Thus, in pre-*Pushpanathan* doctrine, the pragmatic and functional analysis (which originated with Dickson J. in *C.U.P.E.* and was labelled and formalized by Beetz J. in *Bibeault*[69]) was used for the purpose of performing this classification. Identification of the appropriate standard of review then followed automatically, with jurisdictional issues evaluated in accordance with a standard of correctness, and the standard of patent unreasonableness applied to issues falling within jurisdiction. *Pushpanathan* appears, however, to have reversed this analysis; rather than certain issues having some inherent characteristic (described as "jurisdictional"), that could be discovered through a pragmatic and functional analysis, *Pushpanathan* would seem to indicate that "jurisdictional" is now simply a label that can be attached if the pragmatic and functional analysis indicates that the administrative decision maker must be correct on this issue. Thus, Bastarache J. stated:

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69. In *Bibeault*, *supra* note 8, the Supreme Court identified the issue before the Quebec Labour Commissioner (the meaning of the word "alienation" in the Quebec *Labour Code*) as jurisdictional, applied the correctness standard, and quashed the decision of the Labour Commissioner. In finding that the interpretational issue was jurisdictional, Beetz J. followed *C.U.P.E.*, *supra* note 8, in rejecting the preliminary or collateral questions doctrine, while at the same time, describing the idea behind that doctrine—that administrative tribunals could not be allowed by a misinterpretation of a statutory provision to assume a different power than that given them by the legislature—as "unimpeachable." What was wrong, according to Beetz J., was not the idea of there being jurisdictional limits and thus, of a category of jurisdictional questions that had to be answered (in the view of the courts) correctly, but the methodology that was used to differentiate these questions from the intra-jurisdictional variety. In his opinion, the remedy lay in abandoning the formalism of the preliminary or collateral questions analysis and taking the same approach to the analysis of whether a question was jurisdictional or not that Dickson J. had taken in *C.U.P.E.* to the question of whether an interpretation of a question within jurisdiction was patently unreasonable. For each question challenged by judicial review, this meant a "pragmatic and functional analysis" was to be carried out to determine whether the legislature intended the question to fall within the jurisdiction of the administrative decision-maker. The factors listed by Beetz J. for consideration were the wording and purpose of the Act, the reason why the administrative decision-maker was created, the expertise of the decision-maker, and the nature of the question being decided. *Bibeault* continues to be noteworthy for having named the pragmatic and functional approach, as well as for providing the first outline of the elements of such an approach.

> Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis.[70]

Thus, according to Bastarache J., the presence or absence of a privative clause in the empowering legislation is simply one of several factors to be considered by the court in determining the appropriate level of deference. Depending on how these factors balance each other, the standard of review for any given issue could fall anywhere from correctness, to reasonableness *simpliciter*, to patent unreasonableness:

> [T]he absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard. However, the presence of a "full" privative clause is compelling evidence that the court ought to show deference to the tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question.[71]

Later decisions of the Supreme Court have followed this newer approach. For example, in two labour relations cases, both involving a privative clause, the Court used the pragmatic and functional analysis to move immediately to the identification of the level of deference owed, rather than to identifying issues as jurisdictional and non-jurisdictional.[72] Both

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70. *Pushpanathan*, *supra* note 6 at para. 28.

71. *Ibid.* at para. 30.

72. *Ivanhoe v. United Food and Commercial Workers, Local 500*, [2001] 2 S.C.R. 565, 201 D.L.R. (4th) 577, 2001 SCC 47 [*Ivanhoe*]; *Sept-Îles (City of) v. Quebec (Labour Court)*, [2001] 2 S.C.R. 670, 201 D.L.R. (4th) 659, 2001 SCC 48 [*Sept-Îles*]. Interestingly, however, although *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1, 2001 SCC 31 [*Trinity Western*] did not involve a privative clause (and therefore under the traditional approach, there would be no need to classify issues as going to or falling within jurisdiction in order to know what standard of review to apply) Iacobucci and Bastarache JJ., writing for the majority, did at one point use the language of jurisdiction, stating: "We are therefore of the view that the BCCT had jurisdiction to condemn discriminatory practices in dealing with the TWU." (*ibid.* at para. 14) However, the judgement then went on to apply the pragmatic and functional analysis in order to establish the appropriate level of review as correctness.

Sept-Îles and *Ivanhoe* involved decisions of the Quebec Labour Court which turned on the interpretation given to a section of the Quebec *Labour Code*[73] dealing with successor rights. In each case, the Labour Court's decision was challenged as not conforming with the interpretation of that section given by the Supreme Court in *Bibeault*. Although the Quebec *Labour Code* contains a full privative clause, the Supreme Court did not revert to the pre-*Pushpanathan* approach of asking itself if the question of whether a business had been alienated was an issue that went to, or fell within, the Labour Court's jurisdiction. Instead, the Court used the pragmatic and functional analysis, as set out in *Pushpanathan*, to move directly to identifying the appropriate level of deference. In *Bibeault*, the question of whether alienation had occurred had been judged to be a jurisdictional issue and therefore subject to the standard of correctness, yet in *Sept-Îles* and *Ivanhoe,* the Court applied the standard of patent unreasonableness. Two reasons for the shift in standard of review were highlighted by Arbour J. First, the Labour Court had, since the decision in *Bibeault*, developed its own expertise in interpreting the relevant section. Secondly (and even more significantly), the *Labour Code* had been amended since *Bibeault* to state that the Labour Court was to determine whether an alienation had in fact taken place.[74]

There was significant unevenness in the response of the lower courts to these aspects of *Pushpanathan*. Certainly a shift in approach with regard to privative clauses was evident in some of the lower court decisions that we examined. Some judges seem to have departed markedly from the pre-*Pushpanathan* focus on identifying questions of law as either going to or falling within jurisdiction. Thus in *Mitchell v. British Columbia (Director of Employment Standards)*,[75] there was no mention of whether an issue before the Employment Standards Board was jurisdictional. The Court simply discussed each of the four factors referred to in *Pushpanathan*, including the existence of a full privative clause, and concluded that the standard of patent unreasonableness was applicable. Similarly, in *Skyline*

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73. R.S.Q. c. C-27.

74. More recently, in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 208 D.L.R. (4th) 107, 2002 SCC 3 [*Chieu*], the Supreme Court considered the jurisdictional quality of the question at issue as one of the factors within the pragmatic and functional analysis that supported the application of the correctness standard. This suggests that a different standard of review might have been applicable if other factors had more strongly supported the application of one of the other and more deferential standards. This implication appears to modify the symmetrical relationship between jurisdictional quality and review for correctness that Pushpanathan contemplated.

75. (1998), 62 B.C.L.R. (3d) 79 (S.C.) [*Mitchell*]. The issue before the Board was whether certain employees were entitled to statutory group termination pay.

Roofing Ltd. v. Alberta (Workers' Compensation Board),[76] an application for judicial review of a decision of the Workers' Compensation Appeals Tribunal, the Court discussed the four *Pushpanathan* factors, including the presence of a full privative clause, without any consideration of whether the question (was the applicant actually an employee) should be characterized as jurisdictional.

On occasion, courts referred expressly to this change in approach. For instance, in *Aseniwuche Winewak Nation v. Greenview (Municipal District No. 16)*,[77] which involved judicial review of a decision of the Municipal Government Board as to the accessability of certain lands, the Court stated that in *Pezim*, *Southam* and *Pushpanathan* the Supreme Court had, "shifted the focus from determining whether or not a question is jurisdictional to ascertaining the standard of review on a spectrum by examining a series of factors."[78] In *Golden Valley Golf Course Ltd. v. British Columbia (Minister of Transportation and Highways)*,[79] a case involving an appeal from a decision of the Expropriation Compensation Board, the Court made clear its understanding of Bastarache J.'s use of the term "jurisdictional". After concluding that the correctness standard applied to an issue of law that was not within the Board's area of expertise, the court then stated, "...this means that if the Board was incorrect in its ruling, the error was a 'jurisdictional' one."[80] Interestingly, in several cases, it seemed that counsel were still using the pre-*Pushpanathan* analysis, while the court was ready to move to the newer approach. In *Michailides v. Alberta (Workers' Compensation Board)*,[81] a case involving judicial review of a decision of the Workers' Compensation Board, the applicant argued that the issue before the Board was a matter going to its jurisdiction. The Court responded by quoting *Pushpanathan* regarding the meaning of jurisdictional error, and then stating, "[t]he starting point is therefore the pragmatic functional

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76. [2001] 10 W.W.R. 651, 95 Alta. L.R. (3d) 126, 2001 ABQB 624 [*Skyline Roofing*]. See also *Brown v. Alberta Dental Assn.*, [2002] 5 W.W.R. 221, 299 A.R. 60, 2002 ABCA 24. In *Cabre Exploration Ltd. v. Alberta (Environment Appeal Board)* (2001), 290 A.R. 146, 33 Admin. L.R. (3d) 140, 2001 ABQB 293, the Court used the *Pushpanathan* analysis; however, a slight hold-over from the previous approach may be reflected in the court's comment that the Alberta Environmental Appeal Board has usually been treated with deference so long as it acted within its jurisdiction (*ibid.* at para. 13).

77. [2001] 3 W.W.R. 693, 89 Alta. L.R. (3d) 27, 2000 ABQB 839 [*Aseniwuche*].

78. *Ibid.* at para. 17.

79. (2001), 200 D.L.R. (4th) 248, 89 B.C.L.R. (3d) 287, 2001 BCCA 392.

80. *Ibid.* at para. 22.

81. (1999), 260 A.R. 323, 1999 ABQB 941, aff'd (2003) 320 A.R. 313, 2003 ABCA 49 [*Michailides*]. The issue before the Board was whether Canada Pension Plan entitlements should be deducted from Earning Loss Supplements.

analysis, not the categorization of the error."[82] In *Canadian Health Care Guild (Alberta Union of Provincial Employees) v. Glenrose Rehabilitation Hospital*,[83] the parties again used the language of jurisdictional issues in arguing the standard of review to be applied to a decision of an arbitrator under a collective agreement; however, the Court referred to *Pushpanathan* and stated:

> The question before me then is not whether the Board made any jurisdictional errors but what is the applicable standard of review in relation to the matters addressed by the Board.[84]

Similarly, in *Alberta Union of Provincial Employees, Local 58/001 v. Alberta (Mental Health Board)*,[85] the union argued that the Board had made a jurisdictional error. The Court noted that this was no longer the appropriate approach.[86]

In contrast, in a number of cases, the court appeared unsure whether to use the four *Pushpanathan* factors to move directly to the standard of review or whether the presence of a privative clause still required some classification of issues as jurisdictional or non-jurisdictional. Some judges have apparently combined elements of the pre- and post-*Pushpanathan* analysis, generally without discussing how the two approaches might fit together. For instance, in *Pyramid Electric Corp. v. International Brotherhood of Electrical Workers, Local 529*[87] an employer sought to quash an order of the Saskatchewan Labour Board, which had required the employer to produce certain documents in the context of an unfair labour practice complaint. The complaint turned on whether or not Pyramid was a successor to another company, within the meaning of s. 37(1) of the Saskatchewan *Trade Union Act*.[88] The Act included a privative clause protecting orders and decisions of the Board. On judicial review, the Court quoted Bastarache J.'s comments on jurisdictional issues, as well as portions from the judgment outlining each of the four factors to be considered

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82. *Ibid.* at para. 11.
83. (2001), 282 A.R. 258, 2001 ABQB 2 [*Glenrose*].
84. *Ibid.* at para. 13.
85. (2001), 308 A.R. 114, 2001 ABQB 938, aff'd (2003), 320 A.R. 267, 2003 ABCA 16, [2001] A.J. No. 1405 [*Alberta Union of Provincial Employees*]. This case involved judicial review of a decision of a board of arbitration in a grievance involving layoffs.
86. *Ibid.* at para. 6.
87. (1999), 185 Sask. R. 82, 19 Admin. L.R. (3d) 113, 1999 SKQB 114, aff'd (2000), 199 Sask. R. 1, 2000 SKCA 44 [*Pyramid*].
88. R.S.S. 1978 c. T-17, s. 37(1), as am. by S.S. 1994, c. 47, s. 19.

in the pragmatic and functional analysis. In applying these factors, the Court held that the nature of the question was "decisive to the applicable standard of review."[89] It then stated that issues relating to the production and disclosure of documents were not "central to its [the Board's] field of expertise."[90] While this sounds very like the "new" approach, before there was any reference to *Pushpanathan*, the Court also spoke of, "[n]arrow errors of jurisdiction [which] relate generally to a provision which confers jurisdiction."[91] Immediately after discussing the relationship between the Board's expertise and the question before it, the Court stated:

> As the determination of this question is not within the Board's jurisdiction "stricto sensu," the standard of review applicable here is whether the interpretation is correct.[92]

A similar merging of approaches was found in a number of other cases. For instance, in *Maliseet Nation At Tobique v. Bear*,[93] the Federal Court Trial Division held that review for patent unreasonableness applied to a finding of wrongful dismissal by an adjudicator appointed under the *Canada Labour Code*.[94] The Court referred to *Pushpanathan*, then began the analysis of the standard of review by stating that "the Adjudicator acted within the limits of the jurisdiction conferred upon him by the ... Code."[95]

Another such example is *Simons v. Prince Edward Island (Workers' Compensation Board)*,[96] a case involving judicial review of a decision of the Executive Director of the Prince Edward Island Workers' Compensation Board to send the applicants' medical files to a doctor, without their consent or knowledge. The Prince Edward Island Supreme Court referred to the existence of a full privative clause in the *Workers Compensation Act*[97] as one of the factors to be considered in the *Pushpanathan* analysis; however, such an analysis was not undertaken. Instead, appearing to revert to an approach based on identifying issues as jurisdictional or non-jurisdictional, the Court stated that *Pushpanathan*

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89. *Pyramid*, *supra* note 87 at para. 23.
90. *Ibid.*
91. *Ibid.* at para. 14.
92. *Ibid.* at para. 23.
93. (1999), 178 F.T.R. 121 (T.D.) [*Maliseet Nation*].
94. R.S.C. 1985, c. L-2.
95. *Maliseet Nation*, *supra* note 93 at para. 22.
96. (1999), 186 Nfld. & P.E.I.R. 277, 18 Admin. L.R. (3d) 277 (P.E.I. S.C. (T.D.)), rev'd (2000), 188 Nfld. & P.E.I.R. 138, 2000 PESCAD 15 [*Simons*].
97. R.S.P.E.I. 1988, C. W-7.1.

> ...does not appear to detract from Sopinka J.'s analysis in *Pasiechnyk*...This appears to be the traditional position that a correctness standard will apply if there is an act in excess of a tribunal's jurisdiction.[98]

In Canada (A.G.) v. Marinos,[99] the challenge was to an adjudicator's holding that she had jurisdiction to hear a grievance under the *Public Service Staff Relations Act.*[100] The adjudicator's decision was based on her interpretation of the Act's definition of "employee." On judicial review, the Federal Court of Appeal concluded that a correctness standard was appropriate. Although the decision contained a reference to *Pushpanathan*, the pragmatic and functional analysis seemed to have been used chiefly for the more traditional task of distinguishing questions that go to jurisdiction from those that fall within it. Thus, the Federal Court of Appeal stated:

> Considering the pragmatic and functional approach, the issue before us is whether section 2 of the PSSRA [*Public Service Staff Relations Act*] involves a jurisdictional question, and if so, what is the proper test to be applied.[101]

The Court went on to quote *Bibeault* to the effect that a "mere error" in interpreting a section which limits a tribunal's powers will lead to a loss of jurisdiction;[102] however, this was followed by the quotation from *Pushpanathan* regarding the meaning of "jurisdictional." *Northwood v. British Columbia (Forest Practices Board)*[103] involved the judicial review of a decision of the Forest Practices Board of British Columbia to include certain matters in one of its Compliance Reports. The Court referred to *Pezim* and *Southam* and listed the four factors from *Pushpanathan*, but then suggested that the identification of an issue as jurisdictional compelled the use of the correctness standard (rather than the other way around, as *Pushpanathan* suggested):

> Where a question is truly jurisdictional as it must be where there is a rigourous privative clause...then a "reasonableness" standard may not

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98. *Simons, supra* note 96 at para. 77.
99. [2000] 4 F.C. 98, 186 D.L.R. (4th) 517, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 221 [*Marinos*].
100. R.S.C. 1985, c. P-35.
101. *Marinos, supra* note 99 at para. 12.
102. *Ibid.* at para. 15.
103. (2001), 86 B.C.L.R. (3d) 215, 31 Admin. L.R. (3d) 1, 2001 BCCA 141, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 207 [*Northwood*].

> meet the test of want of jurisdiction. I understand that a "correctness" standard is required in interpreting the constating statute of the tribunal and other general public statutes, and that a "not patently unreasonable" standard is required for other issues before the tribunal.[104]

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104. *Ibid.* at para. 35. For a similar approach, see *New Brunswick (Board of Management) v. Canadian Union of Public Employees, Local 1190* (2000), 226 N.B.R. (2d) 357 (Q.B. (T.D.)), aff'd (2001), 198 D.L.R. (4th) 66, 236 N.B.R. (2d) 87, 2001 NBCA 21, where the Court fairly quickly concluded that of the three issues dealt with in a decision of an adjudicator under a collective agreement, two should be held to the standard of patent unreasonableness, and one to a correctness standard. The Court listed, but did not discuss, the four factors from *Pushpanathan, supra* note 6, and included a lengthy quote from *Pushpanathan* regarding the spectrum of review and the concept of jurisdictional questions. However, this quote was prefaced by a statement that appeared to reverse Bastarache J's comments: "In *Pushpanathan* ...Bastarache J. concludes that a jurisdictional error is to be assessed on the basis of correctness." (*ibid.* at para. 17) In *Glenrose, supra* note 83, which involved the review of a decision of an arbitration board, the Court started with the *Pushpanathan* approach, stating, "[t]he question before me then is not whether the Board made any jurisdictional errors, but what is the applicable standard of review in relation to the matters addressed by the Board" (*ibid.* at para. 13). However, the Court seemed uncertain as to whether this was to be the approach in all cases, for it also stated that it was the absence of a full privative clause that required an evaluation of the other three factors from *Pushpanathan* (*ibid.* at para. 15) and concluded that the issue in question was "deep within the Board's jurisdiction" (*ibid.* at para. 32). In *Atlas Industries Ltd. v. Saskatchewan (Labour Relations Board)* (1999), 175 Sask. R. 251, 17 Admin. L.R. (3d) 211 (Q.B.), rev'd (1999), 177 Sask. R. 307, 17 Admin. L.R. (3d) 234 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 346 [*Atlas Industries*], the Court began its discussion of standard of review by reference to jurisdictional questions and quoted from *Bibeault* with regard to distinguishing jurisdictional from non-jurisdictional questions. The Court then refered to *Pushpanathan* as taking "a somewhat different approach to the standard of judicial review that appears to be less deferential than has previously been the case." (*ibid.* at para. 13) This was followed by several lengthy quotes from *Pushpanathan*, including the passage regarding the meaning of "jurisdictional," yet in the next paragraph the Court spoke of the difficulty of "determining whether a specific question is one within jurisdiction or one that confers jurisdiction." (*ibid.* at para. 17) Other cases which still seem to classify issues as jurisdictional or non-jurisdictional include: *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (B.C.S.C) [*Greater Vancouver*]; *Alberta (Environment) v. McCain Foods (Canada) Ltd.* (2000), 263 A.R. 55, 21 Admin. L.R. (3d) 141 (Q.B.) [*McCain Foods*]; *PCL Constructors Pacific v. International Union of Operating Engineers, Local 115* (2000), 77 B.C.L.R. (3d) 270, 2000 BCSC 968 [*PCL Constructors*]; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Broadcasters* (1999), 239 N.R. 119, 1 C.P.R. (4th) 80 (F.C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 250 [*Society of Composers*]; *Canada Safeway Ltd. v. United Food and Commercial Workers, Locals 312A, 373A and 401* (2001), 283 A.R. 32, 2001 ABQB 120; *Construction and Allied Union (CLAC), Local 154 v. Nova Scotia (Labour Relations Board Construction Industry Panel)* (2002), 200 N.S.R. (2d) 88, 2002 NSSC 2, aff'd (2002), 207 N.S.R. (2d) 1, 2002 NSCA 73; *Leisureland Sports Bar v. Edmonton (City)* (2001), 298 A.R. 201, 37 Admin L.R. (3d) 73, 2001 ABQB 745; *Ontario (A.G.) v. Ontario Public Service Employees Union* (2000), 52 O.R. (3d) 77, 195 D.L.R. (4th) 376 (C.A.); *Air Nunavut v. Canada (Minister of Transportation)* (2000), [2001] 1 F.C. 138, 187 F.T.R. 16 (T.D.); *Assiniboine South Teacher's Assn. of the Manitoba Teachers' Society v. Assiniboine South School Division No.3* (2000), 187 D.L.R. (4th) 385, 148 Man. R. (2d) 1, 2000 MBCA 9, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 435; *Seimans Westinghouse v. Canada (Minister of Public Works and Government Services)* (2001), [2002] 1 F.C. 292, 202 D.L.R. (4th) 610, 2001 FCA 241, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 490. At times, a court's use of the pre-*Pushpanathan* terminology may, at least in part, be predicated on language in a statute. See *e.g. Queen Elizabeth II Health Sciences Centre v. Nova Scotia (Workers' Compensation Appeals Tribunal)* (2001), 200 D.L.R. (4th) 504, 193 N.S.R. (2d) 385, 2001 NSCA 75, considering the Nova Scotia *Workers' Compensation Act*, S.N.S. 1994-95, c. 10, which allows appeals on any question regarding the jurisdiction of the Workers' Compensation Appeals Tribunal, as well as on questions of law.

Clearly then, the courts have not completely abandoned the pre-*Pushpanathan* approach, where the presence of a privative clause required that errors of law be classified as either going to or falling within jurisdiction, in order to determine the standard of review. Given the degree to which the previous approach was entrenched in administrative law, it is perhaps not surprising to discover that the shift set out in *Pushpanathan* has not yet been fully incorporated into the jurisprudence at the lower court levels. On the other hand, some lower courts clearly have accepted and started to apply the newer approach, and with results that are consistent with the logical implications of *Pushpanathan,* namely that a privative clause no longer dictates a choice between correctness and patent unreasonableness review. A few of the lower court decisions that we examined did use the middle standard (resonableness *simpliciter*) in the context of a privative or finality clause. Thus, in *Maple Leaf Foods v. Alejandro,*[105] where a full privative clause was involved, a decision of the referee regarding entitlement to termination pay under the *Employment Standards Act*[106] was held to the reasonableness standard. Various factors were taken as indicating the appropriateness of judicial deference and others as indicating a contrary tendency, so the court chose the mid point on the spectrum of review. In *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment),*[107] the Court applied a reasonableness standard to a decision of the Minister of the Environment on an issue involving mixed fact and law, where the Minister's decision was protected by a privative clause. In *Newfoundland (Workplace Health, Safety and Compensation Commission) v. Smith,*[108] the Court did not specifically state the standard of review to be applied to a decision of a Review Commissioner under the *Workplace Health, Safety and Compensation Act.*[109] After noting the existence of a privative clause, however, the Court went on to state that the Review Commissioner's findings on the issue of whether a worker had suffered work-related stress were "eminently reasonable in light of the recorded facts".[110] Such wording probably indicates that a reasonableness standard was applied.

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105. (1999), 120 O.A.C. 264, 17 Admin L.R. (3d) 1 (C.A.) [*Maple Leaf Foods*].
106. R.S.O. 1990, c. E.14, as rep. by S.O. 2000, c. 41, s. 144(1).
107. (2000), 265 A.R. 341, 34 C.E.L.R. (N.S.) 303, 2000 ABQB 388 [*Legal Oil and Gas Ltd.*]. The Minister had confirmed an environmental protection order issued by the Director of the Land Reclamation Division.
108. (2000), 194 Nfld. & P.E.I.R. 159 (Nfld. S.C. (T.D)). The Review Commissioner had held that the applicant suffered from work-related stress.
109. R.S.N. 1990, c. W-11, s. 2(o); *ibid.*, ss. 26(1)-(2), as am. by S.N. 1994, c. 12, s. 4.
110. *Supra* note 108 at para. 24.

Occasionally in the context of a privative clause, the court hovered between the two deferential standards. This was so in *Eggertson*,[111] a case which involved judicial review of a decision of the Professional Appeal Committee of the Alberta Teachers Association, upholding the finding of a hearing committee that a teacher had been guilty of professional misconduct. The Court suggested that the factual quality of the issues, the presence of a privative clause, the expertise of the Committee and the purpose of the Act, "weigh heavily towards a patently unreasonable standard."[112] The Court went on to say, "[a]t the very least, they weigh towards a reasonableness standard."[113] Two other cases, *Duffy v. Alberta (Human Rights and Citizenship Commission)*[114] and *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*,[115] applied a test of reasonableness *simpliciter* to administrative decision-makers protected by finality clauses.

In the vast majority of the cases we reviewed that dealt with a privative or a finality clause, however, courts applied either the standard of correctness or that of patent unreasonableness. Whether a court perceived this as simply the way in which the various elements of the pragmatic functional analysis stacked up in a particular case,[116] or whether this was considered inevitable given the existence of a privative clause, depended, not surprisingly, on the extent to which the court had adopted the *Pushpanathan* approach to the concept of jurisdiction. Conforming to the pre-*Pushpanathan* approach left no room for a middle standard. For instance, the Court in *Northwood* stated, "I understand that a 'correctness' standard is required in interpreting the constating statute of the tribunal and other general public statutes, and that a 'not patently unreasonable' standard is required for other issues before the tribunal."[117] Similarly, in *Simons*, the Court quoted from *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)* to the effect that where there is a full privative clause, a court can review only for an error of jurisdiction or for patent unreasonableness within jurisdiction.

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111. *Supra* note 19.

112. *Ibid.* at para. 19.

113. *Ibid.* In *McTague v. Canada (A.G.)* (1999), [2000] 1 F.C. 647, 177 F.T.R. 5 (T.D.) the court determined that reasonableness was the appropriate standard against which to review a decision of the Veterans Review and Appeals Board. This is perhaps an example which blurs a number of boundaries. The decision of the Board was protected by a finality clause and the fact that the legislation did not contain a full privative clause was one of the elements that persuaded the court to apply reasonableness rather than patent unreasonableness.

114. (2001), 301 A.R. 236, 36 Admin. L.R. (3d) 312, 2001 ABQB 541 [*Duffy*].

115. (2000), 272 A.R. 34 (Q.B.).

116. For instance, in *Legal Oil and Gas Ltd., supra* note 107, the court refered to all three standards of review before choosing patent unreasonableness.

117. *Supra* note 103 at para. 35.

In other cases,[118] courts either spoke explicitly of the applicability of the full spectrum of standards of review to judicial review involving a privative clause, or implied such applicability by using the *Pushpanathan* approach to determine the standard of review. Yet, as noted above, even in these cases it was rare indeed for the court actually to apply the middle standard.

Another corollary of treating privative clauses as simply one factor to be considered in the pragmatic and functional analysis is that it opens the door (at least in theory) to using the patently unreasonable standard where there is no privative clause. This was the approach taken in *AVS Technologies*,[119] a case involving judicial review of a decision of the Copyright Board; in *Lethbridge (City) v. Daisley*,[120] a case where the issuance of a building permit was being challenged; and in *Apotex*,[121] a case where the decision under review involved the conditions to be attached to the manufacture of a drug before its inclusion on the Drug Benefits List.[122]

In *Teeluck v. Canada (Treasury Board)*[123] also, the patently unreasonable standard was applied to an administrative decision-maker not protected by a privative clause. What makes this case particularly interesting is that the enabling legislation had initially contained a privative clause, which had been repealed before the commencement of the judicial review proceedings. Yet, according to the court, this did "not mean that decisions of the Public Service Staff Relations Board are now more readily set aside."[124] Bastarache J.'s statement in *Pushpanathan* that "the absence of a privative clause does not imply a high standard of scrutiny, where other factors bespeak a low standard"[125] was not cited in *Teeluk* as authority for the continued application of the patently unreasonable standard.

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118. See *e.g. Halifax Longshoremen's Assn., Local 269 v. Offshore Logistics* (2000), 257 N.R. 338, 25 Admin. L.R. 224 (F.C.A.).
119. *Supra* note 22.
120. (2000), 250 A.R. 365, 83 Alta. L.R. (3d) 239, 2000 ABCA 79, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 214, 293 A.R. 189 [*Lethbridge*].
121. *Supra* note 22.
122. See also *Hayat v. University of Toronto* (1999), 181 D.L.R. (4th) 496, 127 O.A.C. 69 (C.A.) leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 27. The patently unreasonable standard was also applied on an appeal in *Howe Sound Pulp and Paper Ltd. v. British Columbia (Environmental Appeal Board)* (1999), 29 C.E.L.R. (N.S.) 225 (B.C.S.C.), although the court also stated that even if the appropriate standard of review had been reasonableness, the decision would still stand.
123. (1999), 177 F.T.R. 39 (T.D.), aff'd (2000), 262 N.R. 389 [F.C.A.].
124. *Ibid.* at para. 19.
125. *Supra* note 6 at para. 30.

In *C.B. v. Manitoba (Director of Child and Family Services)*,[126] the Court did not identify a standard of review but, in overturning a decision of the Director of Child and Family Services, stated that the decision was patently unreasonable. *In Canadian Broadcasting Corp. v. Métromédia CMR Montréal*,[127] the Court stated that a decision of the CRTC must be shown "a great deal of deference,"[128] despite the absence of a privative clause, given the Commission's expertise and the delicate balancing required among "conflicting objectives ...which essentially [involve] economic and cultural policy considerations."[129] Similarly, in *Money's Mushrooms Ltd. v. British Columbia (Marketing Board)*,[130] a decision of the British Columbia Marketing Board was given "considerable deference."[131] On the other hand, the older approach was expressly followed in several cases, including *City Furniture (Y.T.) Ltd. v. Yukon Liquor Corp.*,[132] where the Court held that the patently unreasonable standard should not apply to a decision of the Liquor Licensing Board, as "there is no privative clause ousting the jurisdiction of the court."[133]

c. *Relationship Between Expertise and Other Elements of the Pragmatic and Functional Analysis*

In *Pushpanathan*, Bastarache J. explored the relationship between expertise and the other three elements of the pragmatic and functional analysis. The focus on expertise is not new. As far back as *C.U.P.E.*, the relative expertise of an administrative decision maker, as opposed to that of the courts, was recognized as calling for deference.[134] In *Bibeault*, Beetz J. identified the expertise of the decision maker as one of the four elements

126. (2000), 154 Man. R. (2d) 63, 40 C.R. (5th) 308, 2000 MBQB 215 [*C.B. v. Manitoba*].
127. (1999), 254 N.R. 266 (F.C.A.).
128. *Ibid.* at para. 3.
129. *Ibid.* at paras. 5–6.
130. [1999] B.C.J. No. 2902 (S.C.), aff'd 2001 BCCA 453.
131. *Ibid.* at para. 32. In this case, the Board upheld a decision of the Mushroom Marketing Board which required changes in a proposed contract between mushroom growers and a licensed marketing agency, where the Mushroom Board was of the view that clauses within the contract "conflict[ed] with its regulatory authority." (*ibid.* at para. 1)
132. (2000), 26 Admin. L.R. (3d) 286, 2000 YTSC 517 [*City Furniture*]. This case involved a refusal to renew three liquor licences.
133. *Ibid.* at para. 12.
134. The Supreme Court of Canada accepted in *C.U.P.E., supra* note 8, that the Labour Board was a specialized tribunal that could apply "its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area." (*supra* note 8 at para. 12)

of the pragmatic and functional analysis. In *Southam*, Iacobucci J. described expertise as "the most important of the factors that a court must consider in settling on a standard of review."[135] In *Pushpanathan*, Bastarache J. clarified the relationship between the expertise of the administrative decision-maker and the other elements of the analysis by identifying three aspects of evaluating expertise:

> ... the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise.[136]

Thus, *Pushpanathan* emphasized that the level of an administrative decision maker's expertise could only be judged in relation to the particular issue, not ascribed in general terms; courts are required to consider the expertise of the administrative decision maker *vis-à-vis* the expertise of the courts in the specific context of the question before the board or tribunal.[137]

The Supreme Court decisions since *Pushpanathan* have continued to emphasize the links between expertise and other elements of the analysis, and the issue of expertise has been determinative in several recent cases decided by the Court. In *Canada (Deputy Minister of National Revenue–M.N.R.)* v. *Mattel Canada*,[138] the Court applied the correctness standard to a question of law decided by the Canadian International Trade Tribunal. The questions to be decided (what constituted a sale of goods, and how two provisions of the Act related to each other) were not seen as calling upon any scientific or technical experience that the Tribunal might have accumulated. Instead, these issues were "traditionally the province of the Courts."[139] In *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*,[140] a case which involved an appeal from a decision of the Ontario Securities Commission as to whether to use its powers to act in the public interest to grant a remedy to aggrieved minority shareholders, the Court characterized this issue as fit-

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135. *Supra* note 8 at para. 50.
136. *Supra* note 6 at para. 33.
137. Mullan reads *Pushpanathan* as indicating,

> ...that the Court is being much more careful in its willingness to concede expertise automatically to tribunals. It is taking considerable care to calibrate any claims for respect to expertise to the precise decision-making context.

(Mullan, *supra* note 1 at p. 79)
138. [2001] 2 S.C.R. 100, 199 D.L.R. (4th) 598, 2001 SCC 36 [*Mattel*].
139. *Ibid.* at para 33.
140. [2001] 2 S.C.R. 132, 199 D.L.R. (4th) 577, 2001 SCC 37 [*Asbestos*].

ting within the Commission's "core of expertise."[141] Although deference was considered warranted, the Court held that the existence of a right of appeal indicated that reasonableness *simpliciter*, rather than the standard of patent unreasonableness, was appropriate.

The Court's evaluation of expertise was also of critical importance in *Trinity Western*,[142] a case which dealt with the judicial review of a decision of the British Columbia College of Teachers. The College rejected an application for accreditation from the University because of the College's perception that certain practices of the University (in particular the "Community Standards" document denouncing homosexuality that Trinity required every student to sign) were discriminatory. The trial judge of the Supreme Court of British Columbia found that rejecting Trinity's application for accreditation on these grounds fell outside the College's jurisdiction. This determination was upheld by the British Columbia Court of Appeal. The majority of the Supreme Court[143] held that the absence of a privative clause, the nature of the question (which was characterized as involving human rights issues rather than educational issues) and the relative expertise of the College and the courts on such matters, all indicated that the correctness standard should be applied. In particular, the majority was of the view that the College of Teachers did not possess expertise regarding human rights principles or the balancing of conflicting rights. These three decisions conform to both *Southam's* emphasis on expertise, and *Pushpanathan's* clarification that expertise must be judged in the context of a particular decision.

The *Pushpanathan* approach to expertise seemed to be understood and applied in most of the lower court decisions we reviewed.[144] Thus, in *Pyra-*

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141. *Ibid.* at para. 49.

142. *Supra* note 72.

143. See *ibid.* L'Heureux-Dubé dissented, arguing that even though there was no privative clause, the other elements of the *Pushpanathan* approach favoured deference so strongly that the standard of patent unreasonableness should be applied.

144. This was not universal however. One decision, *Alberta v. Alberta (Labour Relations Board)*, (2001) 293 A.R. 251, 209 D.L.R. (4th) 694, 2001 ABCA 299, seemed to de-emphasize the significance of expertise. The Board had been required to decide whether municipal districts were employers within the meaning of the *Improvement Districts Act*, R.S.A. 1980, c. I-1, in the context of a successor rights application. Although the determination of the meaning of "employee" might seem to be the kind of issue that a Labour Board would face fairly frequently, the Alberta Court of Appeal characterized this as a question of law and stated that the Board had no specialized expertise in statutory interpretation. However, the existence of a privative clause and the purpose of the Act in providing a "fair and speedy method of regulating labour issues" (*ibid.* at para. 59) convinced the court that the legislature intended the decision to lie with the Board. Therefore, a standard of patent unreasonableness was applied.

mid,[145] a case involving judicial review of a decision of the Saskatchewan Labour Board to order an employer to disclose certain documents, the principal reason identified by the Court for applying a correctness standard was the board's lack of expertise relative to the issue before it. This was also the case in *Bradasch v. Yukon (Registrar of Motor Vehicles)*,[146] where the decision of a Review Officer under the *Motor Vehicles Act*[147] to uphold the suspension of a driver's licence was challenged on the grounds that the Review Officer had applied the wrong standard of proof. In *Coughlan v. WMC International*,[148] an appeal from a decision of the Ontario Securities Commission, the Court also emphasized the need to evaluate expertise in terms of the specific question before the administrative decision-maker. The court recognized that "[t]he OSC [Ontario Securities Commission] is a highly specialized tribunal with expertise in the regulation of capital markets"[149] and referred to *Pezim*, where the Supreme Court held that some deference was due to a decision of the British Columbia Securities Commission. In *Coughlan*, however, the Court concluded that the Commission had been deciding "questions of law of general application [which] are not squarely within [its] area of expertise."[150] Therefore in *Coughlan*, the Securities Commission was required to be correct in its determinations.

In other cases, the expertise of the administrative decision-maker on the issue before it was seen as mandating deference from the courts. For instance, in *North Central Health District*, a decision of the Labour Relations Board to impose a collective agreement was seen as falling "squarely within the parameters of the Act and ...best dealt with by a tribunal with a particular expertise,"[151] and as a result, the patently unreasonable standard was applied. In *Maple Leaf Foods*,[152] the Court reviewed a decision of a referee under the *Employment Standards Act*[153] against a reasonableness standard, stating that while referees were not part of a permanent tribunal, they did acquire familiarity with the Act. While the issue in question — the interpretation of "termination" — was held to be a question of law, it was found to be one which would engage the referee's specialization. There-

145. *Supra* note 87.
146. *Supra* note 19.
147. R.S.Y. 1986, c. 118, as am. by S.Y. 1997, c. 14.
148. (2000), 143 O.A.C. 244, 31 Admin. L.R. (3d) 19 (Div. Ct.).
149. *Ibid.* at para. 27.
150. *Ibid.* at para. 34. The issue before the Commission was whether or not it was bound by a rescinded policy on non-disclosure, or by an undertaking given by the Commission's legal counsel.
151. *Supra* note 59 at para 30.
152. *Supra* note 105.
153. *Supra* note 106.

fore, even in the context of an *ad hoc* decision-maker considering a question of law, the Court was willing to recognize and defer to some degree of expertise.

Further, in their evaluation of the expertise of administrative decision makers, all but one of the cases we reviewed followed the approach of previous jurisprudence in avoiding scrutiny of the backgrounds or skills of the individual members of the board or tribunal, and focussed instead on factors such as whether the Act required particular expertise or credentials for appointment, whether the administrative decision maker presided as a continuing body or was appointed on an *ad hoc* basis, and whether the administrative decision maker was involved in a broad range of specialized activities, including policy development. For instance, in *Bradasch*, the Court noted that the particular review officer making the decision had legal training but held that since most review officers would not have such expertise on questions of law, the correctness standard applied. The only deviation from the usual approach was found in *Association of the Academic Staff of the University of Alberta v. Governors of the University of Alberta*,[154] where the Court did see the expertise of the particular arbitrator as offsetting the *ad hoc* nature of the appointment, in evaluating the level of deference required:

> It does appear that there is some support in the jurisprudence for a distinction between standing expert tribunals and ad hoc arbitrators for the purposes of this element of the analysis. However, bearing in mind that the parties were content to select the arbitrator, a former Chair of the Alberta Labour Relations Board, and well known expert in the field, I have difficulty perceiving the decision as stripped of expertise arising from the qualities of the Arbitrator.[155]

Two cases raised the interesting question of whether a Court should ever defer to the expertise of the ordinary person. In *Alberta (Family and Social Services) v. Gramaglia*,[156] an Appeal Panel appointed under the *Assured Income for the Severely Handicapped Act*[157] had to decide whether a disability pension received from another country fit within the definition of income within the Act, such that it should be deducted from the "handi-

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154. (2001), 92 Alta. L.R. (3d) 45, 32 Admin. L.R. (3d) 175, 2001 ABQB 255, rev'd (2002), 303 A.R. 363, [2002] 7 W.W.R. 204, 2002 ABCA 99 [*Assn. of Academic Staff*].
155. *Ibid.* at para. 64.
156. (1999), 172 D.L.R. (4th) 294, 15 Admin. L.R. (3d) 1, 1999 ABCA 105, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 252 [*Gramaglia*].
157. R.S.A. 1980, c. A-48.

cap benefit" paid to the applicant. In a very brief judgement, two judges of the Court of Appeal restored the decision of the Appeal Panel which had been set aside by the lower court on an application for judicial review. Noting that the Act contained a partial privative clause, and classifying the issue before the Panel as involving mixed fact and law, Hunt J.A. held (with McClung J.A. concurring):

> It is also true that this is not an "expert" tribunal in the way that the tribunals were in *Southam* and *Pezim*. Nevertheless, it seems to me that the members have been appointed at least in part because they are from the community. As such, they have a certain level of expertise (by virtue of their daily lives) as regards the type of issues they are required to decide. In other words, given the subject-matter of their jurisdiction, I think that their decisions are owed some deference simply because, as relatively ordinary citizens, they can be expected to bring their daily experience and common sense to bear on the matters in dispute. It is therefore arguable that they are better qualified to decide the sorts of questions that arise than, for example, are judges.[158]

The third judge held that little deference needed be shown, because no particular expertise was required by the Act. The same judges took the same position on the issue of expertise in *Sexsmith v. Alberta (Director of Family and Social Services)*,[159] handed down the same day as *Gramalgia*. The approach of Hunt and McClung J.A. is interesting not only because it indicates that non-specialization may sometimes represent the needed expertise, but also because the Court was willing to recognize the expertise of non-specialists with regard to issues that could easily have been classified as exercises in statutory interpretation, and therefore well within the expertise of the court.

d. *Application of Pragmatic and Functional Analysis to Questions of Fact*

Historically, various phrases have been used to describe the seriousness of the error required to warrant judicial intervention. For instance, the party challenging a factual determination was required to show that the error was palpable and overriding, that material findings of fact were unsupported by evidence sufficient in law, or that findings of fact were manifestly against the weight of the evidence. All such phrases obviously set a

158. *Gramalgia, supra* note 156 at para. 4.
159. (1999), 245 A.R. 240, 19 Admin. L.R. (3d) 231 (Q.B.).

high and restrictive barrier to judicial intervention. Notwithstanding the considerable latitude that judges held in deciding what was "palpable and overriding" or "material" or "manifestly against the weight of the evidence," the result was that courts tended to be quite deferential to administrative fact finding, in appeals as well as judicial review proceedings. It was not initially clear what if any relationship existed between the standard of "patent unreasonableness" and the more familiar phrases used to articulate the deferential standard of review for factual determinations. Then, in 1990, in two cases involving decision makers protected by privative clauses,[160] the Supreme Court implicitly equated review for patent unreasonableness with the "no evidence" standard of review from earlier cases. The Court did not, however, attempt to define fully or otherwise to clarify the relationship between patent unreasonableness review and review of the facts under the more traditional labels. In particular, the Court did not specify whether the use of the new standard for review of findings of fact was limited to cases to be reviewed under a privative clause. The *Pushpanathan* restatement of the elements of the pragmatic and functional analysis confirms that challenges on issues of fact fall under the rubric of that analysis. It therefore confirms that the standard of review for a determination of fact will be one of the generic standards of review from the *Southam* spectrum. Whether a question is primarily an issue of fact, or law, or a mixture of fact and law is considered within the pragmatic and functional analysis under the heading of "nature of question," and therefore, in the *Pushpanathan* approach is simply one of the elements to be weighed in identifying the appropriate standard of review.

This aspect of *Pushpanathan* seems to have become widely accepted by lower courts. Interestingly, this expansion of the pragmatic and functional analysis to issues of fact has at times led to the application of a more interventionist standard than would previously have prevailed. True, the high level of deference traditionally shown to an administrative decision-maker's findings of fact was found in several of the lower court decisions reviewed here. For instance, in *Daycon Mechanical Systems Ltd. v. United Brotherhood of Carpenters and Joiners of America (Millwrights Union Local 1021)*,[161] the Court applied the standard of patent unreasonableness to a question of fact decided by the Saskatchewan Labour Relations Board. Patent unreasonableness was also applied to factual findings in *Saftner v.*

160. *Lester*, *supra* note 8; *National Corn Growers*, *supra* note 8.
161. (1999), 185 Sask. R. 142, 1999 SKQB 90 [*Daycon*].

Northwest Territories and Nunavut (Workers' Compensation Board),[162] *Thimer v. Alberta (Workers' Compensation Board Appeals Commission)*,[163] *Corbett Lake Country Inn Ltd. v. British Columbia (Land Reserve Commission)*,[164] *Brown* v. *Alberta Dental Association*,[165] *A.B.Z. v. Canada*,[166] and *Singh v. Canada (Minister of Citizenship and Immigration)*.[167]

In a significant number of cases, however, the application of the pragmatic and functional analysis led to the application of a more interventionist level of scrutiny than the older tests would have mandated. For instance, in *Mahmood*, the Convention Refugee Determination Division of the Immigration and Refugee Board had rejected the applicant's refugee claim because the panel did not believe his evidence regarding persecution, or alternatively, because the panel found that he had an internal flight alternative. On judicial review, the Federal Court Trial Division noted that *Pushpanathan* made it clear that the Immigration and Refugee Board was held to a standard of correctness on questions of law, but had not set the standard of review for fact or mixed fact and law. The Federal Court then stated that in *Southam*,

> ...the Supreme Court of Canada held that questions of mixed law and fact are to be reviewed on the standard of reasonableness *simpliciter*. I would be of the opinion that the same standard should apply to the review of factual findings.[168]

Although the Panel's decision in *Mahmood* was upheld, with the Court holding that the Panel's findings on credibility were reasonable and that

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162. (2001), 32 Admin. L.R. (3d) 212, 2001 NWTSC 11 [*Saftner*]. The applicant challenged, by way of judicial review, a decision of the Workers Compensation Appeals Tribunal which denied him an increase in disability benefits and opportunities for further training.

163. (2000), 276 A.R. 236, 31 Admin. L.R. (3d) 281, 2000 ABQB 706 [*Thimer*]. This case involved judicial review of a Workers Compensation Appeal Board's decision to deny a claim for compensation.

164. 2000 BCSC 1286. This involved judicial review of a decision of the Land Reserve Commission allowing the Ministry of Transportation and highways to widen a highway, using land in the Agricultural Land reserve.

165. (2002), 299 A.R. 60, [2002] 5 W.W.R. 221, 2002 ABCA 24. This involved judicial review of a decision of the Alberta Dental Association Board, holding that an agreement between a dentist and a corporation which provided management services violated the *Dental Profession Regulation* (Alta. Reg. 328/84).

166. *Supra* note 22. This case involved judicial review of a decision of the Appeal Division of the Immigration and Refugee Board, which had denied the applicant's request to reopen an appeal of a deportation order.

167. (1999), 173 F.T.R. 280, 2 Imm. L.R. (3d) 191 (T.D.) [*Singh*]. In this case, the applicant challenged, by way of judicial review, a determination of the Convention Refugee Determination Division that he was not a refugee.

168. *Mahmood*, *supra* note 38 at para. 13.

inferences drawn from the evidence were correct, clearly the Court did not feel obliged to be particularly deferential to the Panel's decision. The reasonableness standard was also applied on questions of fact in *Chow v. Canada (Minister of Citizenship and Immigration)*,[169] another application for judicial review of a decision that the applicant was not a convention refugee. The Court sent the matter back for redetermination by the Convention Refugee Determination Division, stating:

> Although the Board is entrusted with the task of weighing the evidence and assessing the Applicant's credibility and these findings are treated deferentially, I am of the opinion that the Board was unreasonable in its assessment of the Applicant's testimony.[170]

On judicial review of a decision of a Human Rights Board of Inquiry, the Prince Edward Island Supreme Court in *Magill* stated:

> On questions of fact, involving the Board's assessment of the evidence and findings of fact...the standard of review which I consider to be applicable in the present case is "reasonableness."[171]

The standard of reasonableness *simpliciter* was also applied to findings of fact made by a discipline subcommittee of the Nova Scotia Barristers' Society in *Nova Scotia Barristers' Society v. Pavey*.[172]

Just as the application of the pragmatic and functional analysis appears to allow for the possibility of diluting previous common law standards of review on issues of fact, one reading of section 18.1(4)(d) of the *Federal Court Act*[173] would also allow for greater intervention by courts. In *Kerth v. Canada (Minister of Human Resources Development)*,[174] in reviewing a decision of the Pension Appeals Board, the Federal Court Trial Division

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169. [2000] F.C.J. No. 788 (T.D.) [*Chow*].

170. *Ibid.* at para. 7.

171. *Supra* note 19 at para. 9.

172. (2001), 198 N.S.R. (2d) 381, 2001 NSCA 165. The discipline subcommittee of the Nova Scotia Barristers' Society made a finding that Mr. Pavey had engaged in professional misconduct; he challenged this finding as not supported by the evidence.

173. Section 18.1(4) of the *Federal Court Act*, *supra* note 18, states:

The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal . . .

(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.

174. (1999), 173 F.T.R. 102 (T.D.) [*Kerth*]. The Pensions Appeals Board had held that Mr. Kerth was employable, and therefore not eligible for a disability pension.

interpreted 18.1(4)(d) as permitting the use of any of the standards of review in the spectrum:

> I note that the phrases in paragraph 18.1(4)(d) are disjunctive; one asks whether the decision under review was based on a finding of fact that was made in a perverse or capricious manner or without regard for the material before the decision-maker. That is, insofar as the review of the decision by reference to their underlying facts is concerned, the statutory mandate allows for a spectrum of review from one which involves a high degree of deference (perversity or capriciousness must be shown) to one in which correctness or reasonableness may be the test (the decision-maker did not exhibit regard for the material before it).[175]

On the other hand, in *Stadnyk v. Canada (Employment and Immigration Commission)*,[176] a case involving judicial review of a decision of a Review Tribunal established under the *Canadian Human Rights Act*, the Federal Court of Appeal stated:

> With respect to the review of findings of fact, in my view it is paragraph 18.1 of the *Federal Court Act* which defines the standard of review exercisable by the Federal Court. It is a relatively narrow basis of review which only permits judicial intervention where this court concluded that the findings of fact are wrong and that they were made in a perverse or capricious manner or without regard to the material before the Tribunal. As has been pointed out by Hugessen J. in *Canadian Pasta Manufacturers Association v. Aurora Importing and Distribution et al* ...this is tantamount to a "patently unreasonable" test espoused elsewhere as a standard of review in matters of fact.[177]

In *Lai v. Canada (A.G.)*[178] the Court also referred to the wording of the *Federal Court Act* on matters of fact. Although the commentary was brief, the Federal Court Trial Division here seemed to take the same approach as in *Stadnyk*, stating that for a court to intervene on "a pure question of fact ... the determination must be found to be patently unreasonable ... or made

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175. *Ibid.* at para. 19.

176. (2000), 257 N.R. 385 (F.C.A.) [*Stadnyk*]. This case involved an allegation of gender discrimination in the context of a job interview. Both the Human Rights Tribunal and the Review Tribunal dismissed the complaint. This was challenged by way of judicial review.

177. *Ibid.* at para. 22.

178. (2001), 208 F.T.R. 67, 2001 FCT 740 [*Lai*]. In this case, the applicant challenged, by way of judicial review, a decision of the Chair of the Public Service Commission Appeal Board, dismissing an appeal regarding appointments made from a closed competition.

in a perverse or capricious manner without regard to the material."[179] In *Stelco v. British Steel Canada*,[180] a case involving judicial review of a decision of the Canadian International Trade Tribunal regarding dumping, the Court stated with regard to s. 18.1(4)(d):

> It does not seem to us to advance matters appreciably to try to determine whether this equates to a "patently unreasonable" or an "unreasonableness *simpliciter*" standard. Indeed, there is a danger that the inquiry of that kind may serve to divert the Court's attention from a careful consideration of the words in which Parliament has formulated the standard of review for the factual findings in which federal administrative tribunals base their decisions.
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> However, this is not to say that the words of paragraph 18.1(4)(d) are self-applying. Far from it. It is certainly useful to approach the question of giving more specific content to the statutory language by considering the common law standard for reviewing findings of fact and the factors that are included in a pragmatic or functional analysis.[181]

e. *Application of Pragmatic and Functional Analysis to Discretion*

Pushpanathan restated the pragmatic and functional analysis for the standard of review for questions of law and of fact under statutes with and statutes without a privative clause. In *Baker,* that framework for analysis was applied to the review of discretionary decision-making. That case involved an application for judicial review of the decision of the Minister of Immigration and Citizenship not to exercise the discretion provided under section 114(2) of the *Immigration Act* to allow Baker, an overstayer, to apply for landed immigrant status from within Canada. One significant ground for her application was that she had four young, Canadian-born children. The Supreme Court held that a failure to consider the interests of Ms. Baker's children meant that the Minister's discretion had not been exercised reasonably. L'Heureux-Dubé J., writing for a unanimous court, held that the pragmatic and functional analysis from *Pushpanathan* could also be applied to discretion:

> In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this [pragmatic and func-

179. *Ibid.* at para. 38.
180. [2000] 3 F.C. 282, 20 Admin. L.R. (3d) 159 (C.A.).
181. *Ibid.* at paras. 15-16.

> tional analysis] framework, especially given the difficulty of making rigid classifications between discretionary and non-discretionary decisions ... The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament.
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> ...
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> The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which the decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.[182]

Weighing the various elements of the pragmatic and functional analysis, L'Heureux-Dubé J. concluded that the decision of the Minister should be judged against a reasonableness *simpliciter* standard.[183]

Before *Baker*, exercises of statutory discretion were typically reviewed on grounds such as whether the administrator had fettered its discretion, used its powers for improper purposes, or considered irrelevant considerations (or failed to consider relevant ones). According to this approach, the

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182. *Baker*, *supra* note 5 at paras. 55–56.

183. In the view of L'Heureux-Dubé J., factors which militated against deference included the absence of a privative clause, and the fact that the issue involved related "directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them." (*ibid.* at para. 60) On the other hand, several factors suggested that some degree of deference was called for, including the fact that "[t]he Minister has some expertise relative to the courts in immigration maters, particularly with respect to when exemptions should be given from the requirements that normally apply;" (*ibid.* at para. 59) that the decision involved "considerable choice on the part of the Minister" (*ibid.* at para. 60) and involved the application of "relatively 'open-textured' legal principles," (*ibid.* at para. 60) and that the nature of the issue was "fact-specific." (*ibid.* at para. 62) The Court held that the decision failed the reasonableness test because the notes of the immigration officer, on which the decision was based, showed the officer to have been "completely dismissive of the interests of Ms. Baker's children." (*ibid.* at para. 65) L'Heureux-Dubé J. went on to state:

> I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. . . . The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness. (*ibid.* at para. 65)

court was reviewing only the manner in which discretion was exercised, rather than the substance of the decision itself. Review for these discreet categories of error tended to be deferential, even if this was not completely predicable. As with the pre-*Pushpanathan* approach to questions of fact, the relationship between deference to exercises of discretion and the deference mandated by patent unreasonableness remained unexplored, unappreciated and unclear. The significance of the shift signalled in *Baker* should not be underestimated (although it may be that the Supreme Court has already, in *Suresh*, retreated somewhat from its position in *Baker*).[184] After *Baker*, with discretion reviewed under the pragmatic and functional analysis, it became clear that courts were no longer restricted to considering how the decision-maker went about exercising the discretion; the outcome of that exercise was now open to review. Furthermore, a court could be fairly interventionist. In *Baker* itself, reasonableness *simpliciter* was

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184. *Suresh, supra* note 3, involved a determination by the Minister of Citizenship and Immigration that Mr. Suresh constituted a danger to Canadian security and should be deported to Sri Lanka. Mr. Suresh applied for judicial review, arguing that the Minister's decision was unreasonable, that the decision-making process was flawed and that the relevant provisions of the *Immigration Act* violated section 7 of the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada dismissed the constitutional argument, but ordered a new hearing on procedural grounds. Regarding review of the Minister's exercise of discretion, the Supreme Court stated at paras. 29, 35, 37:

> We agree ... that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.
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> ...
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> The Court's recent decision in *Baker, supra*, did not depart from this view. Rather, it confirmed that the pragmatic and functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable, and that there may be special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions ...
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> ...
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> The passages in *Baker* referring to the "weight" of particular factors ... must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh limitations and/or patently relevant factors.

See also *United States v. Kwok*, [2001] 1 S.C.R. 532, 197 D.L.R. (4th) 1, 2001 SCC 18. The Minister of Justice had ordered that the appellant be surrendered to the United States to stand trial on drug trafficking charges. One of the matters to be considered by the Minister was whether the appellant could be effectively prosecuted in Canada. The Supreme Court of Canada stated, "[t]he Minister's decision with respect to the appropriateness of domestic prosecution attracts a high degree of deference." See also the comments on the more recent restatement of the pragmatic and functional analysis found in *Dr. Q., supra* note 16.

applied, and there is nothing in the decision that precludes the possibility of the correctness standard being used in the context of discretion. One of the lower court decisions we reviewed noted expressly that the newer approach opens the door for more rigorous review of discretionary decisions. Thus, in *Awuah v. Canada (Minister of Citizenship and Immigration)*,[185] a case involving judicial review of a Ministerial decision under the *Immigration Act*, the Court stated that *Baker* "overturned the traditional deferential approach given to discretionary decisions."[186]

The application of the pragmatic and functional analysis in this context has been widely accepted by the lower courts, although there were still a few examples of the older approach. For instance, in *Friends of Cypress Provincial Park Society v. British Columbia (Minister of Environment, Lands and Parks)*,[187] the Court applied the pre-*Baker* approach in reviewing a Minister's discretionary decision to permit expansion of a recreation facility. The Court stated that its function was to determine whether the Minister had followed a lawful process, not whether the court would have reached the same decision. In *Blue Line Car Leasing Ltd. v. Halifax International Airport*,[188] the Court appeared to merge the older approach with that in *Baker*, in reviewing a discretionary decision of an airport manager. The Court stated: "I am not persuaded that the manager's decision ... was for an improper purpose or an irrelevant consideration. It was not patently unreasonable."[189] Similarly, in *Jada Fishing v. Canada (Minister of Fisheries and Oceans)*,[190] the Court held that the reasonableness *simpliciter* standard applied to a reconsideration of the Pacific Region Licence Appeal Board regarding the discretionary allocation of fishing quotas. However, the Court's approach for determining the reasonableness of the decision calls to mind the pre-*Baker* approach to discretion. The Court asked whether the Board had relied on relevant information in reaching its decision.[191]

In most cases involving discretion, however, lower courts seemed fairly

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185. [1999] F.C.J. No. 1873 (T.D.).
186. *Ibid.* at para. 3.
187. (2000), 33 C.E.L.R. (N.S.) 276, 2000 BCSC 466 [*Cypress Park*].
188. 2001 FCT 296 [*Blue Line*].
189. *Ibid.* at para. 27. Another reading of the Court's comments would be to see them not as reflecting the older approach to discretion, but differentiating between those aspects of the older tests that were by *Baker* subsumed into the pragmatic and functional analysis and those aspects which may still stand separately. See discussion below.
190. (2001), 198 F.T.R. 161 (T.D.), aff'd (2002) 288 N.R. 237, 41 Admin. L.R. (3d) 281, 2002 FCA 103. Leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 209.
191. See also *Ahamad v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 109, 184 F.T.R. 283 (T.D.).

comfortable with the direction taken in *Baker*.[192] Application of the pragmatic and functional analysis led to varying results, depending on the various factors involved. In very few cases involving discretion did the pragmatic functional analysis lead to the application of the correctness standard.[193] The bulk of the cases involving discretion measured the decision of the administrative decision maker against either the not patently unreasonable or the not unreasonable standard. In terms of numbers, significantly more cases applied reasonableness *simpliciter*; however quite a few of these involved immigration decisions.[194] When the non-*Immigration Act* cases were compared, there was a fairly even division between those where the discretionary decision was held to the standard of patent unreasonableness and those where the standard of reasonableness *simpliciter* was applied.[195]

There may still be some aspects of the judicial review of discretion that do not fit within the pragmatic and functional analysis. One of the questions left unanswered after *Baker* was whether the pragmatic and functional analysis had completely eclipsed previous approaches to the review of discretionary decisions, with Mullan suggesting that:

> On one side of the fence, it is clear that challenges based on bad faith or acting under dictation will not be affected. On the other, taking account

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192. See *e.g. A.B.Z., supra* note 22; *Abdul-Karim v. Canada (Minister of Citizenship and Immigration)* (2000), 191. F.T.R. 115, 9 Imm. L.R. (3d) 96 (T.D.) [*Abdul-Karim*].

193. In *3430901 Canada, supra* note 19, the trial judge applied the standard of correctness to a decision involving discretion on appeal; however, the Federal Court of Appeal separated the question of whether certain information was exempt under the *Access to Information Act*, R.S.C. 1985, c. A-1, into two questions: an issue of law regarding the interpretation of the relevant section and an issue involving the Minister's discretion as to whether or not to disclose the particular information being sought relating to licensing processes. On the Minister's refusal to disclose information, the Federal Court of Appeal applied the reasonableness *simpliciter* standard. In *East Luther Grand Valley (Township of) v. Ontario (Minister of Environment and Energy)* (2000), 48 O.R. (3d) 247, 33 C.E.L.R. (N.S.) 23 (Sup. Ct. J.) the Court interpreted *Baker* as holding that the correctness standard cannot be applied to discretionary decisions (*ibid.* at para. 32).

194. See *e.g. A.B.Z., supra* note 22; *Abdul-Karim, supra* note 192; *Bhardwaj v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 170 (F.C.T.D.); *Gupta v. Canada (Minister of Citizenship and Immigration)* (2000), 186 F.T.R. 232, 24 Admin. L.R. (3d) 127 (T.D.); *Legault v. Canada (Minister of Citizenship and Immigration)* [2001] 3 F.C. 277, 203 D.L.R. (4th) 450, 2001 FCT 315 (T.D.).

195. For instance, reasonableness was applied in *Metro Toronto Police Services Board v. Ontario (Municipal Employees Retirement Board* (1999), 45 O.R. (3d) 622, 178 D.L.R. (4th) 440 (C.A.) and *University of Saskatchewan v. Canada (Commissioner of the Plant Breeders Rights Office)*, [2001] 3 F.C. 247, 11 C.P.R. (4th) 348, 2001 FCT 134, while not patently unreasonable was applied in *BC Landscape, supra* note 44; *Cypress Park, infra* note 214; and *Heisler v. Saskatchewan (Minister of Environment and Resource Management)*, (1999), 186 Sask. R. 201, 16 Admin. L.R. (3d) 215, 1999 SKQB 156.

> of irrelevant factors and failing to take account of relevant factors obviously come within its ambit. Acting for a wrongful purpose is more of a problem.[196]

The Court's approach to discretion in *Northeast Bottle Depot Ltd. v. Alberta (Beverage Container Management Board)*,[197] fits with Mullan's understanding of the scope of the pragmatic and functional analysis. In this case, a decision of the Beverage Container Management Board to grant a permit for the operation of a new bottle recycling depot was challenged on several grounds, including impermissible sub-delegation and improper fettering of discretion. The Court dealt separately with these two challenges to the Board's decision (concluding that administrative functions such as issuing permits fell within an accepted exception to the non-delegation rule, and that the complaint of fettering was not supported by the facts) before moving on to the pragmatic and functional analysis and concluding that the proper standard of review was patently unreasonable. Similarly, in *Moresby Explorers Ltd. v. Canada (A.G.)*,[198] the Federal Court Trial Division dealt first with the allegation that the Superintendent of Parks had improperly fettered his discretion and then proceeded to consider the appropriate standard against which to review the Superintendent's exercise of discretion. The Superintendent's decision to attach certain conditions to a licence issued to the applicants was held to be reviewable against the reasonableness standard. The exercise of discretion was seen as primarily fact based, requiring the balancing of various issues, and engaging the Superintendent's expertise. Nevertheless, the Court stated "there is not so much difference in expertise that the Court should limit its intervention to cases of patent unreasonableness."[199] In *Heisler v. Saskatchewan (Minister of Environment and Resource Management)*,[200] also, issues of fettering and improper delegation were dealt with separately from review of other aspects of a discretionary decision of the Minister of the Environment.[201]

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196. Mullan, *Administrative Law*, *supra* note 1 at 112.
197. (2000), 269 A.R. 248, [2000] 11 W.W.R. 331, 2000 ABQB 572 [*Northeast Bottle*].
198. *Supra* note 44.
199. *Ibid.* at para. 91.
200. *Supra* note 195.
201. See also *Holland v. Canada (A.G.)* (2000), 188 F.T.R. 305 (T.D.).

3. *Applying the Standards of Review*

One of the areas that is most uncertain in the new substantive review doctrine is the exact nature of the difference between review for patent unreasonableness and review for unreasonableness *simpliciter*. In *Southam*, Iacobucci J. explained the difference as follows:

> I conclude that the third standard [of review] 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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> 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 ... 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 ... But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.[202]

More recently, in *Law Society of New Brunswick v. Ryan*, Iacobucci J., again writing for the Court, rejected the idea that the reasonableness standard was a "floating one," sometimes closer to correctness and sometimes closer to patent unreasonleness, depending on the circumstances of each case for which it was found to be the appropriate standard of review.[203] He further said that the difference between review for unreasonableness and

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202. *Southam*, *supra* note 8 at paras. 56-57.
203. *Ryan*, *supra* note 8.

correctness was that in the latter situation, the reviewing court must undertake its own reasoning process to determine the result that it considers correct. In contrast, in reviewing for unreasonableness, the court must never ask if the challenged decision was correct, but only if the reasons given for the decision can, when taken as a whole and subjected to a somewhat probing analysis, support the decision. He contrasted review for unreasonableness with review for patent unreasonableness by again citing that the difference lies in the immediacy or obviousness of the defect. In addition, he also contrasted the two by saying that whereas a defect that makes a decision patently unreasonable will be simple and easy to explain, leaving no real doubt that the decision is defective, explaining why a decision is unreasonable, "may require detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead the tribunal to reach the decision it did."[204] In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, McLachlin C.J. described review for correctness as "exacting review," review for unreasonableness as "significant searching and testing," and review for patent unreasonableness as leaving the issue "to the near exclusive determination of the decision-maker."[205]

In contrast to this almost exquisite level of doctrinal refinement and precision, we found that the lower courts frequently apply the various standards of review with little or no commentary on their understanding of what the different standards of review mean. Even where there was some discussion of this, it often took a fairly standardized form. Thus, in order to describe the content of reasonableness *simpliciter*, courts turned routinely to the language of Iacobucci J. in *Southam*, to the effect that "[a]n unreasonable decision is one that, in the main is not supported by any reasons that can stand up to a somewhat probing examination."[206] They would, however, rarely say anything as to what they understood this language to mean. Patently unreasonable was often described as a "strict standard"[207] or a "severe test,"[208] or courts quoted from Cory J. in *P.S.A.C.* to say that a decision which is "not clearly irrational"[209] will withstand a patent unreasonableness review. Again, Iacobucci J. in *Southam* was frequently quoted to explain the difference between an unreasonable decision and a

204. *Ibid.* at para. 53.
205. *Supra* note 16 at para. 22.
206. *Supra* note 8 at 776.
207. See *e.g. Apotex, supra* note 22 at para. 86.
208. *Daycon, supra* note 161 at para. 23.
209. *Supra* note 8 at 963.

patently unreasonable one, which is said to lie in the "immediacy or obviousness of the defect."[210] As a result, review under the reasonableness standard "must be somewhat more searching"[211] than if the review were one for patent unreasonableness. Very rarely did the courts attempt to state their own understanding of the difference between unreasonableness and patent unreasonableness review.

Indeed, we found that it was not uncommon for courts to use the language of reasonableness when applying the test of patent unreasonableness, suggesting that the court could have accomplished the same level of scrutiny through a reasonableness analysis. For instance, in *Alberta Union of Provincial Employees*, the Court held that the standard of patent unreasonableness applied to the decision of an arbitrator in a labour matter. In upholding the decision, the court stated that it was "entirely reasonable"[212] for the Board to consider the issues that it did. In *A.B.Z.*, the Court stated at one point that the decision of the Immigration and Refugee Board was "certainly not patently unreasonable"[213] and at another that the Board's conclusions were "reasonable."[214] Similarly, in *Alberta v. Alberta (Labour Relations Board)*, the Court, in applying the patent unreaonsonableness standard, stated that the Board's analysis was "hardly irrational"[215] and later, that the Board gave "thoughtful and careful reasons for its conclusions on a complex and difficult matter."[216] This language suggests that the Court could have accomplished the same level of scrutiny while using the reasonableness *simpliciter* standard. This was made explicit in *Hao v. Canada (Minister of Citizenship and Immigration)*, where a judge of the Federal Court Trial Division said, "I note that I have never been convinced that 'patently unreasonable' differs in a significant way from 'unreasonable.'"[217]

While some blurring between patent unreasonableness and unreasonableness was common, several courts also suggested that, in certain contexts, there may be room for deference even within the correctness

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210. In *Southam*, *supra* note 8 at para. 57, Iacobucci J. states :
> 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.

211. See *e.g. Alberta (Minister of Municipal Affairs)*, *supra* note 24 at para. 39.
212. *Supra* note 85 at para. 25.
213. *Supra* note 22 at para. 9.
214. *Ibid.* at para. 11.
215. *Supra* note 144 at para. 90.
216. *Ibid.* at para. 95.
217. (2000), 184 F.T.R. 246 (T.D.) at para. 9.

standard.[218] The decision in *Gallant v. New Brunswick (Workplace Health and Safety Compensation Commission)*[219] involved an appeal from the Appeals Panel of the Workplace Heath Safety and Compensation Commission of New Brunswick. The appeal turned on the interpretation to be given the definition of "average net earnings" in the *Workers' Compensation Act*.[220] Relying on the fact that this was an appeal on a question of law, the majority of the Court of Appeal held that correctness was the appropriate standard of review.[221] In reaching this conclusion, the majority also stated that "[c]urial deference need not translate into the application of a standard of judicial review that is less probing than 'correctness.'"[222] The possibility of deference within the correctness standard was raised and discussed more fully in *Northwood v. British Columbia (Forest Practices Board)*,[223] which involved judicial review of a recommendation made in a Compliance Report of the Forest Practices Board. Lambert J.A. (MacKenzie J.A. concurring) stated:

> ... the standard called "correctness" cannot be a rigid one. Reasons for judgment of the judges of this Court are described as "opinions," in the *Court of Appeal Act* ... Indeed judges often feel that they are not right or wrong, correct or incorrect, in a particular case. Rather, they form opinions. Almost all arguments about statutory interpretation in this Court, and indeed arguments about many other questions, consist of reasoned thinking supporting one view or the other. In the end, the judges tend not to say that one argument is correct and the other incorrect. They say that they adopt, accept or prefer one argument to the other and give their opinions accordingly ... If an argument is made that deference on the interpretation of the statute should be given to those who are experts in its functioning, that does not mean that the standard of "correctness" is being abandoned. What it means is that deference is being given through acceptance of one of the arguments ... In such a situation, neither of the competing arguments need be categorized as "wrong", but only one of them is preferred. That one, but not the other ones, then meet the standard of "correctness".[224]

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218. This approach may not be limited to the lower courts. See *supra* note 8 and accompanying text.
219. (2000), 228 N.B.R. (2d) 98, 191 D.L.R. (4th) 712 [*Gallant*].
220. R.S.N.B. 1973, c. W-13, s. 38.1(1).
221. *Gallant*, *supra* note 219 at para. 45. Rice J.A., while concurring that the Appeal Panel's interpretation had been correct disagreed as to the standard of review, holding that when the tribunal's "role and expertise in labour relations" were also taken into account, the reasonableness standard ought to be applied.
222. *Ibid.* at para. 25.
223. *Northwood*, *supra* note 103.
224. *Ibid.* at para. 36.

Lambert J.A. then listed reasons why,

> ... even on a "correctness" standard of review very considerable deference ought to be given to the Forest Practices Board in choosing which of the two "reasonable" arguments is to be preferred.[225]

Lambert J.A. later stated that, "[a]pplying the standard of 'correctness', coupled with an appropriate degree of deference to the assessment by the Forest Practices Board of its own functions in the context of the objects of the Forest Practices Code,"[226] the Board's decision was to be upheld. Hall J.A. concurred in the outcome but stated "I do not find it necessary to comment on the matters raised by my colleague"[227] in the paragraphs dealing with deference and correctness.

The suggestion that a degree of deference may be incorporated into the correctness standard was also found in *Canada (A.G.) v. Public Service Alliance of Canada*.[228] This case involved judicial review of a decision of the Canadian Human Rights Tribunal regarding a pay equity complaint. Given *Canada (A.G.) v. Mossop*, in which the Supreme Court applied a correctness standard to the Tribunal's determination of legal issues, the Court felt that it could not re-determine the appropriate standard of review; however, it found that the section of the *Canadian Human Rights Act*[229] dealing with pay equity, "was enacted at the level of a principle, and requires for its implementation mastery of a range of technical knowledge of considerable sophistication, and a thorough understanding of the given workplace."[230] Given the lengthy hearing before the Tribunal, where some of the presentations "resembled educational seminars," the court concluded that Tribunal members were likely better placed than a judge to understand "the problems of operationalizing the principle of pay equity."[231]

These cases raise the question of whether either the reasoning or the result would have been different had the Court simply applied the reasonableness standard. This sense from at least some of the cases that the boundaries between the different levels of scrutiny are rather permeable, when coupled with our observation that the initial decision is upheld about half the time even where correctness is identified as the approropriate stan-

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225. *Ibid.* at para. 38.
226. *Ibid.* at para. 42.
227. *Ibid.* at para. 46.
228. (1999), [2000] 1 F.C. 146, 180 D.L.R. (4th) 95 (T.D.) [*Public Service Alliance*].
229. R.S.C. 1985, c. H-6.
230. *Public Service Alliance*, *supra* note 228 at para. 80.
231. *Ibid.* at para. 86.

dard, suggests that, despite the importance ascribed by the Supreme Court to determining the appropriate standard of review, this determination does not always affect the outcome.[232] This possibility was certainly implicit in cases where the court did not identify the standard of review at all, instead simply stating how the board or tribunal should have decided, and was explicit in those cases where the court did select a standard of review, but noted that the outcome would be the same even if another standard were applied.

In reading the cases, we also paid attention to signs that the selection of the reasonableness *simpliciter* or patent unreasonableness standard signaled that the court saw the issue under review as one which might lend itself to a number of different resolutions, at least several of which might be equally "correct." This question has appeared and reappeared in the jurisprudence and literature at least since *C.U.P.E.*, where Dickson J. suggested that one of the indicators for deference would be legislation which could be interpreted in a number of ways, none of which was patently unreasonable. A number of lower court decisions suggested a perspective consistent with Dickson J.'s approach in *C.U.P.E.* The recognition that there might be a range of options for an administrative decision-maker to choose from was perhaps most evident in cases involving the exercise of discretion.[233] For instance, in *Philippines (Republic) v. Pacificador*,[234] a case involving a decision of the Minister of Justice to deport an individual to the Philippines for trial on various charges, the decision was challenged on several grounds including that the Minister had not taken sufficient account of the dangers of torture and an unfair trial if Mr. Pacificador were deported. The Court held that the reasonableness standard applied to this portion of the decision, and then held that there was nothing "illogical or unreasonable with the Minister's analysis"[235] of the situation in the Philippines. The Court acknowledged that it might not be in the best position to judge the issues before the Minister and for this reason, deference was appropriate. This stance suggests that

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232. We certainly do not argue that the selection of a standard of review is completely irrelevant; there is an increased pattern of deference as one moves from correctness to reasonableness *simpliciter* to patent unreasonableness. Yet for the reasons given above, we question whether the determination of the standard of review actually carries the weight that would seem to be implied by the amount of doctrine developed around this determination.

233. See *e.g. Lethbridge*, *supra* note 120; *Devlin v. College of Physicians and Surgeons of British Columbia*, 2000 BCSC 1271, aff'd (2002), 171 B.C.A.C. 251, 2002 BCCA 419.

234. (1999), 60 C.R.R. (2d) 126 (Ont. Gen. Div.), aff'd [1999] O.J. No. 3866 (Sup. Ct. J.), rev'd (sub. nom. *Canada (Minister of Justice) v. Pacificador*) (2002), 60 O.R. (3d) 685, 216 D.L.R. (4th) 47 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 390.

235. *Ibid.* at para. 63.

the Court did not see itself as measuring the Minister's decision against the correct answer as chosen by the court. A number of other cases not involving discretion reflected a similar approach.[236]

In other cases, it seemed clear that the court did perceive there to be only one correct answer, despite the application of the patent unreasonableness standard. Sometimes, however, it may have been the nature of the issue in question which led a court to conclude that there was only one correct answer, even when the appropriate standard of review was identified as patent unreasonableness. In *Brown v. Workers Compensation Board*,[237] the Court reviewed a decision of the Workers' Compensation Board, which had refused to include a physiatrist on a list of specialists from which a medical review panel would be chosen to decide whether an applicant with a muscular-skeletal disability was entitled to benefits. The Court stated that the applicable standard of review was patent unreasonableness, yet in overturning the decision, described the issue as "quite straightforward," given that the applicant had a muscular-skeletal disability and that this "is the very thing which a physiatrist diagnoses and treats."[238] In this case, however, the Board really only had two choices; it could agree to include this particular type of medical professional on the specialist list, or it could refuse to do so. If refusing would, in this context, be patently unreasonable, then despite the fact that the most deferential level of scrutiny was chosen, really there was only one decision which would withstand that scrutiny.

This discussion also calls to mind Sopinka J.'s suggestion in *Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*,[239] that even where patent unreasonableness is the appropri-

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236. See *e.g. Conkova v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 300 (T.D.), in which an applicant for refugee status claimed that she was a Roma and therefore subjected to persecution. The Convention Refugee Determination Division panel hearing the claim found that Ms. Conkova was not a Roma. On judicial review, the Federal Court Trial Division stated "[t]he view which the CRDD took of the evidence was one that could reasonably be taken, just as the opposing view could also reasonably be taken. The evidence, as is so often the case, is ambiguous and equivocal . . . So long as its [the CCRD's] conclusion is not one which is wrong on its face, it is not patently unreasonable." (*ibid.* at para. 5) See also *Huron (County) Huronview Home for the Aged v. Service Employees' Union, Local 210* 50 O.R. (3d) 766, 27 Admin. L.R. (3d) 309 (C.A.), leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 646, involving judicial review of the decision of an arbitrator under a collective agreement. The employer laid off employees because of cuts in funding; the arbitrator interpreted the clause in the collective agreement giving the employer the authority to determine the number of employees needed at any time as referring only to layoffs caused by lack of work. On judicial review, the Court of Appeal stated, "[i]n my view, the arbitrator's interpretation was one that the colective agreement could reasonably and logically bear, and it follows that it was not open to the Divisional Court to interfere." (*ibid.* at para. 22)

237. *Supra* note 44.

238. *Ibid.* at para. 22.

239. [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437 [*Paccar*].

ate standard of review, a court should first ask whether the decision is correct, and only if the answer is no, need the court go on to consider whether the decision should nonetheless be allowed to stand as not patently unreasonable. Although Sopinka J.'s approach in *Pacccar* has been criticized,[240] and has as well been rejected clearly by the Supreme Court, related thinking can still be seen in a number of the recent lower court decisions on standard of review. While none of these cases stated that a decision was wrong but should be upheld anyway through the application of the reasonableness *simpliciter* or patent unreasonableness standards, a number of cases, discussed above, did state that the decision was correct, even though the pragmatic and functional analysis had led the courts to conclude that a deferential standard of review was appropriate.[241]

Sometimes it was not clear whether the court adhered to the view of Dickson J. or of Sopinka J. on this issue. Thus in *C.B. v. Manitoba*, the Court quashed a decision of the Child Abuse Registry Review Committee to place the applicant's name on the abuse registry. The Court stated that the majority of the Committee had "erred in law in its interpretation of the term 'abuse'...such an interpretation...is, in my view, patently unreasonable."[242] On this wording, did the Court see the Committee's interpretation of "abuse" as simply too far removed from the correct interpretation, or did it recognize a range of possible interpretations that would

240. For instance, Bryden speaks of the "awkward situation that arises in the wake of a judicial decision that indicates that an administrative tribunal has erred in interpreting the provisions of a statute or collective agreement but that upholds the tribunal's decision on a basis that the tribunal's decision was not patently unreasonable." (Philip Bryden, "Inside, Outside and Around Tribunals: Administrative Practice Today" (Paper presented to the Canadian Bar Association Continuing Legal Education Programme, 1 November 1996) at 44) Bryden suggests that this awkward situation both invites judicial review and "in the eyes of the public, undermines the credibility of our system of judicial review because the courts are affirming administrative decisions that they acknowledge to be incorrect" (*ibid.* at 45). Similarly, Mullan, *Administrative Law*, *supra* note 1 at 71, suggests that Sopinka's approach in *Paccar* "conflicts with the whole notion that Dickson J. espoused in ...[C.U.P.E.] that there is no single correct answer to statutory interpretation problems" and that "it assumes the primacy of the reviewing court over the agency or tribunal in delineating the meaning of the relevant statute."

241. At least at first glance, a court labelling a decision as not only not patently unreasonable but correct may seem less problematic than a court labelling a decision as not patently unreasonable but wrong. However, the awkwardness that Bryden, *ibid.*, speaks of arises here too. If there really is a range of acceptable interpretations which would be upheld on judicial review or appeal then a court should be willing on other occasions to uphold any one of these interpretations; yet once the court has pronounced one approach to be correct, this would seem to invite appeals or applications for judicial review, if the administrative decision maker uses a different interpretation in a future case. And, to follow Bryden's criticism, if the later interpretation were challenged, the court would have to choose between showing less than the appropriate deference or undermining public confidence by upholding an interpretation that deviates from that one previously labelled as correct.

242. *Supra* note 126 at para. 21.

survive scrutiny on a standard of patent unreasonableness but conclude that this particular interpretation was outside the pale?

As noted above, probably the most noteworthy observation regarding how courts carry out substantive review of administrative decision-making is the level of deference shown to administrative decision-makers. In significant measure, this has as much to do with how standards of review are applied as with the choice between standards of review. In at least two-thirds of the cases we reviewed, the decision of the board or tribunal was upheld by the reviewing court. When cases involving *Immigration Act* issues (where courts tend to be more interventionist) are separated out, the administrative decision was upheld nearly three-quarters of the time. Where the standard of review was set at patently unreasonable, overwhelmingly the decision under review or on appeal was confirmed by the court, and a very significant level of deference was shown to decisions held to the reasonableness standard as well. Even where the standard of correctness was applied, the decision of the administrative decision-maker was overturned only about half the time. Most of the cases where the correctness standard of review was applied involved issues characterized by the courts as questions of law, questions of jurisdiction, or sometimes both. Where an issue was labelled jurisdictional, it was much more likely that the decision would be quashed than where it was simply labelled as a question of law.

Interestingly, there was significantly less deference shown in cases where courts did not identify any standard of review. In fact, an administrative decision was more likely to be overturned if no standard of review was specified, than if the standard was set at correctness. It also seemed that choice of standard of review was affected by the area of law involved, which presumably also reflected the courts' acceptance of certain administrative decision-makers as particularly expert in their fields. Thus, a preponderance of cases involving the review of decisions of labour relations boards are dealt with under the patent unreasonableness standard, while cases involving most other areas of law seemed more evenly spread across the various standards of review. Immigration law appears, in contrast, to be a field in which correctness is becoming the widely if not generally applied standard of review.

III. *Reflections*

We began with two rationales for wanting to know more about how (and if) Supreme Court substantive review doctrine was being implemented in a large cross-section of trial and court of appeal decisions. The first rationale, derived from the quantity and complexity of doctrinal change in substantive review law, was the need to know more about the extent to which the doctrine is being applied in lower courts and, where applied, the doctrine's usefulness. The second rationale lay in the high context-dependency that now represents the methodological core of substantive review law, and that consequently makes the operational effect of the doctrine particularly dependent on how it is understood and applied by the judge or judges who decide each individual case of substantive review. Underlying both rationales were two basic goals. The first was to understand what role the doctrine plays in how judges who are required to answer most substantive review questions conceive, analyze and think about these questions. The second was to ascertain whether the judicial policies that prevail in the making of substantive review doctrine, primarily at the Supreme Court, also prevail in the implementation of that doctrine in other courts.

What we have learned (or perhaps confirmed) is that Canada's trial courts and courts of appeal are generally deciding substantive review cases by applying the most recent and canonical decisions in the Supreme Court's corpus of substantive review jurisprudence. In general, trial judges and courts of appeal conduct substantive review by selecting a standard of review from the spectrum that has been recognized and applied by the Supreme Court in numerous cases, but especially in the three cases (*Southam*, *Pushpanathan* and *Baker*) that collectively contain much of the current law's basic doctrinal infrastructure. Further, trial judges and courts of appeal fairly consistently make these standard of review choices by acknowledging their obligation to use a pragmatic and functional analysis as they are mandated to do by these and other Supreme Court cases. A high degree of consistency is quickly observable in the language, concepts and authorities that lower courts invoke throughout the cross-section of lower court substantive review jurisprudence that we reviewed. This consistency embraced trial courts and courts of appeal in every judicial jurisdiction. It also embraced substantive review in appeal as well as judicial review proceedings, in cases involving privative clauses and cases where the statute under consideration lacked such a provision, as well as in cases concerned with questions of law, of fact, and of mixed law and fact, as well as with those concerned with the exercise of discretionary powers.

At the same time, our review of the cases revealed another pattern of

contrary import. This is the tendency of Canadian courts, especially at the trial level, to reach conclusions in substantive review cases both about the standard of review and the application of the standard with only minimal explanation or analysis as to how or why those conclusions flow from the application of general principles to the specific factual and legal context for the decision being reviewed. In a large number of cases, what might be called "the analysis" consists of little more than referencing and perhaps quoting from *Pushpanathan, Baker,* and other Supreme Court cases, as if these cases established precise legal rules that need only be stated to be applied. Very frequently, the quick conclusion that a question is or is not of jurisdictional quality, and therefore subject either to review for correctness or for patent unreasonableness, is the substitute of choice for analysis.

But the apparent desire to decide cases by applying a simple rule, a precedent, a principle or a concept, instead of by conducting a fully contextualized analysis guided by such of these as are available and relevant, is by no means limited to cases that are capable of being thought of as concerning jurisdictional questions. For example, it is even more obvious in the way that *Southam*, which applied the standard of reasonableness *simpliciter* to a question of mixed law and fact after a full pragmatic and functional analysis, is often cited as authority for a general legal principle that reasonableness is the standard of review wherever the question is one of mixed law and fact. Similarly, one of the reasons for the widespread application of the reasonableness standard of review to exercises of discretion is that *Baker* is frequently taken to have decided that reasonableness is the standard of review for discretionary action, rather than as an example of how a nuanced pragmatic and functional analysis, such as that carried out in *Baker* itself, can produce a standard of review that is appropriate for each individual review of discretionary action. Of course, this is almost certainly changed after *Suresh*, where the Supreme Court has virtually established a presumption that the standard of review for discretionary action will be patent unreasonableness.[243]

Such findings are perhaps not startling. Given our judicial traditions and the organization of our court system, we should expect to find lower courts at least using the cases that are now the authoritative pronouncements from the Supreme Court on substantive review law. Likewise, we should not be surprised to find the lower courts, and especially trial courts, applying a simplified or abbreviated version of the total doctrinal package,

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243. *Suresh, supra* note 3. Again, however, see the comments at *supra* note 16, regarding the seemingly broader language in *Dr. Q.*

solely on the basis of its relative newness and its complexity. Indeed, similar observations about how the lower courts apply Supreme Court pronouncements on substantive review have been made by Wade MacLauchlan in his excellent article on the Supreme Court's didactic role in administrative law, based on his review of a run of cases that started later (after *Baker*) and finished earlier (early 2001) than the cross-section of cases reviewed here.[244] He notes a superficial adherence by the lower courts to the direction being provided by the Supreme Court, primarily in the invocation of the language of pragmatic functionalism and in the common citation of one or more of a consistent set of leading Supreme Court cases that included *Pushpanathan* as well as *Baker*. But like us, he noticed that lower court analysis put more reliance on the form than on the substance of pragmatic functionalism. For example, he observed the absence of, "widespread evidence, especially at the trial level, that courts truly engage in a functional assessment of the interpretive capacity of administrative decision-makers."[245] He also noted that, "The analysis remains largely at the level of the application of labels, most of them related to the intention of the legislature."[246] As in our review, the most prominent of these labels in MacLauchlan's review was the tendency to determine the standard of review by differentiating between questions about and questions within jurisdiction.

Where our analysis departs somewhat from MacLauchlan's is with his conclusion that the continuing formalism of lower courts in substantive review cases largely reflects a lack of commitment to pragmatic functionalism and (or) a lack of understanding of how it is to be done. Here, we return to yet a third pattern that we see cutting across the cases. Our review shows not only that the lower courts are using language, concepts and an analytical framework that are consistent with the revolutionized doctrine, but that they are doing so to produce outcomes that cumulatively run fairly strongly in favour of curial deference and against frequent judicial intermeddling in administrative matters. For example, over roughly a four year period, the lower courts used the pragmatic and functional analysis to find unreasonableness *simpliciter* or patent unreasonableness to be the standard of review roughly twice as often as they found correctness to be the appropriate standard of review. Patent unreasonableness was even sometimes applied in appeal cases, which takes deference in that context fur-

244. MacLauchlan, *supra* note 1.
245. *Ibid.* at 292.
246. *Ibid.*

ther than has the Supreme Court. Where review for unreasonableness or for patent unreasonableness was applied, the courts left the administrative decision in place nearly five-sixths of the time. Even where review for correctness was determined to be appropriate or necessary, marginally more administrative decisions were upheld than were quashed. Indeed, several cases clearly recognized doctrinal scope for deference within correctness review and again, these courts appear to be somewhat ahead of the Supreme Court on this question. Overall, we found that courts overturned the administrative decision on substantive grounds in roughly one third of the cases, but this rate of intervention drops to between 25 and 30% when immigration and refugee case (where intervention runs closer to 40%) are excluded from the calculations. It is also significant that in labour relations cases, the historic epicenter of judicial resistance to administrative autonomy, the standard of review that is applied is almost routinely that of patent unreasonableness. In all but a few of such cases, it was applied to leave the decision of the labour relations board or collective agreement arbitrator in place.

Of course, we appreciate that the setting aside of the administrative decision in a quarter or more of the cases is not an inconsequential rate of judicial intervention. But it is a lower rate of intervention than we would have expected, given that some rate of judicial intervention is obviously not only to be expected but required by the fundamental constitutional imperatives that are served by judicial supervision of the exercise of delegated statutory authority. It also seems low given the difficulty that the courts have had historically in embracing curial deference as a fundamental principle of their relationship with the administrative state.[247]

In sum, it seems to us that the lower courts are not only talking the walk but also to some extent walking it. It is true that they often do not engage with each administrative decision in its total factual and legal context to nearly the same degree as does the Supreme Court when it is called on to apply the pragmatic and functional analysis. But they are, at least at the macro level, getting to the outcomes that are globally in accord with the policy behind pragmatic functionalism. They appear, in other words,

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247. The Supreme Court's retreat from the spirit if not the letter of *C.U.P.E., supra* note 8, during the 1980's presents a classic example of this difficulty. The cases most often mentioned in this context are still *Syndicat des employes de production du Quebec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, 55 N.R. 321; and *Bibeault, supra* note 8. For examples of the academic criticism that these cases generated, see Brian A. Langille, "Judicial Review, Judicial Revisionism and Judicial Responsibility" (1986) 17 R.G.D. 169 and J.M. Evans, "Developments in Administrative Law: The 1984-85 Term" (1986) 8 Sup. Ct. L. Rev. 1. A history of the ebb and flow of curial deference post-C.U.P.E was also provided by Wilson J. in *National Corn Growers, supra* note 8.

to be exercising considerable restraint and to be generally animated by at least an expectation if not a presumption that they will generally not intervene to quash administrative decisions on their merits.

In our view, these patterns suggest that a culture of respect for administrative autonomy and expertise may be putting down roots throughout and across the superior courts. They suggest, in other words, that lower court judges are for the most part applying the language, concepts and doctrinal framework found in cases such as *Pushpanathan*, not only because they are obviously bound to follow the law as stated by the Supreme Court, but also, because they understand and accept the policy objectives of that law. Why do we say this? The reason lies again, in the highly discretionary quality of the adjudicative responsibility given to judges under the current doctrinal framework. This means that a formula for the application of either the pragmatic and functional analysis or of the various standards of review is not capable of being doctrinally mandated for the lower courts by the Supreme Court. It seems therefore, that since lower courts are arriving at deferential outcomes considerably more often than not, they must be doing so with some appreciation that this is what is, in general terms, expected of them. To put it a little differently, if the lower courts were not at some level committed to curial deference, they would have the adjudicative latitude to depart from it much more frequently at the level of outcome than they do.

The tendency of lower courts toward performing the pragmatic and functional analysis in a rather sketchy or *pro forma* fashion may seem disconcerting in light of the centrality ascribed to this analysis by the Supreme Court. This was the view expressed by MacLauchlan after his briefer review of doctrinal application in the lower courts. We submit that the analytical brevity of the lower courts becomes less disconcerting when the review of lower courts' decision-making goes beyond their selection of standards of review to considering the outcomes that are reached through their application of standards of review. There, the concept of judicial deference appears to be clearly understood, and applied in ways that seem both to reflect the underlying purpose of judicial oversight of administrative decision-makers and to provide a sense of "rough justice" in terms of where the court intervenes and where it does not.

Our suggestion is that there may be other reasons for the missing analysis behind substantive review outcomes in the lower courts than lack of judicial commitment to deference and functionalism, or lack of an understanding of what is involved in being deferential and functional. The reason may instead be that lower court judges do not always find fulsome pragmatic and functional analysis to be useful or necessary in reaching outcomes that are consistent with the commitment to both deference and func-

tionalism that they in fact do share with the Justices of the Supreme Court. In addition, it may be that such an analysis is not always feasible, either because of a lack of the necessary information, as MacLauchlan notes, or because of the press of other judicial business, especially at the trial court level.[248]

Our exposure to pragmatic functionalism in action convinces us that an over-all picture of how courts interact with administrative decision-makers can be gained only by looking at outcomes as well as at the processes through which those outcomes are reached, such as standard of review determinations. This relates to the skepticism that we expressed in our introduction regarding the usefulness of the current approach to substantive review of administrative decision-making. In particular, we approached our research with considerable doubt about whether it is necessary or even useful to have a spectrum of at least three standards of review, any one of which could (at least in theory) be applied to any decision under review, whether by an application for judicial review or a statutory appeal. This is not to deny that there is continued value in having courts reflect explicitly on how much deference should be shown to a particular decision; if the immigration and refugee cases that we reviewed provide any guide, it does appear that the absence of any attempt at articulating a standard of review tends to lead to greater judicial intervention. However, it may be possible that a somewhat simplified doctrine might still achieve the salutary effect of restraining judges from simply re-deciding whatever comes before them on review or appeal whenever that is what they want to do. The current framework seems to dictate that a significant amount of time and effort go into selecting the appropriate standard of review; yet, it is somewhat unusual to find a thorough pragmatic and functional analysis. In response, one could simply berate lower court judges for continuing to "get it wrong" or one might consider whether there is a message here regarding the undue complexity of the current analysis. Arguably, the fact that in approximately two-thirds of the cases, judges chose one of the two deferential standards and then, very frequently, proceeded to uphold the decision being challenged suggests that it might be possible, at a minimum, to collapse the standards of reasonableness and of patent unreason-

248. See Laverne A. Jacobs & Thomas S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002) 81 Can. Bar Rev. 616, where it is argued that the question of tribunal standing should itself be answered pragmatically and functionally, rather than on the basis of formalist distinctions between jurisdictional and intra-jurisdictional questions, and particularly, with reference to tribunal capacity to provide information relevant and helpful to the larger pragmatic and functional analysis regarding selection and application of the standard of review.

ableness into one comprehensive standard of deferential review.[249]

We admit to some trepidation in making this suggestion. Our study of pragmatic functionalism in operation suggests that there is currently considerable alignment between the pattern of outcomes being produced and the objectives of the law, as articulated in Supreme Court decisions. Specifically, the stability and relative predictability that has been achieved in particular administrative fields, such as labour law, should not be lightly jeopardized. Nevertheless, it seems to us that a more generalized reliance on review for simple unreasonableness might allow and encourage judges to spend more time thinking about what is actually reasonable in particular contexts, and why, rather than grappling with attempts to explain why they have chosen one of the deferential standards over the other, or what the difference between the two actually is. Moreover, based on what we see in the lower court decisions, we believe that such a change presents little risk of an increase in inappropriate interventionism. Given that administrative decisions are upheld half the time even when the correctness standard is chosen and that at least a few courts are starting to explore the possibility of locating some degree of deference within correctness itself, it may even be worthwhile to consider whether it is possible to move to a single standard of review — contextualized reasonableness — or at least to ask what the draw-backs of such an approach might be. We have just begun to ask ourselves the questions that such a development would raise, particularly relative to such issues as the implications for and from section 96 of the *Constitution Act, 1867*,[250] for the interpretation and application of privative clauses, the judicial review of the decisions of human rights adjudicators, and so on. In this regard, the most that this article does is to provide modest empirical and pragmatic support and pragmatic considerations for a doctrinal change that has been strongly argued for on theoretical

249. The very recent decisions of the Supreme Court of Canada have reaffirmed the Court's commitment to a spectrum of standards of review that includes three distinct standards. Also, the Court has served notice that, contrary to some comments in earlier decisions, it does not foresee the recognition of additional standards of review to the three already recognized. Further, the Court has stated in very strong terms that reasonableness *simpliciter* is a fixed standard of review, not one that slides along the spectrum, sometimes being truly between correctness and patent unreasonableness and sometimes being closer to one than the other (see *Ryan, supra* note 8). On the other hand, during our final edits of this paper, the Court decided *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, 2003 SCC 63, in which Lebel J. (Deschamps J. concurring) contemplates the possible future merger of review for unreasonableness and review for patent unreasonableness in a concurring judgment (see *ibid.* at paras. 120-34). Many of the considerations that are said to point in this direction are consistent with the observations that are drawn in this paper from the experience of the lower courts.

250. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

grounds.[251] Our study suggests that Canadian judges have, in significant degree, internalized the respect for the distinctive expertise of administrative decision-makers that is such a fundamental part of the doctrinal change that has taken place over the past quarter century. It is therefore questionable whether their continuing commitment to curial deference depends upon the formal existence of a spectrum of standards of review that reminds them that some cases are farther beyond their realm of expertise than are others. Meanwhile, there are considerable gains to be achieved in the potential for increased transparency in substantive review adjudication that may come from greater judicial attention to the differentiation of reasonable administrative interpretations and findings from unreasonable ones.

At the same time, we appreciate that deference is not always the appropriate judicial posture and that deference is not somehow intrinsically superior to intervention in all circumstances. The legal framework for substantive review has evolved beyond the point where its overriding goal was to substitute a culture of deference for a culture of intervention. Now, the goal is to differentiate between the cases that call for intervention and the cases that call for deference. The underlying premise of a spectrum that always extends from correctness to patent unreasonableness through unreasonableness is that the law is as much concerned with ensuring judicial intervention where that is appropriate as it with counselling restraint in many more situations. We would suggest however, that against the background of the large literature that has been dedicated to calls for greater judicial recognition of administrative autonomy, the true concern with a generally applicable standard of reasonableness must surely be that it would undermine deference, not that it would prevent courts from intervening where they currently do so under the correctness standard. In other words, the concern with a generally applicable standard of reasonableness must be the loss of review for patent unreasonableness, not the loss of review for correctness. Our review of lower court decision-making suggests that this concern, if once valid, may be less valid now. Trial courts and courts of appeal are broadly deferential in their approach to the review of administrative decisions. Our impression from the cases is that this is not because the distinction between unreasonableness and patent unreasonableness reminds them to keep their interventionist urges under control. Rather, in our view, it is because Canadian courts have by and large accepted the fundamental legitimacy of the legislative decision to delegate decision-making authority across many fields of social and economic life to tribu-

251. Dyzenhaus & Fox-Decent, *supra* note 3.

nals and other administrative agencies. Conversely, our review suggests that there should be little concern about the courts losing the capacity (or the willingness) to intervene in cases where they currently intervene under the correctness standard. In significant measure, cases that are now assessed for correctness *de facto* are already decided on the basis of an assessment of reasonableness. Often, this is an unavoidable consequence of the open-ended nature of the questions of law that come to administrators for decision and to courts for review.

We have one further and alternative suggestion for doctrinal evolution that may, at first glance, appear contradictory. It is that consideration be given to building on the foundation that *Pushpanathan* established for either abandoning or constraining the jurisdictional principle as the basis for judicial review. On this, our analysis of lower court cases has led us to the same conclusion as MacLauchlan. It strongly indicates that many (perhaps most) Canadian judges still conceive of the differentiation between jurisdictional and non-jurisdictional questions as the fundamental issue in substantive review cases involving legislation with a privative clause. One of the manifestations of this is the general tendency across the cases to give the presence of a privative clause prevailing weight under the pragmatic and functional analysis, in virtually all circumstances. The result is that such clauses almost always reduce the standard of review spectrum to the options of correctness and of patent unreasonableness. We therefore found very little exploration within the lower court cases of the implications of Bastarache J.'s openness in *Pushpanathan* to the outweighing of a privative clause by other variables in the analysis.

This means that Canadian judges are only exceptionally substituting review for unreasonableness for review for patent unreasonableness for questions that arise under a privative clause. For the most part, the lower courts at least do not appear to be even considering the possibility, and this may be a reflection of the fact that the Supreme Court itself has not built upon the comments of Mr. Justice Bastarache. This may all come as a relief to the drafters of legislation who are instructed, in the face of the changed terrain of judicial review, to protect administrative autonomy through legislative means. The continuing security of privative clauses is significant, given our finding that there is more judicial intervention into administrative decision-making under reasonableness than under patent unreasonableness. But just as the courts are not substituting reasonableness for patent unreasonableness in cases involving a privative clause, so are they not substituting unreasonableness for correctness. Moreover, it should be recalled here that in our cases, the courts were more likely to overturn decisions that they reviewed for correctness when they characterized the decision as not only depending on a legal question but on a legal

question that went to jurisdiction. In addition, the cases showed a significant tendency to associate legal questions with jurisdiction, a tendency that recent Supreme Court statements on what types of questions go with which standards of review may be accentuating. This tendency is arguably evident in *Southam,*[252] and *Pushpanathan*[253] themselves, as well as in later cases such as *Mattel*[254] and *Dr. Q.*,[255] which together illustrate an apparently growing tendency to equate what were referred to as questions of "pure law"[256] in *Dr. Q.* to questions of jurisdiction. Thus, in various ways, the continuing emphasis on jurisdiction as an organizing concept is constraining analysis in ways that might mean less curial deference overall or alternatively, less true calibration between scope and intensity of review and the facts and law of each particular decision.

We are aware that it may seem contradictory to be arguing for a change that will open more cases to the full spectrum of review standards while otherwise arguing for the elimination (or at least for a reduction in scope) of at least one and perhaps two of the standards of review. There is however, consistency with our more fundamental point, that doctrinal simplification may be a key ingredient to facilitating consistent judicial concentration with greater transparency and accountability on the quality of administrative decision-making, not doctrinal categories. In addition, we note that in the body of cases reviewed here, substantive review did tend to gravitate towards a single standard of review, that of reasonableness, where the choice of standard was unconstrained by a privative clause and therefore, by the limiting concept of jurisdiction. Thus, the intermediate standard of review for unreasonableness *simpliciter* might evolve into a dominant and even all-encompassing standard of review, due to a combination of pull and push dynamics that might be expected to come to the fore with the elimination of the concept of jurisdictional questions and therefore, with the final barrier between appeal and judicial review cases and between cases with and cases without privative clauses. One of these factors may simply be that review for unreasonableness is in fact just what it is — an intermediate standard of review that appears from the cases to be attractive as a "split-the-difference" outcome, especially when the factors that are considered under the pragmatic and functional analysis point

252. *Supra* note 8.
253. *Supra* note 6.
254. *Supra* note 138.
255. *Supra* note 16.
256. *Ibid.* at para. 34.

in opposite directions. Indeed, the stated rationale for review for unreasonableness as a half-way house between correctness and patent unreasonableness is precisely this, that it is virtually necessitated by cases in which some factors point to deference and others to intervention. In our view, the implications may run strongly in favour of an expanding middle in standard of review analysis, provided the availability of review for unreasonableness in privative clause cases becomes more generally accepted. Given the complexity of most administrative statutes and, in particular, the ubiquitous tension in statutory design between the objectives of conferring and constraining statutory authority, judges could often find themselves confronted with factors that point toward deference and others that point toward intervention and thus, with a rationale for review for simple unreasonableness. Formal abandonment of the idea that jurisdictional quality or its absence determines the applicability of the standards of correctness and of patent unreasonableness respectively would create greater scope for the operation of this dynamic of convergence to the middle in standard of review selection.

Finally, regardless of how many standards of review are maintained, our study of lower court case law has led us to be concerned, like MacLauchlan, that judicial reliance on the form without the substance of pragmatic functionalism is likely to produce dissatisfaction with judicial review outcomes, a lack of public confidence in both administrative and judicial processes, and many lost opportunities, both for judicial contribution to better administration and for improved judicial understanding of the contributions that specialized agencies can make to the development of the law. We therefore support his advocacy for the adoption by the Supreme Court of a larger didactic role that would use substantive review cases as opportunities for the Court to model the functional and pragmatic approach for lower courts and, through them, for administrative decision-makers. In other words, we share his view that it is time for the Supreme Court to move beyond the articulation of the policy of curial deference, to a primary focus on its coherent, thorough and consistent implementation by others. We agree with him that one of the steps that can usefully be taken in this regard is greater and more consistent attention to the development and modeling "of practices that inform a pragmatic and functional approach" and that, "*show* how the pragmatic and functional approach works together with an ethos of justification."[257] Arguably, recent deci-

257. MacLauchlan, *supra* note 1 at 298 [emphasis in the original].

sions of the Court suggest that this advice is already being taken and acted upon.[258] Perhaps what this study indicates is that, to be fully successful, such a shift in focus needs to pay as much attention to the different institutional capacities of different courts as it has in the past paid to the different institutional capacities of courts and administrative decision-makers.

258. *Chieu, supra* note 74; *Ryan, supra* note 8; *Dr. Q., supra* note 16. See also *Asbestos, supra* note 140.