# Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review

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The purpose of this article is to analyse the definitional problem underlying the application of the standards of review for patent unreasonableness and reasonableness *simpliciter* in Canadian administrative law. The first section of this paper will discuss the history, purpose and importance of the standards of review in administrative law and include an outline of the pragmatic and functional analysis. Second, the difficulties underlying patent unreasonableness and reasonableness *simpliciter* will be analysed. Particularly, the focus of this section will be on the different definitions given to both standards of review, but also on LeBel J.'s concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*[1] ( *Toronto (City)*), where he discussed the possibility of eliminating one of the two because they were difficult to apply. Third, the evolution of the doctrine of "*Wednesbury* unreasonableness" in the United Kingdom will be analysed. While this specific case has not often been pleaded successfully in Canada[2] it remains that the famous "*Wednesbury*" standard for judicial review has been regarded as a general

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1 [2003] 3 S.C.R. 77.

2 David Mullan, "Deference From *Baker* to *Suresh* and Beyond - Interpreting the Conflicting Signals" in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 21 at 28, David J. Mullan, *Administrative Law*, (Toronto: Irwin Law, 2001) at 121–22; see also *Re Stora Kopparbergs Bergslags Aktiebolag and Nova Scotia Woodlot Owners' Association*, (1975), 61 D.L.R. (3d) 97 (N.S.S.C.A.D.); *Canadian National Railway Co. v. Fraser-Fort George (Regional District)*, (1995), 29 Admin. L.R. (2d) 97 (B.C.S.C.), aff'd (1996), 140 D.L.R. (4th) 23 (B.C.C.A.).

doctrine of unreasonableness applicable to discretionary decisions.[3] With the advent of the *Human Rights Act*[4] in the United Kingdom in 1998, the *Wednesbury* principle has been tightened with the introduction of a proportionality type test in human rights cases. A proportionality type test is also used in European Community law and this successful approach will be discussed in the fourth section of this text. Ultimately, it will be argued that a proportionality test, similar to any analysis under section 1 of the *Canadian Charter of Rights and Freedoms*,[5] should be used in Canadian administrative law in order to guide the courts in the judicial review of administrative decisions when the standard of review is patent unreasonableness.

## I. HISTORY, PURPOSE AND IMPORTANCE OF THE STANDARDS OF REVIEW

As a result of the complexity of modern society and the establishment of the welfare state, the legislature often delegates the responsibility of implementing statutory programs to specialized administrative bodies. While the legislature has clearly empowered these bodies to address and even to regulate particular issues, it remains the role of the judiciary to oversee the exercise of delegated responsibility. The judiciary ensures that administrative bodies and tribunals remain within their competence, and do not act contrary to fundamental constitutional principles.[6] Thus, this relationship between the legislature's intention, the administrative bodies and the courts has created a tension that underlies the law of review. Because the courts have to implement the intention of the legislature to delegate the administrative decision making to a specialized body, they have scrutinized administrative decision making with differing degrees of intensity by subjecting the administrative decisions to varying standards. In essence, the jurisprudence built upon this analysis represents the

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3 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53.

4 *Human Rights Act 1998* (U.K.), 1998, c. 42.

5 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

6 Judicial interference with administrative decision making is premised on the court's role as the "guardian of the rule of law": administrative action should be exercised according to law and no one should suffer but for a breach of a clear law; that the same laws should apply in the same way to everyone, including the state; and that the law should be seen as restatements of constitutional cornerstones such as democratic accountability, predictability and liberty: see A.V. Dicey, *Introduction to the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1961) at 188-203.

nexus at which social program implementation and the rule of law converge. This topic has been dubbed the "standard of review".[7]

Essentially, a reviewing court must always ask two questions: should the particular decision maker be afforded curial deference; and if yes, what degree is appropriate? Generally, deference is warranted where the administrative decision maker makes a decision that is squarely within its specialty, and the enabling statute delegates to it the authority to make the decision. Historically, this has given rise to various distinct stages where different standards of review have been used. Initially, courts used an interventionist policy, notably developed in the early Canadian law of judicial review in the late 1970's. In *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*,[8] *Bell v. Ontario (Human Rights Commission)*,[9] and *Blanco v. Rental Commission*,[10] the Supreme Court accepted the approach taken by the House of Lords in *Anisminic v. Foreign Compensation Commission*[11] (*Anisminic*). In that case, the House of Lords avoided a strong privative clause by characterizing as *ultra vires* the tribunal's jurisdiction over any administrative decision where the decision maker asked itself the wrong question, took into account irrelevant factors, or failed to take into account important factors. Thus judicial intervention was greatly expanded, as the class of errors that could take the tribunal outside its jurisdiction was enlarged. This standard of review is now identified as the standard of correctness.

Second, in an important departure from established practice, the Supreme Court adopted a deferential posture in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*[12] (*N.B. Liquor Corp.*). In that case, Dickson J. (as he then was) recognized that deference may further the goals and purposes underlying the legislature's decision to delegate ultimate responsibility to an administrative tribunal rather than to the courts. Dickson J. in fact recognized that statutory language used in the enabling statute may be ambiguous and capable of multiple legitimate interpretations. Therefore, a specialized body may be better equipped than the courts to determine the most appropriate interpretation to be given to its jurisdiction. Once the administrative tribunal had appropriately determined the contours of its jurisdiction, its ultimate decision should not be overturned, as it was properly delegated by the legislature to the

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7 For a great discussion of the standards of review and their application, see Blais *et al.*, *Standards of Review of Federal Administrative Tribunals*, 2005 Edition (Toronto: Butterworths, 2005) at 1-12.

8 [1970] S.C.R. 425.

9 [1971] S.C.R. 756.

10 [1980] 2 S.C.R. 827.

11 [1969] 2 A.C. 147 (H.L.).

12 [1979] 2 S.C.R. 227.

administrative body. However, the court could intervene where the tribunal's interpretation is "so patently unreasonable that its construction cannot rationally be supported by the relevant legislation and demands judicial intervention by the court upon review".[13] This standard of review may now be identified as patent unreasonableness.

The third development of the standards of review arose in *Pezim v. British Columbia (Superintendent of Brokers)*[14] (*Pezim* ) where the Court discussed an intermediate standard of review, identified on a "spectrum" ranging from correctness to patent unreasonableness. This standard was later articulated in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*[15] (*Southam*) as the standard of reasonableness *simpliciter*. Recently, in *Law Society of New Brunswick v. Ryan*,[16] (*Ryan*) Iacobucci J. held that the metaphor of a spectrum used in *Pezim* did not create an infinite number of standards. Rather, it identified a spectrum of deference consisting of three different standards of review.

The fourth development was the use of the pragmatic and functional analysis, first articulated by Beetz J. in *Union des employés de service, local 298 v. Bibeault*[17] (*Bibeault*) (before the establishment of the standard of reasonableness *simpliciter*), and restated by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*[18] (*Pushpanathan*). In essence, prior to determining which of the three standards apply to the judicial review of the administrative decision, a reviewing court must consider four factors:

1) right of appeal or privative clauses;
2) expertise of the decision maker;
3) purpose of the Act as a whole, and the provision in particular; and
4) the "nature of the problem": a question of law or fact?[19]

This is now the modern approach, that is, reviewing courts must conduct a pragmatic and functional analysis to determine the standard of review applicable to every administrative decision,[20] regardless of whether the decision is discretionary or not.

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13 *Ibid.* at 237.

14 [1994] 2 S.C.R. 557.

15 [1997] 1 S.C.R. 748 at para. 57.

16 [2003] 1 S.C.R. 247 at para. 44.

17 [1988] 2 S.C.R. 1048.

18 [1998] 1 S.C.R. 982.

19 *Ibid.* at paras. 29-38.

20 *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 40.

This historic examination of the establishment of the three standards of review and the pragmatic and functional analysis has given rise to extensive academic literature. Various questions remain problematic, such as how much deference should be granted to administrative tribunals, whether the pragmatic and functional analysis (and thus the standards of review) applies to all types of administrative decisions, and how to apply the three standards of review in specific situations. This article will now provide an examination of the standards of review, and suggest an alternative to the patent unreasonableness standard of review that could be applied to any type of administrative decision.

## II. THE DIFFICULTIES UNDERLYING THE STANDARDS OF REVIEW

The adoption of the pragmatic and functional analysis gave rise to extensive discussion on its application to specific administrative decisions. These discussions, in turn, resulted in an inconsistent application of the standards of review, especially the standards of reasonableness *simpliciter* and patent unreasonableness. This section will discuss and outline the different definitions applied to each standard, and discuss the difficulties underlying them.

An example of the inconsistent application of the pragmatic and functional analysis, and hence the standards of review, can be found in *Baker v. Canada (Minister of Citizenship and Immigration)* (*Baker*).[21] Prior to *Baker*, judicial review of discretionary decisions had traditionally been approached separately from other administrative decisions involving the interpretation of the delegated authority and the rules of law. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts ought not to interfere.[22]

The elements that had to be considered on judicial review of a discretionary decision prior to *Baker* were only on limited grounds, and had been discussed as one base of the doctrine of *Wednesbury* unreasonableness articulated by Lord Greene in *Associated Provincial Picture House, Ltd. v. Wednesbury Corporation*[23] (*Associated Provincial Picture House*) and used in Canadian law in *Roncarelli v. Duplessis*[24] (*Roncarelli*) and later applied and developed in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*[25]

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[21] *Supra* note 3.

[22] *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 7-8; applied in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231.

[23] [1948] 1 K.B. 223 (C.A.).

[24] [1959] S.C.R. 121.

[25] [1975] 1 S.C.R. 382.

(*Nipawin*), *N.B. Liquor Corp.*, and *Maple Lodge Farms Ltd.*[26] In *Roncarelli*, Rand J. held that the decision maker had to respect both the purpose of its enabling statute and other fundamental principles of administrative law:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.[27]

Therefore, not only the proper elements had to be considered prior to the exercise of discretion, but the discretion also had to be exercised with the situation of the individual in mind, within the purpose and perspective of the enabling statute, and had to comply with fundamental principles of constitutional and administrative law.[28]

In *Baker*, L'Heureux-Dubé J. held that it was inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions.[29] In her view:

> the 'pragmatic and functional' approach recognizes that standards of review for errors of law are appropriately seen as a spectrum of three standards of review ... and the standard of review of substantive aspects of discretionary decisions is best approached within this framework.[30]

Therefore, the decision in *Baker* indicates that nothing differentiates administrative interpretations of the general rules of law from administrative exercises of discretionary powers and that the same approach, namely the pragmatic and functional analysis, should be used to determine the appropriate standard of review.[31] While the pragmatic and functional analysis must be applied to determine the standard of review applicable in every situation, the specific standard chosen may not yield an easy application, since the definitions of reasonableness *simpliciter* and patent unreasonableness are confusing.

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26 *Supra* note 22.

27 *Supra* note 24 at 140.

28 See *Baker*, *Supra* note 3 at para. 56. See also David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) U.N.B.L.R. 52.

29 *Supra* note 3 at para. 54.

30 *Ibid.* at para. 55.

31 Geneviève Cartier, "The *Baker* Effect: A New Interface Between The *Canadian Charter of Rights and Freedoms* and Administrative Law - The Case of Discretion" in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 61 at 62.

Moreover, in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*,[32] Binnie J., concurring, cited *Baker* as having established that the review for abuse of discretion may in principle range from correctness through unreasonableness to patent unreasonableness. The Supreme Court, perhaps noting that lower courts had interpreted *Baker* as permitting a more searching standard of review of discretionary decisions, noted in *Suresh v. Canada (Minister of Citizenship & Immigration)*[33] (*Suresh*) that:

> 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 implied limitations and/or patently relevant factors.[34]

Since *Suresh*, it has become apparent that there is a certain discomfort between the judges at the Supreme Court as to the standard of review of administrative decisions. While this has been especially evident where discretion is exercised, it is present for every type of administrative decision. For example, in *Ryan*,[35] the Court held that there were only three standards of review, despite the insinuation in *Pezim*[36] and the interpretation of lower courts[37] that there was in fact a *spectrum* of standards of review. In *Ryan's* sister case, *Dr. Q. v. College of Physicians and Surgeons of British Columbia*,[38] the Court held that it was no longer sufficient to slot a particular issue into a pigeon hole of judicial review and the pragmatic and functional approach had to be applied to determine the standard of review applicable to every administrative decision.[39]

However, three cases in 2003 and 2004 clearly outlined the differences of opinion as to the approaches to be taken in applying the standards of review, and even the number of standards. The first evidence of the discussion, which stemmed from the application of the pragmatic and functional approach to

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32 [2001] 2 S.C.R. 281 at para. 54.; followed in *Dr. Q.*, *Supra* note 20 at para. 24.

33 *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3.

34 *Ibid.* at para. 37.

35 *Supra* note 16 at para. 24.

36 *Supra* note 14 at 589-590.

37 See, for example, *Trainor v. Canada (Attorney General)*, [2000] F.C.J. No. 503 (Q.L.); *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.*, [1997] F.C.J. No. 1543 (Q.L.).

38 *Supra* note 20.

39 *Ibid.* at para. 25.

every administrative decision, appeared in *Chamberlain v. Surrey School District No. 36*[40] where LeBel J., concurring, voiced his concern with the issue:

> Our Court is reviewing a policy decision made by an elected body whose function is to run local schools with the input of the local community. The full set of factors included in the standard-of-review formula does not translate well into this context.[41]

But it was in the trilogy of *C.U.P.E. v. Ontario (Minister of Labour)*[42] (*CUPE*), *Toronto (City) v. CUPE, Local 79*[43], and *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*[44] (*Voice Construction*) that the current status of the standards of review gave rise to discussion and debate.

In *CUPE*, the Minister of Labour appointed four retired judges to chair several arbitration boards following a reorganization of public sector institutions in early 1998. This was contrary to the old practice of appointing mutually acceptable arbitrators, and was done without consulting the unions. The unions complained, and sought declarations that the Minister's actions denied natural justice and lacked institutional independence and impartiality. On the standard of review applicable to the exercise of a ministerial discretion, the Court held unanimously that the applicable standard was that of patent unreasonableness. However, when the Court ruled on the merits, the decision was a six to three majority that the Minister's determination was in fact patently unreasonable. The problem with this decision was the application of the standard of patent unreasonableness. In my opinion it should be impossible, given the definition of the standard of patent unreasonableness, to come to this conclusion. In fact, given that three judges are of the opinion that the decision was not patently unreasonable, it cannot qualify as being so outrageous as warranting the intervention of the Court. If that had been the case, the decision should have been unanimous.

In *Toronto (City)*, LeBel J., writing also for Deschamps J., concurring, outlined the different definitions possible for the standard of patent unreasonableness and demonstrated how this standard interplays with both correctness and reasonableness *simpliciter*. LeBel J. opined that the Court should probably move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness.[45] In that case, a recreation instructor for the City was charged with sexually assaulting a boy under his supervision. He pleaded

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40 [2002] 4 S.C.R. 710.

41 *Ibid.* at para. 193.

42 [2003] 1 S.C.R. 539.

43 *Supra*, note 1.

44 [2004] 1 S.C.R. 609.

45 *Supra* note 1 at para. 134.

not guilty, but at trial before a judge alone he testified and was cross-examined. The trial judge found that the complainant was credible and entered a conviction, which was affirmed on appeal. The City fired its employee a few days after his conviction, and the employee grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony at the trial but did not call him to testify. The employee testified and claimed that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether the employee had sexually assaulted the boy. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that the employee had been dismissed without just cause. The Supreme Court held that the standard of review of the specific decision to admit the criminal evidence was correctness.

Finally, in *Voice Construction*, the appellant was a trade union representing labourers in the construction industry and dispatched a union member from its hiring hall to a construction company, notwithstanding the respondent's request that she not be sent to its job sites. The appellant claimed that the respondent's refusal to put her to work constituted a violation of the collective agreement and grieved the matter. The arbitrator found that the collective agreement's "name hire" and "dispatch" provisions constituted an express restriction on the respondent's broad right to "hire and select workers" and accordingly held that the respondent was required to hire qualified workers properly dispatched by the union. On an application for judicial review, the reviewing judge found that the arbitrator had exceeded her jurisdiction by finding an express restriction on management's rights to hire and select. He applied a standard of correctness and quashed the award. A majority of the Court of Appeal upheld the decision.

Major J., for the majority, held that the standard of review of the arbitrator's decision was that of reasonableness. Justice Major then proceeded to elaborate a new definition and limited the scope of the patent unreasonableness standard of review:

> A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard. By its nature, the application of patent unreasonableness will be rare. A definition of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd.[46]

Despite this reappraisal, LeBel J., again with Deschamps J., concurring, held that:

> [I]t is time for this Court to re-evaluate the appropriateness of using the patent unreasonableness and reasonableness simpliciter standards. Patent unreasonableness is an

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[46] *Supra* note 44 at para. 18.

> inadequate standard that provides too little guidance to reviewing courts, and has proven difficult to distinguish in practice from reasonableness simpliciter.[47]

## A. LeBel J.'s concurring opinion in *Toronto (City)*

As stated above, in *Toronto (City)* LeBel J. discussed the foundational difficulties with the standards of reasonableness *simpliciter* and patent unreasonableness. The following lines will outline his discussion on the topic, and the difficulties which make it challenging to differentiate the application of the standards of review. According to LeBel J., there are two main difficulties with the standard of patent unreasonableness when reviewing administrative decision making. The first one is that it is unclear whether a decision should be overturned because of the immediacy or obviousness of the defect or because of the magnitude of the defect. The second difficulty is much more important, and relates to the nullifying errors enumerated in *Nipawin*[48] and *N.B. Liquor Corp.*:[49] acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice, or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. The main reason why the latter difficulty is problematic is that courts tend to determine on a correctness basis whether the administrative decision maker did in fact make one of those nullifying errors.[50] Therefore, they should not be part of the definition of patent unreasonableness. Nevertheless, in *CUPE*, Binnie J. held that:

> [A]pplying the more deferential patent unreasonableness standard, a judge should intervene if persuaded that there is no room for reasonable disagreement as to the decision maker's failure to comply with the legislative intent. In a sense, like the correctness standard, the patently unreasonable standard admits only one answer. A correctness approach means that there is only one proper answer. A patently unreasonable one means that there could have been many appropriate answers, but not the one reached by the decision maker.[51]

Unfortunately, this statement not only blurs the line between the standards of correctness and patent unreasonableness, but also fails to offer any suggestion as to what position should be occupied by the standard of reasonableness *simpliciter*. As for the latter standard of reasonableness *simpliciter*, the main issues are the lack of sufficiently clear boundaries between patent unreasonableness

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47 *Ibid.* at para. 40.

48 *Supra* note 25 at 389.

49 *Supra* note 12 at 237.

50 David Mullan, "Deference From *Baker* to *Suresh* and Beyond - Interpreting the Conflicting Signals", *Supra* note 2 at 24.

51 *Supra* note 42 at para. 164.

and reasonableness *simpliciter*[52] and the concerns that we have a regime of judicial review which may allow any irrational decision to escape rebuke simply because it is not "clearly irrational".[53] The following lines will discuss the definitions and approaches underlying the application of the standards of patent unreasonableness and the standard of reasonableness *simpliciter*. The standard of correctness will not be analysed, since its application is not problematic. When correctness is the standard of review applicable, courts simply make their own assessment of the case, and substitute judgment where their decision is different from that of the administrative decision maker.

## B. The Standard of Patent Unreasonableness

When reviewing a decision under the patent unreasonableness standard of review, lower courts are always struggling with the depth of examination of the decision. Some advocate that the error should be "on the face of the record" or "immediate and obvious",[54] while others prefer a more searching and in depth analysis and review decisions because of the magnitude of the error.[55] Thus, it will be the magnitude of the defect instead of its obviousness that is the most important factor. LeBel J. believes that both approaches are defective:

> Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable....[56]

> The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonable-

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52 *Supra* note 1 at para. 101, LeBel J.

53 See David J. Mulan, "Recent Developments in Standard of Review", in *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (Canadian Bar Association (Ontario), October 20, 2000) at 24-25. I do not intend to discuss whether the terms "irrational" and "unreasonable" share the same meaning. For the purposes of this article, I will use the terms interchangeably, as LeBel J. in *Toronto (City)*.

54 See *Southam*, *Supra* note 15 at para. 57.

55 *CAIMAW, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

56 *Supra* note 1 at para. 106.

> ness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason....[57]

> In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe?[58]

In *Ryan*, trying to describe yet again what "immediate and obvious" meant, the Court stated that "a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective."[59] In my opinion, this would emphasize the need to search and test the decision to a certain degree and is indicative of the "magnitude of the error" definition more than the "immediate or obviousness" of the error. Therefore, it appears that even within the patent unreasonableness standard the two different approaches are blurred. Binnie J., in *CUPE*, implicitly recognized this problem. If a defect is "immediate or obvious," it will be found in the reasons of the decision, and there should be no need to perform an in-depth analysis of the record. Even on the patent unreasonableness standard, however, reviewing courts should be able to review the record in its entirety.[60]

LeBel J. correctly identified that the difficulty of this is "determining how invasive a review is invasive enough, but not too invasive".[61] After all, if courts do consider the entire record and evidence, even on the standard for patent unreasonableness,[62] one could wonder whether judges first make their own finding (on a correctness standard), and then write their reasons according to the applicable standard of review. LeBel J. acknowledged this criticism in *Toronto (City)* by writing:

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57 *Ibid.* at para. 109

58 *Ibid.* at para. 111.

59 *Supra* note 16 at para. 52.

60 *Supra* note 15 at para. 57, cited in *CUPE*, *Supra* note 42 at para. 159, Binnie J.

61 *Supra* note 1 at para. 111.

62 Sopinka J., writing also for Lamer J. in *Paccar*, *Supra* note 55 at 1017-1018, suggested that this was the right approach. The reviewing court should not ignore its own views of the merits of the decision under review.

> At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.[63]

Notwithstanding the differences, if any, one must still question a system that may allow irrational decisions to stand, just because they are not irrational enough. As stated by LeBel J.:

> An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand....
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> As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at pp. 367-68). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.[64] [Emphasis in the original.]

There is another fundamental flaw to the patent unreasonableness standard of review, and this one applies mainly with regard to the review of discretionary decisions. Ever since the seminal case of *Roncarelli*[65] later developed in *Nipawin*,[66] *N.B. Liquor Corp.*,[67] and *Maple Lodge Farms Ltd.*,[68] judicial intervention was informed by the review of certain specific questions: bad faith; arbitrary de-

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63 *Supra* note 1 at para. 99.

64 *Ibid.* at paras. 125, 133.

65 *Supra* note 24.

66 *Supra* note 25.

67 *Supra* note 12.

68 *Supra* note 22.

cisions or decisions undertaken for improper purposes or ulterior motives; consideration of irrelevant factors or failure to consider relevant factors. This review, however, is not for patent unreasonableness, but the review of a discretion conferring jurisdiction. Thus, courts will review those grounds for correctness, and review the decision for *ultra vires*.[69] The Court struggled, as discussed above in *Baker*, to reconcile the pragmatic and functional approach to discretionary decisions with the review of jurisdictional grounds.

After having applied the pragmatic and functional approach to a ministerial discretion, L'Heureux-Dubé J. applied the standard of reasonableness *simpliciter*. She overturned the decision on what could be considered "jurisdictional grounds", which were bias and the failure of having taken into account the needs of the applicant's children. Those were "boundaries" conferred by the statute, and thus the decision was "unreasonable". Under the old doctrine of judicial review of discretionary decisions, one would have concluded that the decision maker failed to consider a relevant factor, was biased, and made a decision which "went to the jurisdiction" and was thus *ultra vires*. In *Baker*, the decision maker had to give "substantial weight" to the children's best interests, and "be alert, alive and sensitive to them."[70] Since the Officer failed to do that, the decision was overturned. Nonetheless, in determining whether the decision maker did in fact consider all the relevant factors, a court must show deference to the decision and not reweigh the factors. In *Suresh*,[71] as noted above, the Supreme Court went out of its way to produce a retort to arguments suggesting otherwise.[72] However, the "weighing" question remains controversial.

As can be seen, the standard of patent unreasonableness is still very confusing, and its application and determination troublesome. Nevertheless, unless the Court moves to two standards of review, or reforms either patent unreasonableness or reasonableness *simpliciter*, to which we now turn, the situation may remain as problematic.

## C. The Standard of Reasonableness *Simpliciter*

The theoretical underpinning of the standard of reasonableness *simpliciter* is that there will be situations where there is no single right answer to the questions that are under review. On judicial review, even if judges were to think that there could be a best answer, it is not the court's role to seek it out when

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69 Lorne Sossin, "Developments in Administrative Law: The 2002-03 Term" (2003) 22 S.C.L.R. (2d) 21 at 38-39.

70 *Supra* note 3 at para. 75.

71 *Supra* note 33.

72 David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity" (2004) 17 C.J.A.L.P. 59 at 67.

deciding if the decision is unreasonable.[73] Therefore, a reviewing judge must never determine what the "correct" answer is, but only whether the decision was one that was open to the decision maker. This rationale for the standard of reasonableness *simpliciter*, however, is the same as for the standard of patent unreasonableness. The main difference is that following the pragmatic and functional approach, some decision makers must be afforded more leeway than others. Since both standards are rooted in the same guiding principle, it has been difficult to find a workable distinction between them. This is the reason why the Supreme Court has made tremendous efforts to differentiate them by crafting specific tests for each one. The differences set out between them, which are based on the "immediacy or obviousness" or the "magnitude" of the defect are tautologous.[74] In *Toronto (City)* LeBel J. cites the comments of Barry J. in *Miller v. Newfoundland (Workers' Compensation Commission)*:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all. [75]

As outlined above, relying on semantics can rarely give an accurate picture as to how probing the examination of the decision must be, and as to the degree of irrationality needed before an irrational decision becomes patently unreasonable. In a recent article Professor Mullan opined that:

> To maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the more deferential standard of scrutiny.[76]

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[73] *Ryan*, *Supra* note 16 at para. 51.

[74] *Supra* note 1 at para. 104. See also J.G Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at 27-28; G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle*, (Montréal: Wilson & Lafleur, 2002) at 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs*, (Cowansville : Yvons Blais, 2003) at 34-35.

[75] (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27.

[76] *Supra* note 53.

This in fact leads me to another conceptual difficulty in administrative law. It appears that the whole rationale for the standard of review, or the doctrine of deference to decision makers, is "the right to be wrong".[77] The essential determination in assessing the standard of review concerns not whether a tribunal has erred, but more whether or not it is permitted to err. If a tribunal does not have the right to be wrong, the standard of review will be correctness. If, however, a decision maker is permitted to err, the question concerns the scope of the right. When more leeway is appropriate, courts will review decisions for patent unreasonableness. If less deference is warranted, courts will ensure that the decision under review was simply reasonable.[78] In my view, an argument could be made that any system of law which permits "wrong" decisions to stand merely because they are not "clearly wrong" is against the rule of law.[79] The standards of reasonableness *simpliciter* and of patent unreasonableness should never have been interpreted as permitting a decision maker to make erroneous findings, whether on facts or on law. The premise of both standards is to recognize that decision makers are often better placed than courts to make administrative decisions. Deference is warranted in many situations because of the expertise of the tribunal. That does not mean, however, that erroneous decisions are shielded from review just because they lie at the heart of the decision maker's expertise.[80] The standards of review only recognize that sometimes it would be inappropriate to overturn an administrative decision and favour that of the court because, in fact, the administrative decision may also be an appropriate decision. As stated in *Ryan*:

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77 See *Anisminic*, *Supra* note 11; *Nipawin*, *Supra* note 25 at 236; *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245; *CAIMAW, Local 14 v. Paccar of Canada Ltd.*, *Supra* note 55; *Dayco (Canada) Ltd., v. CAW-Canada*, [1993] 2 S.C.R. 230; and *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316.

78 Blais et al., *Standards of Review of Federal Administrative Tribunals* (Markham: Butterworths, 2003) at 5.

79 In a substantive article, Luc Tremblay has argued that if administrative tribunals have a "right to be wrong", that means that there must have been a "correct" decision or interpretation. It follows that if that is the case, then the argument to the effect that there could be more than one valid interpretation is invalid. Therefore, any judicial deference is unjustified, and administrative decisions should be reviewed for correctness. Thus, any decision allowed to stand because, while erroneous, is within the "right to be wrong", is against the rule of law. See L.B. Tremblay, "La norme de retenue judiciaire et les erreurs de droit en droit administratif : une erreur de droit? Au-delà du fondationalisme et du scepticisme" (1996) 56 Rev. du B. du Q. 141-250.

80 In *Baker*, *Supra* note 3 at para. 65, L'Heureux-Dubé J., for the Court, held that notwithstanding the fact that the decision was within the expertise of the decision maker, he had to give serious weight to relevant considerations, in that case being the interests of the children.

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness [this also applies to the standard of patent unreasonableness]. For example, when a decision must be taken according to a set of objectives that exist in tension with each other, there may be no particular trade-off that is superior to all others. Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.[81]

Thus, the cliché "the right to be wrong", if it has ever really existed, should be eliminated from administrative law. Administrative decisions should be shielded from judicial intervention when deference is warranted, and no judicial review should be used to substitute the court's view over another valid interpretation or application of legal principles. This reflects the fact that more than one decision may be open to the decision maker, especially when dealing with discretionary decisions, since many actions may be taken by the administrative decision maker.[82] To characterize a decision that is different from the court's, and to give it the epithet of "wrong", only to let it stand in the name of deference, is to make a mockery of the whole system. On the other hand, whenever a court affixes the epithet of "wrong" to an administrative decision, it should intervene. Deference is only warranted when a court acknowledges that the decision was one within a multitude of possible decisions, each of which are within the jurisdiction accorded by the conferring statute.

It follows that a better approach to the standard of reasonableness *simpliciter* is not far from what is used currently. In *Southam*, Iacobucci J. held that:

> 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.[83]

The standard of reasonableness *simpliciter* does allow "significant searching or testing"[84] by the courts to find the defect in the administrative decision. Therefore, courts must accept that more than one decision is possible, and that specific determination was delegated by Parliament to an administrative body.

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81 *Supra* note 16 at para. 51.

82 Tremblay, as stated above, argues that there is always one "correct" decision, and this may also apply to discretionary decisions. In arguing that standards of review are incompatible with the Constitution, he relies on constitutional principles such as the rule of law, the right to decisions in conformity with the law, the right to be treated according to justice, as well as the principles of autonomy and personal liberty: L.B. Tremblay, "La norme de retenue judiciaire et les erreurs de droit en droit administratif : une erreur de droit? Au-delà du fondationalisme et du scepticisme" (1996) 56 Rev. du B. du Q. 141 at 190-191.

83 *Supra* note 15 at para. 56.

84 *Ibid.* at 57.

If the reasons or the evidence justify the decision, deference is due regardless of whether the court would have come to a different conclusion. This approach is similar to the idea of "deference as respect", articulated by Dyzenhaus, and accepted in *Baker*.[85] Evan Fox-Decent has argued that deference as respect was most at home with the reasonableness *simpliciter* standard of review, since reasonableness invites a "somewhat probing examination"[86] of the reasons said to justify the decision. Moreover, deference as respect is fully consistent with the possibility that there may be more than one justifiable outcome or more than one reasonable interpretation of a statute.[87]

While all this sounds good, it still does not answer the question as to how one must assign weight to considerations that pull in different directions, even if the standard of reasonableness *simpliciter* allows for a "somewhat probing examination". Therefore, even if the test under patent unreasonableness was to be modified, it may not, unfortunately, render the standard of reasonableness *simpliciter* clearer and easier to apply.

## D. "*Wednesbury* Unreasonableness" and the History of Patent Unreasonableness

The main difficulty with the review of administrative decisions, as stated above, is that there is a basic tension between the doctrine of Parliamentary sovereignty, which permits legislation to delegate very broad decision making authority, and the rule of law, requiring that even governmental action must be done according to the enabling statute and other fundamental principles. Therefore, when dealing with discretionary decisions for example, any abuse of discretion will be an error which is jurisdictional in nature. This is so even though "the statutory delegate is properly constituted, has complied with all mandatory requirements, is dealing with the subject-matter granted to it by the legislation, and undoubtedly has the right to exercise the discretionary power in question."[88]

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85 In quashing the decision, L'Heureux-Dubé J. accepted Professor Dyzenhaus' notion of "deference as respect" in which, notwithstanding the important deference that is owed: "[d]eference as respect requires not submission [to the administrative decision] but a respectful attention to the reasons offered or which could be offered in support of a decision." See *Baker*, *Supra* note 3 at para. 65; David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (1997) 279 at 286.

86 *Ibid.* at 154.

87 Evan Fox-Decent, "The Internal Morality of Administration: The Form and Structure of Reasonableness" in D. Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) 143 at 155.

88 David P. Jones & Anne S. de Villars, *Principles of Administrative Law*, 4th ed. (Toronto: Carswell, 2004) at 169.

Historically, on judicial review of such discretionary decisions, courts would try to find specific nullifying errors, enumerated above in the context of the patent unreasonableness standard of review, which would bring into play the doctrine of *ultra vires*. Such review, however, was for correctness. It was in *Associated Provincial Picture House* that Lord Greene wrote his now famous reasons on the determination of the proper exercise of discretion:

> When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.
>
> What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. *If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. ... Bad faith, dishonesty—those, of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all been referred to as being matters which are relevant for consideration.* In the present case we have heard a great deal about the meaning of the word "unreasonable". It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. *If he does not obey those rules, he may truly be said, and is often said, to be acting "unreasonably".* Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense he is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head...
>
> [T]he court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it.[89] [Emphasis added.]

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[89] *Supra* note 23 at 228-230, 233-234.

As can be seen, *Wednesbury* unreasonableness is but one of the two tests set by Lord Greene in *Associated Provincial Picture House*. In reviewing discretionary decisions, courts must first investigate as to the factors taken into consideration in the decision making process. This did not mean that the court would engage in reweighing all the factors.[90] It was merely a checklist of factors, and if the decision maker had considered them, he would remain within the four corners of his jurisdiction. Only after this jurisdiction conferring analysis will the court then consider whether the decision can be reviewed for *Wednesbury* unreasonableness.

The two senses of "unreasonableness" were designed to legitimate judicial interventions over discretionary decisions, and to establish the limits to any such intervention. The first meaning of the term allowed the courts to intervene where the decision was of a type that could not be made at all and was therefore illegal (*ultra vires*). It was outside the four corners of the power that Parliament had given to the decision maker and it was therefore right and proper for the courts to step in. Where, however, the primary decision maker was within the four corners of its power then the courts should be reluctant to interfere. The courts should not substitute their view for that of the public body, nor should they overturn a decision merely because they felt that there might have been some other reasonable way for the agency to have done its task. Some control over decisions that were within the four corners of the public body's power was, however, felt to be warranted and legitimate. This was the rationale for the second meaning of unreasonableness. If the impugned decision really was so unreasonable that no reasonable decision maker could have made it, then the court was justified in quashing it.[91]

This second meaning of the word reasonableness in the *Wednesbury* unreasonableness test[92] was arguably developed in *N.B. Liquor Corp.*, and gave rise to

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90 "*Wednesbury* did not seem to require any serious involvement with the merits of the decision since the defect it sanctioned was to clearly appear on its face": Geneviève Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law - The Case of Discretion", *Supra* note 31 at 65.

91 Paul P. Craig, *Administrative Law*, 5th ed. (London: Sweet & Maxwell, 2003) at 611.

92 It remains contentious, however, whether Canadian judges, under the patent unreasonableness standard of review could evaluate the substance of the decision and reweigh the factors. While some judges preferred that approach, others preferred the approach under *Wednesbury* to prevent the risk of subverting the standard into a correctness standard. Therefore, it seems that some judges see a difference between the Canadian standard of patent unreasonableness, and the UK approach under the old *Wednesbury* test : G. Cartier, *Supra* note 31 at 65-66. See also *CAIMAW v. Paccar of Canada Ltd.*, *Supra* note 55; *National Corn Growers*, *Supra* note 55; *Dayco (Canada Ltd.) v. CAW-Canada*, *Supra* note 77; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, *Supra* note 77. See also David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's L.J. 445 at 493.

the standard of patent unreasonableness in Canada, which applies to both discretionary and non discretionary decision making. In that case, Dickson J. (as he then was) developed a new approach favouring deference to administrative decision makers. This approach protected decisions of administrative tribunals which were made within their jurisdiction. Dickson J. noted that the jurisdiction conferring section was very ambiguous, and that no one interpretation could be said to be "right". Therefore, since the Board was interpreting what seemed to lie logically at the heart of its jurisdiction, the decision should not be overturned.[93] He then defined the appropriate standard of judicial review in these words:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, 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?[94]

Unfortunately, Dickson J.'s definition was not only limited to this statement. In fact, just before using the words "patently unreasonable" in his definition, he wrote this:

> [i]t is contended, however, that the interpretation placed upon s. 102(3)(a) was so patently unreasonable that the Board, although possessing "jurisdiction in the narrow sense of authority to enter upon an inquiry", in the course of that inquiry did "something which takes the exercise of its powers outside the protection of the privative of preclusive clause". In the *Nipawin* case, in a unanimous judgment of this Court, it was held that examples of such error would include, at p. 389:
>
> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not emitted to it.[95]

While Dickson J. (as he then was) is right that these errors are outside the protection of the privative clause, they do not make the decision patently unreasonable, but rather *ultra vires*, under what used to be called the "jurisdictional question" doctrine. Those errors were described in *Associated Provincial*

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93 *Supra* note 12 at 236.

94 *Ibid.* at 237. This is also very close to the definition set by Cory J. in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64: "It is said that it is difficult to know what 'patently unreasonable' means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. ... Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test."

95 *Supra* note 12 at 237.

*Picture House*[96] (the first meaning of the word unreasonableness in the determination of the four corners of the jurisdiction) and *Anisminic*[97] as being jurisdictional errors. By collapsing the nullifying jurisdictional errors into the definition of patent unreasonableness, or both definitions of the term unreasonableness in *Wednesbury* unreasonableness, Dickson J. in effect blurred the distinction between the standards of correctness and patent unreasonableness. In fact, he seemed to suggest that courts should determine, on a correctness basis, whether the decision maker made one of the nullifying errors and that, if that happened, there was patent unreasonableness.[98]

In *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*,[99] Beetz J. enunciated a distinction between errors made by a tribunal while acting within its jurisdiction to determine the issue before it and errors made in determining whether it had jurisdiction to consider the issue before it. This concept had been identified as the "preliminary or collateral question doctrine."[100] For Beetz J., while Dickson J. was right that the tribunal needed only to make a decision which is not patently unreasonable, on the issue of jurisdiction, the standard of deference will be much lower. For him, a patently unreasonable decision could be described as a "fraud on the law".[101]

In *Bibeault*,[102] Beetz J., used the pragmatic and functional analysis to associate (and differentiate) the concepts of jurisdictional errors and patent unreasonableness. Therefore, a tribunal will exceed its jurisdiction in two instances:

> 1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
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> 2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.[103]

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96 *Supra* note 23.

97 *Supra* note 11.

98 David Mullan, "Deference From *Baker* to *Suresh* and Beyond - Interpreting the Conflicting Signals" *Supra* note 2 at 24.

99 [1984] 2 S.C.R. 412.

100 *Ibid.* at 421; see also *Union des eEmployés de sService, lLocal 298 v. Bibeault*, *Supra* note 17 at 1083.

101 *Ibid.* at 420.

102 *Supra* note 17.

103 *Ibid.* at para. 116.

In my opinion, Beetz J. was trying to recognize the two different definitions of unreasonableness in English law and in *Associated Provincial Picture House*. The first circumstance where a tribunal may lose jurisdiction is the second sense of the word unreasonableness in *Associated Provincial Picture House*, while the second circumstance is the first. Hence, when a tribunal is within the four corners of its jurisdiction it can only lose jurisdiction if it has *come to a conclusion so unreasonable that no reasonable authority could ever have come to it*, while if, in determining its own jurisdiction, it has considered irrelevant factors, was acting in bad faith... then it never had jurisdiction in the first place and the tribunal has acted unreasonably.

The development of the standard of patent unreasonableness did not, unfortunately, stop there. The Court continued to tweak the analysis, without ever diminating the remnants of the past definitions. Recently, other definitions have emerged, and most of them have been discussed above. However, three are worth noting. First, in *Ryan*, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand".[104] In *CUPE*, Binnie J. incorporated both the magnitude and the obviousness of the defect in the decision. A patently unreasonable decision, he writes, is one whose defect is immediate and obvious *and* so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand.[105] Finally, in *Voice Construction*, as stated above, Major J. again reframed the test, and limited the application of the patent unreasonableness test to rare cases where the tribunal is empowered by a policy laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause. A definition of patently unreasonable is difficult, he writes, but it may be said that the result must almost border on the absurd.[106]

As can be seen, over the years there were many definitions given to the standard of patent unreasonableness. In English law, the two meanings of the word reasonable in *Associated Provincial Picture House* have been somewhat modified recently, and because Canadian courts have referred to the old *Wednesbury* test, it is important to focus on the new English approach to reasonableness review. While the first meaning of the word reasonableness still exists, the second meaning (so unreasonable that no reasonable authority could ever have come to it) has been modified, if not replaced, in English law by a more detailed proportionality test. The evolution of the old doctrines of judicial deference and substitution of judgment in the United Kingdom could be helpful in

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[104] *Supra* note 16 at para. 52.

[105] *Supra* note 42 at para. 165.

[106] *Supra* note 44 at para. 18.

defining a new test for the application of patent unreasonableness. Such a test, dubbed as a proportionality test used in the United Kingdom, has already been applied in Canada, albeit implicitly, when the *Canadian Charter of Rights and Freedoms* has applied to administrative decisions. Such cases will be discussed later, and include *Baker*, *Suresh*, and *Burns*.

## III. EVOLUTION OF *WEDNESBURY* UNREASONABLENESS TO PROPORTIONALITY IN ENGLISH LAW

The *Wednesbury* unreasonableness test in English law has recently given way to an implicit application of a proportionality test. This proportionality type test has been applied in three different types of cases:

1) human rights cases;
2) policy laden administrative decisions;
3) penalty or burden cases.

The proportionality test has been applied in all cases, albeit implicitly, and differently. The following lines will discuss English case law dealing with all three categories. At the end of this section, I will discuss the intensity of the review under the proportionality test, as used in English Courts.

### A. The Implicit Use of Proportionality in Judicial Review of Human Rights Cases

The official position in English law since *R. v. Secretary of State for the Home Department: ex parte Brind*[107] has been that the merits of discretionary decisions in English law are not subject to review on the basis of proportionality. Nevertheless, there is evidence that notwithstanding the "official" position, courts do somewhat use proportionality in reviewing administrative decisions. The proportionality test involves a balancing of the suitability of the measure, its necessity, and its proportionality *strictu sensu*, that is, considering the necessary objective and the means used to achieve them. In *Brind*,[108] while maintaining the language of *Wednesbury* unreasonableness, Lord Bridge held that the court would look at whether an important competing interest was sufficient to deny fundamental rights. There is no doubt that such an exercise requires the balancing of various issues. Lord Templeman was even more direct in his explanation of what the courts were doing under the rubric of *Wednesbury* unreasonableness, stating that a decision to infringe rights must be necessary and proportional.

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[107] [1991] 1 A.C. 696.

[108] In that case, the Secretary of State issued directives under the *Broadcasting Act of 1981* forbidding the BBC from broadcasting the words of members of terrorist organizations or individuals inviting support for such organizations. However, the BBC was permitted to display a still-life picture of such individuals with a verbatim or paraphrased account of their words.

Nevertheless, instead of clearly incorporating proportionality as a head of review, the House of Lords held that a discretionary decision may only be overturned if it is, in the words of Lord Greene in *Wednesbury*, "so unreasonable that no reasonable authority could ever have come to it."[109] The reasons for this position were neatly summarized in the speech of Lord Lowry. First, the belief in English administrative law that the merits of decision making were the proper realm of the executive as a matter of constitutional law, second, the belief that judges did not possess sufficient expertise to undertake a serious review of the merits of complex decisions involving questions of economic and social policy, and third, the fear of opening the floodgates of liability. Still, in the words of Lord Bridge, the principle of *Wednesbury* unreasonableness, as it is usually understood, is probably not suited to cases where rights were affected:

> [T]he Court start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.[110]

The developments of the *Wednesbury* unreasonableness principle continued in *R. v. Secretary of State, ex parte Leech.*[111] In this case, Lord Steyn held that in determining whether a statute gives an agency the discretion to make certain types of rules, the court will start from the proposition that any interference with a fundamental right must be justified, and only an important public interest will suffice in this respect. Thus, courts will apply a higher standard of scrutiny where the right is fundamental and the infringement is severe.

This same type of analysis was applied in *R. v. Ministry of Defense, ex parte Smith,*[112] where the House of Lords applied again a more intensive *Wednesbury* test of review. Lord Bingham reformulated the *Wednesbury* unreasonableness test, and crafted it much like a proportionality test:

> The Court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision maker. But in judging whether the decision maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with

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[109] *Supra* note 107 at 757.

[110] *Ibid.* at 748–749.

[111] [1993] All E.R. 539. In this case, Leech challenged a Secretary of State regulation under the *Prison Act* which allowed the governor of a prison to read any correspondence by a prisoner, and stop it if it contained objectionable content.

[112] [1996] Q.B. 517. In this case, the applicant was seeking judicial review of a military policy which permits homosexuals to be discharged on the grounds of their sexual orientation.

> human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlines above..[113]

Even after having exercised more control, the House of Lords did not overturn the decision to discharge the applicants for their homosexuality. On appeal to the European Court of Human Rights, in *Smith and Grady v. United Kingdom*, [114] the European Court held that there was a breach of the fundamental human rights of the applicants, which could not be justified under the proportionality test as applied under the European Court of Human Rights pursuant to the *European Convention on Human Rights*.

As can be seen, without expressly saying so the House of Lords has applied a proportionality type test in reviewing administrative decisions which limited fundamental rights protected by either the *Human rights Act*, 1998, or the *European Convention on Human Rights*.

## B. Proportionality in Policy Laden Administrative Decisions

The courts have tightened the *Wednesbury* test even in cases that have nothing to do with fundamental rights, thereby making it easier to review those decisions. [115] In *R. v. Parliamentary Commissioner for Administration* ("OCA"), *ex parte Balchin*,[116] in granting judicial review, Sedley J. proposed yet another definition of the second sense of *Wednesbury* unreasonableness:

> A decision will be Wednesbury Unreasonable if it discloses an error of reasoning which robs the decision of its logical integrity. If such an error is disclosed it is not necessary for the applicant to demonstrate that the decision maker must be regarded as "temporarily unhinged". However, the respondent's decision was very clearly reasoned and save for the question of breach of relevancy did not disclose an error of logic.[117]

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[113] *Ibid.* at 554, accepting the able submission of Mr. David Pannick, representing the applicants.

[114] [2000] 29 E.H.R.R. 493.

[115] Paul P. Craig, *Administrative Law*, 5th ed., *Supra* note 92 at 612.

[116] [1996] E.W.J. No. 1557 (QL); [1997] C.O.D. 146. In this case, the applicant's neighbour's property was bought by a local authority which planned to use it to construct a highway. The local authority refused to purchase the applicant's property, even if the highway would have significantly diminished its value. As a result, the bank demanded repayment of loans secured over the property, whose value was sure to fall. The Department of Transport approved the project. In the end, however, the project was cancelled by the authority. Nevertheless, it was too late for the applicant, who was financially ruined by the whole affair. The OCA conducted an investigation, but concluded that the Department of Transport had not acted out of "maladministration" in failing to make its confirmation contingent on the Authority purchasing the applicant's property or at least advising it to do so.

[117] [1996] E.W.J. No. 1557 (QL) at para. 22; [1997] C.O.D. 146 at 147.

The clearest example of the emergence of proportionality in English law, without being formally accepted as a head of review, is in *R. v. Secretary of State for the Home Department, ex parte Daly*.[118] Lord Bingham, in granting the application, went through each of the three stages of the proportionality test, that is suitability, necessity and proportionality *strictu sensu*, but insisted that he was merely applying the common law approach. It was also in this case that Lord Cooke argues that proportionality should be recognised as an independent head of review:

> I think that the day will come when it will be more widely recognized that *Wednesbury* was an unfortunate retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may very well be, however, that the law can never be satisfied in any administrative field by a finding that the decision under review is not capricious or absurd.[119]

Until the decision of the House of Lords in *R. (Alconbury Ltd.) v. Secretary of State for the Environment, Transport and the Region*,[120] English judges were reluctant to accept that proportionality could potentially constitute an independent head of review in English administrative law. In that case, Lord Slynn, supported by Lord Clyde on this point, opined that proportionality should be recognized as a general head of review within domestic law:

> I consider that even without reference to the *Human Rights Act* the time has come to recognize that this principle [of proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing. Reference to the *Human Rights Act* however makes it necessary that the court should ask whether what is done is compatible with Convention rights. That will often require that the question should be asked whether the principle of proportionality has been satisfied.[121]

Finally, it is arguable that many if not most *Wednesbury* unreasonableness cases are really proportionality cases in disguise because in practice they involve

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[118] [2001] 2 A.C. 532. In this case, the applicant challenged the validity of a policy which allowed prison guards to search a prisoner's cell and examine (but not read) his correspondence in his absence.

[119] *Ibid.* at 549.

[120] [2001] W.L.R. 1389.

[121] *Ibid.* at para. 51.

judges in the same type of exercise that a proportionality test requires.[122] It would also be possible to argue that the proportionality test is merely the *Wednesbury* test being applied with due regard to the nature of the subject matter.[123]

Nevertheless, proportionality plays a small explicit role in English administrative law, and a very large implicit one. Since the United Kingdom is a member of the European Union, it must apply a proportionality head of review for judicial review of Member States and Community action or when a European Union or European Convention of Human Rights issue is in cause. Where a case involves the application of European law, the English courts have followed the European Court of Justice in applying the proportionality test to determine whether State action is in compliance with the *EC Treaty*. For example, in *R. v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd. (ITF)*,[124] Lord Slynn held that the decision of the constable was not unreasonable in either of the *Wednesbury* senses. On the first sense, the Chief Constable took into account all of the relevant interests affected, including the financial constraints of the police department imposed by the extra protection being afforded to *ITF*, and on the second sense of *Wednesbury* unreasonableness, the Chief Constable arrived at a reasonable decision. Applying the European Convention, Lord Slynn applied the proportionality test. He first expressed doubts as to whether the proportionality test was different than the analysis under the *Wednesbury* unreasonableness standard of review, and held that in any event, the negative impact of the means taken on *ITF* were proportional to the interests of public security at stake. Lord Cooke, in his speech, reformulated yet again the *Wednesbury* test. He opined that it was not necessary to have such an extreme formulation in order to ensure that the courts remained within their proper bounds. Thus, he advocated for a simpler test: was the decision one that a reasonable authority could have reached.[125]

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[122] J. Jowell & A. Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law" (1987) P.L. 368.

[123] J. Laws, "Wednesbury", in C. Forsyth and I. Hare, eds., *The Golden Metwand and the Crooked Cord, Essays in Honour of Sir William Wade* (Oxford: Oxford University Press, 1998) at 185-202.

[124] [1999] 2 A.C. 418. In that case, the Chief Constable of Sussex ordered *ITF* to stop ferrying livestock across the English Channel except on two days per week, when demonstrations by animal rights activists threatened to erupt into violence. Initially, the Chief Constable had provided *ITF* with supplementary police protection, but the cost turned out to be prohibitive, so he decided to order *ITF* to cease its activities.

[125] *Ibid.* at 452.

## C. Proportionality in Cases Involving Penalties

Finally, U.K. courts explicitly apply a proportionality test in cases involving penalties. For example, in *R. v. Barnsley Metropolitan Borough Council, ex parte Hook*,[126] the applicant was a trader in a market, and one night after the market had been closed he urinated on a wall. He was caught by the security guards and reported to the market manager. After two hearings, the applicant's trading license was revoked. Lord Denning granted certiorari and overturned the penalty because it was not proportional to the objective. Thus, any penalty had to "fit the crime".

## D. Proportionality and Intensity of Review

There is no doubt that the use of proportionality as a test to determine whether a decision is patently unreasonable will prompt many questions on the intensity of review and the extent to which courts should defer to the administrative decision maker. The English Courts have also had to deal with the issue. Notably, in *Daly*, Lord Steyn held that there was a material difference between a rationality test cast in terms of heightened scrutiny and a proportionality test. He accepted that many cases would be decided the same way under either test, but acknowledged that the intensity of review would be greater under proportionality.[127]

There is no doubt that the balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the courts.[128] However, as the case law demonstrates, under proportionality different margins of appreciation apply in different circumstances. Varying levels of the intensity of review will be appropriate in different categories of cases and this will, in turn, correspond to the different formulations of the test (balancing, necessity, suitability) outlined above. In many cases, decision makers enjoy a wide margin of appreciation and courts will strike down a decision on the grounds of proportionality only when the balance was manifestly inappropriate or when the rights or interests of the complainant have been subjected to an unnecessarily excessive burden.[129]

Even if there are questions as to the intensity of review, this challenge is outweighed by the advantages of the proportionality test. In fact, the propor-

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[126] [1976] 3 All E.R. 452.

[127] *Supra* note 119 at 547.

[128] S.A. de Smith, *Principles of Judicial Review*, 6th ed. by Lord Woolf, J. Jowell & A.P. Le Sueur (London: Sweet & Maxwell, 1999) at 456. See also David Dyzenhaus, "The Unwritten Constitution and the Rule of Law" in G. Huscroft and I. Brodie, eds., *Constitutionalism in the Charter Era* (Toronto: Butterworths, 2004) 383 at 398-401.

[129] S.A. de Smith, *ibid.* at 509.

tionality test provides an implicit explanation for some of the existing judicial interventions under the guise of *Wednesbury* unreasonableness. Even if one accepts the view that judges should hesitate before encroaching upon the merits of a decision, a proportionality analysis is likely to prevent rather than facilitate this type of encroachment, particularly because the structured proportionality analysis forces judges to give an open and reasoned justification for intervention.[130] Moreover, the proportionality test provides a framework that a decision maker may use to assign particular weights to particular considerations and thereby attempt to justify a decision that is adverse to the individual or group immediately affected by the decision.[131] It is especially useful as a tool for assessing two categories of decisions, those that are unreasonably onerous or oppressive, and those where the decision maker manifestly made an improper balance of relevant considerations. Under the first of these, the courts in effect evaluate whether there has been a disproportionate interference with the applicant's rights or interests. Under the second, the exercise of balancing relevant considerations involves the courts in effect evaluating whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision.[132]

It is quite possible to effectuate this analysis without substituting judgment, by deferring to the decision maker, and allowing judicial review only for those cases where, after careful analysis, a court feels that the burden imposed on the applicant outweighs the benefits to the population. In conducting this review, a very wide margin of appreciation can be allowed to the tribunal, especially when the impugned decision is a polycentric one. Therefore, the main difference between *Wednesbury* unreasonableness and proportionality is the refinement of the analysis, and the clear criteria that judges must answer before they can quash the administrative decision. With such criteria to answer, at least prior to changing an administrative decision, judges would have to clearly explain their decision following a set test. As LeBel J. discussed in *Toronto (City)*, one problem with the difficulties in applying the standards of review is that because the test to be applied is inconsistent, people wonder whether judges first make their own finding (on a correctness standard), and then write their reasons according to the applicable standard of review.[133]

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130 G. Wong, "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality" (2000) P.L. 92.

131 Evan Fox-Decent, "The Internal Morality of Administration: The Form and Structure of Reasonableness", *Supra* note 86 at 151. See also Paul P. Craig, "Unreasonableness and Proportionality in UK Law" in Evelyn Ellis, ed., *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999).

132 S.A. de Smith, *Supra* note 129 at 504.

133 *Supra* note 1 at para. 99.

For the purposes of Canadian administrative law, the determination of whether deference is warranted is done following a pragmatic and functional analysis, and this method need not be changed. However, after having determined that the standard of patent unreasonableness applies, the reviewing court should determine whether the decision was patently unreasonable after a proportionality test. This has been practiced by the European Court of Justice, where administrative decisions have been reviewed with a proportionality test. We now turn to the European Community law to determine how a proportionality test could apply in judicial review of administrative action.

## IV. The Proportionality Test in European Community Law

The principle of proportionality originates and is fully developed in German law. When making discretionary decisions, the authority is required by the principle of proportionality to choose the measure which least restricts the citizen's rights.[134] In German constitutional and administrative law, it has developed into a three part test that will allow the courts to diligently scrutinize state action. Such actions have to: be suitable to achieve the aim they are used for; be necessary to achieve the objective in the sense that there is no other measure which would be less restrictive of freedom; and outweigh the individual's interest, in the sense that the measure is not disproportionate.[135]

This principle has also established itself in European Union law as one of the general principles applied in judicial review. It is a "general principle of law" developed by the Court under article 230 of the European Community (E.C.) Treaty and is now enshrined in article 5 of the Treaty. Therefore, not only is it recognised as a separate head of review, but it is one of the most important concepts of administrative law. Proportionality has been applied by the European Court of Justice (E.C.J.) to review Community and Member State actions in cases involving alleged infringements of fundamental rights, to review policy and regulations which imposes burdens (penalties and levies), and to review the Commission's discretionary decisions.

The E.C.J. has recognized that it is not always appropriate to review the merits of administrative decisions, given that the Community has discretion in implementing legal directives, and particularly where they raise complex economic and social policy questions. To overcome this problem, the Court has accorded agencies greater deference in cases which involve such considerations.

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[134] N. Foster & S. Sule, *German Legal System and Laws*, 3rd ed. (Oxford: Oxford University Press, 2002) at 256.

[135] *Ibid.* at 170. See also Jurgen Schwarze, *European Administrative Law*, (London: Sweet & Maxwell, 1992) at 687.

For example, in cases involving the common agricultural policy (CAP), the Court has applied a "manifestly disproportionate" test.

In Case 114/76, *Bela-Muhle Joseph Bergmann KG v. Grows-Farm GmbH and Co*,[136] on judicial review the Court held that an E.C. regulation violated the general principle of proportionality. The burdens imposed by the regulation, in the form of the costs imposed on the applicants, were not justified by the objective of the E.C., which was to eliminate a surplus. The means taken and the ends sought to be achieved were not proportionate, as the burdens imposed on the applicant were unnecessary for the achievement of the community's objective (it could have been achieved with another measure).

In Case 181/84, *R. v. Intervention Board for Agricultural Produce (IBAP), ex parte, E.D. & Man (Sugar) Ltd.*,[137] the E.C.J. held that the regulations requiring the application for a license within a *short period* did not fulfill any valid substantive objective, they were not necessary to prevent speculation, nor did they enable the *IBAP* to control the release onto the market of sugar. The automatic forfeiture of the entire deposit in the event of any failure to fulfill the time requirements was too drastic.[138]

In Case C-331/88, *R. v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa*,[139] the applicant was challenging a regulation banning the use of five hormones which were causing distortions in the market for beef. The applicant alleged that the regulation violated the general principle of proportionality. In reviewing the decision, the E.C.J. held that in matters of CAP, which are very policy oriented, the Council enjoyed a certain amount of deference. Thus, the court will only interfere on the basis of proportionality where there is a *manifest error*. In dismissing the application, the Court considered the suitability of the measure (the black market will emerge regardless of whether the five hormones

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136 [1977] E.C.R. 1211. In that case, the defendant in an action in Germany agreed to pay the plaintiff, a manufacturer of livestock-feed, any increase in his costs which arose subsequent to an agreement of sale concluded between them. A short time later, the E.C. issued a regulation requiring livestock-feed producers to purchase stocks of skimmed milk, which was three times more expensive than soya, what was used before, since there was a surplus of skimmed milk powder in the community. The defendant refused to pay for this additional cost imposed by the E.C. on the plaintiff.

137 [1985] E.C.R. 2889. In that case, the applicant was in the business of exporting sugar. It submitted a tender to the *IBAP*, and was successful. However, the applicant had to give a security deposit to the Board when seeking a licence to export the sugar. The applicant was four hours late in the application process, and failed to complete the paperwork in time under the E.C. regulation. The Board, acting pursuant to the regulation, declared the amount to be forfeit. The applicant argued that the measure violated the general principle of proportionality.

138 *Ibid.* at para. 29.

139 [1990] E.C.R. 4023.

are permitted), its necessity (there were other means of enforcing the prohibition such as to ensure it is effective, although education campaigns could not have alleviated the distortions in the market) and its proportionality (the importance of the objective justified the costs imposed on producers by the ban). In this case, the E.C.J. specifically addressed the issue of the intensity of review, and the use of the proportionality test:

> With regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it... Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.[140]

Thus, the E.C.J. adopted a less intensive standard of review for the judicial review of discretionary decisions and adapted the proportionality test accordingly.

Finally, in Case C-8/89, *Zardi v. Consorzio Agrario Provinciale di Ferrara*,[141] the Court held that in the case of matters of the CAP which involve complex issues of policy and politics, the Court will apply the principle of proportionality with less scrutiny. It will only invalidate regulations where there has been a manifest error. In the present case, the Court held that the measure satisfied the requirements of the principle of proportionality.

As can be seen, even if the proportionality test is applied by the E.C.J. to review administrative action in E.C. law, the scrutiny of review is less intensive when reviewing discretionary or polycentric decisions. In addition, the Court is less deferential to agency decisions depending on the circumstances of the case. The proportionality principle applied by the Court covers a spectrum ranging from a very deferential approach, to a quite rigorous and searching examination of the justification for a measure which has been challenged. This discussion of a spectrum is different than the discussion of a spectrum in Canadian law, which has now been eliminated by the Supreme Court in *Ryan*, in favour of a spectrum comprised of only three specific points.[142]

Nevertheless, three broad types of cases have been distinguished where the intensity of review for proportionality may differ. First, there are cases where an

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[140] *Ibid.* at 4063.

[141] [1990] E.C.R. 2515. In that case, the Council passed a regulation requiring producers of cereal to pay, in advance, a penalty for over-production above stipulated quotas. The producers could get it back fully if they did not exceed the quotas at the end of the year, part of it if they only exceeded the quota by less than 3% or none of it back if they exceeded the quota by more than three percent. Zardi claimed that the regulation violated the general principle of proportionality by requiring the penalty to be paid before any violation occurred.

[142] *Supra* note 16 at para. 24.

individual fundamental right has been unduly restricted by administrative action. The Courts are likely to engage in vigorous scrutiny in cases of this type.[143]

Second, there are cases where the attack is on the penalty imposed, rather than the administrative policy or decision itself. Courts are likely to be reasonably searching in these types of cases in part because penalties can impinge on personal liberties and in part because a court can normally strike down a particular penalty without undermining the entirety of the administrative policy with which it is connected.

Finally, the third type of case is where the individual argues that the very policy choice made by the administration is disproportionate because, for example, the costs are excessive in relation to the benefits, or because the measure is not suitable or necessary to achieve the end in view. The judiciary is likely to be very circumspect in this type of case because the administrative and political arm of the government makes the policy choices and courts should not overturn these merely because they believe that a different option would have been better.[144] Thus, in E.C. law, courts have recognized that the intensity of review may be different depending on the type of case. However, the test will always be that of proportionality. This provides for a detailed test where the courts will have to justify their decisions by analyzing the suitability of the measure for the attainment of the desired end, the necessity of the disputed measure (in the sense that the decision maker has no other option at its disposal which is less restrictive), and the proportionality of the measure. It will be argued that this test is very similar to the proportionality test used by Canadian courts in *Charter* litigation, and has already been implicitly applied in cases like *Baker*, *Suresh*, and *Slaight Communications Inc. v. Davidson*.[145] While all these cases were dealing with a fundamental rights issue, the test set in *Oakes* could be used in determining whether administrative decisions are patently unreasonable.

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[143] For example, in the famous *Casis de Dijon* (Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein*, [1979] E.C.R. 649) case, the E.C.J. considered whether a German rule prescribing a minimum alcohol content for a certain alcoholic beverage constituted an impediment to the free movement of goods. The E.C.J. held that it did so, and held that the justification that the rule was necessary in order to protect consumers from being misled was too restrictive. The interests of the consumers could be safeguarded in other less restrictive ways, by displaying the alcohol content on the label.

[144] P.P. Craig & G. De Burca, *EU Law, Texts, Cases, and Materials*, 3rd ed. (Oxford: Oxford University Press, 2003) at 373.

[145] [1989] 1 S.C.R. 1038. See also Geneviève Cartier, "The *Baker* Effect: A New Interface Between *The Canadian Charter of Rights and Freedoms* and Administrative Law - The Case of Discretion", *Supra* note 31 at 62.

## V. PROPORTIONALITY AS A TEST FOR PATENT UNREASONABLENESS

The principle of proportionality is now used in European law and to a certain extent, in English law. What used to be akin to the patent unreasonableness standard of review in English law has now developed into a proportionality test, or if not that explicitly, courts are now considering implicitly the proportionality test in determining whether a decision is *Wednesbury* unreasonable.

If Canadian courts are to continue with a three standard of review spectrum of deference, it is submitted that a different test should be used to distinguish more effectively between the standards of reasonableness *simpliciter* and patent unreasonableness. While courts should continue to use the pragmatic and functional analysis to determine which standard applies, courts would benefit of a clear criteria in applying all three standards. For example, under the correctness standard courts should make an individual assessment, which is currently done adequately, and substitute judgment if their decision is different than that of the administrative decision maker.

Under the standard of reasonableness *simpliciter*, courts should refuse to grant judicial review where the decision was one of the many "right" decisions a tribunal could make. This would recognize that more than one decision is supported by the enabling statute, and would preserve the principle of Parliamentary sovereignty, since it would recognize the power of Parliament to delegate decision making to administrative bodies. Therefore, for reasonableness *simpliciter*, courts could continue to apply the current definition. Thus, there would be no role for proportionality under this head of review. While some could argue that the standard of reasonableness *simpliciter* is problematic, I do not propose to deal with an alternative in this paper.

Finally, when following the pragmatic and functional analysis, a court determines that the standard of review applicable is that of patent unreasonableness, a proportionality type test should be used to determine whether a decision is manifestly disproportionate. Such test, crafted like the test used in E.C. law, could permit courts to defer to the decision maker, on discretionary decisions or other rules of law, while quashing the decision where it is manifestly disproportionate. This would recognize both Parliamentary sovereignty and the rule of law, since it would compel the decision maker to act within the bounds of its enabling statute, and not act arbitrarily.

Arguably, the proportionality test has already been applied in judicial review of administrative action, when the *Charter* has been considered to limit the discretion of the Minister.[146] For example, in *Baker*, L'Heureux-Dubé J. held that

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[146] Geneviève Cartier has argued that *Baker* laid the foundations for the development of a new kind of relationship between the *Charter* and administrative law in matters of discretion. Moreover, the Court may prefer to resort to the constitutional standard of review provided

"the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause to Ms. Baker..."[147] In *Suresh*, the Court concluded that the Minister had to exercise his discretion in a constitutional manner.[148] In doing so, the Court noted that torture was so abhorrent that "it will almost always be disproportionate to interests on the other side of the balance".[149] In *Kindler v. Canada (Minister of Justice)*,[150] the Court recognized that the Minister's discretion was limited by the *Charter*,[151] and that the *Charter* required a balancing on the facts of each case of the applicable principles of fundamental justice. In *United States v. Burns*,[152] the Court balanced the interests of the public and those of the accused, and determined that the extradition to the death penalty was an unconstitutional use of the Minister's discretion, as it was a violation of s. 7 of the *Charter*.[153]

Earlier we discussed that proportionality has been applied to three different types of cases in E.C. and English law: cases where a fundamental human right is limited, cases involving a penalty, and cases where the decision maker must consider a myriad of issues under a policy laden enabling statute. As for the first situation, there is no doubt that the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms*, applies to administrative action and limits the discretion of the decision makers. When courts have to consider whether an administrative decision has trampled fundamental rights protected by the *Charter*, they must not determine whether the administrative decision is reasonable *simpliciter* or patently unreasonable, they must determine if the administrative

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for in the *Charter* rather than the administrative law standard of review for review of discretion. See Geneviève Cartier, "The *Baker* Effect: A New Interface Between *The Canadian Charter of Rights and Freedoms* and Administrative Law - The Case of Discretion", *Supra* note 31 at 62, 74.

147 *Supra* note 3 at para. 73. Evan Fox-Decent has also argued that *Baker* implicitly introduced some principles that bear close resemblance to the principle of proportionality: Evan Fox-Decent, "The Internal Morality of Administration: The Form and Structure of Reasonableness", *Supra* note 86 at 157-163.

148 *Supra* note 33 at para. 79.

149 *Ibid.* at para. 76.

150 [1991] 2 S.C.R. 779 at 846-847.

151 See also *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

152 [2001] 1 S.C.R. 283.

153 *Ibid.* at para. 130.

decision has breached a *Charter* right and if not, whether the infringement can be saved by the s. 1 proportionality test.[154]

This conclusion stems from the wording of s. 32 of the *Charter*, which applies to Parliament and the Legislatures. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, administrative tribunals, and police officers, is also bound by the *Charter*. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which permit any breach of it. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions, and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.[155]

It follows that administrative decisions which limit the rights protected by the *Charter* must be safeguarded under s. 1 and the proportionality test.[156] The standard of review applicable to this particular question, i.e. a constitutional question, is that of correctness, notwithstanding the fact that the decision maker has a statutory discretion.[157] We are thus in a situation akin to the European Community law and English law position as to the judicial review of administrative decision in cases with a fundamental rights issue. It could even be argued that more curial deference is allowed to E.C. and English decision makers in those types of decisions than in Canadian law, where no deference whatsoever is owed to the tribunal's determination of the question, as constitutional questions never lie within their expertise. Consequently, Canada, as in E.C. law

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[154] See generally Geneviève Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law - The Case of Discretion", *Supra* note 31.

[155] Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf edition (Toronto: Carswell) at 34-12.1. See also *Slaight Communications Inc. v. Davidson*, *Supra* note 127 at 1077-1078; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 1 S.C.R. 307 at para. 38.

[156] *Slaight Communications Inc. v. Davidson*, *Supra* note 139 at 1079-1080.

[157] *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 S.C.R. 504 at para. 31; *U.F.C.W, Local 1518 v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1089 at para. 69. See also, *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2003) at 14-10.

and English law, applies a proportionality test when reviewing administrative decisions where fundamental rights issues arise.[158]

The only question that remains as to the appropriateness of a proportionality test in Canadian administrative law is as to its application in the other two types of cases, namely those where the review is of a decision which imposes burdens (penalties and levies), and the review of policy laden discretionary decisions. It has already been demonstrated that a higher degree of deference can be allowed to decision makers even if a proportionality test informs the patent unreasonableness standard of review. As noted in E.C. law, a decision will be reversed only if manifestly disproportional, when the decision involves a myriad of considerations, including economic and political issues.

A proportionality test could be used in Canadian law when reviewing administrative decisions imposing a penalty or a burden on the applicant. In the field of labour law for example, where administrative decision makers frequently decide whether an employee may be terminated, those types of cases do impose penalties and burdens and could be reviewed following a proportionality type test. The Federal Court of Appeal has held the standard of review of the Public Staff Relations Board, for example, on a question of termination of employment, was patent unreasonableness.[159] The review for patent unreasonableness should be guided by the proportionality test. The question would become: was the penalty imposed proportional with the offence and the need for dissuasion?[160] Unless the decision is manifestly disproportionate with the offence, the administrative decision would stand. However, should the courts decide to intervene, there will be an adequate test guiding their analysis in support of the decision.

As for the third type, the review of policy laden decision where the decision maker must consider a myriad of issues, there is no doubt that this is the hardest kind of judicial review. This third approach includes all cases where there is no fundamental right or excessive penalty, as they would be settled under the preceding approaches. This third approach would presumably require the judicial review of a polycentric decision, protected by a strong privative clause, and made by expert decision makers since, following the considerations of the prag-

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158 This was recognised recently by Justice Bastarache in a recent article: M. Bastarache, "La révision judiciaire des decisions ministérielles à la lumière de l'arrêt *Baker c. Canada*" (2004) 5:2 Revue de la Common Law en Français 399 at 407.

159 *Singh v. Canada (Public Works and Government Services)* (2001), 212 F.T.R. 153 at para. 11. For a general discussion on the standard of review of the Public Service Staff Relations Board, see Blais et al., *Standards of Review of Federal Administrative Tribunals*, (Toronto: Butterworths, 2003) at 221-230.

160 Even though the standard of reasonableness *simpliciter* was applied in those cases *Ryan*, *Supra* note 16, and *Moreau Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 are examples of cases where a proportionality test would have been adequate.

matic and functional analysis, the standard of review would have been set at patent unreasonableness.

The paradigm of this third category is the case where the public body decides to exercise its decision making authority in a particular manner, necessitating the balancing of various interests, and a person affected argues that the balancing was disproportionate. While it cannot be right for the judiciary to overturn a decision merely because it would have balanced the conflicting interests differently, this does not mean that proportionality has no role to play. The proportionality inquiry, for example, could be confined to a particular aspect of the decision, or as exemplified in E.C. law, a less intensive review can be utilised in these cases.[161] When reviewing this type of case, courts would be well advised not to try and balance all the issues considered by the public body, especially when political and economic issues have been considered.[162]

## VI. CONCLUSION

The standard of patent unreasonableness does not provide an adequate test for the review of administrative decision making. As noted by Lebel J. in *Toronto(City)*, the test is not clearly defined, and does not adequately provide guidelines for its application. Where a Court must make, under the correctness standard, a decision and substitute judgment if it is different than the decision maker's, a court must recognize that more than one "good" decision was open to the decision maker under the reasonableness *simpliciter* standard.

Courts are still struggling as to the intrusiveness of the review under the patent unreasonableness standard, and arguably, the standard of reasonableness *simpliciter*. Where some believe that the error must be evident in the reasons of the decision, or "on the face of the record", others prefer an approach including the searching and testing of the evidence. This approach is inconsistent and unworkable.

While Lebel J. has advocated in favour of a two standard of review system, another option is available. This option would see the intrusion in Canadian law of a proportionality test within the patent unreasonableness test. This would have the advantage of guiding courts in the judicial review of administrative decisions, whether discretionary or not, and would force judges to adequately canvass their decision and their reasons for intervening. Moreover, this would answer the growing criticism that judges in fact make their determination

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161 Paul P. Craig, *Administrative Law*, 5th ed., *Supra* note 91 at 624-625.

162 In *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 709-10, for example, the Court stated that the remedy on "reading in" was clearly inappropriate when it change the legislative objective or impact budgetary policy. Arguably, the same considerations should apply on judicial review of policy laden discretionary decision-making.

on a correctness standard, and then write their reasons in such a fashion as to respect the applicable standard of review. In turn, this would be a future guideline for the administrative decision makers, and would help them in the exercise of their decision making authority.

Major J., in *Voice Construction*, has recently limited the application of the patent unreasonableness test, stating that it applies in the rare occasions where the tribunal is empowered by a policy laden statute, where the nature of the question falls squarely within its relative expertise, and where that decision is protected by a full privative clause. Unless the decision borders on the absurd it is not patently unreasonable.[163]

While the limit of Major J. is probably a step in the right direction, it still does not provide a clear test or guideline to apply the patent unreasonableness standard of review. It does, however, go back somewhat to the original meaning of *Wednesbury* unreasonableness, the decision being qualified as almost absurd. Again, it must be noted that this definition in English law has been developed, although implicitly in the review of discretionary decisions, in a proportionality test. In my opinion, the future of the patent unreasonableness test must lie in the E.C. law proportionality test. If such a test was to be adopted, all three standards of review would be better defined, and would all provide for a clearer guideline in the application of the standard of review. As discussed above, the correctness standard would enable courts to make an individual assessment and substitute judgment if their decision is different than that of the administrative decision maker. As for the standard of reasonableness *simpliciter*, courts should recognize that more than one exercise of the decision maker's discretion, or more than one interpretation, is possible under the enabling statute. Thus, where the decision was one of the many "right" decisions the body could make, its decision should not be quashed. Finally, the proportionality test should be used to determine whether a decision is patently unreasonable, as it is manifestly disproportionate. This test of proportionality, in the patent unreasonableness standard of review, should be very rarely applied, as the original *Wednesbury* unreasonableness principle was, i.e. only in extremely special circumstances such as an abuse of powers contrary to the rule of law.

Thus, the standard of review to be applied on judicial review should continue to be determined following a pragmatic and functional analysis or various criteria. When reviewing under correctness, courts should make their own finding and substitute judgment accordingly. When reviewing under the reasonableness *simpliciter* standard, courts should start with the premise that many decisions were open to the decision maker, and determine whether the one selected can be supported by the enabling legislation. Finally, under the patent unreasonableness standard of review, courts should determine, first, whether a

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[163] *Supra* note 44 at para. 18.

fundamental right is affected or a penalty has been imposed. If it has, a decision should be overturned if the burden imposed is not proportional with the benefits to the population. If there is no fundamental right in cause, and no penalty has been imposed, the decision should only be overturned if manifestly disproportionate to the legislative objective, as the decision is manifestly vague or too broad, or clearly contrary to the aim of the statute.

The other option, as advocated by Lebel J. in *Voice Construction*, is to eliminate one of the two problematic standards of review, probably the standard of patent unreasonableness. Thus, a reviewing court should only ask, as discussed in the first section of this paper, whether the particular decision maker should be afforded curial deference. In any event, regardless of which deferential standard is chosen to survive, the test for proportionality should still be implemented. While the difficulties related to both standards would be eliminated, there would still be problems with transparency, and the proportionality test provides a clear criteria.