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"But Only on a Question of Law": Examining the Scope of Appellate Review of the Landlord and Tenant Board

Toby Young*

Résumé
Selon la Loi sur la location à usage d'habitation, 2006, la compétence d'un tribunal d'appel en révision de décisions de la Commission de la location immobilière est limitée aux questions de droit. Cet article a deux objectifs principaux : l'examen des limites et des contours de ce qui pourrait constituer « une question de droit » aux fins d'appel de la Commission et l'examen de la norme de contrôle judiciaire applicable.

La norme de contrôle judiciaire applicable dépend en grande partie de la nature de la « question de droit » soulevée en appel, et dans ce cas la norme est semblable à celle appliquée aux appels de décisions judiciaires.

Il est généralement admis que la norme est celle de la décision correcte quant aux questions de droit, et de ce fait, il est de la plus haute importance de préciser ce qui constitue une question de droit — ce qui n'est pas toujours facile. Cet article étudie à fond comment extraire des questions de droit à partir de questions de fait ou de questions mixtes de fait et de droit. De plus, certaines questions de droit — c.-à-d. les règles de la justice naturelle, le devoir d'équité de la procédure et le pouvoir discrétionnaire conféré par la loi — font appel à une norme différente du fait d'approches analytiques distinctes appliquées à ces types de questions juridiques.

L'article passe en revue Dunsmuir c. Nouveau-Brunswick, [2008] 1 R.C.S. 190, où la Cour suprême du Canada a éclairci le fait qu'il n'existe plus à présent que deux normes de révision — celle de la décision correcte et celle de la raisonnalbilité — et évalue l'impact de cet éclaircissement sur la norme en usage à la Commission. L'article fait valoir que Dunsmuir n'aura pas un impact d'importance à la Commission et cela largement du fait que la Commission ne possède pas d'expertise hautement spécialisée.

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INTRODUCTION

The central purpose of this article is to examine the scope of appellate review\(^1\) of the Landlord and Tenant Board\(^2\) under the Residential Tenancies Act, 2006.\(^3\) The article will show, as a very general proposition, that appellate review of the Board is driven primarily—as are appeals of judicial decisions—by the underlying policy considerations regarding the appropriate role of an appellate court. The determination of the standard of review to be applied to the Board turns largely on the nature of the question at issue because the main justifications for deference to administrative decisions by appellate courts—privative clauses and relative expertise—are not factors that ought to apply in the review of Board decisions. Therefore, despite the fact that an administrative law standard of review analysis is inapplicable to judicial decisions,\(^4\) the standards applied to the appellate review of the Board and the appellate review of judicial decisions are essentially indistinguishable.\(^5\) Moreover, this article suggests that the express provision in the RTA setting out appellate jurisdiction to “only questions of law” has little, if any, impact and, as a practical matter, does very little to restrict the scope of appellate review that would occur if review of questions of mixed fact and law or of fact alone were expressly referenced in the RTA.

More specifically, this article has three other objectives. First, it seeks to identify the types of questions of law that may be the subject of appeal (e.g. jurisdiction, statutory interpretation, and natural justice and procedural fairness). Second, it acknowledges and explores the sometimes contentious task of how questions of law are character-

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1. In this paper, the term "appellate review" refers to the review of Landlord and Tenant Board [Board] decisions by way of statutory right of appeal under the Residential Tenancies Act, 2006, S.O. 2006, c. 17 [RTA] and is used in contradistinction to the term "judicial review," meaning the review of Board decisions by way of application for judicial review. This paper focuses on appellate review although some reference is made to judicial reviews, a fairly uncommon event in residential tenancy law.

2. See RTA, sections 168 to 182. The predecessor to the Board was the Ontario Rental Housing Tribunal [ORHT or Tribunal]. The Tribunal existed from 1998 to 2006.

3. S.O. 2006, c. 17. The RTA was proclaimed on force on 31 January 2007. Section 210(1) provides that any person affected by an order of the Board may appeal to the Divisional Court, "but only on a question of law." The RTA's predecessor, the Tenant Protection Act, 1997, S.O 1997, c. 24 [TPA], was identical to the RTA in this respect (section 196(1) TPA). In contrast, the TPA's predecessor, the Landlord and Tenant Act, R.S.O. 1990, c. L.7 [LTA], at section 116(1) provided that an appeal was available "from a final order of a judge.”

4. In Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226 at para. 33 [Dr. Q.] McLachlin C.J.C. for the Court observed that the "conceptual foundation of review of administrative decisions is fundamentally different than that of appeals from judicial decisions" and that "in the context of judicial review of administrative action, the nature of the question is just one of four factors to consider when determining the standard of review:"

5. See Zeitoun et al. v. The Economical Insurance Group (2008), 91 O.R. (3d) 131 (Div Ct.), which held that the same standard of review applies to appeals from masters and from judges. The decision of a master should be interfered with only if the master made an error of law or exercised his or her discretion on wrong principles or misapprehended evidence such that there was palpable and overriding error. These standards of review are, it is argued, equally applicable to most tribunals, including the Board.
ized, with a particular focus on how courts may extract questions of law from what appears to be other types of questions (i.e. questions of mixed fact and law, questions of fact and the exercise of statutory discretion). Third, it reviews the appropriate degree of deference that an appellate court may apply to the particular question of law before it (i.e. standard of review).

It is understood that statutory appeals are inherently limited exercises. They are not intended to be a retrial of a case or a hearing *de novo*. An appellate court's basic institutional role is to preserve and uphold the rule of law by identifying and correcting legal error. As noted by Charles Alan Wright:

> Everyone agrees, so far as I know, that one function of an appellate court is to discover and declare—or to make—the law. From the earliest times appellate courts have been empowered to reverse for errors of law, to announce the rules which are to be applied, and to ensure uniformity in the rules applied by various inferior tribunals.  

The principles that lead to a posture of general deference toward trial courts are, it is suggested, largely applicable to administrative tribunals. As a matter of broad policy, appellate courts are concerned about contributing to any undue increase in the number and length of appeals, recognize the autonomy and integrity of trial courts (and the legislative delegation of certain matters to tribunals), and are conscious that increased appellate intervention could make the appellate forum available primarily to wealthier parties. In contrast, the primary role of trial courts and administrative tribunals, including the Board, is to resolve disputes by making findings of fact and applying settled law.

Because the RTA expressly permits appeals on questions of law alone, the characterization of the question on appeal is crucial. For instance, are questions of mixed fact and law immune to the scope of appellate review? Such questions may be capable of being recast as legitimate questions of law or, perhaps more precisely, questions of law may be able to be extracted from questions of mixed fact and law. The Supreme Court of Canada has recognized the challenge in drawing hard and fast distinctions between the various types of legal errors and, in particular, between a question of law and a question of mixed fact and law. Moreover, errors of fact, if sufficiently

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8. In Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at para. 35 [Southam] the Supreme Court per Iacobucci J., noted:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what negligence means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction be-
serious, can amount to questions of law as, for example, findings of fact based on no evidence or a misapprehension of the evidence. In addition, the exercise of statutory discretion in a manner that includes factors deemed to be outside the statutory grant of discretionary jurisdiction may also constitute a question of law.

The standard of review applied by the courts to Board decisions ought to be correctness in virtually every appeal but not because the scope of appellate jurisdiction is restricted to questions of law. Once a question of law is identified, there is no basis for any deference by the court due to the lack of any specialized expertise at the Board. The mere legislative choice of the Board to deal with residential tenancy matters cannot carry any assumption of expertise. In short, it is argued that the court may adopt a deferential approach to issues within the special expertise of administrative tribunals in the face of a strong privative clause but, even in those circumstances, the tribunal must have expertise on the particular question before it. It is suggested that there is no question of law upon which the Board can be considered to have greater, or even equal, expertise than a reviewing court.

This article is divided into seven sections. The first section provides an overview of the standard of review analysis to be applied in appeals from the Board. Each of the subsequent five sections also includes a review of the applicable standard of review to be applied to the types of legal error that are commonly raised at the Board. In particular, the second section deals with questions of law and the difficult exercise that delineating a question of law can be. The third section examines questions of mixed fact and law and, in particular, demonstrates how a question of law may be extracted from an apparent question of mixed fact and law. The fourth section reviews questions of fact and, once again, examines how questions of law may be extracted by finding error in the Board's fact-finding process and its treatment of the evidence. The fifth section addresses the matter of reviewing the Board's statutory powers of discretion. Discretionary decisions are essentially fact-based exercises given wide latitude, but the courts have wrestled with the issue of the proper scope of the Board's discretionary jurisdiction. The sixth section examines questions of natural justice and procedural fairness and the judicial pressure to be, on the one hand, the ultimate arbiter of fairness but, on the other hand, to also provide a degree of respect for the legislature's choice of procedures in the RTA. In the seventh and final section of the article, the Board's duty to provide reasons as a component of the duty of procedural fairness will be examined. As will be seen, inadequate reasons themselves can pro-

\[\text{tween law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turn out to be law, or vice versa.} \] [Emphasis added.]


9. See below, Reviewing Questions of Fact.
vide the basis for an appeal as an error of law. However, precisely what constitutes inadequate reasons in a case is a matter of some subjectivity and there is no clear, bright line distinction that may be relied upon consistently for any guidance.

**THE STANDARD OF REVIEW**

*The determination of the operative standard of review is as much an exercise in judicial self-discipline as it is an exercise in statutory interpretation.*

The standard of review analysis is derived from two distinct adjudicative contexts—the courts and administrative tribunals—resulting in two distinct approaches to the standard of review analysis, with some degree of overlap between the two approaches. In some respects, it is misleading to even speak of a "standard of review" analysis with respect to court decisions because that formal analysis is applicable only to the appellate and judicial review of administrative decision-making. In the courts, the analysis has essentially centred on the nature of the question before the court; in particular, is this a question of law, a question of mixed fact and law, or a question of fact? Different standards have been articulated by the courts, depending on which type of question is being reviewed. In contrast, in the context of administrative action, the nature of the question is viewed as but one of four factors to be considered in determining the appropriate standard of review. Nevertheless, both the appellate review and judicial review of administrative action, recently subjected to substantive revision by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, seek the same objective of determining the proper scope of deference to be given to an administrative decision.

In the administrative context, Sara Blake notes that the standard of review jurisprudence reflects a tension about the appropriate roles of the courts and the legislature:

> Unstated but underpinning the analysis is the separation of powers between the court and the legislature and executive, of which tribunals form a part. The court may not review the wisdom of government policy. Its role is to supervise tribunals to ensure that they act lawfully. The court must defer to the intention of the legislature as expressed in the statute. The court's constitutional duty is to protect the rule of law.

10. In *Natarelli v. Sheikh*, [2007] O.J. No. 604 at para. 5 (Div. Ct.) the court held that "[f]ailing to give reasons in support of the amount of damages and failing to explain why the adjournment was not granted are errors of law."


12. The standards applied by the courts also operate on the basis that all of these questions are subject to review, absent any statutory direction to the contrary.

13. [2008] 1 S.C.R. 190 [*Dunsmuir*].

14. Sara Blake, *Administrative Law in Canada*, 4th ed. (Toronto: Butterworths, 2006) at 206. See also *Dunsmuir*, supra note 13 at para. 27 *per* Bastarache and LeBel JJ.
The central question to be decided by a court was succinctly expressed in *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*\(^{15}\) emphasizing the importance of legislative intent: “[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?”\(^{16}\)

Moreover, the jurisprudence has developed in the context of both applications for judicial review and statutory rights of appeal.\(^{17}\) This has had important implications in the determination of the appropriate standard. For example, the consideration of a privative clause does not genuinely arise in the context of the statutory right of appeal from the Board. A privative clause purports to restrict courts from intervening in tribunal decisions. A statutory right of appeal, in contrast, indicates a legislative intent to grant greater appellate scrutiny and, in general, the jurisdiction of a court on appeal is broader than the jurisdiction on judicial review. Moreover, the Board’s expertise and the principle of the specialization of duties inherent in the delegation of landlord and tenant disputes to the Board are essential factors to be considered.\(^{18}\) In other words, to particularize the issue of determining legislative intent as set out in *Pasiechnyk*\(^{19}\) with respect to the Board: Was the question that the provision raises one that falls squarely within the Board’s area of expertise?

**Pre-Dunsmuir: The Pragmatic and Functional Approach**

Until *Dunsmuir*,\(^{20}\) the standard of review in all cases of appellate and judicial review was determined by the “pragmatic and functional approach”,\(^{21}\) which created a spectrum

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16. *Ibid.* at para. 18 *per* Sopinka J.
17. It has been noted, however, that the standard of review jurisprudence has developed more so in the context of judicial review applications: see Paul Rapsey, “Standard of Review from Decisions of the Ontario Rental Housing Tribunal” (2002) 17 J. L. Soc. Pol’y 1 at 2. There are few judicial review decisions in the residential tenancy context. A notable exception is *Metropolitan Toronto Housing Authority v. Godwin* (2002), 161 O.A.C. 57 (C.A.) [*Godwin*], which found the Tribunal had the jurisdiction to hear representative evidence. No standard of review analysis was undertaken by the Court of Appeal but the Divisional Court did so in *Metropolitan Toronto Housing Authority v. Godwin* (2002), 50 O.R. (3d) 207 at paras. 37 and 38 (Div. Ct.), *per* O’Driscoll J. and concluded that if the question of law at issue is within the tribunal’s jurisdiction, it would exceed its jurisdiction only if it errs in a patently unreasonable manner. If, however, the question at issue concerned a legislative provision limiting the tribunal’s powers, a mere error would cause it to lose jurisdiction and subject the tribunal to judicial review. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 [*Pezim*], Southam, *supra* note 8, and *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 [*Bell*] for authority on the applicable standard of review in the context of statutory appeals.
18. See *Bell, supra* note 17 at 1745-46 *per* Gonthier J.
of levels of deference: correctness,\textsuperscript{22} reasonableness \textit{simpliciter} (reasonableness),\textsuperscript{23} and patent unreasonableness.\textsuperscript{24} This approach involved weighing four factors, none of which was solely dispositive.\textsuperscript{25}

1. the presence or absence of a privative clause or statutory right of appeal;
2. the expertise of the administrative tribunal relative to the reviewing court regarding the question at issue;
3. the purpose of the legislation, and the statutory provision in particular; and
4. the nature of the question: law, fact, or mixed law and fact.\textsuperscript{26}

In \textit{Law Society of New Brunswick v. Ryan},\textsuperscript{27} the Supreme Court noted that when in the process of reviewing a decision for correctness "the court may undertake its own reasoning process to arrive at the result it judges correct."\textsuperscript{28} In reviewing for reasonableness, a court must not interfere unless the party seeking review has positively shown that the decision, taken as a whole, was unreasonable. The focus is on the reasons for decision. An unreasonable decision is "one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."\textsuperscript{29} Finally, the most deferential standard—patent unreasonableness—involved an error that was "apparent on the face of the record and was so immediate and obvious that there was no real possibility of doubting the decision was defective."\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{23} Ibid. at para. 47. Until 1997 in \textit{Southam}, supra note 8, and the development of the reasonableness standard, there were only the correctness and the patent unreasonableness standards available to a reviewing court.
  \item \textsuperscript{24} Ibid. at para. 52.
  \item \textsuperscript{25} Re Cartaway Resources Corp., [2004] 1 S.C.R. 672 at para. 44.
  \item \textsuperscript{26} Ryan, supra note 22, at para. 27.
  \item \textsuperscript{27} Ibid.
  \item \textsuperscript{28} Ibid. at para. 50.
  \item \textsuperscript{29} Ibid. at para. 48 (citing \textit{Southam}, supra note 8):
    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.
  \item \textsuperscript{30} Ryan, supra note 22 at para. 52. In \textit{Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.} (1979), 97 D.L.R. (3d) 417 at 425 (S.C.C) Dickson J. described the patently unreasonable standard as follows: "[W]as 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?"
In residential tenancy jurisprudence there has been a rather reflexive adoption of the correctness standard of review and an absence of analysis, primarily due to the statutory provision limiting appeals to questions of law.\textsuperscript{31} The jurisprudence reveals, however, that all three standards of review have been applied: correctness,\textsuperscript{32} reasonableness,\textsuperscript{33} and patent unreasonableness.\textsuperscript{34}

**Post-Dunsmuir: The New Standard of Review Analysis**

In *Dunsmuir*,\textsuperscript{35} the Supreme Court extensively reconsidered the standard of review jurisprudence and concluded that the two variants of reasonableness review—reasonableness and patent unreasonableness—should be collapsed into a single form of "reasonableness" review. Thus, there are now only two remaining standards of correctness and reasonableness,\textsuperscript{36} and the "pragmatic and functional approach" terminology has been supplanted by a "standard of review analysis".\textsuperscript{37} The court clarified that "[a]n exhaustive review is not required in every case" and only where the existing jurisprudence does not clearly reveal the proper standard to be applied does

\begin{enumerate}
\item See *Paul Bunyan* supra note 8; *Burt Dozet Management Inc. v. Goharzad*, [2001] O.J. No. 550 (Div. Ct.) (on consent on this issue); and possibly *MacKay v. Sanghera*, [2001] O.J. No. 2600 (Div. Ct.) (although the court also held that decision was correct).
\item See *Smolcec v. Longhouse Village (Thunder Bay) Inc.* (2001), 32 Admin. L.R. (3d) 72 (Div. Ct.) [Smolcec].
\item *Supra* note 13.
\item *Ibid.* at paras. 45 to 50. The court went on to define the two standards: 

*Reasonableness* is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.

\[\ldots\]

When applying the *correctness* standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct (at para. 50). [Emphasis added.]
\item *Ibid.* at para. 63.
\end{enumerate}
a court need to embark on an analysis of the factors to identify the proper standard of review.\textsuperscript{38} The joint reasons for judgment stated:

The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. \textit{In many cases it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.}\textsuperscript{39}

With regard to the nature of the question of law at issue, a distinction was made between a question of law that is of central importance to the legal system and outside the area of expertise of an administrative tribunal (which would always attract a correctness standard)\textsuperscript{40} and a question of law that does not rise to that level.\textsuperscript{41}

What, if any, impact will this have in the Board context? It is argued that \textit{Dunsmuir}\textsuperscript{42} will likely lead to an even less formal application of the standard of review factors than is already the case and that once a question of law is identified, given the broad right of appeal, the correctness standard will invariably be applied. The sole exception may be those questions of law that formerly attracted the standard of patent unreasonableness: discretionary decisions.\textsuperscript{43} Justice Binnie, in concurring reasons,\textsuperscript{44} noted that while a court ought generally to respect the exercise of administrative discretion, particularly in the face of a privative clause, this is not the case where there

\begin{itemize}
\item \textsuperscript{38} \textit{Ibid.} at paras. 57, 62, 64.
\item \textsuperscript{39} \textit{Ibid.} at para. 64 [emphasis added] \textit{per} Bastarache and LeBel JJ. \textit{Dunsmuir} includes three sets of reasons: joint reasons for judgment \textit{per} Bastarache and LeBel JJ. (McLachlin C.J.) and Fish and Abella JJ. (concurring) and two sets of concurring reasons \textit{per} Binnie J. and \textit{per} Deschamps J. (Charron and Rothstein JJ. concurring).
\item \textsuperscript{40} \textit{Ibid.} at para. 55 (citing \textit{Toronto (City) v. C.U.P.E. (Local 79)}, [2003] 3 S.C.R. 77). The court noted that the following types of questions would attract the correctness standard: constitutional questions such as those regarding the division of powers between Parliament and the provinces (para. 58); true questions of jurisdiction or \textit{vires}, i.e. where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter (para. 59); where the issue is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (para. 60); and questions regarding the jurisdictional lines between two or more competing specialized tribunals (para. 61).
\item \textsuperscript{41} \textit{Ibid.} at para. 55. Bastarache and LeBel JJ. concluded, at para. 71, that considering the privative clause, the nature of the regime and the nature of the question of law at issue, the standard was reasonableness.
\item \textsuperscript{42} \textit{Supra} note 13.
\item \textsuperscript{43} See below, Reviewing the Exercise of Discretion.
\item \textsuperscript{44} \textit{Supra} note 13 at paras. 119-57. Binnie J. held, at para. 156, that the reasonableness standard applied because the adjudicator was interpreting his “home turf” statutory framework and there was a privative clause.
\end{itemize}
is a full statutory right of appeal.45 Moreover, Justice Deschamps46 emphasized that the nature of the question before the administrative tribunal needed to be identified (i.e. question of law, mixed fact and law, or fact) and was of the view that little else needed to be done in order to determine whether deference needed to be shown.47 Deference, therefore, is not owed on a question of law where there is a statutory right of appeal.48

In an early post-Dunsmuir49 appeal from the Board, Darragh v. Normar Developments Inc.,50 the court found that the standard of review remained a correctness standard and that Dunsmuir51 had no impact in the case.52 The court characterized the issue on appeal as a “pure question of law”, specifically the issue of retroactivity and retrospectivity of legislation, and determined that the Board had no special expertise, relative to the court, to determine such an issue.53 Given the issues as framed in Darragh,54 it is argued that the court applied the proper standard and, moreover, would have reached an identical result under the former pragmatic and functional approach.

The Dunsmuir55 standard of review analysis raised objections from Justice Binnie, who voiced concern that the waters would remain muddy by merely shifting the debate from choosing between two standards of reasonableness to a debate within the single reasonableness standard.56 However, early indications from the Ontario Court of Appeal, at least, are encouraging. In Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal),57 the court held that it was inappropriate to assess

45. Ibid. at para. 123. Binnie J. opined, at para. 124, that the correctness standard should be applied to questions concerning the constitution, the common law and the interpretation of a statute other than the administrator’s “home statute” or a rule or statute closely connected to it.
46. Ibid. per Deschamps J. at paras. 158-73.
47. Ibid. at para. 158. Deschamps J. noted at para. 160: “By focusing on the ‘nature of the question’ ... it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.” Deschamps J. concluded that, at para. 168, the correctness standard applied because the common law, not the adjudicator’s enabling statute, was the starting point of the analysis and because the adjudicator did not have expertise in interpreting the common law there could be no deference.
48. Ibid. at para. 163.
49. Supra note 13.
51. Supra note 13.
52. Supra note 50 at paras. 12-15.
53. Ibid. at para. 15.
54. Supra note 50.
55. Supra note 13.
56. Ibid. at paras. 150-55.
57. (2008), 237 O.A.C. 71 (C.A.)
varying degrees of deference within the single reasonableness standard. Yet some commentators have expressed skepticism about whether the new standard of review analysis has really changed the degrees of deference at all and that the standard of patent unreasonableness has not been eliminated but only driven underground. It remains to be seen whether it will be appropriate to apply the reasonableness standard more deferentially or less deferentially, depending on the circumstances.

The Standard of Review Applicable to the Board

The respective roles of the courts and the legislature in establishing the standard of review in statutory appeals has been described by David Mullan as creating "at least superficially the potential for a clash between the legislative objective in the express conferral of a right of access to the courts and judicial assessment of the respective competence of decision-makers and courts." This clash is more apparent than real, as there is no persuasive basis for judicial deference on any question of law raised on appeal. The appropriate standard to be applied to the Board is correctness, as all four factors point to granting the Board little, if any, deference.

Several residential tenancy decisions have applied the pragmatic and functional approach, albeit not usually in a comprehensive manner. A notable exception is Sage v. Corporation of the County of Wellington, where the court conducted a relatively detailed review of the four factors. In Sage, the issue was whether the Ontario Rental Housing Tribunal erred in its interpretation of section 84(2)(a) of the Tenant Protection Act, which required the Tribunal to refuse an eviction application where the landlord was in serious breach of its responsibilities. In an implicit recognition of

58. Ibid. at para. 18. In Ryan, supra note 22, at para. 20, it was also noted that the standard of reasonableness does not “float” according to the circumstances but always involves asking the same question about the challenged decision.


61. In Toronto Community Housing Corporation v. Greaves, [2004] O.J. No. 5112 (Div. Ct. [Greaves] the court provided an overview of the recent case law on the standard of review in the RTA context but did not actually determine which standard was applicable. More recently, in Capano v. Smith, [2007] O.J. No. 5074 (Div. Ct.) [Capano], the Court considered a landlord's appeal of an order that refused an eviction and awarded no damages in an eviction application for the tenant's interference with reasonable enjoyment and undue damage to the premises. In determining the standard of review, the court observed, at paras. 12-14, that there was authority for different standards of review depending on the nature of the question, both correctness and patent unreasonableness. No reference was made to Paul Bunyan, supra note 8, and the standard of reasonableness.


63. Ibid. at paras. 11-21.

64. Ibid. note 62.
the Tribunal's lack of expertise, the court applied a correctness standard despite the issue being a matter of the statutory interpretation of the Tribunal's enabling statute. In addition, it is important to note that multiple standards of review may be applied in an appeal where multiple questions of law are raised. In 626114 Ontario Ltd. v. Tirado, the court held that the question of the interest payable on the tenant's last month's rent deposit involved the interpretation of a statutory provision and was a question of law. Thus, the standard was correctness. However, with respect to the second issue—the exercise of discretion under section 84(1) of the TPA—the court held that this matter involved a question of mixed fact and law and was therefore not subject to appeal but that, if it was subject to review, then the standard of review was patent unreasonableness. We now turn to a detailed examination of the four factors in the standard of review analysis.

Right of Appeal
While the RTA contains a privative clause, the clause is applicable only with respect to applications for judicial review—a rare occurrence in residential tenancy law, as the RTA explicitly mandates judicial supervision by providing for a right of appeal. In addition, the Divisional Court has broad appellate powers, including the power to substitute its decision for that of the Board. In Sage, the court noted that the TPA provided a statutory right of appeal and granted broad powers in relation to an error on a question of law. This factor clearly points to showing the Board little, if any, deference.

Nature of the Question
In assessing the appropriate degree of deference, a critical factor to consider is the nature of the question before the Board and, specifically, whether the issue under

66. Ibid. at para. 5.
67. Supra note 3. Section 84(1) provided:
   Upon an application for an order evicting a tenant, the Board may, despite any other provision of this Act or the tenancy agreement,
   (a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or
   (b) order that the enforcement of the eviction order be postponed for a period of time.
68. Supra note 65, at paras. 14, 15. The issue of relief from eviction and the review of discretionary decisions is dealt with in Review of Exercise of Discretion.
69. Section 209(1) of the RTA provides: Except where this Act provides otherwise, and subject to section 21.2 of the Statutory Powers Procedure Act, an order of the Board is final and binding. See supra note 17.
70. Section 210(4) provides: If an appeal is brought under this section, the Divisional Court shall hear and determine the appeal and may,
   (a) affirm, rescind, amend or replace the decision or order; or
   (b) remit the matter to the Board with the opinion of the Divisional Court.
71. Supra note 62.
72. Ibid. at paras. 13-14.
appeal can be classified as a question of law. The nature of the question may be characterized broadly (i.e. question of law, question of mixed fact and law, or question of fact) but once it is determined that there is a question of law, the next stage is to determine what species of question of law is under review. For example, is it a question of jurisdiction, statutory interpretation, exercise of discretion, or natural justice and procedural fairness? 73

The nature of the question as one of law demands little deference to the Board. Thus, the inquiry becomes whether there are types of questions of law where a court might be inclined to respect the Board's expertise. Arguably, the exercise of discretion is one such question of law and, as a general proposition, an unreasonable exercise of discretion should not be permitted to stand. In addition, where the Board is interpreting its enabling or home statute, the RTA, it could be contended that deference should be accorded. 74 The fundamental issue is whether the Board has a level of specialization and expertise that ought to be respected by the court and, if so, whether the specific question of law may be seen as an area where deference should be accorded. 75

It is argued here, however, that once a question of law is identified, there are no grounds for deference by the court. As is discussed below, there is no basis to consider the Board to be an expert tribunal. Moreover, with respect to the review of the exercise of discretion, this matter is more accurately characterized as a question of mixed fact and law, unless the court can extract a legal principle as, for example, the Board's failure to consider a relevant factor. This factor also points to little deference being accorded by the court.

Purpose of the RTA
The purposes of the RTA are set out in section 1. 76

The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

In Sage, 77 with respect to the purpose of the legislation as a whole and the specific provision under review, the court noted:

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73. For a counter to this argument, see Rapsey, supra note 17 at 3.
74. Supra note 13, at para. 54.
75. In Jacob Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353 (2008), 91 O.R. (3d) 20 at paras. 36-39 (Div. Ct.) [Jacob Catalytic] the majority of the court found that the Ontario Labour Relations Board [OLRB] deserved deference on both the interpretation and application of the OLRB's enabling statute, the Labour Relations Act 1995, and with respect to the application of the common law principles of the doctrine of estoppel.
76. No purpose section was included in the TPA or the LTA, supra note 3.
77. Supra note 62.
The TPA sets out the rights and responsibilities of landlords and tenants and provides a mechanism for the resolution of disputes. The purpose of s. 84(2) is straightforward and precludes an order for eviction if the landlord is in serious breach of her or his duties under the TPA. The section limits the ability of landlords to evict tenants if they are in serious breach of their obligations under the Act or the lease.\(^7\)

The general purpose of the RTA is the resolution of disputes and the determination of rights between the parties by the Board. In this respect the Board's basic role is similar to that of the courts. In short, the Board is not in the business of policy development but is essentially an adjudicative body. The Board is not called upon to determine issues that involve balancing the benefits and costs for many different parties or what has been described as "polycentric" issues.\(^7\) This factor also points to less deference by the courts.

**Area of the Board's Expertise**

Expertise has been described as the most important of the factors used to determine the standard of review\(^8\) and can relate to questions of law, mixed fact and law, or fact alone.\(^9\) Assessing the Board's expertise involves a judicial inquiry into the Board's competence to address the specific issue under review. As noted by the Supreme Court:

 Greater deference will be called for only where the decision-making body is, in some way, more expert than the Courts and the question under consideration is one that falls within the scope of this greater expertise.\(^2\)

There ought to be no presumption that the legislative choice of the Board to deal with residential tenancy disputes constitutes even an implied recognition of the Board's expertise on any question of law.\(^3\) In assessing the relative expertise of the Board, the courts must:

1. characterize the expertise of the tribunal;
2. consider its own expertise relative to that of the tribunal; and
3. identify the nature of the specific issue before the tribunal relative to their expertise.\(^4\)

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79. *Pushpanathan, supra* note 21 at para. 36.
80. *Southam, supra* note 8 at para. 50.
81. *Dr. Q., supra* note 4 at para. 29.
83. See Rapsey, *supra* note 17 at 7 for a critique of Paul Bunyan, *supra* note 8, where the court suggested that the ORHT was an expert tribunal because it was established "presumably because the government of Ontario believed this task could be handled more effectively and efficiently by a panel of lay persons with expertise in this field."
84. *Dr. Q., supra* note 4 at para. 28 [citing *Pushpanathan, supra* note 21 at para. 33].
In *Sage*, the court found that the Ontario Rental Housing Tribunal was a specialized tribunal but that the ORHT did not have specialized expertise in health or environmental law:

The ORHT is a specialized tribunal concerning landlord tenant matters. The subject-matter of the appeal is a question of law. The Tribunal did not consider legislative enactments or provincial standards to determine whether the landlord's failure to provide potable water or repair the well was a serious breach of the Act or the tenancy agreement. The governing standards for potable water are not found in the TPA and the Tribunal does not have the expertise in the area of health or environmental law. The Court is in as good or better position than the Tribunal to examine these standards and apply them to correctly interpret the term serious breach.

In *MacNeil v. 976445 Ontario Ltd.*, the Court also found the Tribunal to be a “specialized tribunal concerning landlord and tenant matters.” However, the court did not go on to identify whether the Tribunal had greater expertise than the courts on the issues raised in the case, i.e. the correct legal test to determine the standard of “serious breach” in section 84(2) of the TPA.

It is suggested, nevertheless, that the Board is not an “expert” tribunal in the sense this term has been used by the Supreme Court. The Supreme Court has held that a tribunal similar to the Board, under a statute similar to the RTA, was not an expert tribunal. The court found that the former Ontario Residential Tenancies Commission was not a specialized tribunal and therefore was not entitled to broad curial deference because there was no requirement that its members have legal training or occupational experience and the process of selection of members was not based on any bipartite or tripartite principle. Moreover, the Board has no specialized expertise, such as economic, technical, or scientific knowledge that would call upon an expertise not available to a court. Clearly, the Board is not a highly specialized expert tribunal in the same sense as a provincial Securities Commission, the federal Competition Tribunal, a provincial Labour Relations Board, or a provincial Judicial Institute.

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85. *Supra* note 62.
90. *Ibid*. at 748. This remains the case with respect to Board Members.
91. *Pezim, supra* note 17.
93. *Jacob, supra* note 75.
Thus, it is not crucial to determine whether the question of law at issue falls within the Board's expertise, as the Board maintains no specialized expertise on any question of law, including the interpretation of the RTA. As noted in Southam, the reasonableness standard is, at root, deference to expertise, and courts should give considerable weight to tribunals about matters on which they have "significant expertise." It is difficult to envision where an appellate court might encounter difficulties in understanding the ramifications of a Board decision, in stark contrast to, for example, the economic and commercial ramifications of the federal Competition Tribunal's decisions, where the Supreme Court observed that there was a "natural inference" that the purpose of the Competition Tribunal Act would be better served by deference to the Tribunal's decisions. A court should not, therefore, grant the Board any deference with respect to the final factor of relative expertise in the standard of review analysis.

**Conclusion on Standard of Review at the Board**

Given the statutory right of appeal, the broad appellate powers to replace, rescind, or affirm a Board decision and the Board's relative lack of specialized expertise on any question of law, much turns on the characterization of the question on appeal. A question of law should attract no deference from the court—the standard of correctness should be applied. However, on some questions of law (i.e. the exercise of statutory discretion) a different "standard of review" or test may be applicable, while other questions of law (i.e. natural justice and procedural fairness) may require a different approach, one similar to review on the correctness standard, as the courts do not apply a standard of review analysis to these types of questions of law.

It has been observed that anything less than a correctness standard implies that a non-expert Board would be permitted to make errors of law and that it is only on applications for judicial review, where questions of fact and questions of mixed fact and law may be raised, that there may be a consideration of standards of review other than correctness. However, the application of a reasonableness standard is not contingent on the nature of the question under review, but rather on the application of the RTA's privative clause in applications for judicial review. Both appellate and

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95. Supra note 8.
96. Ibid. at para. 62.
97. R.S.C. 1985, c. 19 (2nd Supp.)
98. Supra note 8 at para. 49. See also Flora v. Ontario (Health Insurance Plan, General Manager), (2008) 91 O.R. (3d) 412 at paras. 40-41(Ont. C.A.) where the court, per Cronk J.A., held that the standard of review was reasonableness on a statutory appeal to the Health Services and Appeal Board. Despite the existence of a broad right of appeal, the court found that the Board had an "understanding of medicine", an area in which the court could not claim any greater expertise, and that the Board was engaged in interpreting its enabling statute and not any matter of general law outside the Board's specialized expertise.
99. Rapsey, supra note 17 at 4-5.
100. Ibid. at 10-11.
judicial review exist to correct legal error by inferior tribunals, each is governed by
the same four factors in the standard of review analysis and each applies the same
standards to questions of fact and questions of mixed fact and law. The crucial dis-
tinction is that, in judicial review, a court must be cognizant of the privative clause
that signals some deference is to be accorded to the Board. A standard of reasonable-
ness may be more probable in an application for judicial review but much would turn
on the nature of the question of law under review and the characterization of the
legal error—a task that can result in conflicting interpretations from the courts. It is
to this issue that we now turn.

REVIEWING QUESTIONS OF LAW

Questions of law are questions about what the correct legal test is.101

Questions before the courts have consistently been identified as either questions of
fact, questions of law, or questions of mixed fact and law. Any appellate review starts
with such an identification process which is, of course, of central importance on ap-
peals from the Board. What, therefore, may be classified as a “question of law”; and is
the category broader than merely delineating the “correct legal test”? As will be seen,
there is debate about what may constitute a question of law and what type of question
of law has been raised.

Classifying a Question of Law

On appellate review from the Board, the characterization of the error is of critical
importance. The right of appeal is permissible “only on a question of law” under
the RTA. The threshold issue for the reviewing court is to determine whether the
grounds of appeal from a decision of the Board identify a question of law in order to
vest the court with its appellate jurisdiction. In many cases, the dispute as to whether
an appeal raises a question of law is raised on motions to quash an appeal where the
moving party portrays the appeal as one devoid of merit and involving questions of
fact or of mixed fact and law rather than of law alone.102

In most appeals from the Board there is no substantive dispute as to the existence
of a question of law as with, for example, issues of statutory interpretation103 and

101. Southam, supra note 8, per Iacobucci J. at para. 35.
v. Mohammad (2006), 214 O.A.C. 221 (Div. Ct.); and Toronto Community Housing Corporation v. Jilks,
103. Issues of statutory interpretation have been found to be questions of law alone. See Briarlane Property
But questions of law are not confined to simply determining what the correct legal test may be. Issues of natural justice and procedural fairness are properly characterized as questions of law but do not involve the determination of a legal test. Furthermore, the issue of what constitutes a "question of law" is not always self-evident or straightforward. In Sheldrick v. Ontario (Ministry of Community and Social Services), a case concerning eligibility for disability income support, two appellate courts comprising six justices differed on whether the Social Benefits Tribunal [SBT] had erred in law in its treatment of the evidence and its fact-finding process. The Court of Appeal held that the Divisional Court committed reversible error by incorrectly characterizing the SBT decision as including an error of law. In a brief endorsement, it held that the Divisional Court was in substance simply disagreeing with the SBT’s weighing of the evidence and that the SBT had fulfilled its role in the consideration and weighing of the evidence and provided sufficient reasons. The Divisional Court, in contrast, found that the SBT had disregarded and failed to appreciate relevant uncontradicted medical evidence, specifically from two expert witnesses, without adequate explanation and had thereby erred in law.

In other words, the Divisional Court was of the view that the SBT had considered but failed to appreciate the medical evidence, whereas the Court of Appeal was of the view that the medical evidence was both considered and appreciated and that the Divisional Court was essentially not satisfied with the SBT’s treatment of the evidence and inappropriately substituted its own view of the weight that should have been accorded to the evidence. The Court of Appeal found that there was no error in the SBT’s fact-finding process and, alternatively, could have analyzed the SBT decision by applying the “palpable and overriding error” test regularly applied to findings of fact. Using either approach, it is suggested that the Court of Appeal would have determined that no question of law was raised.


106. They are frequently characterized as errors of jurisdiction.


108. Ibid. at para. 1.


110. The author’s review of the SBT decision, Sheldrick v. Director (Disability Adjudication Unit) (26 August 2004; Foster) File No. 0307-05797 (SBT) at 4-5, indicates that the SBT, in the author’s view, did make reference to and did consider the expert evidence of the family doctor and the psychologist.

111. See below, Reviewing Questions of Fact.
Furthermore, even where there is agreement that a question of law exists, there may be disagreement about what type of question of law exists and this can affect the standard of review analysis. In *Dunsmuir*, all nine justices agreed that a question of law was raised but six justices applied a reasonableness standard and three justices applied a correctness standard. While a majority of the court viewed the legal question as one of statutory interpretation of the adjudicator's statutory framework, the minority viewed the issue as one of common law and concluded that, as the adjudicator did not have specific expertise in interpreting the common law, the applicable standard was correctness.

**Standard of Review on Questions of Law**

In *Housen v. Nikolaisen*, the Supreme Court held that the standard of review of a trial court, on a "pure question of law", was correctness, primarily because of the duty of an appellate court to establish legal rules required a broad scope of review. An appellate court conducts an identical role with administrative tribunals, including the Board, and there is no basis for the application of a reasonableness standard to questions of law, even where the tribunal is recognized as a highly specialized expert body. This is so because of, as set out in *Housen*, two related underlying policy considerations: the principle of universality, which requires appellate courts to ensure that the same legal rules are applied in similar situations, and the recognized law-making role of appellate courts.

A reasonableness standard means that conflicting interpretations of questions of law may be upheld by the courts where both are reasonable. As noted in *Dunsmuir*, the reviewing court must recognize that tribunals have a margin of appreciation

113. *Ibid.* at paras. 72-76, per Bastarache and LeBel JJ.; at para. 156 per Binnie J.
114. *Ibid.* at para. 168, per Deschamps J. Moreover, to further complicate the classification of questions of law, there is the issue of distinguishing between general questions of law that may have precedential effect or the potential to apply widely to many cases ("pure questions of law"), subject to a correctness standard, and those questions of law that are so particular as to not have any precedential value and within the specialized expertise of the administrative tribunal, subject to a reasonableness standard. See Mullan, *supra* note 60 at 74-77, for a discussion of the Supreme Court jurisprudence in this area.
116. *Ibid.* at para 9 per Iacobucci and Major JJ.
117. See *Jacob Catalytic, supra* note 75 at para. 29. With respect to the OLRB and the application of the common law doctrine of estoppel, the court's view was that the application of the doctrine raised questions of mixed fact and law but recognized that the "Board and labour arbitrators have a long history of applying this doctrine when adjudicating grievances."
118. *Supra* note 115.
within the range of acceptable and rational solutions.\textsuperscript{122} Certain questions of law may attract a correctness standard,\textsuperscript{123} but where the legal question is not one of central importance to the legal system or is within the specialized expertise of the tribunal,\textsuperscript{124} a standard of reasonableness may apply.

The applicability of a reasonableness standard on questions of law at the Board has been criticized as being unacceptable in housing law, as appeal decisions would have no binding precedential standing on the interpretation of the RTA.\textsuperscript{125} It is argued here, however, that on questions of law the Board must be correct in its decision on the basis that it is not a highly specialized, expert tribunal to be accorded any deference as to, for example, its interpretation of the RTA. There is no question of law, including the statutory interpretation of its "home" statute, on which the Board can be presumed to possess a greater ability in determining relative to the courts. To adopt the words of McLachlin C.J.C. in \textit{Dr. Q.},\textsuperscript{126} the Board has no "topical expertise" and is not "adept in the determination of particular issues".\textsuperscript{127} Although the exercise of assessing expertise has been described as depending on a combination of factors, primarily involving conjecture and not scientific inquiry by the courts,\textsuperscript{128} it is equally true that the RTA bestows a statutory right of appeal. As such, an appellate court should always conduct a correctness review, unless the question of law is one that is classified as falling within a tribunal's core expertise.\textsuperscript{129}

We now turn to an examination of the area of questions of mixed fact and law and, in particular, how a question of law may be extracted where it is determined that an incorrect legal test or standard has been applied.

\section*{Reviewing Questions of Mixed Fact and Law}

\textit{Questions of mixed law and fact are questions about whether the facts satisfy the legal tests.}\textsuperscript{130}

Where the application of the facts to the law is the alleged error of law, a court is generally inclined to characterize the question as one of mixed fact and law. Under the RTA, questions of mixed fact and law are not subject to appeal because they are,

\begin{itemize}
  \item 122. \textit{Ibid.} at para. 47, \textit{per} Bastarache and LeBel JJ.
  \item 123. \textit{Ibid.} at paras. 58-61.
  \item 124. \textit{Ibid.} at para. 70.
  \item 125. Rapsey, \textit{supra} note 17 at 9. This comment was made in context of the TPA but is equally applicable to the RTA.
  \item 126. \textit{Supra} note 4.
  \item 127. \textit{Ibid.} at para. 28.
  \item 128. Mullan, \textit{supra} note 60 at 71.
  \item 129. \textit{Ibid.} at 72. A reasonableness standard was applied in the context of a statutory appeal in both \textit{Southam}, \textit{supra} note 8 and \textit{Pezim, supra} note 17. It is suggested that this was because of the Court's willingness to show deference to the tribunals' relative expertise in highly specialized fields.
  \item 130. \textit{Supra} note 4 at para. 35.
\end{itemize}
by definition, not questions of law alone. The Board's duty is to consider and weigh the evidence, make findings of fact and to apply those facts to the relevant law. The question becomes whether the “relevant law” has been correctly applied.

**Defining a Question of Mixed Fact and Law**

A number of appellate decisions have dismissed appeals on the basis that a question of mixed fact and law has been raised, frequently in the context of eviction applications for own use possession by the landlord. In *Meredith v. Leboeuf Properties Inc.*, the court conducted the question of law threshold inquiry very strictly. The tenant alleged that the Tribunal erred in failing to exercise its mandatory authority to refuse the eviction under section 84(2)(a) of the *TPA* where the landlord was in serious breach of its obligations. The court denied the appeal as it did not involve a question of law alone, holding that a determination as to whether there was *any* evidence was a question of law, and what inferences could or should be drawn from *some* evidence was at best a question of mixed fact and law.

In *Jemiolo v. Firchuk*, the court similarly found that no question of law was raised in an appeal challenging the Tribunal’s fact-finding process. The issue was whether the appellant was a “tenant” within the meaning of the *TPA*. The court held that the standard of review for questions of statutory interpretation was correctness and that “tenant” was a defined term under the *TPA*. The tenant argued that the Tribunal failed to properly consider the evidence of the appellant and the evidence of the conduct of the landlords’ agents. The court stated:

**131.** *Section 48 RTA, supra* note 2. See *Liu v. Chen*, [2004] O.J. No. 3965 (Div. Ct.), where the court held that the issue of good faith in a landlord’s own use eviction application was at best a question of mixed fact and law, and was not subject to appeal; *Emerson v. Themer*, [2007] O.J. No. 3662 (Div. Ct.) at paras. 1-3 (Div. Ct.) where the court held that the issue regarding bad faith was a question of fact or at best a question of mixed fact and law and was not reviewable by the court; and *Bakardjieva v. MacLean* (10 July 2006) Court File No. 244/05 at para. 2 (Div. Ct.) (leave to Court of Appeal refused 15 January 2007 and leave to appeal to Supreme Court of Canada refused [2007] S.C.C.A. No. 127), in which the court held that determining good faith for the purpose of residential occupancy was a question of fact and not a question of law alone.


**133.** *Ibid.* at para. 3.

**134.** (2005) Court File No. 577/04 (Div. Ct.).

**135.** *Ibid.* at para 5. See also *North York General Hospital, supra* note 31 at para. 23, where the court had serious reservations about whether a determination that the residents were “owners” of their dwellings for the purposes of the *TPA* was a question of law alone, since it required an investigation of the factual underpinnings of the relationship. However, because of the blurred distinction between questions of law alone and questions of mixed fact and law, the possibility of error in making that determination, and the fact that there were other questions of pure law raised in the appeal, the court dealt with the merits of the appeal.
The factual findings of the Tribunal are not subject to review. Whether or not there is any evidence is a question of law. What inferences can or should be drawn from some evidence is at best a question of mixed fact and law ... Our jurisdiction is limited to questions of law.136

It would be more accurate, however, to state that factual findings of the Board are subject to review but these findings will be disturbed only where the error of fact is sufficiently serious.137 Where there is some evidence to support the factual findings, the court will not intervene. In Jemiolo,138 the Tribunal’s findings that the appellant was not a tenant and that there was no tenancy agreement were supported by some evidence. The Tribunal, in the court’s view, was therefore correct to conclude that there was no implied tenancy agreement.139

Standard of Review of Questions of Mixed Fact and Law

In Housen,140 it was recognized that determining the applicable standard of review was a difficult exercise.141 Questions of mixed fact and law (i.e. applying a legal standard to a set of facts) lie along a spectrum. Questions of mixed fact and law are questions where the legal and factual issues are intertwined and cannot easily be separated. The court did not therefore articulate a distinct standard for all questions of mixed fact and law:

Where the trier of fact has considered all of the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed fact and law and is subject to a more stringent standard of review [than for findings of fact]: [citation omitted].142

The question for the reviewing court is whether a legal principle is readily extricable from the factual.143 If it is not, then it is a question of mixed fact and law “subject to a more stringent standard”.144 If a legal principle may be extracted, then it may constitute an error in law and be subject to a correctness standard.

136. Ibid. at para 12 [emphasis added].
137. Below, Reviewing Questions of Fact.
138. Supra note 107.
139. Ibid. at para 13. For a different result, see Bielak v. Clarke, [2003] O.J. No. 4479 (Div. Ct.), where the Tribunal found that the landlord’s daughter’s desire to occupy the unit was genuine and granted the eviction application. The court found that the Tribunal erred in finding good faith, having failed to weigh and address the evidence of bad faith. Although the issue of good faith is regularly characterized as a question of mixed fact and law, the court extricated a question of law: did the Tribunal fail to consider evidence? In short, the fact-finding process was flawed.
140. Supra note 115.
141. Ibid. at para. 27.
142. Ibid. at para 28.
143. Ibid. at para 36.
144. Ibid. at para 36: “The general rule ... is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error”.

Arguably, a question of law may be extracted from both the Board’s characterization of a legal test or standard and from its factual findings. If no error in law may be extracted from either area, then the question falls into the middle of the spectrum and may be classified as a question of mixed fact and law and, with respect to the Board, beyond the scope of appellate review.

**Extracting a Question of Law from a Legal Standard**

The application of a legal test or standard to a factual situation requires an analysis of both law and fact and, to that extent, is a question of mixed fact and law. The exercise of extracting a question of law from a question of mixed fact and law raises two distinct lines of inquiry: is there a factual dispute (i.e. are the facts as found supported by the evidence?) or is there a dispute about the legal test to be applied (i.e. what is the content of the legal test?)? In *Housen*,\(^{145}\) the Supreme Court discussed, in the context of a negligence action, the task of extricating a question of law from a question of mixed fact and law:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact.” Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard.\(^{146}\)

Thus, whether the facts, once established, satisfy the legal test is a question of mixed fact and law. But the identification of the content of the legal test itself is a question of law. As noted in *Dunsmuir*,\(^{147}\) questions of mixed fact and law vary—is this a question of identifying the “contours and the content of a legal rule” or is this a matter of simply applying an established rule to a set of facts?\(^{148}\)

In *Housen*,\(^{149}\) it was observed that both questions of mixed fact and law and factual findings often involve drawing inferences and that the difference between the two questions lies in whether the inference drawn is legal or factual.\(^{150}\)

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145. *Supra* note 115.
146. *Ibid.* at para. 36 [emphasis added] *per* Iacobucci and Major JJ.
148. *Ibid.* at paras. 161-64 *per* Deschamps J.
149. *Supra* note 115.
We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review.¹⁵¹

In short, where a question of mixed fact and law can be isolated and attributed to the application of an incorrect standard, such as the failure to consider a required element of a legal test, it is an error of law subject to a correctness standard.¹⁵² Housen¹⁵³ offers the following example:

In Southam ... this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.¹⁵⁴

A review of recent appellate jurisprudence considering section 84(2)(a) of the TPA illustrates the courts' analytical approach to extricating a question of law from what may appear, at first instance, to be a question of mixed fact and law.

**Extracting a Question of Law from a Statutory Standard: "Serious Breach" of a Landlord's Responsibilities**

Section 84(2)(a) of the TPA limits the ability of landlords to evict if they are in "serious breach" of their responsibilities. In Puterbough v. Canada (Public Works & Government Services),¹⁵⁵ an appeal of eviction orders under the demolition provisions of the TPA,¹⁵⁶ the premises were located on the federal government's site for a

¹⁵¹. *Ibid.* at paras. 32, 33 [emphasis added].
¹⁵². *Supra* note 8 at paras. 35-42 *per* Iacobucci J. and *supra* note 115 at paras. 26-37 *per* Iacobucci and Major JJ.
¹⁵³. *Supra* note 115.
¹⁵⁶. Section 53 of the TPA, *supra* note 3.
proposed airport. The government concluded that demolition of the properties was the lowest-cost option. In two of the five cases under appeal, the Tribunal held that the government’s breach of its maintenance responsibilities was serious, contravened section 84(2)(a) of the TPA, and refused an eviction order.

With regard to the Beelby appeal, the Tribunal found as fact that:

1. in the past, the landlord had spent less on maintenance than what the landlord acknowledged was reasonable;
2. the premises were in poor condition (mould, rotting kitchen countertop, deteriorated walkway/driveway and garage); and
3. major expenditures were necessary to be able to continue to use the premises as residential premises.

Applying these facts to the statutory standard in section 84(2)(a), the Tribunal found that the landlord breached its section 24(1) obligation and the breach was serious. On appeal, the court found the Tribunal had engaged in “improper reasoning” in concluding that these facts constituted a serious breach.

The court characterized the issue as one of statutory interpretation, specifically the meaning of the term “serious breach” of the landlord’s responsibilities in section 84(2) (a). Adopting a “pragmatic, balanced and contextual approach”, the court determined that the focus had to be on the seriousness of the breach as opposed to the seriousness of the defect or deficiency. In short, a serious breach was not established merely by the premises being in need of significant or extensive repairs. The seriousness of the defect was but one factor to consider. The court adopted the approach taken in the Tribunal’s Guideline.

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157. Supra note 155 at para. 32. Demolition would have cost $12,000 while repairs and upgrades would have cost $54,300.
158. The appellants Beelby and McKay. There were five appellants consolidated into the appeal: Puterborough, Beelby, McKay, Mogk and Knapp.
159. Section 84(2)(a) of the TPA, supra note 3, provided:

Without restricting the generality of subsection (1), the Board shall refuse to grant the application where satisfied that,

(a) the landlord is in serious breach of the landlord’s responsibilities under this Act or of any material covenant in the tenancy agreement;

160. Supra note 155 at para. 84.
161. The landlord's statutory obligation to maintain and repair the premises.
162. Supra note 155 at para. 91.
163. Ibid. at para. 106.
164. Ibid. at para. 15.
165. Ibid. at para. 22.
166. Supra note 155 at para. 27.
The Tribunal considers a variety of factors, such as whether the breach of the duty to repair has resulted in a health or safety concern, the impact any repair problem has had on the tenant, what actions the landlord has taken to deal with the repair problem, whether the tenant complained to the landlord about a longstanding repair problem, whether the landlord was aware of the problem prior to any application being brought, and whether the tenant contributed to the problem. A similar approach to section 84(2)(a) was applied in Sage, but a different result was reached by the court. The tenants argued the landlord was in serious breach under section 84(2)(a) because he failed to fix the roof and provide a consistent source of safe water. In concluding that the landlord was not in serious breach, the Tribunal found the evidence did not show the water was at all times unsafe and the tenants had resorted to obtaining their own water, which was a matter that the tenants could pursue in their own application. On appeal, the court defined the issue as whether the Tribunal erred in its interpretation of section 84(2)(a), stating:

The term "serious breach" found in s. 84(2) of the TPA is a statutory standard. The seriousness of the breaches by the County is shown by the failure of the water supply to meet the water quality standards ... that apply throughout the province. I find that the breaches were on-going for several years, there was a causal connection between the breaches and the contaminated well water, the County took no steps to fix the cause of the contamination and the risk to health and safety were grave. The breaches were serious for the above reasons.

I find that the Tribunal erred in its interpretation of the word "serious" within the meaning of s. 84(2) of the TPA and in its reasoning that the breach was not serious because the water was not "at all times unsafe." The court thus considered that (1) the significance of the defect; (2) the length of time of the defect; (3) the landlord's lack of action; and (4) the degree of risk to health and safety together constituted a "serious" breach of the landlord's maintenance obligations. Arguably, the court applied the correct legal test insofar as various factors were considered and not merely the significance of the defect. The court did not, however, embark on an explicit analysis of the proper test to be applied.

Lastly, in MacNeil v. 976445 Ontario Ltd., the tenants of a mobile home park were evicted because the landlord wanted to convert the park to non-residential use to avoid the expense of complying with environmental orders relating to sewage. The tenants also alleged, in addition to the sewage issue, that the roads were not well

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167. Interpretation Guideline 7: Relief from Eviction: Refusing or Delaying an Eviction (released 31 January 2007).
168. Supra note 62.
169. Ibid. at para. 9.
170. Ibid. at para. 10.
171. Ibid. at paras. 42, 43.
172. Supra note 87.
maintained and that the Tribunal failed to properly apply section 84(2)(a).\textsuperscript{173} The court again characterized the issue as whether the Tribunal had erred in its interpretation of section 84(2)(a)\textsuperscript{174} and stated that the "correct legal test to determine the term 'serious' breach found in section 84(2)(a) was a question of law."\textsuperscript{175}

The court held that the landlord was not in serious breach of her obligations under section 110 of the \textit{TPA},\textsuperscript{176} finding that there was "no evidence to suggest that the roads were in such poor shape as to be considered a serious breach".\textsuperscript{177} The court had heard no evidence to suggest that the landlord was in serious breach of its obligations under section 110 regarding the road maintenance. Although there were problems with the sewage system, the landlord had taken remedial action and a septic system was currently in place, and remained so except as directed by the municipality. In addition, the Tribunal determined that the landlord had explored her alternatives to closure of the park to a reasonable degree,\textsuperscript{178} that she had made a business decision rather than a personal one in deciding to evict all the tenants, and that this decision was made in good faith. In making this determination, the court had to look at the intent of the landlord at the time of issuing the termination notices. It was unreasonable to conclude, in the court's view, that there was motive to evict the entire mobile home park to retaliate for a dysfunctional relationship with one tenant.

\textit{MacNeil},\textsuperscript{179} from one perspective, may be considered as a "no evidence" appeal where the court was concerned chiefly about the lack of evidence relating to the condition of the roads. In other words, on the evidence, the defect was not significant and the Tribunal had made a flawed finding of fact. Moreover, even if the road conditions were a significant defect, following the analysis set out in \textit{Puterbough},\textsuperscript{180} the defect would be but one factor to consider in assessing whether there was a serious breach of the landlord's maintenance obligations.

\textit{Puterbough},\textsuperscript{181} \textit{Sage},\textsuperscript{182} and \textit{MacNeil}\textsuperscript{183} demonstrate how a question of law may be extracted from an apparent question of mixed fact and law and thus subject to appeal under the \textit{RTA}. Whether the landlord's breach of its responsibilities is "serious"
involves applying the facts to a statutory standard, but where the wrong standard is applied then the issue becomes a question of law. On the other hand, if the correct legal standard is applied to a set of facts, then the question is likely to be characterized as one of mixed fact and law. However, as seen in MacNeil, a court may also review the fact-finding process itself and, for instance, characterize the issue as one of no evidence or, in other words, as an erroneous finding of fact. It is to that issue that we now turn.

**Reviewing Questions of Fact**

*Questions of fact ... are questions about what actually took place between the parties.*

Traditionally, appellate courts have applied a principle of deference to the factual findings of trial courts, emphasizing that courts should not second guess the weight assigned by the trier of fact to the evidence. The same principle is applicable to administrative tribunals. As a general rule, the Board's factual determinations will not be subject to appeal due to an appellate court's general reluctance to substitute its own view of the facts for those of the Board.

In order to determine "what actually took place between the parties" the Board must consider and weigh all of the relevant and admissible evidence before it. Given the express limitation in the RTA to appeals only on questions of law, it might be contended that all questions of fact are excluded from appellate review. After all, some statutes do make express reference to the power to appeal or review questions of fact. For example, the *Federal Court Act* provides that the court may grant relief if the decision is based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it." However, it is argued...

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184. As a question of law, all three decisions found that the applicable standard of review was correctness.
185. *Supra* note 87.
186. *Southam*, *supra* note 8 at para. 35.
187. See *Stein v. Kathy K (The Ship)*, [1976] 2 S.C.R. 802 at 808. In *Housen*, *supra* note 115 at para. 24, the majority stated the "essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review." There remains some debate, however, about the proper approach to reviewing inferences of fact (see the majority decision at paras. 22, 23, and the minority decision at paras. 101-103).
188. In the residential tenancy context see *Walls v. Bezarevic*, [2001] O.J. No. 2041 (Div. Ct.), where the Court held that a single illegal act could warrant eviction in law but that the issue of weighing the evidence to determine if it should warrant eviction in a particular case was not a legal question.
189. R.S.C. 1985, c. F-7 [FCA]. See also sections 6(1)(a) and (b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides for an appeal to the Court of Appeal (a), with leave, from an order of the Divisional Court on a question that is not a question of fact alone and (b) from a final order of a judge of the Superior Court of Justice.
190. *FCA*, *supra* note 189, section 18.1(4)(d). Section 42(3) of the *Human Rights Code*, R.S.O. 1990, c. H.19 (now repealed), provided that an appeal could be brought "on a question of law or fact or both."
that the express statutory provision is largely irrelevant in defining the scope of the court's jurisdiction. In essence, statutory language, such as exists in the FCA and elsewhere, merely articulates the applicable standard of review rather than providing the jurisdictional basis for the power to review. Findings of fact are susceptible to appellate review because the fact-finding process may be so flawed as to constitute reviewable error, regardless of the statute's language.

In order to apply the facts to the law, there must be an accurate determination of the facts based on the evidence adduced. The law also applies to the fact-finding process and, as such, may well engage a question of law. Questions of fact are reviewable if they are erroneous findings of fact because those are classified as errors in law. At the Board, in an appropriate case, what appears to be merely a question of fact (i.e. what actually took place between the parties) may be transformed into a question of law as a result of the Board's flawed treatment of the evidence leading to the finding of fact. The key preliminary issue, however, is what standard of review a court will apply to the Board's fact-finding determinations. As might be anticipated, a great deal of deference is given to factual findings, largely as a result of the court's recognition of the fact-finding function of tribunals and trial courts.

**Standard of Review for Findings of Fact**

In *Housen*, the Supreme Court, in the context of an appeal from a trial court, set out the applicable standard of review:

A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a *palpable and overriding error*. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was *some evidence upon which he or she could have relied to reach that conclusion*.

This statement of the law is equally applicable to administrative tribunals, including the Board, albeit the specific language of "palpable and overriding error" is not always explicitly referred to as the applicable test. How do we recognize such an error? The Supreme Court stated:

What is palpable error? The New Oxford Dictionary of English (1998) defines "palpable" as "clear to the mind or plain to see" ... The Cambridge International Dictionary of English (1996) describes it as "so obvious that it can easily be seen or known" ... The Random

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192. *Supra* note 115.
193. *Ibid.* at para. 1 [emphasis added]. See also *St. Jean v. Mercier*, [2002] 1 S.C.R. 491 at paras. 37 and 46; and *Honda Canada Inc. v. Keays* (2008), 239 O.A.C. 299 (S.C.C.), where the majority, *per* Bastarache J., at paras. 19-48, conducted an extensive review of the record and concluded, on the issues of bad faith and discrimination, that the trial judge made a number of palpable and overriding errors. The minority, *per* LeBel J., at paras. 84-113, was of the view that, "despite some flaws", there was a factual foundation for the trial judge's findings that was adequate.
House Dictionary of the English Language (2nd ed. 1987) defines it as "readily or plainly seen" 

The common element in each of these definitions is that palpable is plainly seen.  

A palpable error, however, is not necessarily an overriding error. As noted by the Ontario Court of Appeal in Waxman v. Waxman:

An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error [citation omitted].

While the application of the "palpable and overriding error" standard has been repeatedly endorsed and applied by the courts, it is to be noted that there is jurisprudence concerning the Board (and elsewhere) referring to the application of an apparently distinct reasonableness standard to findings of fact. In Southam, the court equated the standard of reasonableness with the standard to be applied in reviewing findings of fact and noted that the closeness of the "clearly wrong" test and the standard of reasonableness were obvious. The court also found that "clearly wrong" did not go so far as patent unreasonableness, as there was some distinction to be drawn between "clearly" and "patently", albeit acknowledging that they were

194. Ibid. at paras. 5, 6. The court also went on to note the policy reasons for employing a high level of appellate deference to findings of fact at paras. 10-18.
195. (2004), 186 O.A.C. 201(C.A.) [Waxman] [emphasis added].
196. Ibid. at para. 297 [emphasis added].
197. Despite its longstanding application, the palpable and overriding error standard of review had been subjected to some intense criticism. R.D. Gibbens, supra note 7 at 452, has written:

The notion that the error must be "palpable and overriding" is more of a ritual incantation used to justify appellate action rather than to determine when it is appropriate. Short of those cases where the trial judge just got his proverbial sums wrong, the phrase is merely a tool by which any appellate court can implement their own particular view of justice on the facts.
198. In Barrett v. Norquay Development Limited, [2003] O.J. No. 6274 at paras. 1, 2 (Div. Ct.) [Barrett], a post-Housen decision (but without any reference to Housen, supra note 115), the court held that findings of fact that cannot be reasonably supported by the evidence are errors of law. Barrett concerned a tenants' claim that the landlord substantially interfered with their quiet enjoyment. The court held that the finding that the landlord substantially interfered with the reasonable enjoyment of the unit by the tenants, by failing to address a problem with a window, was reasonable on the evidence. Furthermore, the abatement of rent and award of damages were justified on the evidence and the hearing officer could not be said to be "clearly wrong" in such findings [emphasis added]. More recently, in Chadra v. Kanaan, [2008] O.J. No. 2590 at para. 11 (Div. Ct.), the court, while not applying a standard of review analysis, held that the Board was owed a "high degree of deference" on its review of the facts and findings of credibility. [Emphasis added.]
199. Supra note 8.
200. Ibid. at para. 59.
Furthermore, in Dr. Q.,202 there is authority for the proposition that, while trial courts' factual findings would be subject to a palpable and overriding error standard due to the nature of the question alone, the same could not be said of administrative tribunals where the nature of the question was just one of the four factors to consider in determining the applicable standard of review.203 Moreover, the Supreme Court noted that some administrative bodies may have "relative institutional expertise" in fact-finding.204

However, the same standard of "palpable and overriding error" ought to be applied to the review of findings of fact of both courts and tribunals. The use of the standard of reasonableness terminology as applied to factual findings is not particularly helpful. First, it is conceptually confusing to use a reasonableness standard because, in both the court and tribunal contexts, an appellate court need not apply a Dunsmuir standard of review analysis to questions of fact, as the nature of the question itself drives the scope of the inquiry.206 Second, the reasonableness standard and the palpable and overriding error standard are virtually indistinguishable standards. Thus, whatever standard is applied at the Board, the practical result will be the same. In reviewing questions of fact, the role of a reviewing court is not to posit alternate interpretations of the evidence but rather to determine whether the interpretation of the evidence was reasonable or whether it had some basis in the evidence.207 In Waxman,208 the Court of Appeal attempted to reconcile the two standards by concluding that the concepts of "unreasonable", "clearly wrong" and "palpable error" were, in effect, one and the same standard:

After Housen, appellate courts will not review findings of fact ... by asking whether on the totality of the evidence, those findings are reasonable ...

201. Ibid. at para. 60.
202. Dr. Q., supra note 4.
203. Ibid. at para. 33.
204. The Supreme Court cited Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 [Mossop] as authority for its position respecting "relative institutional expertise" in the human rights context. In Entrop v. Imperial Oil Ltd. (2000), 50 O.R. (3d) 18 at para. 43 (C.A.), the Ontario Court of Appeal followed Mossop and found that the standard of review of the Canadian Human Rights Commission's Board of Inquiry's findings of fact (and the application of the law to those findings of fact) was reasonableness. A year prior to Mossop, the Ontario Divisional Court, in Emrick Plastics v. Ontario (Human Rights Commission) (1992), 55 O.A.C. 33 (Div. Ct.) [Emrick] found that the standard applied to a trial court's findings of fact—i.e. palpable and overriding error—should also apply to findings of fact made by a human rights tribunal. It is suggested that Emrick is the preferred approach.
205. Supra note 13.
206. Supra note 4 at para. 33, where McLachlin C.J.C. observed that the nature of the question almost entirely determined the standard of review and factual findings would be interfered with only if there was "palpable and overriding error" or where the finding was "clearly wrong".
207. Dr. Q., supra note 4 at para. 41.
208. Supra note 195.
That is not to say that the approach favoured by the majority in *Housen* will change the result of many fact-based appeals. A process which yields findings of fact that cannot pass the reasonableness standard of review will almost always be tainted by at least palpable error. Similarly, a finding of fact based on speculation and not logical inference will be subject to appellate correction not because the finding is unreasonable, although it clearly is, but because a process of fact-finding based on speculation is clearly wrong, and therefore constitutes palpable error: [citation omitted].

In *Dunsmuir*, moreover, Justice Deschamps noted that questions of fact always attract deference and that the use of different terminology—“palpable and overriding error” versus “unreasonable decision”—did not change the nature of the review, where an appeal is based on an erroneous finding of fact:

> Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge’s findings of fact: [citation omitted]. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

Fact-finding is the principal function of the first-level decision-maker, whether a trial judge or Board Member, and a high degree of deference to factual findings is the operative approach. This is fundamentally so because of the distinct advantages the trier of fact has. As stated in *Housen*:

> The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce and the judge’s familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

Like most tribunals, the Board need not comply with formal rules of evidence and has a broad discretion to admit evidence in a hearing. The Board may determine all questions of fact and law with regard to all matters within its jurisdiction.

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209. *Ibid.* at paras. 305, 306 [emphasis added]. See also *H.L. v. Canada (A.G.)*, [2005] 1 S.C.R. 401 at paras. 4, 55 and 56 [*H.L.*] per Fish J., who noted that the “palpable and overriding error” test should not be allowed to displace “alternative formulations of the governing standard” and that the test is also met where a trial judge’s findings of fact can be characterized as “unreasonable” or “unsupported by the evidence.” *H.L.* was recently applied by a unanimous Supreme Court in *F.H. v. McDougall* 2008 SCC 53 at para. 55.


211. *Ibid.* at para. 161 [emphasis added].

212. *Supra* note 115.


214. Section 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, C. S. 22 [SPPA] provides that a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court, (a) any oral testimony; and (b) any document or other thing, relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

215. Section 174 of the *RTA*, *supra* note 2.
Board, however, has an extremely high caseload and hears many applications in relatively short time frames. As a result, the Board may be particularly susceptible to legal challenges based on its fact-finding process by examining the adequacy of the reasons provided in support of its findings. The objective is to identify flawed findings of fact that amount to palpable and overriding errors that can be fairly framed as questions of law. Examples of reviewable findings of fact include findings made in the absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of the evidence, findings based on credibility assessments, or those findings of fact drawn from primary facts that are the result of speculation rather than inference.

**Extracting a Question of Law from Findings of Fact**

**Absence of Evidence**

Whether there is any evidence to support a finding of fact is a question of law. In *Krafczek v. 1320239 Ontario Ltd.*, the tenant claimed that he had paid the arrears.

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216. The Board deals with approximately 60,000 applications a year and members are typically expected to hear 15-20 cases in a 2½ hour block of time, four times a week. See Richard Feldman, "The Landlord and Tenant Board, Pressures, Powers and Practices in Ontario's New Residential Tenancy Regime: A Year Later" (Law Society of Upper Canada CLE: 6 December 2007).

217. See below, Reviewing the Duty to Provide Reasons.

218. Waxman, supra note 195 at para 296. The issue of findings of fact drawn from primary facts that are the result of speculation rather than inference is beyond the scope of this paper.


> In addition to the all-out attack on the reasonableness of virtually all of the trial judge's crucial findings on the central factual issues, the appellants also contend that the trial judge made innumerable processing errors in the course of her reasons. The phrase "processing errors" is borrowed from *Klojanovic Estate v. Sanserverino*, supra at 489-90 where O'Connor J.A., for the majority, said:
>
> The second kind of error that may warrant appellate interference is what might be called a "processing error", that is an error in processing the evidence that leads to a finding of fact. This type of error arises when a trial judge fails to appreciate the evidence relevant to a factual issue, either by disregarding or misapprehending that evidence. When the appellate court finds such an error it must first determine the effect of that error on the trial judge's reasoning. It may interfere with the trial judge's finding if it concludes that the part of the trial judge's reasoning process that was tainted by the error was essential to the challenged finding of fact. [Emphasis added.]

In addition, at paras. 343-45, Waxman also noted that a failure to consider relevant evidence is a type of "processing error" and can amount to a palpable error if the evidence "was potentially significant to a material finding of fact."

220. See *Marcellos v. Woodbridge Management Ltd*, [2006] O.J. No. 2540 at 1, 2 (Div. Ct.), where it was argued that the Tribunal erred in law by making findings unsupported by the evidence. The Court held:

> An appeal of this nature can only be brought on a question of law, and accordingly, the standard of review is correctness ... While the factual findings of the Tribunal are not subject to review, whether or not there is any evidence to support a finding is a question of law. [Emphasis added.]

221. [2002] O.J. No. 2091 (Div. Ct.). See also *Nepean Housing Corporation v. Kyababenin* (2005), Court File 05-DV-001100 (Div. Ct.), where the Tribunal held that the tenant's negligence caused a fire in the rental unit. The court allowed the tenant's appeal, finding that there was no evidence to support the
in question to the landlord, but the landlord denied receipt of them. The Tribunal reserved at the end of the hearing and ordered the tenant to pay the following month's rent into the Tribunal. The tenant advised the Tribunal that he would do so. The tenant paid the following month's rent into the Tribunal's bank account as directed, but failed to return to the Tribunal with the receipt of payment.

The Tribunal assumed that the tenant had ignored the direction and used this apparent failure of the tenant in assessing the tenant's credibility. A request to review, on the basis that the finding of credibility was based on a clear error of fact, was denied. On review it was held that the fact that the first Member did not know the tenant had paid the money was due to the tenant's mistake of not returning the receipt, despite this being a "commonly accepted and widely publicized administrative requirement of the Tribunal".\(^2\) Even if the tenant's failure to follow the Tribunal procedure was to blame, the request to review was dismissed on the basis that the first Member had not stated that the apparent failure to comply with the direction was the sole or deciding factor in assessing the tenant's credibility.

The court allowed the tenant's appeal:

Member Feldman clearly used the tenant's apparent failure to make the payment of the August rent into account of the tribunal as one of the factors in his adverse findings as to the credibility of the tenant.

There is no evidence that the payment has not been made, in fact it had been made. But the tenant had not filed the receipt from the bank with the tribunal.

Since the credibility finding may well have been influenced by this palpable and overriding error in appreciating the evidence, it is necessary to send the matter back for a further hearing confined to the issue of what sums are owing by the tenant for rent.\(^2\)

In contrast, the sufficiency of the evidence is not open to review.\(^2\) In Mills,\(^2\) the Court of Appeal determined that the issue on appeal related to a finding of fact, namely whether the Workplace Safety and Insurance Appeals Tribunal's [WSIAT] conclusion that a 1979 workplace accident was the cause of Mills's back problems. The Court was satisfied that there was sufficient evidence to make that finding.\(^2\)

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\(^2\) Tribunal's conclusion that the tenant ought reasonably to have foreseen that the lamp in the bedroom could present a risk of fire. In Barker v. Park Willow Developments, 2004 CanLII 2545 (Div. Ct.), the court allowed an appeal from an ORHT decision where the ORHT had made findings on an issue in the absence of any evidence on that issue.

\(^2\) Ibid. at paras. 2-4.

\(^2\) Ibid. [emphasis added].

\(^2\) See Carbonneau v. Ranger, 2005 CanLII 20804 (ON S.C.) for an example in the residential tenancy context. The court rejected the argument that the trial judge made a palpable and overriding error of law in finding that the trailer park owner interfered with the contract of sale negotiated by one of the tenants. The court, at paras. 5-9, found there was "ample evidence" to support such a finding.

\(^2\) Supra note 57.

\(^2\) Ibid. at paras. 34, 35.
Despite the issue being that of a finding of fact, the Court made no reference to the test of palpable and overriding error, as might be expected in light of *Housen*.\(^{227}\) Arguably, *Mills*\(^{228}\) is, at root, a *some* evidence decision that warranted deference, as there were no significant errors in the fact-finding process. As such, the WSIAT’s reasoning and conclusions were not unreasonable.\(^{229}\)

**Refusal to Consider, Ignoring or Excluding Evidence**

In *Manafa v. Rickersby*,\(^{230}\) the Tribunal refused to consider documentary evidence at the hearing and confined submissions to what had been said before the Tribunal. On appeal, the court held:

> In our view this ruling amounts to a judicial error and a denial of natural justice. It is apparent from the transcript that there was some reference by the Tribunal to some of the documents such as the lease and the mover’s receipt.

> In our view, a new hearing is necessary and we wish to say that the relevance of documents to the issues before the Tribunal ought to be the guiding principle for admission and/or submissions. *A rule to consider only oral submissions runs the risk of excluding relevant documents from the Tribunal’s consideration. In our view the failure to consider possibly relevant evidence that was part of the record constituted an error.*\(^{231}\)

**Mis apprehension of the Evidence**

In *Waxman*,\(^{232}\) the Court of Appeal found that a misapprehension of the evidence may amount to palpable and overriding error.\(^{233}\) The crucial point with respect to claims of misapprehension of the evidence is that only essential or material findings of fact will be reviewable. Thus, a tribunal may err in a finding of fact but if that fact is not essential to the outcome then it is not reviewable.\(^{234}\) For this reason, a misapprehension of the evidence must amount to what is commonly referred to as a "material error".\(^{235}\)

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228. *Supra* note 57.
230. (2005), 206 O.A.C. 254 (Div. Ct.). See also *D’Costa v. Mortakis et al.* (2000), 47 O.R. (3d) 417 (C.A.) at para. 37, for authority that a court may interfere with a finding of fact if the trial judge disregards evidence relevant to the issue being determined.
231. *Ibid.* at paras. 1, 2 [emphasis added]. The refusal to consider evidence may also be characterized as a denial of natural justice and procedural fairness. See below, Reviewing Questions of Natural Justice and Procedural Fairness.
234. See *Opara v. Cook*, [2008] O.J. No. 1934 (Div. Ct.) at paras. 9-11, for an example of the Tribunal misapprehending the evidence in two respects but without having any material impact on the result.

> [T]his Court has previously held that an omission is only a material error if it gives rise to a reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion.
In *Ontario (Director, Disability Support Program) v. Crane*,236 the Court of Appeal held that the SBT erred in finding the recipient had been working part-time for approximately three years whereas, in fact, she had been working for only four months prior to the hearing. The error was characterized as a misapprehension of the evidence:

In my view, the majority was correct to conclude that this misapprehension of the evidence amounted to a palpable and overriding error. The Tribunal made the same error twice, so there can be no suggestion that the error was merely a typographical error. The error relates to a crucial part of the evidence, namely, Ms. Crane’s work history. The error is a substantial one—there is a large difference between four months and three years continuous part-time work.237

*In Yusuf v. Ontario (Ministry of Community and Social Services, Director of Income Maintenance),*238 an appeal of a decision of the Social Assistance Review Board [SARB] denying eligibility for social assistance as a single parent under the *Family Benefits Act,*239 the majority held that the court ought not to review findings of fact unless there was an absence of evidence or a material misapprehension of the evidence. The court declined to interfere with SARB’s findings of fact as it found that “they appear reasonably based upon the available evidence”.240 In a lengthy dissent, however, Justice Aitken found, among other errors in its treatment of the evidence, that SARB misapprehended the evidence of marriage breakdown that was adduced on behalf of the appellant and erred in concluding that there was nothing in the respondent’s evidence that supported a finding that the appellant’s spouse had been violent with the appellant.241

**Credibility Assessments**

Findings of fact receive the greatest deference and, where they turn on the credibility of witnesses, it is particularly difficult to disturb them, especially where *some* reasons are provided for rejecting the evidence of a witness.242 As noted by the Supreme Court in *R. v. Gagnon*,243

Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this

240. *Supra* note 238 at para. 2.
242. *Dr. Q., supra* note 4, at para. 38, where McLachlin C.J.C. noted that assessments of credibility were questions of fact and the relative advantage of the trier of fact must be respected and that the issue is whether there is some basis in the evidence for the trier of fact’s conclusions.
Court decided, most recently in *H.L.*, that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected.\(^2\)

Moreover, in *Waxman*,\(^2\) the Court of Appeal noted with regard to alleged errors in credibility assessments:

Although the "palpable and overriding" standard of review applies to all factual findings, *Housen ...* recognizes that findings of fact grounded in credibility assessments will be particularly difficult to disturb on appeal. Credibility assessments are inherently partly subjective and reflect the life experience of individual judges and their own perception of how the world works. Credibility assessments are also grounded in numerous, often unstated considerations which only the trial judge can appreciate and calibrate.

Deference to the findings of credibility includes giving full force and effect to those findings. An allegation that a trial judge has made a palpable and overriding error in assessing a witness' credibility can only be evaluated by examining the entirety of the record touching on that credibility assessment. Where a trial judge advances several reasons for rejecting a witness' testimony in its entirety as incredible, a demonstrated error in relation to just one of those reasons will not necessarily warrant reversal of the credibility assessment.\(^2\)

Nevertheless, findings of fact based on credibility assessments may constitute reversible error. They are most effectively challenged on the basis that the reasons provided do not adequately disclose why some evidence was accepted and other evidence rejected.\(^2\) There is considerable authority to the effect that a party is entitled to know why his or her evidence was disbelieved and that adequate reasons are required when making adverse findings of credibility.\(^2\)

\(^2\) *Ibid.* at para. 20. There is a long line of Supreme Court jurisprudence establishing that findings of fact based on credibility of witnesses are not to be reversed on appeal unless there is some palpable and overriding error: see *Lensen v. Lensen* [1987] 2 S.C.R. 672 at para. 8.

\(^2\) *Supra* note 195.

\(^2\) *Ibid.* at paras. 359, 360.

\(^2\) *Ibid.*. The Court of Appeal also noted that (at para. 364):

Although credibility assessments ... are difficult to reverse on appeal, they are not immune from appellate review. For example, a credibility finding that is arbitrary in that it is based on an irrelevant consideration or tainted by a processing error can be set aside on appeal.

\(^2\) See *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* (1985), 51 O.R. (2d) 302 at para. 30 (Div. Ct.) *per* Reid J.:

The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its grounds for disbelief. The board cannot simply say, as the Member did here, "I feel that I have not received credible evidence to rescind the decision of the Respondent". Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.

See also *Dowlut v. Ontario (Commissioner of Social Services)* (1985), 11 Admin. L.R. 54 at para. 20 (Div. Ct.). But see *Trotter v. College of Nurses of Ontario*, [1991] O.J. No. 348 (Div. Ct.) [unreported]; and *Devgan v. College of Physicians and Surgeons of Ontario*, [2005] O.J. No. 306 at para. 54 (Div. Ct) [Devgan], where the court held that while it was preferable to give reasons for rejecting the credibility of a witness, a failure to do so does not constitute reversible error.
In *Bell v. Peel Living*, the tenant missed her original hearing because she was ill. A new hearing was granted and the tenant gave her evidence that she was too ill to attend the original hearing. There was no evidence to the contrary but the Tribunal did not believe the tenant. On appeal, the court found that the tenant was entitled to a full hearing on the merits:

The Member did not make a specific finding that he did not believe the tenant and he did not make a specific finding that she was not ill at the time of the first hearing ... It is not possible for us to know whether the Member understood that if the tenant was ill nothing further was required and a rehearing should have been ordered. Further, if the Member did reject the complainant's evidence we have no indication of why he did so.

*It is of course open to a trier of fact to reject evidence he finds lacks credibility. However, in our view, in circumstances such as this, it is incumbent on the trier of fact to provide some indication of the basis for that finding. The reasons need not be lengthy. However, the tenant is entitled to know the reasons her evidence was rejected as untruthful or unreliable.*

*Bell* highlights that a trier of fact must provide reasons for finding against a party's version of events. It is inadequate to simply state that the evidence is disbelieved or not accepted. The tenant gave uncontradicted evidence that she had been ill and the Tribunal had no evidence to the contrary. In making an adverse finding of credibility against the tenant the Tribunal erred in failing to explain why.

Lastly, even where *some* reasons are provided in making credibility assessments, those reasons may be subjected to review, albeit it would likely be a rare case when this would occur. In *Yusuf*, the minority judgment was critical of the findings of adverse credibility against the appellant. Justice Aitken concluded that "adverse credibility findings cannot be based on the blanket assumption that because a litigant has something to gain from the litigation, that of necessity puts that witness' credibility into doubt."

Justice Aitken further observed:

> In the case at hand, unlike the Re Pitts Case, the SARB did provide *some reasons* why it "was not compelled by the Appellant's evidence". The chief reason seemed to be that the Appellant and Mr. Habib "had everything to gain financially" by leading the Respondent to believe that Mr. Habib was not living with the Appellant or residing in the same dwelling place with the Appellant. *This cannot be the basis upon which the SARB rejects an appellant's credibility, as this reason would apply to any appellant challenging the Respondent's findings*

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249. *Peel Living v. Bell* (17 January 2005), Court File No. DC 03-12624-00 (Div. Ct.) [*Bell*].
250. *Ibid.* at 1, para. 3.
252. *Ibid.* at para. 7 [emphasis added].
253. Supra note 249.
254. Supra note 238.
256. Supra note 248.
regarding her status as a single person. Decisions concerning credibility cannot be founded on a pervasive scepticism about the validity of claims for family benefits. At best this reality should represent one small factor which may tip the scales against an appellant after those scales are already weighed down by other cogent evidence. 257

**REVIEWING THE EXERCISE OF DISCRETION**

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. 258

In essence, the exercise of discretion involves the weighing of factors in the context of balancing competing interests. The Board's statutory exercises of discretion include considering requests for relief from eviction, 259 imposing conditions in orders, 260 and determining claims for abatements of rent or other remedies. 261 In general, the Board's discretionary decisions, as with those of other tribunals and the courts, will be accorded a high degree of deference. This is the case not because of any deference to the Board's expertise in exercising its discretion but due to the very nature of discretion, which presumes that there is a range of reasonable options and not only one correct answer. The Board's discretionary decisions will attract a deferential standard of review, or review on a reasonableness standard, subject to three main, but not exhaustive, exceptions where the Board may be said to have erred in law due to the existence of jurisdictional error, which attracts a correctness standard of review. 262 These jurisdictional errors occur where the Board's discretion is not exercised at all, where the discretion is exercised outside the scope of the statutory authority (or outside the statutorily imposed set of boundaries), and where the discretion is exercised in contravention of the duty to be fair.

**Failure to Exercise Discretion**

In some instances, the Board may fail to exercise its discretion at all and thereby commit an error of law. In *First Homes Society v. Henry*, 263 the tenants presented new evidence at a review hearing indicating that depression and other medical problems caused them to miss rent payments. The court stated:

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257. *Supra* note 238 at para. 41 [emphasis added].
259. *RTA, supra* note 2, section 83(1).
262. Mullan has noted, *supra* note 60 at 82, that traditionally the correctness standard is automatic for jurisdiction-conferring issues and, furthermore, questions that need to engage in the balancing analysis of the standard of review analysis.
The guidelines for reception of new evidence rest in the reviewing Member a discretion to accept or reject new evidence when proffered. Regrettably, we can only speculate on whether she accepted or rejected this proffered evidence, for her reasons are silent on it. We can only conclude that she failed to exercise this discretion at all. This failure to make a decision which is a necessary part of determining the issues before her was an error of law.\textsuperscript{264}

The failure to exercise discretion may also be characterized as a jurisdictional error or, more particularly, as an improper refusal of jurisdiction and thus as a question of law.\textsuperscript{265} In \textit{Gramercy Apartments Ltd. v. Alexander Anthony et al.},\textsuperscript{266} the Tribunal failed to address the landlord's requests to file missing documentation in its application for a rent increase. The court held:

> The Adjudicator's failure to consider these requests amounts to an "unreasonable exercise of the discretion conferred" by the legislation [citation omitted]\textsuperscript{267} ... \textit{This failure to exercise the discretion conferred upon the Adjudicator by the legislation is unreasonable and amounts to an improper refusal of jurisdiction and therefore, constitutes an error in law.}\textsuperscript{268} [citation omitted].

In \textit{Capano v. Smith},\textsuperscript{269} the eviction application claimed the tenant caused substantial interference and undue damage due to the presence of a fish pool inside the unit. The Board made no order with respect to the removal of the pool on the basis that it had no jurisdiction to make such an order. On appeal, the majority held the Board's determination that it could not "fashion a common sense remedy, even amounting to something akin to a mandatory injunction", would unduly limit the Board and reduce its mandate significantly.\textsuperscript{270} The court observed that section 190(1) of the \textit{TPA}\textsuperscript{271} gave the Board a broad discretionary power to make any order it considered fair in the circumstances. In the majority's view, the failure to order the removal of the pool completely ignored this provision and amounted to an error of law.\textsuperscript{272}

Both of the above decisions made no reference to a standard of review analysis. The jurisprudence is not clear whether such an analysis is applicable or, if so, in what circumstances. The question of the standard of review to be applied and by what manner a court may determine the standard is complicated, particularly in those cir-

\begin{itemize}
\item \textsuperscript{264} \textit{Ibid.} at para 1 \{emphasis added\}.
\item \textsuperscript{265} \textit{Southam, supra} notes 8 and 101.
\item \textsuperscript{266} [2008] O.J. No. 673 (Div. Ct.).
\item \textsuperscript{267} \textit{Ibid.} at para. 33 \{citing \textit{Baker, supra} note 258, at para. 65\}.
\item \textsuperscript{269} \textit{Supra} note 61.
\item \textsuperscript{270} \textit{Ibid.} at para. 22.
\item \textsuperscript{271} \textit{Supra} note 3. This is now section 204(1) of the \textit{RTA, supra} note 260.
\item \textsuperscript{272} \textit{Supra} note 61 at para. 22. The minority, \textit{per} Swinton J., also found that the Board had discretion to include in an order any condition that it considered fair in the circumstances. In fashioning an appropriate remedy, the Board ought to have considered whether conditions should have been imposed pursuant to s. 190(1), given the breach and the risk of further damage. Its failure to consider this provision and this evidence was an error of law.
\end{itemize}
circumstances where the discretion is argued to have been exercised outside the proper scope of the statutory authority or in contravention of the principles of procedural fairness. We now turn to an examination of the issue of the standard of review of the exercise of discretion.

**The Standard of Review of the Exercise of Discretion**

It is indisputable that all tribunals are entitled to control their own procedure and will be accorded deference on matters requiring an exercise of statutory discretion. But in what circumstances will a court intervene? What is the standard of review to be applied to the Board's discretionary decisions and, more particularly, does the *Dunsmuir* standard of review analysis apply?

**Exercise of Discretion: The Established Rule**

The traditional approach to discretionary decisions is that they are reviewable only on limited and discrete grounds including bad faith, breach of natural justice and improper purpose. In *Maple Lodge Farms Ltd. v. Canada,* the Supreme Court stated that:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. *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 court should not interfere.*

While the rule itself may be clearly established, its application is less clear. As explored in more detail below, what distinguishes an error in law warranting court intervention from a court simply exercising its discretion in a manner different from the Board? As the Supreme Court itself has acknowledged, the courts have justifiably received criticism for arrogating to themselves powers to substitute their own view under such “vague doctrinal terms” as “irrelevant considerations”, “improper purpose”, “reasonableness” and “bad faith”.

**Exercise of Discretion: The Correctness Standard**

As noted, the question of identifying the appropriate standard of review may be approached solely by classifying the question at issue as being one of jurisdiction. The Board, as a creature of statute, must be correct in determining the scope of its delegated mandate, and the scope of discretionary jurisdiction is a question of law that ultimately must be supervised by the courts. The challenge, therefore, becomes

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276. *Ibid.* at 5 [emphasis added].
whether the issue under review is one concerning the scope of discretionary jurisdiction (reviewable) or merely one of the weight given to factors properly within the scope of the statutory grant of discretionary jurisdiction (not reviewable).

Blake has observed that correctness is never applied as the standard of review to discretionary decisions,278 which are reviewable only as being unreasonable or patently unreasonable.279 However, this assumes that the issue is framed by the courts as not involving the scope of the statutory mandate. In 

Chieu v. Canada (Minister of Citizenship and Immigration),280 the Supreme Court defined the issue as whether the phrase “having regard to all the circumstances of the case” in the Immigration Act281 allowed the Immigration Appeal Division to consider the potential foreign hardship a permanent resident would face if removed from Canada or whether only domestic factors could be taken into account. Given that the statutory phrase “all of the circumstances” is very broad and does not provide any guidelines as to how the discretion is to be exercised, the question becomes a matter of statutory interpretation—what is or is not a relevant factor to be included in defining the proper scope of “all of the circumstances”? As an issue of jurisdiction, the court concluded that “little deference” should be shown and applied a standard of correctness.282

In general, the courts have not applied a jurisdictional analysis to the question of whether the discretion has been appropriately exercised and, moreover, have not applied the standard of review analysis. In residential tenancy jurisprudence, there is a longstanding application of an “error in principle” test to questions of statutory discretion. In particular, the error in principle test has been consistently applied to discretionary decisions involving the Board’s power to grant relief from eviction.283 This test is one that reflects a high degree of deference. The court’s task is not to reweigh the factors considered and, in general, a court should intervene only to determine whether the factors considered are properly within the scope of the statutory

278. Blake, Administrative Law in Canada, supra note 14 at 216.
279. Ibid. Of course, in light of Dunsmuir, supra note 13, there can no longer be any reference to the patently unreasonable standard. Blake supra note 14 at 216 has noted:

A discretionary decision that is patently unreasonable is, essentially, one that is beyond the scope of the statutory authority or an abuse of the power. However, a statutory discretion to choose from a variety of options in the adjudication of an individual case may be reviewable on a standard of reasonableness.

280. [2002] 1 S.C.R. 84 [Chieu].
282. Supra, note 280 at 100.
283. See also Sidaplex-Plastic Suppliers, Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563 at para. 4 (C.A.), where the Court of Appeal considered a provision of the Business Corporations Act provided the Court with a broad discretionary power, under section 248(3) to "make any interim or final order it thinks fit" to rectify the consequences of oppressive conduct. The Court held that:

This gives the Court at first instance a broad discretion and the appellate Court a limited power of review. The appellate Court is entitled to interfere only where it is established that the Court at first instance has erred in principle or its decision is otherwise unjust.
discretionary authority or whether factors properly within the scope of discretionary authority have failed to be considered. In conducting this type of review, it is suggested that a court applies, in effect, a correctness standard. Questions with respect to the proper scope of the Board's statutory discretion are questions that do not permit more than one answer.

**Exercise of Discretion: The Reasonableness Standard**

In Baker, the pragmatic and functional approach was applied to the substantive aspects of discretionary decisions, and given Dunsmuir, it might be expected that the new standard of review analysis will apply to the substantive discretionary decisions of the Board. If so, and with the demise of the patently unreasonable standard in Dunsmuir, substantive discretionary decisions will now, in all likelihood, be reviewed on a reasonableness standard. In Baker, it was noted that a general doctrine of "unreasonableness" has been applied to discretionary decisions and this incorporated the idea that considerable deference will be given in reviewing the exercise of discretion.

Under the RTA, the Board has a broad equitable discretion to refuse or delay an eviction even where the landlord has established that grounds for eviction exist. However, it is rare that such a question about the proper exercise of discretionary relief from eviction is explicitly framed as a question of law. The general trend

284. Supra note 258.
285. Ibid. L'Heureux-Dubé J. stated at para. 55:

The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less [citations omitted] ... In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. [Emphasis added.]

See also Dr. Q., supra note 4 at para 22, where the Supreme Court appeared to incorporate the nominate grounds of abuse for discretion within the pragmatic and functional approach. For discussion on the difficulties with this approach, see Mullan, supra note 60 at 64-68 and 95.

286. Supra note 13. Bastarache and LeBel Jj. noted, at para. 53, that where the question is one of discretion, "deference will usually apply automatically." Deschamps J. noted, at para. 165, that "deference was owed to exercise of discretion, unless the body has exceeded its mandate."

287. Ibid.

288. In Baker, supra note 258, the court held that the decision about whether to grant a humanitarian and compassionate exemption involved a considerable appreciation of the facts and did not involve the application or interpretation of legal rules. The court concluded, at paras. 61 and 62, that the appropriate standard was reasonableness.

289. Ibid.
290. Ibid. at para. 53 (citing Associated Provincial Picture House Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223 (C.A.)).
291. Supra notes 67 and 259.
of pre-*Dunsmuir* jurisprudence on appeals from the Board was that the proper standard to be applied was patent unreasonableness. However, a court has rarely, if ever, conducted a review of the factors set out in the pragmatic and functional approach in the context of an appeal from the Board of a discretionary decision. In *Chieu*, the Supreme Court did apply the former pragmatic and functional approach in a deportation case to statutory language in the *Immigration Act* that closely mirrored the Board's broad discretion in the *RTA* to grant relief from eviction, in particular, to have regard to all of the circumstances of the case. In other words, for example, failing to consider a factor properly within the ambit of the discretionary mandate could be viewed as both an error in principle and an error of jurisdiction. From either perspective, the result is identical as the court accords little deference and intervenes to correct the legal error.

**Exercise of Discretion: The Error in Principle Approach**

In *Finnermark v. Hum*, the landlord applied for an eviction as he required possession of the property for himself and his children. The tenant requested relief from eviction. The court held:

> In our view, the Tribunal reviewed all of the evidence and exercised its discretion in a judicial way regarding the issues under s. 84 of the Tenant Protection Act. We cannot say that the Tribunal has erred in principle or misinterpreted material evidence or that its decision is in any way unjust [citation omitted].


294. *Smolcec*, *supra* note 34 at paras. 21, 22 where the court noted:

> The referenced authorities hold that the Tribunal has the duty to consider all the relevant issues under s. 84 and to make findings of fact with respect to those issues. However, once the Tribunal has made its findings under s. 84 a Court on appeal will afford the Tribunal a great deal of deference … In my view the standard of review to be applied in this case, given that it involves findings of the Tribunal under s. 84 of the *TPA* is that of “patently unreasonable.”

The court considered the relief from eviction provisions in the *TPA*:

> The decision in *Longhouse Village (Thunder Bay) Inc. v. Smolcec …* and s. 84, *Tenant Protection Act* 1997 have settled the question that the application of s. 84 of the *Tenant Protection Act* is not strictly a jurisdictional issue, but falls within the expertise of the Tribunal. Once the Tribunal has made its findings under s. 84, a Court on appeal will afford the Tribunal a great deal of deference. The standard of review to be applied when involving findings of the Tribunal under s. 84 of is that of “patently unreasonable.” [Emphasis added.]

295. The author is unaware of any such case.

296. *Supra* note 280.


298. *Ibid.* at para. 6 [emphasis added].
From one perspective, the error in principle approach reviews the substantive result and reflects the view that a court will not interfere with an exercise of discretion, even where it may disagree with the manner in which the discretion has been exercised. In other words, a range of reasonable conclusions are open to the Board and it is only where the decision is unreasonable that a reviewing court will be justified in intervening. The Supreme Court has recognized that a discretionary decision should not be disturbed unless the decision-maker has made "some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner."

In Asbestos Corp., Societe Nationale de l'Amiante and Quebec (Province), Re, the Ontario Court of Appeal held that a reviewing court should interfere with the exercise of discretion only where the tribunal has "erred in principle, acted capriciously or made a decision that amounts to a miscarriage of justice". The court provided a useful, if somewhat expansive, working definition of what constitutes an error in principle:

Error in principle is a broad term that embraces many different grounds of review. It has been held to include not only error of law or applying a wrong legal principle, but as well, failing to take into account a relevant factor, taking into account an irrelevant factor, failing

299. See Peel Non-Profit Housing Corp. v. McNamara (1991), 2 O.R. (3d) 414 (Div. Ct.) at 415 [McNamara No. 2].

300. In short, applying pre-Dunsmuir, supra note 13, terminology, the decision may have to descend to the point of patent unreasonableness in order for a discretionary decision to be overturned. In Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour), [2003] 1 S.C.R. 539 at para. 164 [C.U.P.E.] Binnie J., writing for the majority, stated:

   However, applying 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 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.

301 In Cooke v. Mathur (19 February 2003), Court File No. 02-DV-000662 (Div. Ct.) the tenant brought an application for harassment, interference and illegal entry. At the hearing, the tenant refused to disclose the documents upon which she intended to rely. The Tribunal dismissed the application, ordered the tenant to pay the landlord's costs of $375 and made it a condition that no further application could be brought by the tenant until the costs were paid. The court held that section 190(1) of the TPA, supra note 2, was broad enough to permit the Tribunal to impose such a term on the tenant but that such an "exceptional order should only be made sparingly." The court concluded that the discretion was exercised reasonably in the circumstances:

   On the record before us, it is not possible to conclude that the order amounts to a denial of natural justice and procedural fairness or improperly fetters the jurisdiction of another Tribunal Member on a future application, nor has the tenant demonstrated that Member McInnis exercised his discretion unreasonably in the particular circumstances of this case.

Suresh v. Canada (Minister of Immigration & Citizenship), [2002] 1 S.C.R. 3 at para. 34 [Suresh] [citing Pezim, supra, note 17].

to give sufficient weight to a relevant factor, over-emphasizing a relevant factor and misapprehending the evidence.\textsuperscript{303}

The issue therefore becomes to what extent the result may be driven by an appellate court substituting its own exercise of discretion rather than by the Board's error in principle. However, if not giving "sufficient weight to" or "overemphasizing" relevant factors are legitimate errors in principle, then there would appear to be very little to prevent a court from interfering where it sees fit to do so. It is suggested, however, that a court ought not interfere with the weight accorded to particular factors where the factors have been considered by the Board, even if a reviewing court might have assigned different weights to the relevant factors in the exercise of its own discretion.

\textit{Exercise of Discretion: The Application of the Error in Principle Approach}

In \textit{London & Middlesex Housing Authority v. Graystone},\textsuperscript{304} the Ontario Court of Appeal held that intervention should occur on matters of discretion to grant relief from eviction only "if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice"\textsuperscript{305} The majority found that two misdirections were committed by the trial judge. First, the judge erred in taking into account the possible effects on other tenants in other buildings where the tenant might relocate. Second, the judge erred in considering the fact that the tenant had already been convicted and sentenced in relation to the same matter and that an eviction would constitute a further punishment.\textsuperscript{306} The majority concluded the trial judge had considered "inappropriate criteria" but, alternatively, could have categorized this as the consideration of irrelevant factors,\textsuperscript{307} or as an excess of jurisdiction by considering factors not within the scope of the trial judge's discretionary jurisdiction. In contrast, the minority judgment of Justice Borins found that the trial judge took into con-

\textsuperscript{303} \textit{Ibid.} at paras. 33, 34.
\textsuperscript{304} (22 March 1995), File No. 426 (Div. Ct.) \textit{[Graystone].} Rosenberg J. delivered the majority judgment.
\textsuperscript{305} The majority cited \textit{Alsom v. Alsom} \textit{[sic]}, [1989] 1 S.C.R. 1367 at 1375. \textit{Elsom} was also applied in \textit{McNamara No. 2, supra} note 299.
\textsuperscript{306} \textit{Graystone, supra} note 304 at 4.
\textsuperscript{307} The similarity between the former standard of patent unreasonableness and the traditional discrete grounds of review for abuse of discretion (see \textit{Maple Lodge, supra} note 275) was remarked upon in \textit{Suresh, supra} note 301 at para. 29. In an unanimous decision, the court noted:

The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing Court should adopt a deferential approach to this question and \textit{should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors}. [Emphasis added.]

See also para. 41 where the court compared a patently unreasonable decision to one that is "unreasonable on its face, unsupported by evidence, or vitiated by the failure to consider the proper factors or apply the appropriate procedures."
sideration the correct principles, even though he may have come to a result different from that of the trial judge.\textsuperscript{308}

A number of cases have considered the issue of relief from eviction in the context of subsidized housing and misrepresentation as to income or other income eligibility criteria. The decisions are not easy to reconcile and reflect the difficulty courts may have in refraining from substituting their own views of how the lower court's discretion should be exercised. In \textit{Peel Non-Profit Housing Corporation v. McNamara},\textsuperscript{309} the trial judge granted relief from eviction to a disabled tenant after he and his spouse omitted the spouse's income from their declaration of income to the social housing provider. The court exercised its discretion not to terminate the tenancy as it would be a disproportionate penalty for the tenant and an unjustified punishment for the tenant's two children.\textsuperscript{310} On appeal, the court found that while none of the members of the panel would have disposed of the matter in the same manner as the trial judge,\textsuperscript{311} the decision was not so clearly wrong as to amount to an injustice.\textsuperscript{312} Justice Steele noted:

Conversely, [the trial judge] also considered the special circumstances of this particular male tenant who had lied. The male tenant has been found to be permanently unemployable, is on welfare assistance, has two infant children and has very limited income ... The judge considered the effects upon the male tenant, the welfare of the children and the whole concept of public assistance to a person such as the male tenant.\textsuperscript{313}

More recently however, in \textit{Greater Sudbury Housing Authority v. Racicot},\textsuperscript{314} the court found the Tribunal erred in exercising its discretion not to evict. The tenants had lied on their application for social housing by failing to report that they owed arrears of rent to a previous social housing provider. Apart from this misrepresentation, the tenants qualified for the housing. The Tribunal ordered the tenants to reach an agreement with the former subsidized housing landlord regarding the payment of the arrears and that, if this was not done by a specific date, the current landlord could reopen the application for eviction on notice to the tenant.

On appeal, the court noted that "it is not for this court simply to substitute its own discretion for that of the Tribunal"\textsuperscript{315} and held that the granting of relief from eviction in these circumstances was an exercise of discretion on a wrong principle for two reasons: by condoning the misrepresentation at the expense of honest applicants and by failing to consider the impact on the integrity of the social housing system of

\textsuperscript{308} \textit{Supra} note 304 at 5.
\textsuperscript{309} (1990), 74 O.R. (2d) 450 (Dist. Ct.) [\textit{McNamara No. 1}].
\textsuperscript{310} \textit{Ibid.} at 457.
\textsuperscript{311} \textit{Supra} note 299 at 415.
\textsuperscript{312} \textit{Ibid.} at 416.
\textsuperscript{313} \textit{Ibid.}
\textsuperscript{314} [2003] O.J. No. 816 (Div. Ct.) [\textit{Racicot}].
\textsuperscript{315} \textit{Ibid.} at 2.
this condoning of fraud. The court noted that there was no evidence of any greater hardship on this family than the hardship suffered by the unhoused applicants they had displaced. The court concluded that to withhold eviction in this case was not just wrong in principle, but was "so clearly wrong as to amount to an injustice, not only to the housing authority, but also to those honest applicants affected."  

Racicot distinguished McNamara No. on the basis that in that case the court had considered the harm to the integrity of the system but decided that it was outweighed by the special circumstances of the tenant. Yet the Tribunal decision clearly identified, albeit briefly, the difficulty of condoning the tenants' misrepresentation at the expense of other applicants for subsidized housing, and nevertheless decided to grant relief from eviction on terms and conditions despite the tenants' misrepresentations. It is difficult to avoid the conclusion that the court was simply dissatisfied with the weight the Tribunal accorded to this factor as opposed to the Tribunal failing to consider it at all. In short, the Tribunal felt that the tenants' own circumstances outweighed the impact on other applicants and the subsidized housing system.

**Conclusion: Standard of Review of Exercise of Discretion**

It is suggested that the "error in principle" approach is very similar analytically to the correctness standard if approached from the perspective of jurisdiction, but can also be considered as a reasonableness standard if approached from the perspective of the substantive result. A court will not intervene unless the Board's exercise of discretion was beyond the range of reasonable outcomes. An unreasonable exercise of discretion cannot stand.

It is further suggested that an unreasonable exercise of discretion is also conceptually related to the traditional discrete grounds for reviewing discretion as articulated in Maple Lodge. If a discretionary decision is based upon, for

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316. Ibid. at paras. 12, 13.
317. Ibid. at para. 13.
318. Supra note 314.
319. Supra note 299.
320. Racicot, supra note 314 at para. 12.
322. The Board's Guidelines support the application of a reasonableness standard with regard to discretion. Interpretation Guideline #8, Review of an Order, states at 3 of 6:

Discretion refers to decisions such as whether relief from eviction should be granted (see section 83), or what remedies should be ordered in a particular case. The reviewing Member should not interfere with the decision even if they may have exercised the discretion in a somewhat different way. A review is not for making minor adjustments to the discretion which was reasonable: for example, that an abatement was within the reasonable range of amounts which could have been ordered. [Emphasis added.]

323. Supra note 275.
example, the consideration of irrelevant (or inappropriate) factors or upon the failure to consider relevant factors, then the discretion is exercised unreasonably.

In addition, the standard of review of discretionary decisions might be viewed as similar to that applied to factual findings—i.e. "palpable and overriding error", which is tantamount to being "clearly wrong" or "unreasonable." All of these phrases point to a form of injustice and Graystone, McNamara No. 2, and Racicot all referred to the test on discretion as including so clearly wrong as to amount to an injustice. But there is no valid distinction between "clearly wrong" and "so clearly wrong", just as there was no true distinction between the standards of "unreasonable" and "patently unreasonable". Fundamentally, however, once again, the judicial terminology employed is not as important as the judicial approach applied to an area of administrative decision-making where the principle of deference is firmly entrenched.

**REVIEWING QUESTIONS OF NATURAL JUSTICE AND PROCEDURAL FAIRNESS**

*The denial of a right to a fair hearing must always render a decision invalid.*

The principles of natural justice and procedural fairness concern the manner in which a tribunal makes its decision. The Board is required to comply with the requirements of natural justice appropriate to the nature of the hearing, and a failure to do so will result in its decision being quashed. A fair hearing is an independent and unqualified right. But what level of deference, if any, is appropriate to the Board's procedural rulings? Moreover, what test is applied by the courts to assess whether any deference should be accorded? In this regard, all that can be said with any degree of certainty is that, while some deference may apply to Board decisions, the concept of deference is not linked to the standard of review analysis.

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325. *Supra* note 304.
326. *Supra* note 299.
327. *Supra* note 314.
328. *Dunsmuir, supra* note 13 at paras. 41-42 per Bastarache and LeBel JJ.
330. These two concepts are used here interchangeably to reflect the basic principles of the right to know the case against a party and the opportunity to prepare and present a response. There is no discussion in this paper of the apprehension of bias.
Standard of Review of Procedural Choices

While issues of natural justice and procedural fairness are indisputably questions of law, the standard of review analysis is not applied. In London (City) v. Ayerswood Development Corporation, the Court of Appeal stated, in relation to an alleged lack of procedural fairness:

[A] court need not engage in an assessment of the appropriate standard of review. Rather, the court is required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly.

Nevertheless, there is Supreme Court authority holding that compliance with the rules of natural justice is a legal issue subject to a correctness standard. From one perspective, this is highly questionable, given that the standard of review analysis is inapplicable. Where there has been a breach of natural justice or fairness, the standard of review should not enter into consideration and the court must intervene as the breach renders the decision void.

A “correctness” standard of review can make sense, nevertheless, from another perspective if the issue is reclassified. A breach of natural justice may also be characterized as a jurisdictional error, or as an excess of jurisdiction, in the sense that, even though the Board may be acting within the subject matter granted to it by the legislature, its actions may nevertheless be ultra vires if it breaches the principles of natural justice or the duty to be procedurally fair. Issues of jurisdiction are reviewed on a correctness standard as a tribunal must be right with respect to its jurisdiction. The

334. London (City) v. Ayerswood at para. 10. In Jung v. Toronto Community Housing Corporation, [2007] O.J. No. 4363 (Div. Ct.) [Jung is reported at (2007), 288 D.L.R. (4th) 225] [Jung] the court found the fundamental issue to be procedural fairness and that where a tribunal’s decision is attacked on the basis of a denial of natural justice it is not necessary for the court to engage in an assessment of the standard of review.
337. Jones and de Villars, Principles of Administrative Law, 4th ed. (Toronto: Thomson Canada Ltd., 2004) at 242-44. Jung, supra note 334, can be viewed from this perspective in that the Tribunal had jurisdiction to hear the applications but stepped outside its jurisdiction in determining that Ms. Jung was an occupant and had no status to bring her tenants’ rights application.
applicable standard on questions of natural justice and procedural fairness has been referred to as a kind of "modified form of correctness review" in that the courts are the ultimate experts on procedures, but there will be occasions on which deference to the tribunal's choice of procedures is required. This reflects a tension between the courts as defenders of fair play and the procedural choices made by tribunals. What level of deference may be accorded to the Board's procedures cannot be predicted with any degree of certainty. Ultimately, the inquiry may turn on the court's perception of whether the Board is in a better position than the court to render a decision. In this regard, the analysis bears more than a passing resemblance to the most important factor in the standard of review analysis, i.e. whether the Board has any recognized expertise in determining the applicable procedural format in a given case.

The Content of the Duty of Fairness

While the Dunsmuir standard of review analysis is inapplicable to questions of natural justice and procedural fairness, the specific content of the duty of procedural fairness in a given case must be established. It has been observed that the standard of review analysis and the criteria applied to determine the content of the duty of procedural fairness are similar yet distinct lines of inquiry. There can be confusion between the two because many of the factors considered in determining the requirements of procedural fairness are also involved in the standard of review analysis. The central distinction is that the content of the duty of procedural fairness goes to the manner in which the decision is made, whereas the standard of review is applied to the product of the decision-maker's deliberations. If it is determined that there is no breach of procedural fairness or other aspect of natural justice, the court may embark upon a standard of review analysis.

338. Mullan, supra note 60 at 13. How much deference a court will give to a tribunal's choice of procedures is an open question. In Baker, supra note 258, L'Heureux-Dubé J. found that "important weight must be given to the procedures made by the tribunal itself and its institutional constraints."

339. Supra note 13.

340. In C.U.P.E, supra note 300 at paras. 103, Binnie J. observed that overlapping factors include the nature of the decision being made, the statutory scheme and the expertise of the decision maker. Other factors did not overlap. In procedural fairness, the court is concerned with the importance of the decision to the individual affected, whereas in the standard of review there is consideration of the existence of a privative clause. Binnie J. concluded: "The point is that, while there are some common 'factors,' the object of the Court's inquiry in each case is different."

341. Dunsmuir, supra note 13 at para. 47, states that reasonableness can also apply to the "process of articulating the reasons." In Clifford v. Ontario (Attorney General) (2008), 90 O.R. (3d) 742 at 753 (Div. Ct.) (Clifford) the majority judgment concluded that the absence of reasons made it impossible to determine if the decision was a reasonable one and thus the decision was not a reasonable one as well as not being in accordance with the principles of natural justice and procedural fairness.
Assessing the content of the duty of procedural fairness depends on the context and all the circumstances of the particular case. In Baker, the Supreme Court provided a non-exhaustive list of five factors to consider:

1. The nature of the decision being made and the process followed in making it;
2. The nature of the statutory scheme and the role of the particular decision within that statutory scheme;
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectations of the person challenging the decision; and
5. A respect for the choices made in procedure by the decision maker.

The Baker factors were applied in Jung v. Toronto Community Housing Corporation. The tenant moved into her grandmother's social housing unit and cared for her until her passing twelve years later. The landlord applied to evict the tenant on the grounds that she was an unauthorized occupant and the tenant applied for a determination of her rights under the TPA. The landlord argued that the Tribunal had no jurisdiction to hear the tenant's application. Ultimately, the Tribunal refused to hear the tenant's application on the grounds of her lack of status as a tenant, refused an adjournment to consider its jurisdiction and ordered the tenant's eviction. On appeal, the court determined the content of the duty of fairness in the circumstances:

The fundamental decisions to be made were whether Ms. Jung had any rights in the unit and whether the landlord could evict her. The scheme of the legislation is designed to have such issues dealt with in a straightforward and expeditious manner. The decision is particularly important to Ms. Jung because she would be deprived of accommodation. It is important to the landlord but of no immediate consequence to the Corporation. Ms. Jung had lived with her grandmother for 12 years. She had a legitimate expectation that she would have a hearing before she was evicted. With respect to the Tribunal's choice of procedure, the Act

342. Supra note 258.
343. Ibid. at paras. 23-28.
344. The Supreme Court reaffirmed the five factors and applied them in Congregatation des temoins de Jehovah de St. Jerome-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650 at para. 5 and 11, although McLachlin C.J., for the majority judgment, restated the fifth factor in slightly different words:

The fifth factor—the nature of the deference owed due to the decision maker—calls upon the reviewing Court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm.

345. Supra note 258.
346. Supra note 334.
347. Supra note 3, TPA section 81(1). RTA, supra note 2, section 100(1) provides a tenant may not make a transfer of the possession of his or her unit to another person without the consent of the landlord to sublet or assign the unit.
348. Supra note 334 at 3.
contains different requirements depending on the issue under consideration. For example, if the Tribunal makes an order under s. 72 and the tenant moves to set it aside, under s. 72(10), the Tribunal “shall hold a hearing.” If the Tribunal sets aside an order made under s. 76, then under s. 76(8), the Tribunal “shall hear the merits of the application.” Under s. 81 (to which Member Taylor referred), the “landlord may apply to the tribunal for an order” but there are no procedural requirements. In the printed information attached to the Form A2 and T2 the recipient is told that once the application is filed, “the Tribunal will give the tenant a Notice of Hearing.” The printed information also refers the recipient to the Rules and Guidelines from the local Tribunal office that include references to oral hearings, written hearings and electronic hearings.

The court concluded that the content of the duty of procedural fairness required that the applicant be given notice of the facts, arguments and considerations upon which the decision was based, and an opportunity to make submissions at an oral hearing:

Based on the foregoing, Ms. Jung was entitled to have an oral hearing in which evidence would be led and legal submissions would be heard and considered as to her status. Procedural fairness dictates that Ms. Jung be given notice of the facts, arguments and considerations upon which the decision is to be based and an opportunity to make submissions.

The court’s conclusion is eminently reasonable, primarily because the TPA itself contemplated an oral hearing where it is alleged there is an unauthorized occupant. The TPA did not provide any statutory discretion to the Tribunal to decide what type of hearing should be afforded in these circumstances. In effect, the Tribunal erred by deciding the application based solely on the landlord’s submissions. The Tribunal determined the issue of the occupant’s legal status without providing her with the opportunity to present her evidence and argument and, in so doing, committed a clear breach of the duty of procedural fairness.

**Reviewing the Duty to Give Reasons**

*The most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is the losing party.*

Traditionally, the principles of fairness did not impose a general duty on a tribunal to provide reasons. However, with the landmark decision in *Baker,* it is now established that the duty to give written reasons exists in the common law, in certain circumstances, and is a component of the duty of procedural fairness. The failure to provide meaningful reasons supporting a decision may, in itself, be a breach of

349. *Supra* note 334 at paras. 21-23 [emphasis added].
352. *Supra* note 258.
natural justice that warrants quashing the decision.\textsuperscript{353} The importance of full and complete reasons has been emphasized repeatedly.\textsuperscript{354}

In \textit{Baker},\textsuperscript{355} the Supreme Court dealt with the judicial review of the decision of an immigration officer who refused an application for permission, on humanitarian and compassionate grounds, to remain in Canada. Considering the role of reasons in the duty of fairness analysis, Justice L’Heureux-Dubé concluded:

In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required… . It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.\textsuperscript{356}

It is to be noted that there is no statutory requirement under the \textit{RTA} for the Board to provide reasons, and Rule 26 of the Board's Rules of Practice provides that reasons will not necessarily be issued in all cases. Where a party wishes reasons it may request them orally at the hearing or in writing within thirty days after the order is issued.\textsuperscript{357} However, given that there is a statutory right of appeal and a great volume of Board

\textsuperscript{353} In \textit{Waxman, supra} note 195 at paras. 307, 308 the Court of Appeal noted:

The emphasis in \textit{Housen} on the application of the “palpable and overriding” standard to the process by which findings of fact are made moves reasons for judgment to the centre of the appellate review stage. Reasons for judgment can be so cryptic or incomplete as to provide little or no insight into the fact-finding process. Where reasons for judgment are so deficient that they effectively deny meaningful appellate review on a “palpable and overriding” standard, the inadequacy of the reasons may in and of itself justify appellate intervention [citations omitted]. [Emphasis added.]


Recently, the Federal Court of Appeal considered the nature and extent of a statutory duty to give reasons in \textit{VIA Rail Canada Inc. v. Canada (National Transportation Agency)}, [2001] 2 F.C. 35:

The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., “[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons” [citation omitted].

\textsuperscript{355} \textit{Supra} note 258.

\textsuperscript{356} \textit{Ibid.} at para. 43.

\textsuperscript{357} The commentary under Rule 26.2 provides:

Subsection 17(1) of the SPPA requires a tribunal to issue written reasons for its orders upon the request of any party. The Board will exercise its authority to issue reasons on its own initiative in some cases, and will issue reasons when requested under this Rule. However, in most cases, written
hearings involve eviction applications and thus have very important significance to tenants, it is argued that the Board has a general common law duty to provide reasons. These reasons are required from the Board in order to be fair to the parties who are entitled to know why the Board decided as it did, to foster just decisions and to enable a meaningful right of appeal, if desired.

**Standard of Review and the Duty to Give Reasons**

The duty to provide adequate or meaningful reasons is an aspect of the duty to act fairly. Thus, the failure to provide adequate reasons may itself be a breach of the principles of procedural fairness and, as such, the standard of review analysis is inapplicable. However, in *Dunsmuir*, the Supreme Court defined the reasonableness standard as including an inquiry "into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." 359

The standard of review analysis does not apply to the duty to give reasons and, moreover, is unnecessary. The failure to provide adequate reasons constitutes a breach of procedural fairness and is compatible with a reasonableness standard, to the extent that "reasonableness" can be equated with "adequate". By definition, inadequate reasons would constitute an unreasonable decision because a reviewing court is unable to determine whether the decision is a reasonable one. Reasons must exist to some extent to allow the reviewing process to be carried out. A decision that fails to provide adequate reasons is not in accordance with principles of procedural fairness and is *de facto* unreasonable. 360

We now turn to the analysis to be applied with regard to the Board's duty to provide reasons. The two essential inquiries are: what can be considered to constitute the reasons and, if some reasons are provided, what constitutes adequate reasons? 361

**What Are the Reasons?**

As a starting point, any review of the reasons given cannot be done in isolation. The provision of reasons for a decision must be looked at in the context of the entire administrative decision-making structure. Where there are administrative procedures, such as an internal review or appeal, the fact that the internal review decision

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358. *Supra* note 13. See also *Ryan*, *supra* note 22.
359. *Supra* note 13 at para. 47.
360. See *Clifford*, *supra* note 341.
361. In *Via Rail*, *supra* note 354 at 35, 36. The court held, "The duty to give reasons is only fulfilled if the reasons are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case."
contains little, if any, reasons may not be determinative. In Baker,362 in an immigration law context, the Supreme Court found that the notes of a subordinate reviewing officer could be taken, by inference, to be the reasons for the decision made by a senior officer.363

How does one recognize reasons for a decision and how do they differ from mere conclusions? In Kalin v. Ontario College of Teachers,364 the applicant, a teacher, requested an adjournment. The College heard submissions from both parties and denied the adjournment, stating only:

The Committee is satisfied that the notice of hearing was properly served and allowed sufficient time for the Member to make arrangements to be present, and therefore, the motion by the defence for an adjournment is denied.365

On appeal, the court noted:

These are not reasons. It is not sufficient for the Tribunal to merely state that it agrees with the submissions of one party without stating why. In this case there is no indication that the Tribunal weighed the various pros and cons in the balance in reaching the conclusions it did. That is a breach of natural justice.366

In Toronto Community Housing Corporation v. Greaves,367 the landlord argued that the court ought not to decide the appeal on the basis of absence of reasons because the tenant failed to request such reasons.368 The court rejected the submission:

The Tribunal’s decision in this case was five pages long. As noted above, the decision culminates with the heading “It is ordered that:” followed by five numbered sub-paragraphs setting out the Member’s order. In our view, it was reasonable for the tenant to conclude, as she did, that these five points are the orders of the Member and that the preceding two pages of the decision are the Member’s reasons for the orders made. Section 23.1 is appropriately invoked where no reasons whatsoever are provided, but merely an order. It is not appropriately invoked in a situation in which a Member has given some form of written reasons, but which the tenant considers to be deficient. We do not fault the tenant in this situation for failing to

362. Supra note 258.
363. Ibid. at para 44.
365. Ibid. at para. 29.
366. Ibid. at para. 61. See also Knights Village Non-Profit Homes v. Chartier, [2005] O.J. No. 2376 (Div. Ct.) where the court found that the failure to give reasons for the denial of an extension of time to request a review of an order was a breach of procedural fairness. The Tribunal failed to explain the decision reached and merely stated that the tenant had not provided valid reasons for the request.
367. Supra note 61.
368. Rule 23.1 of the Board Rules of Practice and Procedure provides:

23.1 If a party wished the Member to issue written reasons for the order, the party must make the request:

(a) orally at the hearing; or (b) in writing within 30 days after the order is issued.
request more fulsome reasons in writing and we do not consider her failure to do so to be a barrier to her raising the inadequacy of the reasons as a ground of appeal.\textsuperscript{369}

**When Are the Reasons Inadequate?**

In *Gray v. Ontario (Director, Disability Support Program)*,\textsuperscript{370} the Court of Appeal set out succinctly the requirements for adequate reasons:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.\textsuperscript{371}

The critical point with regard to the adequacy of reasons is that perfection is not required. Reasons may be less than ideal but still deemed to be adequate,\textsuperscript{372} but it is clear that it is insufficient to merely summarize the positions of the parties and then simply state conclusions.

In *Stanoulis v. Lykakim Holdings Ltd.*,\textsuperscript{373} the Board's reasons were found to be inadequate. The landlord applied to evict on the grounds that he required the residence for his son, and the tenants countered with an application claiming that there was no landlord and tenant relationship and that they occupied the premises as licensees. The court concluded that meaningful appellate review was impossible as the Board's reasons were "merely conclusory."\textsuperscript{374} Similarly, in *Greaves*,\textsuperscript{375} the court noted that

\begin{itemize}
  \item \textsuperscript{369} Supra note 61 at para. 17 [emphasis added].
  \item \textsuperscript{370} Supra note 354.
  \item \textsuperscript{371} Ibid. at para. 22 [citing *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.)].
  \item \textsuperscript{372} In *R. v. Walker*, 2008 SCC 34 (Can LII), the Supreme Court recently re-emphasized that reasons do not confer a "free standing right of appeal" and that the failure to live up to the duty does not necessarily entitle a party to appellate intervention. Reasons have to be sufficient only to meet their purpose, and the court concluded that the trial judge's reasons adequately explained why the accused was acquitted of second-degree murder despite the fact that the oral reasons "fell well short of the ideal." The court held, at para. 20 that "Reasons are sufficient if they are responsive to the case's live issues and the parties' key arguments. Their sufficiency should be measured not in the abstract, but as they respond to the substance of what was in issue."
  \item \textsuperscript{373} [2008] O.J. No. 1845 (Div. Ct.).
  \item \textsuperscript{374} Ibid. at para. 12. The court found that there was no factual analysis, no findings of credibility and no indication of what evidence was taken into account on any issue. For example, on the issue of the landlord requiring possession the Board stated, at para. 6: "On a balance of probabilities, the Landlord in good faith requires possession of the rental unit for the purpose of residential accommodation of his Nick Stanoulis and Nick's family."
  \item \textsuperscript{375} Supra note 61. See also *Fisher v. Moir*, [2005] O.J. No. 4479 (Div. Ct.) for an example of a court's dissatisfaction with the Tribunal's duty to give reasons.
\end{itemize}
the Tribunal failed to give any reasons for finding that the tenant committed an illegal act:

There are no reasons given for the finding that the tenant committed an illegal act in the face of a dispute that obviously required credibility findings, as only two eye witnesses (the parties to the altercation) testified. In fact, the decision is devoid of reasons. It merely recites the positions of the parties. We are of the view that such a decision given without reasons for believing one of the two protagonists in an altercation cannot stand [citation omitted].

The court also criticized the absence of any analysis or reasons as to whether the tenant should be granted relief from eviction:

[T]he reasons are silent on the undisputed fact that the sole basis for the landlord's decision to evict was the laying of the criminal charge against Ms. Greaves and that the landlord had done no independent investigation of the incident. There is also no mention in the reasons that the police officer, who laid the charge against the tenant, refused the request of Ms. Greaves to lay an information against the other tenant involved in the altercation, with the resulting need for Ms. Greaves to appear before a justice of the peace to lay the information...

It is evident that notwithstanding the above-noted paragraph of the Member's decision which is headed "Section 84 Consideration", there is no analysis of s. 84 contained in that paragraph. The paragraph seems predicated on the assumption that the only consideration required in a s. 84 analysis is the need for children to complete the school year.

In contrast, in Jackson v. Toronto Catholic School Board, the court found the school board's reasons were very close to being inadequate but that, in the circumstances, meaningful review was not thwarted. An eleven-year-old boy brought a knife to school. At recess, he took the knife into the schoolyard where, it was alleged, he threatened fellow students with the knife. After an inquiry, the school principal imposed a limited expulsion of one year. The principal's decision was appealed to the school board. The school board denied the appeal.

It was argued that the school board failed to give reasons for its decision. In dismissing the appeal, the school board merely noted that it was "satisfied that the Principal ... considered all relevant factors in arriving at his decision." The court stated that these reasons "fall dangerously close to being inadequate" and that the proper course of action would normally be to return the matter to the school board. It concluded, however:

When we examine the rationale for requiring adequate reasons, we are reluctant to return the matter to the [school board]. Reasons are required to inform the losing party why they

376. Ibid. note 61 at paras. 14, 15 [emphasis added].
377. Ibid. at para. 21.
378. Ibid. at para. 19.
380. Ibid. at para. 53.
381. Ibid. at para 54.
lost and to equip that party with sufficient information to effectively pursue an appeal, if desired …

Any suggestion of the inability of Ms. [Jackson] to effectively pursue her appeal is dispelled by the factum filed on her behalf, containing fifty-three pages comprising one hundred and seventy paragraphs. The factum attacks the decision of the [school board] on at least sixteen different fronts. It cannot be said the failure to give more detailed reasons has in any way impaired Ms. [Jackson]'s ability to mount an effective appeal.

In the end, all that can be stated with certainty is that there is no clear distinction between adequate and inadequate reasons. Each case will turn on its particular facts, the perspective of the particular court, and, in some instances, on the perspective of the particular judge. In Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, the majority and minority judgments disagreed as to whether the reasons provided were inadequate. The majority found that the reasons were “far from the thorough and careful reasons” that were generally issued by the Ontario Labour Relations Board but were nonetheless “adequate for this Court to carry out its judicial review function.” In contrast, the minority decision, in an extensive review of the decision, found the Ontario Labour Relations Board did not provide adequate reasons.

**CONCLUSION**

The role of an appellate court is to correct legal error. Appeals are the exception rather than the rule and the guiding assumption is that the quasi-judicial system of tribunal decision making is just and reasonable. There are strong policy reasons for this approach, and the bases set out in *Housen* for deferring to findings of fact of trial judges are generally applicable to assist in understanding the general judicial temperament toward the proper scope of appellate review with respect to the Board. In particular, the overall scarcity of judicial resources, promoting the integrity of Board proceedings, and recognizing the advantageous position of the Board in fact-finding are all important underlying considerations. But a distinction must be drawn between the Board as being better positioned to make factual findings and its lack of any specialized expertise in making factual findings, applying the facts to the law, or interpreting the law.

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382. *Ibid.* at paras. 57, 58 [emphasis added].
383. *Supra* note 75.
385. *Ibid.* per Smith J. at 38-46. See, in particular at 39, para. 85. See also *Clifford, supra* note 341 where there was a 2-1 split of the Divisional Court panel as to whether adequate reasons had been provided.
386. *Supra* note 115.
388. Primarily because the Board is exposed to the entire case and sees and hears from all the witnesses.
In the vast majority of appeals under the *RTA*, the applicable standard of review has been correctness, and the decision in *Dunsmuir* will not alter this result. Given the statutory right of appeal and, most significantly, the lack of any highly specialized expertise at the Board, a reviewing court will always be in an equal or better position to decide the question of law before it.

The fact that there is no express reference in the *RTA* to appeals based on questions of fact or mixed fact and law is not an absolute bar to appellate review of those questions.

Despite the provision in the *RTA* regarding appeals “only on questions of law”, the central inquiry becomes one of delineating the boundaries of what constitutes a question of law. Questions of law are a broader category than merely determining what the “correct legal test” may be. They include breaches of natural justice and procedural fairness, which are questions of law unrelated to the determination of any correct legal test or standard.

Questions of mixed fact and law fall along a spectrum, and the closer they come to the legal end the more likely the error can be identified as a “pure” question of law. As observed in *Dunsmuir*, questions of mixed fact and law will vary. The central determination will be whether this a question of identifying the “contours and the content of a legal rule” or whether it is a matter of simply applying the rule to a set of facts. The former is more clearly a question of law. The latter is not, and judicial deference will be accorded. With respect to the review of questions of fact, it will have to be established that there was some “palpable and overriding error”, such as no evidence at all, a failure to consider relevant evidence, or a clear misapprehension of the evidence, before a court will intervene in the Board’s fact-finding process. In addition, it is possible to also contest the fact-finding process where the reasons given are inadequate and the reviewing court is unable to determine on what basis certain facts were found, such as, for instance, those facts based primarily on assessments of credibility.

Finally, there are two major exceptions or, at least, partial conceptual departures from the appellate review of the Board on questions of law based on the *Dunsmuir*.

390. In *Darragh*, *supra* note 50 at para. 13, counsel for the landlord unsuccessfully argued that the standard of review should be reasonableness, relying on *Dunsmuir*, *supra* note 13 at para. 54, which stated that deference would be the usual result where a tribunal was interpreting its own statute or statutes closely connected, with which it would have particular familiarity. Binnie J. referred to this, at para. 156, as an adjudicator’s “home turf” statutory framework.
392. *Supra* note 115 at para. 8. The term “pure question of law” is referred to but not defined.
394. *Ibid.* at paras. 161-64, *per* Deschamps J.
standard of review analysis. First, questions of natural justice and procedural fairness, including the duty to give reasons, do not attract the Dunsmuir analysis. A somewhat similar but clearly distinct test is applied, as set out in Baker, which grants a measure of deference to a tribunal's procedural choices. What measure of deference a court would grant to the Board is an open question with little jurisprudential guidance.

Second, discretionary decisions may also constitute reviewable questions of law but they have not attracted the standard of review analysis. While the Board's discretionary decisions, such as relief from eviction or imposing terms and conditions, may, at some point in the future, be subjected to a standard of review analysis, it is more probable that the "error in principle" (or "clearly wrong") analysis will continue to be the operative standard as it is long established in the residential tenancy jurisprudence. Absent such error in principle, if the standard of review analysis was applied to the Board's discretionary decisions, the standard applied would likely be reasonableness.

Ultimately, the legal terminology adopted may just be a matter of semantics—a fair degree of judicial deference is applied to the exercise of discretion, absent error in principle, regardless of the specific legal label applied to describe the standard of review. However, it must be recognized that the varying standards of review—the Maple Lodge rule and the discrete grounds standard; the Baker reasonableness standard; and the Graystone error in principle standard—that may be applied do create uncertainty and confusion. These varying standards of review leave considerable scope for reviewing courts to intervene in the overall merits of a decision or to challenge the weight accorded any factors considered in the discretionary decision making process.

396. Ibid.
397. Supra note 258.
398. Supra note 275.
399. Supra note 258.
400. Supra note 304.
401. Arguably, such intervention occurred in Racicot, supra note 314.
402. Mullan, supra note 60 at 95.