2009

# Developments in Administrative Law: The 2008-2009 Term -- Contemplating Legislative (Im)Precision

Laverne Jacobs
*University of Windsor, Faculty of Law*

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(2009), 48 SCLR (2d) 43 - 70

## I.INTRODUCTION

1 Of the administrative law cases decided in the 2008-2009 term,1 two are particularly noteworthy. Canada (Citizenship and Immigration) v. Khosa2 brought to light a multilayered debate over the proper way to interpret legislation dealing with standards of review. Khosa addressed an issue that had been left unanswered by last year's decision in Dunsmuir,3 a landmark case in which the Supreme Court of Canada attempted to clarify radically the standard of review analysis. Canada (Privacy Commissioner) v. Blood Tribe Department of Health4 analyzed whether the federal Privacy Commissioner, and by extension other administrative agencies, have the ability to pierce solicitor-client privilege in order to conduct investigations. In both cases, the Court was faced with challenging situations marked by imprecise legislative direction. A unifying theme of the cases discussed is therefore the Court's contemplation of legislative imprecision. The cases will be examined under the themes of standard of review and solicitor-client privilege.

## II.STANDARD OF REVIEW: CANADA (CITIZENSHIP AND IMMIGRATION) V. KHOSA

### 1. Facts and Procedural History

2 Sukhvir Singh Khosa, a landed immigrant from India, was convicted of criminal negligence causing death in an automobile street race.5 A removal order was issued to return him to India for reasons of serious criminality.6 Mr. Khosa applied to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board to remain in Canada on humanitarian and compassionate grounds.7 The IAD held that there were insufficient reasons to grant Mr. Khosa humanitarian and compassionate relief.8 In reaching its conclusion, the majority of the IAD considered the factors developed in Ribic v. Canada (Minister of Employment and Immigration)9 and endorsed in Chieu v. Canada (Minister of Citizenship and Immigration). These were at the heart of the analytical framework that had been long established in immigration law. The Ribic factors include the seriousness of the offence, the possibility of rehabilitation and the degree of hardship that the individual would suffer if she or he were removed.11 The second of these factors -- the possibility of rehabilitation -- gave the majority of the IAD pause. This factor involves an assessment of the applicant's risk to the public and his or her expression of remorse. The majority found it troublesome that Mr. Khosa continued to deny his participation in a "street race"; he insisted instead that he experienced a tire blowout while driving at an excessive speed and lost control of his vehicle. The majority also found that Mr. Khosa had shown insufficient remorse.12

3 By contrast, the dissenting member would have stayed the execution of the removal order pending a further review in three years. The dissenting member disagreed with the majority's assessment of the appellant's remorse and his potential for rehabilitation.13

4 Mr. Khosa sought review of this decision at the Federal Court.14 He argued that the IAD had erred by misconstruing the evidence. In his opinion, the majority had attributed too much relevance to his denial of participating in a street race. Mr. Khosa argued further that the majority had not properly evaluated his expressions of remorse. In Mr. Khosa's opinion, the majority had underestimated the significance of his early willingness to plead guilty to dangerous driving causing death.

5 As the case wound its way up to the Supreme Court of Canada, different judges reached different conclusions as to whether the standard of review should be patent unreasonableness or reasonableness. At first instance, Lutfy C.J. determined that the applicable standard of review was patent unreasonableness. He noted that this standard had consistently been used for IAD appeals relating to humanitarian and compassionate relief under the provision of the statute at issue. Chief Justice Lutfy embarked upon the pragmatic and functional test, finding that all four factors militated towards considerable deference. He drew attention in particular to the board's developed expertise in humanitarian and compassionate appeals and the highly factual nature of the problem.15 It is rather unclear from his reasons how Lutfy C.J. saw section 18.1(4)(d) of the Federal Courts Act16 fit into the judicial review analysis. He did not ground his analysis primarily on section 18.1(4)(d). However, he made a point of stating that the majority opinion was "not patently unreasonable or, in the words of paragraph 18.1(4)(d) ... one which is based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material'".17

6 Chief Justice Lutfy dismissed the application for judicial review. His analysis turned on his sense of the appropriate role of a court on judicial review. He reviewed the transcripts of the IAD hearing and the decisions of the criminal courts with respect to the issues of remorse and racing. He found that the majority chose to place greater weight on Mr. Khosa's denial of participating in a race than others might have done and noted that its conclusion on the issue of remorse differed from that of the criminal courts. Chief Justice Lutfy reasoned, however, that the IAD's conclusion could be explained by the fact that it had had an opportunity to evaluate Mr. Khosa's testimony, whereas Mr. Khosa had not testified during his criminal conviction. Chief Justice Lutfy determined ultimately that the Federal Court was being asked to reassess the evidence that had been heard before the IAD. In his opinion, this was not the proper role for the Court on judicial review. He was satisfied that the majority had taken into consideration all the relevant evidence, including the findings of the criminal courts on the issues of street racing and remorse. Consequently, the argument that the IAD's decision was patently unreasonable could not be sustained.

7 Unlike the Federal Court, a majority of the Federal Court of Appeal (Décary J.A. with Malone J.A. concurring; Desjardins J.A. dissenting) held that the appropriate standard of review was reasonableness.18 Writing for the majority, Décary J.A. began his analysis by paying deference to recent Supreme Court of Canada immigration decisions. He observed that many of the Supreme Court's cases relating to humanitarian and compassionate relief had held reasonableness to be the appropriate

standard of review. These cases included Baker v. Canada (Minister of Citizenship and Immigration), Dr. Q. v. College of Physicians and Surgeons of British Columbia and Suresh v. Canada (Minister of Citizenship and Immigration). With respect to Baker, Décary J.A. observed that reasonableness had been selected as the standard of review even though the pragmatic and functional factors pointed to a greater degree of deference. He argued that reasonableness was chosen because the matter dealt directly with the rights and interests of individuals in relation to the government rather than the balancing of interests of various constituencies. Justice Décary found further support for his opinion in Dr. Q, where the Supreme Court had held that less deference is owed when legislation seeks to resolve disputes between two parties in an adjudicative context. Moreover, Chieu22 illustrated the position that removal orders constitute a form of adjudication vis-à-vis the state. Finally, Décary J.A. argued that the exercise of discretion involved in the extraordinary power to grant humanitarian and compassionate relief could not be reconciled conceptually with the standard of patent unreasonableness. This is because the standard of patent unreasonableness requires the original decision-maker's result to "almost border on the absurd"23 before it can be disturbed by a reviewing court, whereas the discretion involved in determining humanitarian and compassionate relief applications requires the exercise of objectivity, dispassion, good faith and careful consideration of the relevant factors.24

8 With respect to the case before them, the majority held that there was a marked lack of expertise on the part of the IAD to deal with what the majority saw as the central issue: Khosa's potential for rehabilitation.25 This was quite different from an immigration case such as Suresh,26 where the Minister's expertise in national security was what led the Supreme Court to apply the patently unreasonable standard.

9 In sum, Décary J.A. held that the standard of review was reasonableness because the decision was not protected by a full privative clause, was not polycentric, related to human interests and did not engage the board's expertise insofar as the central issue was concerned.27 The majority then reviewed the board's decision on a reasonableness standard. This analysis was set against the court's underlying premise that rehabilitation is a criminal law concept for which the IAD should have paid deference to the findings of the criminal courts.28 The decision was found to be unreasonable for three reasons. First, the IAD's examination of the possibility of Mr. Khosa's rehabilitation did not address all the factors necessary for a full analysis. Certain matters relating to rehabilitation in the criminal law context should have been considered.29 Second, the IAD did not explain how it had reached the conclusion that Mr. Khosa would have difficulty being rehabilitated when the findings of the British Columbia criminal courts and theevidence it received with respect to Mr. Khosa's post-sentencing conduct favoured the opposite result. In the majority's opinion, the board had ignored relevant evidence and findings. Finally, Décary J.A. expressed concern over what he termed a fixation on the part of the presiding member of the IAD and counsel for the Crown over the fact that the offence related to street racing. In Décary J.A.'s opinion, this fixation was so intense that the hearing was repeatedly "transformed into a quasi-criminal trial, if not into a new criminal trial".30 Without spending much time on the matter, Décary J.A. emphasized that the board acted outside of its mandate in second-guessing a decision of the criminal court. The majority of the Federal Court of Appeal concluded that the IAD's decision was simply not supported by any reasons that could withstand probing examination. It was therefore unreasonable.31

10 In dissent, Desjardins J.A. held that the applications judge did not err in holding that the appropriate standard of review was patent unreasonableness. Justice Desjardins reasoned that the IAD's relative expertise and the nature of the question were two factors that pushed strongly for deference. As for relative expertise, the IAD was in a better position than the Federal Court to conduct the highly fact-based and contextual exercise of evaluating whether the criteria for a humanitarian and compassionate exemption had been met. Justice Desjardins noted that the factors applied in this exercise were those that the IAD had itself developed and that it had been applying for over 15 years. The question before the IAD was also one of mixed fact and law and Desjardins J.A. held that such questions were entitled to a high level of deference.

11 Justice Desjardins found that no reviewable error had been committed by the applications judge. In support of his application for judicial review, Mr. Khosa had argued that the IAD had placed too much weight on his apparent denial of being in a street race and had ignored both the spontaneity of the race and his extreme remorse. He further argued that the IAD had misconstrued the evidence before it by, in part, overlooking that the family farm in India was about to be sold and that he would therefore have no strong family ties or connections to India. Unlike the majority, Desjardins J.A. did not subscribe to the value that the board should have deferred to the criminal law findings of the B.C. courts. Justice Desjardins asserted that under the Immigration and Refugee Protection Act, the IAD had a specific mandate to consider all circumstances of the case but to reach its own determination. Justice Desjardins held that the findings of the majority were well within the board's domain. With respect to Mr. Khosa's second argument, Desjardins J.A. noted that the IAD had summarized the appellant's testimony relating to the farm and other family connections in India in its reasons for judgment. She noted equally, however, that the IAD's duty is to assess all circumstances of the case at the time of disposing of the appeal. Justice Desjardins asserted that it was in the IAD's discretion to assign relative weight to aspects of testimony received. Moreover, it was not for the Court to reassess the board's weighing of evidence on judicial review. Similar to the judge of first instance, Desjardins J.A. was wary of reviewing evidence and thus overstepping what she saw as the proper role of the reviewing court. She stated that it was "settled law that the Court must not second-guess the decisions of the IAD with respect to the weight assigned to the various factors it has to consider".32

12 The Minister of Citizenship and Immigration appealed from the decision of the Federal Court of Appeal to the Supreme Court of Canada. Between the time of the Federal Court of Appeal decision and the Supreme Court of Canada hearing, Dunsmuir was decided. The decision in Dunsmuir cast the question of standard of review in a different light. A central issue became whether subsection 18.1(4) of the Federal Courts Act provided a legislated standard of review that obviated the need for an analysis based on the common law principles established in Dunsmuir. Subsection 18.1(4) sets out the circumstances in which the Federal Court may grant relief on judicial review. Paragraph 18.1(4)(d), in particular, allows the Federal Court to grant an applicant relief if a federal board, commission or other tribunal relied on an erroneous finding of fact and made that finding in "a perverse or capricious manner or without regard for the material before it".33

2.Supreme Court of Canada

13 Before the Supreme Court of Canada, the Minister argued that section 18.1(4)(d) of the Federal Courts Act prescribed a standard of review and one that was highly deferential. He argued further that this legislated standard of review ousted the common law. The challenge posed for the Supreme Court, therefore, was to establish principles for determining whether a legislated provision can be said to provide a standard of review and how a legislated standard of review should interact, if at all, with the common law principles established in Dunsmuir. In this section, I present an overview of the reasons given in Khosa, followed by a detailed and critical analysis of the major debates between the members of the bench.

(a)Majority Reasons -- McLachlin C.J.C. and Binnie, LeBel, Abella and Charron JJ.

14 At the Supreme Court, Binnie J. penned the majority reasons in Khosa. He framed the issue as being the extent to which, if at all, the common law principles that had been analyzed in Dunsmuir govern "the exercise by judges of statutory powers of judicial review (such as those established by ss. 18 and 18.1 of the Federal Courts Act, R.S.C. 1985, c. F-7)".34 Overall, Binnie J. held that section 18.1 of the Federal Courts Act deals with grounds as opposed to standards of review. He determined also that the judicial review judge of first instance appropriately gave a higher degree of deference to the IAD decision. Placing this within the language of Dunsmuir, which permits of only two standards of review -- reasonableness and correctness -- Binnie J. found that the appropriate standard of review was reasonableness and that the IAD's decision was within a range of reasonable outcomes.

(b)Minority Concurring Reasons -- Rothstein J.

15 Justice Rothstein described the central issue in Khosa as whether the Federal Courts Act "expressly, or by necessary implication, provides the standards of review to be applied on judicial review, and if so, whether this displaces the common law standard of review analysis recently articulated in Dunsmuir v. New Brunswick".35 Justice Rothstein answered both questions in the affirmative. He agreed with the majority's conclusion that the appeal should be dismissed, but would have dismissed the appeal simply because the factual findings of the IAD were not "perverse or capricious" as section 18.1(4)(d) requires.

16 Justice Rothstein had a very different perspective, however, on the general principles of law that should be laid down regarding legislated standards of review. His primary assertion was that decisions of administrative bodies that deal with legal questions should not be given deference by reviewing courts unless there is an unambiguous and strong (or "full") privative clause in the enabling legislation. A strong privative clause is one that completely precludes review for legal error.36

17 Justice Rothstein sought also to retain the standard of correctness as a common denominator in all judicial oversight (whether of administrative bodies or trial courts). He reasoned that this would

maintain the rule of law by preserving universality. Following the appellate context where all questions of law are reviewed on a correctness standard, universality would obtain by having the same legal rules apply in all similar situations.37

(c)Minority Concurring Reasons -- Deschamps J.

18 In brief reasons of only a paragraph, Deschamps J. agreed with Rothstein J. that section 18.1(4)(d) provides statutory standards of review that oust the common law. She agreed largely with Rothstein J.'s analysis and would have allowed the appeal for the same reasons. Justice Deschamps did not, however, enter into the larger debate between Rothstein J. and the majority as to whether privative clauses are a necessary condition precedent to the granting of deference to an administrative tribunal.38

(d)Dissenting Reasons -- Fish J.

19 Justice Fish agreed with Binnie J. and the majority that the standard of review was reasonableness. In his opinion, however, the IAD's opinion was not reasonable. Justice Fish was concerned that the IAD had been overly concerned with the issue of whether or not Mr. Khosa had been involved in a street race:

I find that the decision of the IAD rests on what the Court of Appeal has aptly described as a "fixation" that collides with the overwhelming weight of the uncontradicted evidence in the record before it. I agree with the majority below that the decision, for this reason, cannot stand.39

20 Justice Fish was less cautious than his colleagues on the bench, than the dissenting judges below and than the Federal Court about the appropriateness of examining evidence presented at first instance. He reviewed the evidence that had been presented before the IAD, finding ample information to convince him that Mr. Khosa was extremely unlikely to reoffend and that he had taken responsibility for his actions. He found that Mr. Khosa's denial of street racing was the decisive element, if not the sole basis, on which he was denied humanitarian and compassionate relief. In Fish J.'s opinion:

While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict -- still less to outweigh, on a balance of probabilities -- all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence.40

Justice Fish's opinion shared an underlying premise with the majority of the Federal Court of Appeal -- namely, that deference should be given to the opinion of the criminal courts on criminal matters.41

21 Justice Fish held that the IAD majority's "inordinate focus on racing"42 and its failure to consider contrary evidence did not fit comfortably with the principles of justification, transparency and intelligibility that characterize a reasonable decision within the Dunsmuir framework. As Fish J. eloquently stated: "deference ends where unreasonableness begins."43

3.Commentary on Khosa

22 The richest aspect of the decision in Khosa revolves around the perspectives taken by Binnie J. for the majority and Rothstein J. in his minority concurring reasons. The central debate between Binnie J. and Rothstein J. deals with how clear the legislature must be to indicate that deference should be given to an administrative body. While on one level, their debate focuses on how to recognize and interpret legislated standards of review, its underlying premise engages fundamental questions about deference, expertise and how judicial review of administrative action may be appropriately placed within the broader spectrum of curial oversight.

(a)Deference in the Absence of a Privative Clause? Rolling Back the Clock Pre-Pezim

23 Justice Rothstein expressed concern that the role of the superior courts to supervise administrative agencies would be compromised if the scope of review by the judiciary could be limited even in the absence of a privative clause. In Rothstein J.'s opinion, the courts' constitutional responsibility to maintain the rule of law would be significantly diminished if such incursions into the ability of superior courts to perform judicial review were permitted. Justice Rothstein's argument centred around a theory that he termed "the judicial-legislative tension".44 This theory postulates that the desire of various legislatures to immunize administrative decisions from judicial scrutiny through privative clauses gave rise to tension between the superior courts' aim to uphold the rule of law and the democratic will of legislatures to create administrative bodies endowed with broad powers. The modern standard of review analysis in its various formulations (e.g., the pragmatic and functional approach, Dunsmuir principles, etc.) was designed to restore balance between these two institutions and their respective goals. Unlike the majority, Rothstein J. was strongly of the opinion that no judicial-legislative tension could arise in the absence of a privative clause. The privative clause was what signalled that deference should be accorded to an administrative actor. It was therefore incorrect for courts to consider granting any deference to an administrative body if the enabling legislation did not include a privative clause. The standard of review analysis that stemmed from Dunsmuir and from the pragmatic and functional approach before that, should therefore not be engaged in the absence of a strong privative clause. To make his point even clearer, Rothstein J. emphasized that it was inappropriate to recognize expertise as a free-standing basis for deference on issues of law:

In my opinion, recognizing expertise as a free-standing basis for deference on questions that reviewing courts are normally considered to be expert on (law, jurisdiction, fraud, natural justice, etc.) departs from the search for legislative intent that governs this area.45

24 The search for legislative intent to which Rothstein J. refers should be found solely in the statute itself. Justice Rothstein was particularly troubled that administrative law jurisprudence has taken a marked departure from relying on manifest indications of expertise expressed in statutory privative clauses, to imputing expertise to administrative actors based on a global reading of enabling statutes. Justice Rothstein asserted that this departure began with the Supreme Court's reasons in Pezim v. British Columbia (Superintendent of Brokers). There, the constating statute of the British Columbia

Securities Commission was held to reveal the breadth of the commission's expertise and specialization. Justice Rothstein acknowledged that the approach developed in Pezim has long established itself in our common law -- a point made by the majority. However, he refused to accept that longevity can be a basis for not revisiting what he saw as a misguided aspect of the standard of review jurisprudence:

With respect, I do not believe that the longevity of Pezim should stand in the way of this Court's recent attempts to return conceptual clarity to the application of standard of review. The fact that Pezim has been cited in other cases does not preclude this Court from revisiting its reasoning where there are compelling reasons to do so. ... In my view, Pezim's departure from the conceptual basis for standard of review constitutes such a compelling reason. In Dunsmuir, this Court recognized that the time had "arrived for a reassessment" of "the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals" (para. 1). Such reassessment should include a return to the conceptual basis for standard of review.47

25 In stark contrast to the opinion of Rothstein J., the majority held that deference should always be given to administrative actors so long as the deference is proportionate to the role, function and expertise of the administrative body. Justice Binnie explained that where the legislature has decided to allocate a particular decision to administrative decision-makers rather than to the courts, it was appropriate to grant a measure of deference to their outcomes. Justice Binnie endorsed the idea put forth by David Mullan that deference is required to recognize the expertise or field sensitivity that administrative actors develop in relation to the imperatives and nuances of an administrative regime, and that they may also acquire expertise in the application of principles of common or civil law as they relate to a specific statutory context. Courts should adopt a policy of deference in order to refrain from asserting a level of skill and knowledge in administrative matters which experience has shown that they may not possess.48 Justice Binnie saw the decision in Pezim as merely a turning point at which the courts recognized that deference should be accorded for these reasons and that it may be granted even in the absence of a privative clause. Dunsmuir affirmed this approach. Justice Binnie therefore expressed concern that Rothstein J.'s approach amounted to an attempt to "roll back the Dunsmuir clock"49 to an era where judicial intervention was not always supported by the skill and expertise needed to review properly an area of administrative decision-making.

26 The approach suggested by Rothstein J. challenges deep normative ideas about how best to view the relationship between administrative governance and the rule of law. Justice Rothstein's comment that "residual judicial review jurisdiction means that courts retained authority to ensure the rule of law even as delegated administrative decision making emerged"50 presents an understanding of the administrative state that is hierarchical, with "ordinary courts" having the last word. This Diceyan view is revealed fully with Rothstein J.'s assertion that "almost all rule of law theories include a requirement that each person in the political community be subject to or guided by the same general law".51 Justice Rothstein's analysis shows a disturbing movement away from the policy of deference as respect52 that has come to dominate judicial review theory since New Brunswick Liquor Corp. v. C.U.P.E., Local 963. Deference as respect aims to maintain an institutional dialogue between courts and tribunals in order to permit judicial intervention where necessary without unduly encroaching on the legitimate specialized

work of administrative decision-making bodies. Not since National Corn Growers Assn. v. Canada (Import Tribunal),54 has an attack on the policy of deference been made so strongly.

27 The difficulty in assessing the debate between Rothstein and Binnie JJ. is that the ideal of following legislative intent seems supported by two diametrically opposed approaches. On one hand, Rothstein J.'s suggested approach to follow only express statutory direction to defer cannot be faulted for missing the will of the legislature or for reading in too much. Yet, it is not so much what may be read into legislative intent by the courts that is problematic, but what may be left out. Justice Rothstein's attempt to confine deference to the realm of the explicit privative clause overlooks that legislative intent has an organic component that extends past the four walls of the statute. This is the idea captured by Binnie J. that the on-the-ground expertise that may develop over time (and, I would add, in ways that cannot always be explicitly foreseen by the legislature) deserve some measure of respect by courts on review. In granting a particular area of regulation to an administrative actor, the legislature confers not only a set of tasks but confidence that as the area grows and develops, the administrative actor will also keep up with the management of the sector for which it is responsible. To impose a correctness standard and the possibility of interventionist judicial review whenever a privative clause is absent or ambiguous is likely to result in stifling this necessary aspect of the administrative state.

(b)Using the Common Law to Interpret Judicial Review Legislation

28 As for the majority's discussion on the relationship between judicial review legislation and the common law, Binnie J. prefaced his analysis with some general overarching points. He began by indicating that "where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business".55 He noted that most judicial review statutes use the common law as a backdrop. Their use of certain terms and expressions are to be understood with reference to the common law jurisprudence. As an example, Binnie J. referred to the use of the term "patently unreasonable" in British Columbia's Administrative Tribunals Act.56 In obiter, Binnie J. asserted that the expression "patently unreasonable" was intended to be understood in the context of the common law jurisprudence even if certain indicia of patent unreasonableness are provided in the statute itself. In his opinion:

Despite Dunsmuir, "patent unreasonableness" will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.57

29 Turning to section 18.1 Federal Courts Act, as noted earlier, Binnie J. was of the opinion that it provided grounds of review as opposed to standards of review. Section 18.1 set out threshold grounds that permitted but did not require the court to grant relief.

30 Looking more closely at the statute itself, Binnie J. performed the exercise of verifying whether the subparagraphs of section 18.1(4) seemed to offer a standard of review comparable to that found at common law. However, he did not set a prescriptive methodology for future evaluation of questions of this nature. It may be that all that is required is to check the legislation against the approach of the common law. Nevertheless, his analysis of subparagraph 18.1(4)(d)58 is somewhat dissatisfying. Justice Binnie asserts, first, that the purpose of this section was to put an end to the earlier tendency of some courts to label issues before tribunals "jurisdictional" so that they became subject to more intrusive curial review. He provided no support, however, for his assertion that this was the intention of the legislators in drafting section 18.1(4)(d). Certainly, one would have liked to have seen some proof that this was Parliament's intention in enacting this provision, if only through reference to its legislative history -- for example, background papers, committee hearings, etc.

31 Justice Binnie's second assertion with respect to section 18.1(4)(d) was that it demands a high degree of deference. He argued that this is consistent with Dunsmuir principles. In Binnie J.'s words:

It is clear from s. 18.1(4)(d) that Parliament intended administrative fact finding to command a high degree of deference. This is quite consistent with Dunsmuir. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.59

32 Rather than illustrating how the legislation in question does not provide a standard of review, Binnie J.'s claim does the exact opposite. From the above captioned quote, one sees agreement that the Federal Courts Act has asked for a high level of deference to be shown to findings of fact. In this way, section 18.1(4)(d) is very different than the other subparagraphs of section 18.1(4) which only describe situations in which the court can intervene but do not suggest any level of deference that the court should show. It is not clear why Binnie J. goes on to assert that section 18.1(4)(d) is consistent with the Dunsmuir principles. At issue was whether Dunsmuir needed to be applied at all. Following his discussion on the preservation of patent unreasonableness in British Columbia through the British Columbia Administrative Tribunals Act, one would have thought that Binnie J. would have found Dunsmuir inapplicable. At most, one would have expected him to have sought to use administrative law principles to render more precise the legislative objectives of section 18.1(4)(d). Surprisingly, Binnie J.'s conclusion is that the legislation adds precision to the reasonableness standard of review set out in the common law when dealing with Dunsmuir's application to tribunal fact-finding. This approach is completely at odds with his early dicta in the same judgment relating to the application of the patent unreasonableness concept under the Administrative Tribunals Act. At that point, he had held that the legislative standard is to be calibrated according to general principles of administrative law. As Rothstein J. points out, Binnie J.'s approach to section 18.1(4)(d) does not seem to follow current trends in statutory interpretation.60

33 Overall, with respect to the question of whether a reviewing court need resort to the general common law of judicial review in interpreting judicial review legislation, Binnie J. was of the opinion that reference to the common law is essential, especially in cases where the statutory powers of judicial

review aim to cover a broad range of federal decision-makers, as in section 18.1.61 He expressed the view that section 18.1 merely sets out threshold grounds that permit but do not require the Federal Court to exercise its discretion to grant relief on an application for judicial review. What tips the scales in any given case will be the Court's understanding of the respective roles of courts and administration and the circumstances of each case. Moreover, Binnie J. held that the principles of judicial review enunciated in Dunsmuir offer an appropriate basis for the Court to exercise its discretion. Justice Binnie also refuted any suggestion that section 18.1 compels the Federal Court to grant relief on a judicial review application. Justice Rothstein, by contrast, characterized the majority's approach as reading the Dunsmuir standard of review analysis into section 18.1(4).

34 But the major issue, which is not adequately defended by the majority and that is still left unanswered, is exactly why the common law should play such a significant role in developing legislated standards of review. Can we really say that section 18.1(4) (and, in particular, section 18.1(4) (d)) is not legislation prescribing standards of review but rather stops at only indicating grounds? I think it is more accurate to locate section 18.1(4) somewhere in between the positions of Binnie J. and Rothstein J. It should be acknowledged that section 18.1(4)(d) prescribes a standard of review. This standard, which essentially mimics patent unreasonableness, can be applied without reference to the common law unless the common law helps to clarify the standard by indicating what capricious and perverse mean. Applying the "perverse and capricious" standard indicated in section 18.1(4)(d) is not out of line with the idea of deference for tribunal expertise. It is not quite clear why this method, which seems much more straightforward in line with current legal statutory interpretation, was not followed by Binnie J. At the same time, while section 18.1(4)(d), in particular, identifies a standard of review, it is hard to see the rest of the provisions as offering more than grounds of review. Nevertheless, as discussed in the next section, there was also debate among members of the bench as to whether a universal standard could be observed in section 18.1(4) generally.

(c)Correctness: A Universal Standard of Review?

35 Justice Rothstein sought to maintain the standard of correctness as a common denominator in all judicial oversight (whether of administrative bodies or trial courts). He reasoned that this would maintain the rule of law by preserving universality.62 Justice Rothstein asserted that the intention of Parliament in enacting section 18.1(4) was to have the court apply a correctness standard as it does in the regular appellate context outside of situations where it specifies a more deferential standard of review.63

36 Contrary to Rothstein J.'s call for universality in curial oversight, Binnie J. promoted a more substantive and contextualized approach. Justice Binnie held that it logically could not have been Parliament's intention to create a single standard of review for the hundreds of different administrative actors that exist in the federal sphere. These actors range from Cabinet ministers to tribunals to civil servants. If section 18.1 were understood to create one standard, the standard would necessarily be decontextualized -- that is, it would not take into account the presence or absence of privative clauses,

statutory rights of appeal, etc., found in a variety of enabling statutes. By contrast, it makes more sense to see section 18.1 as a flexible and contextual approach that by necessity had to be elastic enough to cover the wide range of administrative actors.64

37 The debate between Rothstein J. and the majority shows a competition of formalist and substantive approaches. In many areas of public law, courts have attempted to move away from formalist approaches that simply work on the appearance of seemingly like situations being handled similarly, to more contextualized judging. The most notable area is equality law. Within the realm of administrative law itself, however, we see continuous vacillation between the embrace and rejection of contextualized approaches. Contextualization has been adopted with respect to procedural fairness, tribunal standing and, arguably, exclusive and concurrent jurisdiction. It is surprising that Rothstein J. would propose a process of universal review. The difficulty with such a formalist approach to determining standards of review is that it misses the opportunity for judicial review to pay attention to the nuanced details of various administrative actors.

4.Khosa -- Conclusions

38 In my review article of last term, I suggested that what was still required after Dunsmuir was a careful discussion of how each standard of review should be applied.65 Khosa has pushed us forward in this regard but, as the commentary above suggests, has not answered all questions.

39 I also argued last year that one of the main questions remaining after Dunsmuir was how patent unreasonableness would fare in statutory regimes where the standard had been kept. Khosa confirms that the standard of patent unreasonableness will not be disturbed under the British Columbia Administrative Tribunals Act. The majority asserted, in obiter, that the older jurisprudence used to define the standard will continue to guide interpretation under the statute.66

40 There is nothing to suggest that this reasoning will not also apply to other statutory regimes that rely on the expression patent unreasonableness. Khosa's conclusion on this issue may also encourage legislators to continue to use the expression in order to safeguard a certain amount of deference for the decisions of administrative actors. For those concerned that the standard of reasonableness articulated in Dunsmuir may open the door, if not inspire, a greater reach of judicial activism, this aspect of the holding in Khosa offers some comfort. On the other hand, the response of Khosa may simply be one step in an ongoing power struggle between legislature and judiciary over who will get the last word in determining degrees of deference.

41 Last year, in discussing the Supreme Court of Canada's decision in Dunsmuir, I also expressed concern that the broad ambit of reasonableness review put forth by Dunsmuir may invite more intrusive review. I highlighted matters such as the review of factual findings and credibility that had traditionally

attracted the patent unreasonableness standard because of the advantage that the initial trier of fact has in seeing the evidence firsthand. I suggested that these may be sites where searching and possibly unnecessary judicial review might take place. Justice Fish's dissenting opinion in Khosa shows an example of how such an intrusive review may come about. The majority perspective that the standard of review was the common law standard of reasonableness defined by Dunsmuir, as opposed to the test of a capricious and perverse finding of fact as put forth in section 18.1(4)(d), allowed for the IAD's fact-finding and weighing of evidence to be subjected to re-evaluation for its reasonableness. The characteristics of justification, transparency and intelligibility, which are used to define reasonableness, are open to such broad interpretation that it is possible to argue that an evidence-based decision may only be justifiable if it coincides with similar understandings of weight and relevance of a reviewing court. In order to preserve the domain of factual findings from such intrusive review, some criteria may have to be established in the wake of Dunsmuir.

42 A final observation about Khosa is that the approach taken by Fish J. on dissent, coupled with Rothstein J.'s interest in reserving deference to situations in which there are express privative clauses, show a definite movement by some on the bench to circumscribe the amount of power that administrative tribunals may wield. Traces of this movement can also be seen in the underlying current expressed both at the Federal Court of Appeal and by Fish J. at the Supreme Court of Canada that administrative tribunals should show deference to courts in specialized judicial subject areas such as criminal law.67 Yet, it is not clear that deference to parallel decision-making regimes is desirable without more precise legislative direction.

43 Lastly, Binnie J. was in the minority in Dunsmuir and here plays a leading role in the majority decision. What has changed in either Binnie J.'s outlook or the Court's opinion to bring them closer together? It would seem that one thing that has been altered is the notion of reasonableness review having variegated fixed points within it. Although Binnie J. had proposed this approach in his minority decision in Dunsmuir, in Khosa we see him suggest, on behalf of the majority, what seems to be a compromise. He writes: "Reasonableness is a single standard that takes its colour from the context."68 It remains to be seen how much of a rainbow the reasonableness standard will provide.

## III.SOLICITOR-CLIENT PRIVILEGE: CANADA (PRIVACY COMMISSIONER) V. BLOOD TRIBE DEPARTMENT OF HEALTH

44 At issue in this case was whether the federal Privacy Commissioner's statutory power to access personal information about a complainant for the purpose of ensuring compliance with the Personal Information Protection and Electronic Documents Act69 should supersede the right of the holder of the information to keep it confidential for reasons of solicitor-client privilege.70 The Supreme Court of Canada had not yet addressed this issue, although it had dealt with the disclosure of solicitor-client privileged material prepared by in-house counsel to an administrative tribunal71 as well as the question of when it is appropriate for courts to disclose solicitor-client privileged material in the context of access to information litigation.72 In Blood Tribe,73 the Supreme Court of Canada held that the power to

access solicitor-client documents, even for the limited purpose of determining whether the privilege has properly been claimed, is reserved to the courts. For a regulator or other statutory official to pierce this privilege, its enabling statute must provide clear and explicit language.

1.Facts and Procedural History

45 Ms Annette Soup, having been dismissed from her employment with the Blood Tribe Department of Health ("Blood Tribe"), made a request to see her personnel file. She was concerned that her employer had improperly collected inaccurate information and used that information to discredit her before its board. Blood Tribe denied Ms Soup's request for access without providing reasons. Ms Soup filed a complaint with the federal Privacy Commissioner requesting access to her personal employment information. When the Privacy Commissioner requested Ms Soup's employment records, Blood Tribe provided some documents but withheld others, claiming solicitor-client privilege under section 9(3)(a) of PIPEDA.74 Ms Soup's employment records included correspondence between Blood Tribe and its solicitors, as Blood Tribe had sought legal advice at the time of Ms Soup's dismissal.

46 The Privacy Commissioner ordered production of the documents in question. The Commissioner's office maintained that it was necessary to review the documents in order to be absolutely certain that the solicitor-client privilege exemption had been properly invoked. Blood Tribe brought an application for judicial review to challenge the legality of the Privacy Commissioner's order. The Federal Court dismissed the application.75 Justice Mosley argued that Parliament had expressed great confidence in the Privacy Commissioner's ability to protect sensitive information. This could be seen in the Commissioner's power to review information and determine whether it should be exempt for reasons of national security.76 Moreover, Mosley J. noted that the Privacy Commissioner has been given powers that could be exercised in the same manner as a superior court of record. Included in the powers of the superior court is the ability to compel production of documents in order to assess claims of solicitor-client privilege. Overall, Mosley J. was of the opinion that if Parliament had intended to prevent the Commissioner from verifying claims of privilege, it could have done so expressly. Parliament had made such express exclusions with regard to other matters in several other statutes.

47 At the Federal Court of Appeal, a unanimous Court held otherwise.77 Whereas the Federal Court had suggested that express exclusions from the ability to pierce solicitor-client privilege were required to limit the Commissioner's powers, the Court of Appeal held that the power to pierce solicitor-client privilege must be explicit in the statute in order to have the force of law. Justice Malone argued that in granting the Privacy Commissioner the power to compel evidence in a manner similar to a superior court, Parliament had not enlarged the jurisdiction of the Commissioner's office. In his opinion, Parliament's intent was simply to allow the Privacy Commissioner to issue subpoenas and orders with the force of law for matters that were otherwise within her investigative jurisdiction.

2.Supreme Court of Canada

48 At the Supreme Court, Binnie J. penned the decision on behalf of a unanimous Court. His decision was anchored in the importance of solicitor-client privilege to the proper functioning of the legal system. This privilege is a broad rule of substance as supposed to evidence, that applies to all interactions between a client and lawyer in which a lawyer is engaged in a legal capacity. Justice Binnie noted that clients will often not make full disclosure of the facts to their lawyers without an assurance of confidentiality that is as close to absolute as possible. Justice Binnie asserted that solicitor-client privilege therefore encourages the free flow of information between client and lawyer, which in turn promotes access to justice and enhances the quality of justice.

49 Justice Binnie held that the case before the Court fell squarely within the general principle that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively. The privilege cannot be abrogated by inference".78 Consequently, he held that open-textured legislative language that deals with the production of documents, such as section 12 of PIPEDA, will not be read to include documents over which solicitor-client privilege is claimed. In further support of the proposition, Binnie J. referred to Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink and Pritchard.80

50 The court agreed with the Privacy Commissioner's argument that it is important to verify claims of privilege made by the private sector in order to safeguard the fundamental right of access to one's personal information. However, it did not agree that the Privacy Commissioner was the proper forum for this independent verification. In particular, the Court noted that the Privacy Commissioner may become adversarial in interest to the business organization in question. This is because PIPEDA allows the Privacy Commissioner to apply to the Federal Court either as a representative of the complainant or in lieu of the complainant (with the complainant's consent) once the Commissioner has made his or her report.81

51 The Court found several bases for rejecting the Privacy Commissioner's arguments. The Court held that the Privacy Commissioner had drawn a false analogy between its office and a court. The Commissioner had argued that section 12(1)(a) of PIPEDA grants the office the same powers as a superior court of record and a superior court of record can inspect documents over which privilege is claimed. However, the Court was of the opinion that a court's power to review a privileged document flows not from its power to compel production but rather from its power to adjudicate disputed claims over legal rights. In the Court's opinion, since the Privacy Commissioner does not possess this adjudicative capacity, it is not similarly situated to a court.

52 The Court referred to various pieces of legislation to show, on the one hand, that Parliament's use of wording similar to section 12 when read in their statutory contexts, did not always indicate that Parliament intended to abrogate solicitor-client privilege. On the other hand, the fact that the Privacy Act,82 a statute also under the Commissioner's administration, explicitly enables the Commissioner to examine privileged documents, supported an argument that express language could have been used by

Parliament if it had intended the Commissioner to be able to pierce solicitor-client privilege under PIPEDA. Finally, the Court noted that the office of the Privacy Commissioner had at least two alternative means at its disposal for verifying solicitor-client privilege without going behind the privilege itself. The first was to refer the matter to the Federal Court for hearing and determination under section 18.3(1) of the Federal Courts Act. The second was to record an impasse over privilege in its report and then to bring an application to the Federal Court for relief under section 15 of PIPEDA. The legislative regime therefore allowed the objectives of PIPEDA to be met while preserving solicitor-client privilege.

53 The Court was also clearly uncomfortable with the Privacy Commissioner's reason for compelling the production and inspection of the documents at issue. As the Court noted, there was nothing particular about the documents that had inspired the Privacy Commissioner to review the documents in this instance. There was also no basis to show that the privilege had been improperly claimed. The Privacy Commissioner was simply demanding routine access in all cases in which solicitor-client privilege was claimed. Piercing solicitor-client privilege was to become a norm rather than the exception in the course of the Commissioner's everyday work.83 For all these reasons, the appeal was dismissed.

3.Commentary on Blood Tribe

54 Blood Tribe's greatest impact will be felt in its application to the everyday work of administrative tribunals. In particular, while some of the main arguments for the development of the administrative state rest on the ability of administrative actors to complete their work with efficiency, the Supreme Court of Canada's holding in Blood Tribe may slow down the process considerably whenever an administrative actor believes that there is a need to obtain information protected by solicitor-client privilege and the ability to pierce the privilege is not explicit in the statute.84

55 Nevertheless, it goes without saying that there are strong public policy reasons for protecting solicitor-client privilege, including preserving confidentiality and trust in the lawyer-client relationship, as the Court suggests. Yet, the Court seems to be inconsistent in developing and restricting the reach of administrative powers. It was only less than a decade ago that the Court confirmed that the power to decide Charter85 matters, which is by far one of the greatest constitutional powers that any decision-making body can have, should be extended to administrative tribunals. In that situation, all that was needed was for the power to decide questions of law be implied from the statutory regime. While both doctrinal advances by the Supreme Court have been made in the name of promoting access to justice, it seems inconsistent that administrative tribunals need only implied powers to determine the Charter rights of individuals but must look for explicit statutory direction in order to receive information to help them make informed decisions.

56 A final interesting aspect about Blood Tribe is that the decision turned on a scenario involving the federal Privacy Commissioner, an institution that has powers similar to a classic ombudsman, describes itself as such and as being very much outside of the realm of the average administrative tribunal.86 If

the idea of contextualized judicial review is really one that the Supreme Court of Canada has chosen to embrace, then this perspective is hard to reconcile with Binnie J.'s comparison of the Commissioner's office with a court in determining that a lack of adjudicative powers should preclude the Commissioner from reviewing privileged documents. Justice Binnie held:

In any event, a court's power to review a privileged document in order to determine a disputed claim for privilege does not flow from its power to compel production. Rather, the court's power to review a document in such circumstances derives from its power to adjudicate disputed claims over legal rights. The Privacy Commissioner has no such power.87

57 The lack of adjudicative powers is a traditional aspect of ombuds-officers. It may have been more relevant to determine whether or not there was a need for the Commissioner to gain access to solicitor-client privileged material on a routine basis, in light of the investigatory and negotiating role that the Commissioner's office plays. The nature of the administrative scheme was quite central in this case but was hardly given the attention it deserved.

## IV.CONCLUSION

58 In conclusion, if there was a consistent theme during the 2008-2009 Supreme Court of Canada term relating to the Court's key administrative law decisions, it was concern about how explicit legislators need to be in legislative drafting. In Khosa, this issue came up with respect to Rothstein J.'s minority holding that deference should only be granted upon an express, full privative clause. The majority, by contrast, believed in granting deference to administrative actors because of the nature of the work that they do and in respect of the policy of deference that has been long established. In Blood Tribe, the Privacy Commissioner's enabling legislation was said not to be explicit enough to permit her to pierce solicitor-client privilege in order to review documents relevant to an investigation. While the importance of solicitor-client privilege cannot be denied, the Court's analysis in this decision showed hesitancy to embrace the very contextualized notion of judicial review that it has proposed as a general principle. Undoubtedly, the degree of specificity in legislation will arise again for the Court to address and one looks forward to how these issues of legislative imprecision will be contemplated in the future.

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Assistant Professor, Faculty of Law, University of Windsor. I am grateful to the Law Foundation of Ontario for its generous support. Thanks also to Karen Choy, Yannick Katirai and Cynthia Morgan for their excellent research assistance.

1

In chronological order, these cases are: Canada (Privacy Commissioner) v. Blood Tribe Department of Health, [2008] S.C.J. No. 45, [2008] 2 S.C.R. 574 (S.C.C.) (July 17, 2008) [hereinafter "Blood Tribe"]; New Brunswick (Human Rights Commission) v. Potash Corp. of Saskatchewan Inc., [2008] S.C.J. No. 46, [2008]

2 S.C.R. 604 (S.C.C.) (July 18, 2008) [hereinafter "Potash Corporation"]; Redeemer Foundation v. M.N.R., [2008] S.C.J. No. 47, [2008] 2 S.C.R. 643 (S.C.C.) (July 31, 2008) [hereinafter "Redeemer Foundation"] and Canada (Citizenship and Immigration) v. Khosa, [2009] S.C.J. No. 12, [2009] 1 S.C.R. 339 (S.C.C.) (March 6, 2009) [hereinafter "Khosa"]. An additional case that may be classified as an administrative law case but which deals primarily with labour law is Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] S.C.J. No. 44, [2008] 2 S.C.R. 561 (S.C.C.). This decision is discussed in detail by Beth Bilson in this volume - see "Developments in Labour Law: The 2008-2009 Term", at 254-58. The Supreme Court of Canada decided three additional cases this term that address government accountability: Holland v. Saskatchewan, [2008] S.C.J. No. 43, [2008] 2 S.C.R. 551 (S.C.C.) (July 11, 2008), in which a class action was launched alleging negligence on the part of the Saskatchewan government for failing to implement a judicial decree negatively affecting the status of farming herd cattle; Desrochers v. Canada (Industry), [2009] S.C.J. No. 8, [2009] 1 S.C.R. 194 (S.C.C.) (February 5, 2009), in which the scope of the duty of federal institutions to provide services in both official languages was examined; and Montréal (City) v. Québec (Commission des droits de la personne et des droits de la jeunesse), [2008] S.C.J. No. 49, [2008] 2 S.C.R. 698 (S.C.C.) (August 1, 2008), which involved application of the Québec Charter of human rights and freedoms, R.S.Q., c. C-12, to the hiring of police officer candidates who have obtained pardons for criminal convictions.

2

Khosa, id.

3

Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 (S.C.C.) [hereinafter "Dunsmuir"].

4

Blood Tribe, supra, note 1.

5

Sukhvir Singh Khosa and another accused, Bahadur Singh Bhalru, were convicted of criminal negligence causing death contrary to s. 220(b) of the Criminal Code, R.S.C. 1985, c. C-46. The British Columbia Supreme Court sentenced Mr. Khosa to a conditional sentence of two years less a day with specific conditions that included house arrest, community service and a driving prohibition. The British Columbia Court of Appeal upheld the decision of the British Columbia Supreme Court.

6

This removal order was issued pursuant to s. 36(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27.

7

The power of the IAD to grant special relief on humanitarian and compassionate grounds stems from s. 67(1)(c) of the Immigration and Refugee Protection Act, id. Mr. Khosa sought only humanitarian and compassionate relief. He did not challenge the legal validity of the removal order.

8

Khosa v. Canada (Minister of Citizenship and Immigration), [2004] I.A.D.D. No. 1268 [hereinafter "Khosa (I.A.D.)"].

9

[1985] I.A.B.D. No. 4 [hereinafter "Ribic"].

10. [2002] S.C.J. No. 1, [2002] 1 S.C.R. 84 (S.C.C.) [hereinafter "Chieu"].

11

The six Ribic factors are: (1) the seriousness of the offence leading to the removal order; (2) the possibility of rehabilitation; (3) the length of time spent, and the degree to which the individual facing removal is established, in Canada; (4) the family and community support available to the individual facing removal; (5) the family in Canada and the dislocation to the family that removal would cause; and (6) the degree of hardship that would be caused to the individual facing removal to his or her country of nationality.

12

See Khosa (I.A.D.), supra, note 8, at para. 15.

13

The dissenting member found that the evidence as analyzed through the lens of the Ribic factors largely supported Mr. Khosa's claim for humanitarian and compassionate relief. (See id., at paras. 55-77.) She noted the findings of remorse of the criminal courts and found that Mr. Khosa had accepted responsibility for his actions. She highlighted that the appellant was regretful at the IAD hearing, and

found his remorse genuine, noting the emotion in his voice and that he had apologized directly to the family present (id., at paras. 48-54). She further noted that the appellant had complied with all court-ordered sanctions (id., at para. 57). Moreover, with respect to the seriousness of the offence, which is the first of the Ribic factors, she placed significant mitigating weight on the spontaneous, short nature of the race and noted that the appellants did not fit the usual profile of street racers and had no prior criminal history (id., at para. 43).

14

Khosa v. Canada (Minister of Citizenship and Immigration), [2005] F.C.J. No. 1465, 2007 FCA 24 (F.C.A.) [hereinafter "Khosa (F.C.)"].

15

Id., at paras. 24-31.

16

R.S.C. 1985, c. F-7.

17

Khosa (F.C.), supra, note 14, at para. 39.

18

Khosa v. Canada (Minister of Citizenship and Immigration), [2007] F.C.J. No. 139, 2007 FCA 24 (F.C.A.) [hereinafter "Khosa (F.C.A.)"].

19. [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter "Baker"].

20. [2003] S.C.J. No. 18, [2003] 1 S.C.R. 226 (S.C.C.) [hereinafter "Dr. Q"].

21. [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.) [hereinafter "Suresh"].

22

Supra, note 10.

23

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] S.C.J. No. 2, [2004] 1 S.C.R. 609, at para. 18 (S.C.C.).

24

The Federal Court of Appeal referred to Chieu, supra, note 10, in which the Supreme Court of Canada had cited the board decision in Grewal v. Canada (Minister of Employment and Immigration), [1989] I.A.D.D. No. 22 in support of this assertion.

25

See Khosa (F.C.A.), supra, note 18, at paras. 7-12.

26

Supra, note 21.

27

See Khosa (F.C.A.), supra, note 18, at para. 12.

28

In this regard, the majority of the Federal Court of Appeal explained that regardless of the IAD's authority to come to a different decision than that reached by the criminal courts due to intervening events or new evidence, the IAD should at least have explained why its conclusion was different - i.e., why it is that it found that rehabilitation had ceased to be a possibility. The Court likened this deference to the respect paid by provincial courts of appeal to the sentencing decisions made by trial judges. However, one wonders about this analogy since what is proposed is essentially deference across different spheres of activity as opposed to the vertical deference suggested by this analogy and also typically seen in administrative law's standard of review jurisprudence (see Khosa (F.C.A.), id., at paras. 9-11).

29

The Federal Court of Appeal indicated that, at a minimum, the Board should have taken into consideration the factors generally associated with the criminal law concept of rehabilitation. These factors include the absence of a prior criminal record, the absence of previous convictions for dangerous driving, the response to community supervision and the offender's recent history (including the upgrading of his education and work skills). See Khosa (F.C.A.), id., at para. 11. See also my discussion, id., and accompanying text.

30

Khosa (F.C.A.), id., at para. 18.

31

The majority held that the IAD decision should be set aside and the matter sent back to the board for reconsideration by a differently constituted panel. See id., at para. 23.

32

Id., at para. 56.

33

Subsection 18.1(4)(d) reads:

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

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it ...

34

Khosa, supra, note 1, at para. 1.

35

Id., at para. 70.

36

See id., at paras 74, 77.

37

Id., at para. 90.

38

Justice Deschamps agreed with Parts III, IV and V of Rothstein J.'s opinion. See Khosa, supra, note 1, at para. 138.

39

Id., at para. 141.

40

Id., at para. 149.

41

See the dicta of Fish J., id., at para. 150. See also my discussion on this issue, supra, note 28 and accompanying text.

42

Khosa, id., at para. 156.

43

Id., at para. 160.

44

Id., at paras. 76-81.

45

Id., at para. 93.

46. [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.) [hereinafter "Pezim"].

47

Khosa, supra, note 1, at para. 88.

48

Id., at para. 25.

49

Id., at para. 26.

50

Id., at para. 76.

51

Id., at para. 90.

52

On deference as respect, see David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law (Oxford: Oxford University Press, 1997).

53. [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.) [hereinafter "C.U.P.E."].

54

[1990] S.C.J. No. 110, [1990] 2 S.C.R. 1324 (S.C.C.) [hereinafter "National Corn Growers"].

55

Khosa, supra, note 1, at para. 18.

56

Id. See Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 58(2)(a), which reads: "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable".

57

Id., at para. 19.

58

The text of s. 18.1(4)(d) is provided, supra, note 33.

59

Khosa, supra, note 1, at para. 46.

60

On this point, Rothstein J. writes, id., at para. 104: "While recourse to the common law is appropriate where Parliament has employed common law terms or principles without sufficiently defining them, it is not appropriate where the legislative scheme or provisions expressly or implicitly ousts the relevant common law analysis as is the case with s. 18.1(4) of the F.C.A."

61

Id., at para. 33.

62

Id., at para. 90.

63

Id., at para. 117.

64

Id., at para. 28.

65

See Laverne Jacobs, "Developments in Administrative Law: The 2007-2008 Term - The Impact of Dunsmuir" (2008) 43 S.C.L.R. (2d) 1, at 23.

66

See Khosa, supra, note 1, at para. 19, and see my discussion, supra, note 57 and accompanying text.

67

See my discussion of Khosa (F.C.A.), supra, note 18 and Khosa, supra, notes 28 and 41 and accompanying text.

68

See Khosa, id., at para. 59.

69

S.C. 2000, c. 5 [hereinafter "PIPEDA"].

70

The reach of administrative powers was also discussed by the Court this term in Redeemer Foundation, supra, note 1.

71

See Pritchard v. Ontario (Human Rights Commission), [2004] S.C.J. No. 16, [2004] 1 S.C.R. 809 (S.C.C.) [hereinafter "Pritchard"], upholding the protection of solicitor-client privilege in the context of in-house counsel to administrative bodies and suggesting that the nature of the relationship, the subject matter and the circumstances in which the opinion is sought and given are factors that should be considered in determining whether solicitor-client privilege exists on a case-by-case basis. The Court also held that legislation that appears to deny privilege should be interpreted narrowly.

72

See Goodis v. Ontario (Ministry of Correctional Services), [2006] S.C.J. No. 31, [2006] 2 S.C.R. 32 (S.C.C.) (holding that the courts may disclose solicitor-client privileged material only when absolutely necessary).

73

Supra, note 1.

74

Subsection 9(3)(a) reads:

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege ...

75

[2005] F.C.J. No. 406, [2005] 4 F.C.R. 34 (F.C.A.).

76

See Privacy Act, R.S.C. 1985, c. P-21.

77

[2006] F.C.J. No. 1544, [2007] 2 F.C.R. 561 (F.C.A.).

78

Blood Tribe, supra, note 1, at para. 11.

79. [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209 (S.C.C.) [hereinafter "Lavallee"].

80

Supra, note 71.

81

See PIPEDA, supra, note 69, at ss. 14-15.

82

R.S.C. 1985, c. P-21.

83

See Blood Tribe, supra, note 1, at paras. 16-17.

84

Some have also argued, on a positive note, that the decision in Blood Tribe may prevent a push by regulators to pressure parties into giving up privilege rights. These authors note that pressure of this nature has developed in the United States. See Peter Ruby & Lauren MacLeod, "Solicitor-Client Privilege and Administrative Agencies" (2009) 22 Can. J. of Admin. L. & Prac. 91, at 102-103.

85

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter "Charter"]. See Nova Scotia (Workers' Compensation Board) v. Martin, [2003] S.C.J. No. 54, [2004] 2 S.C.R. 504 (S.C.C.).

86

See Office of the Privacy Commissioner of Canada, "Cherry Picking among Apples and Oranges: Refocusing Current Debate About the Merits of the Ombuds-Model under PIPEDA" (October 21, 2005), online: <www.privcom.gc.ca/information/pub/omb_051021_e. asp>.

87

Blood Tribe, supra, note 1, at para. 22.