Special Chambers
Judicial Review Applications in Alberta, 2016

*E. Wayne Benedict, LL.M, JD (Distinction), B.HRLR (Great Distinction), is an Alberta Barrister and Solicitor with the E. Wayne Benedict Professional Law Corporation, providing legal services to clients of the Calgary firm McGown Cook, and other clients. Mr. Benedict was an editor of the Saskatchewan Law Review (2004-05) and the Alberta Law Review (2005-06), and he was Law Clerk to The Honourable Mr. Justice Kenneth Mackenzie and The Honourable Mr. Justice Allan Thackray of the British Columbia Court of Appeal (2006-07). Mr. Benedict was Sessional Instructor of Labour Law with the University of Calgary Faculty of Law (2011-2016). Mr. Benedict holds certifications in locomotive operations, building construction, and industrial relations & human resources, and he is former president of the Canadian Union of Transportation Employees, Local 1 and its successor the Canadian Auto Workers, Local 110. Mr. Benedict acts for individual employees, labour unions/professional associations, and non-union employers in various negotiations, judicial and administrative dispute resolution forums. Mr. Benedict practices predominantly in labour law and employment law, and peripheral areas of civil litigation including: constitutional law (Charter of Rights and Freedoms and Division of Powers), human rights law, privacy law, administrative law (tribunal advocacy and judicial review), and appellate law. This paper was presented at the Canadian Bar Association, Alberta South, Civil Litigation Section Meeting in Calgary, Alberta on 22 November 2016.

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Abstract

When legal counsel is considering an administrative action or decision in relation to whether judicial review may be available to challenge the action or decision, counsel must: understand the concept of judicial review; understand whose actions and decisions are subject to judicial review; determine the time limitation period for filing and serving an application for judicial review; determine the court in which the application for judicial review should be filed, which depends on who the decision-maker is; understand what kinds of administrative decisions are subject to judicial review; understand what kinds of evidence are admissible in judicial review hearings; and determine which standard of review the court is likely to apply to the administrative action or decision. These topics are discussed in Parts II through VIII of this paper.

Once counsel has determined judicial review would be viable and available to challenge the administrative action or decision, and has received client instructions to advance the judicial review, counsel must understand the requisite procedures involved in initiating an application for judicial review. The processes are markedly different at the Federal Court and Federal Court of Appeal, than they are at Alberta's superior court—the Court of Queen's Bench of Alberta. Parts IX – XII of this paper are confined to discussing rules, procedures, and specific forms involved in an application for judicial review at the Court of Queen's Bench of Alberta.

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I. Introduction

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Once counsel has determined judicial review would be viable and available to challenge the administrative action or decision, and has received client instructions to advance the judicial review, counsel must understand the requisite procedures involved in initiating an application for judicial review. The processes are markedly different at the Federal Court and Federal Court of Appeal, than they are at Alberta's superior court—the Court of Queen's Bench of Alberta. Parts IX – XII of this paper are confined to discussing rules, procedures, and specific forms involved in an application for judicial review at the Court of Queen's Bench of Alberta.

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II. What is Judicial Review?

Justice Langston has defined judicial review as follows: "Judicial Review is a process where a Court is asked to determine the appropriateness of decisions made by administrative agencies or tribunals delivering government or public services."[1] It has

[1] *Blair v. Knorr & Associates Ltd*., 2010 ABQB 218, [2010] A.J. No. 364 at para 17 (QL) ["*Blair*"].

also been judicially defined as "a process of supervision of an administrative body in the carrying out of its function or mandate."[2]

If provincial legislatures enact legislation purporting to insulate administrative decision-makers' decisions from judicial review, such legislation is *ultra vires* the province. In *Crevier*,[3] the Supreme Court of Canada considered "the effect upon s. 96 of a privative clause of a statute which purports to insulate a provincial adjudicative tribunal from any [judicial] review of its decisions." The unanimous Court held: "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions…such provincial legislation must be struck down as unconstitutional by reason of having the effect of constituting the tribunal a s. 96 court[4]."[5] In *Khosa*,[6] Justice Rothstein, concurring in result, wrote: "In the provinces, provincial superior courts have inherent jurisdiction and in most, if not all, cases statutory judicial review jurisdiction. In the federal context, the *FCA*[7] transferred this inherent jurisdiction from the provincial superior courts to the Federal Courts."[8]

Generally, judicial review is the juridical process whereby the applicable court reviews the jurisdiction,[9] process,[10] and outcome[11] of an administrative decision-maker on the correct "standard of review."[12] It is also traditionally "[t]he proper remedy for

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[2] *Parsons v. Vista School Board*, 195 Nfld. & P.E.I.R. 214, [2000] N.J. No. 283 at para 18 (QL) ["*Parsons*"].
[3] *Crevier v. Québec (Attorney General)*, [1981] 2 S.C.R. 220 (QL) ["*Crevier*"].
[4] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s 96: "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."
[5] *Crevier*, *supra* note 3.
[6] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12 (QL) ["*Khosa*"].
[7] *Federal Courts Act*, RSC 1985, c F-7.
[8] *Khosa*, *supra* note 6 at para 76.
[9] These are "true questions of jurisdiction or *vires*" of the administrative decision-maker to make the impugned decision (or to decline jurisdiction to make a decision on its merits). "This category is 'narrow' and these questions… are rare": *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47, [2016] S.C.J. No. 47 at para 26 (QL) ["*Edmonton*"].
[10] Such as the "duty of fair procedure" or "natural justice", which encompass issues such as prejudice, actual or reasonable apprehension of bias, *audi alteram partem* (dealing with remedies in the absence of submissions from the parties), fair hearing, "he who hears must decide", and reasons. "It is [a] breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required [because] there is nothing to review. But where… there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] S.C.J. No. 62 at para 22 (QL) ["*Nurses*"].
[11] Meaning the final decision outcome (not to be confused with the reasons for the decision).
[12] Standard of review is discussed in Part VIII below.

breach of statutory duty by a public authority."[13] In *TeleZone*,[14] the unanimous Supreme Court of Canada wrote: "Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance."[15]

III. Whose decisions are subject to Judicial Review?

Generally any decision-maker (individual or tribunal) empowered by, employed by, or part of government, is an administrative decision-maker whose decisions may be subject to public law[16] judicial review. Thus, individual administrative decision-makers lay along a spectrum from "mid-level bureaucrats"[17] through Ministers.[18]

Institutional administrative decision-makers whose decisions are subject to judicial review are myriad and far too numerous to list. However, as the author practices predominantly in labour, employment, and peripheral areas of law, this paper will discuss a few of the administrative tribunals in those areas of law in Alberta, and federally, whose decisions are subject to judicial review; such as: the Alberta Labour Relations Board;[19] the Canadian Industrial Relations Board;[20] the Public Service Labour Relations and Employment Board;[21] Interest[22] and Rights[23] Labour Arbitrators and Boards

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[13] *Holland v. Saskatchewan*, 2008 SCC 42, [2008] S.C.J. No. 43 at para 9 (QL) ["*Holland*"].
[14] *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62, [2010] S.C.J. No. 62 (QL) ["*TeleZone*"].
[15] *Ibid* at para 24.
[16] In exceptional circumstances private entities' actions may be subject to judicial review, such as corporations without shares, private clubs, private schools, religious organizations, unincorporated associations/trade unions.
[17] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 at 134 (QL) ["*Dunsmuir*"]; per Binnie J. concurring in result.
[18] See e.g. *Németh* v. Canada (Justice), 2010 SCC 56, [2010] S.C.J. No. 56 9QL) ["*Németh*"]; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] S.C.J. No. 46 (QL) ["*Fischbacher*"]; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 (QL) ["*Lake*"].
[19] Alberta Labour Relations Board, online: <http://www.alrb.gov.ab.ca>. See e.g. *Driver Iron Inc. v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local Union No. 720*, 2011 ABCA 55, [2011] A.J. No. 155 (QL) ["*Driver Iron*"].
[20] Canadian Industrial Relations Board, online: <http://www.cirb-ccri.gc.ca/eic/site/047.nsf/eng/home>. See e.g. *Dumont v. Canadian Union of Postal Workers, Montréal Local*, 2011 FCA 185, [2011] F.C.J. No. 796 (QL) ["*Dumont*"].
[21] Public Service Labour Relations and Employment Board, online: <http://pslrb-crtfp.gc.ca/intro_e.asp>.
[22]"arbitration, interest" means "arbitration to establish the terms of a collective agreement where the parties are unable to do so by negotiation; interest arbitration occurs primarily in the public sector under statutes which remove the right to strike and make arbitration compulsory; however, there is nothing to prevent

appointed under the Alberta *Labour Relations Code*;[24] Interest[25] and Rights[26] Labour Arbitrators and Boards appointed under Part I of the *Canada Labour Code*;[27] Umpires appointed under the Alberta *Employment Standards Code*;[28] Adjudicators appointed under the *Canada Labour Code*, Part III, s 242;[29] the Alberta Human Rights Commission;[30] the Alberta Human Rights Tribunal;[31] the Canadian Human Rights Commission[32] and Tribunal[33]; the Information and Privacy Commissioner of Alberta;[34]

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parties from resolving an impasse in negotiations by voluntarily submitting their differences to arbitration…": Jeffrey Sack & Ethan Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984) 27 ["Sack & Poskanzer"]. See e.g. *Canadian Union of Public Employees, Local 3421 v Calgary (City)*, 2008 ABQB 374, [2008] A.J. No. 729 (QL) ["*Calgary*"].

[23] "arbitration, grievance or rights" means "arbitration of a dispute concerning the interpretation, application or alleged violation of a collective agreement; the standard mechanism under labour relations in Canada for resolving disputes during the term of a collective agreement": Sack & Poskanzer, *ibid.* See e.g. *United Nurses of Alberta, Local 85 v. Capital Health Authority (Sturgeon Community Hospital)*, 2011 ABCA 247, [2011] A.J. No. 903 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 457 (QL) ["*UNA*"].

[24] *Labour Relations Code*, RSA 2000, c. L-1.

[25] See e.g. *I.M.P. Group Ltd. Aerospace Division (Comox) v. Public Service Alliance of Canada*, 2007 FC 517, [2007] F.C.J. No. 698 (QL) ["*I.M.P. Group*"].

[26] See e.g. *Telecommunications Workers Union v. Telus Communications Inc*., 2011 ABCA 66, [2011] A.J. No. 173 (QL) ["*Telus*"]. Note: "For the purposes of the *Federal Courts Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that *Act*": *Canada Labour Code*, R.S.C. 1985, c. L-2, s 58(3).

[27] *Canada Labour Code, ibid.*

[28] *Employment Standards Code*, RSA 2000, c E-9, s 69. See e.g. *Alberta Plywood Ltd. v. Smaili*, 2010 ABQB 742, [2010] A.J. No. 1391 (QL) ["*Smaili*"].

[29] *Canada Labour Code, supra* note 26, s 242. See e.g. *Deschênes v. Canadian Imperial Bank of Commerce*, 2011 FCA 216, [2011] F.C.J. No. 988 (QL) ["*Deschênes*"].

[30] Alberta Human Rights Commission, online: <http://www.albertahumanrights.ab.ca>. See e.g. *Van der Smit v. Alberta (Human Rights and Citizenship Commission)*, 2009 ABQB 121, [2009] A.J. No. 187 (QL) ["*Van der Smit*"].

[31] Alberta Human Rights Tribunal, online: <http://www.albertahumanrights.ab.ca/tribunal_process.asp>. Decisions of the Alberta Human Rights Tribunal are subject, not to judicial review, but rather to statutory appeal to the Alberta Court of Queen's Bench per *Alberta Human Rights Act*, RSA 2000, c. A-25.5, s 37. "[W]henever a court reviews a decision of an administrative tribunal, the standard of review 'must be determined on the basis of administrative law principles...regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal": *Edmonton*, *supra* note 9 at para 30, citing *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] S.C.J. No. 16 at para 38 (QL) ["*Saguenay*"].

[32] Canadian Human Rights Commission, online: <http://www.chrc-ccdp.gc.ca/eng>. See e.g. *Gosal v. Canada (Attorney General)*, 2011 FC 570, [2011] F.C.J. No. 1147 (QL) ["*Gosal*"].

[33] Canadian Human Rights Tribunal, online: <http://www.chrt-tcdp.gc.ca/NS/index-eng.asp>. See e.g. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] S.C.J. No. 53 (QL) ["*Mowat*"].

[34] Information and Privacy Commissioner of Alberta, online: <https://www.oipc.ab.ca>. See e.g. *Leon's Furniture Ltd. v. Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, [2011] A.J. No. 338 (QL), leave to appeal to SCC refused, [2011] S.C.C.A. No. 260 (QL) ["*Leon's Furniture*"].

the Privacy Commissioner of Canada;[35] appeals to the Appeal Division of the Social Security Tribunal[36] of decisions of the Employment Insurance Commission;[37] and Appeals Commission for Alberta Workers' Compensation.[38]

IV. Time Limitations for Judicial Review

The *Alberta Rules of Court*[39] r 3.15 provides:

> 3.15 Originating application for judicial review
> …
>
> (2) Subject to rule 3.16,[40] an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5[41] does not apply to this time period.[42]

This general 6-month limitation period on applications for judicial review is the maximum limitation period; however, many enabling statutes of specific specialized administrative tribunals contain much shorter limitation periods, and it is imperative that counsel research the applicable limitation period as soon as an administrative decision is being considered as to whether judicial review should be sought. For example: "An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or

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[35] Privacy Commissioner of Canada, online: <https://www.priv.gc.ca/en>. See e.g. *State Farm Mutual Automobile Insurance Co. v. Canada (Privacy Commissioner)*, 2010 FC 736, [2010] F.C.J. No. 889 (QL) ["*State Farm*"].

[36] Social Security Tribunal of Canada, online, <http://www1.canada.ca/en/sst>. Established under the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, s 44. See eg *Hood v. Canada (Attorney General)*, 2016 FCA 141, [2016] F.C.J. No. 479 (QL) ["*Hood*"].

[37] *Employment Insurance Act*, S.C. 1996, c. 23, s 113: "A party who is dissatisfied with a decision of the Commission … may appeal the decision to the Social Security Tribunal."

[38] Appeals Commission for Alberta Workers' Compensation, online: <https://www.appealscommission.ab.ca/Pages/default.aspx>; which hears administrative appeals of the Alberta Workers' Compensation Dispute Resolution and Decision Review Body, online, <https://www.wcb.ab.ca/claims/review-and-appeals/for-workers.html>, pursuant to *Workers Compensation Act*, RSA 2000, c W-15, s 13.2.

[39] *Alberta Rules of Court*, Alta Reg 124/2010, as amended AR 85/2016, online: Alberta Queen's Printer <http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf>.

[40] *Ibid*, r 3.16: "An originating application for an order in the nature of habeas corpus may be filed at any time …"

[41] *Ibid*, r 13.5 regarding variation of time periods.

[42] *Ibid*, r 3.16; emphasis added.

within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days."[43]

> [a] "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.[44]

By way of examples, the relevant limitation periods for filing judicial review applications of the abovementioned administrative tribunals are:

Alberta Labour Relations Board	30 days[45]
Canadian Industrial Relations Board	30 days[46]
Public Service Labour Relations and Employment Board	30 days[47]
Grievance/Rights Labour Arbitration Boards appointed under the Alberta *Labour Relations Code*	30 days[48]
Interest Labour Arbitration Boards appointed under the Alberta *Labour Relations Code*	30 days[49]
Grievance/Rights Labour Arbitration Boards appointed under the *Canada Labour Code*	6 months[50]
Interest Labour Arbitration Boards appointed under the *Canada Labour Code*	30 days[51]

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[43] *Federal Courts Act*, *supra* note 7, s 18.1(2); emphasis added.
[44] *Ibid*, s 2(1) "federal board, commission or other tribunal"
[45] *Labour Relations Code*, *supra* note 24, s 19(2).
[46] *Federal Courts Act*, *supra* note 7, ss 18(1), 18.1(2), 28(1)(h), 28(2); *Canada Labour Code*, *supra* note 26, s 22(1).
[47] *Federal Courts Act*, *supra* note 7, ss 18(1), 18.1(2), 28(1)(i), 28(2).
[48] *Labour Relations Code*, *supra* note 24, ss 145(2) "arbitrator, arbitration board or other body".
[49] *Labour Relations Code*, *supra* note 24, ss 127(2) "Disputes Resolution Tribunals".
[50] *Canada Labour Code*, *supra* note 26, s 58(3); *Alberta Rules of Court*, *supra* note 39, r 3.15(2). See *Canadian Broadcasting Corp. v Newspaper Guild, Local 213 (Canadian Media Guild)*, 1998 ABQB 652, [1998] A.J. No. 886 (QL) ["*Newspaper Guild*"].
[51] *Canada Labour Code*, *supra* note 26, s 79; *Federal Courts Act*, *supra* note 7, s 18.1(2); see *I.M.P. Group*, *supra* note 25 at paras 8-11.

Umpires appointed under the Alberta *Employment Standards Code*	6 months[52]
Adjudicators appointed under the *Canada Labour Code*, Part III, s 242	30 days[53]
Alberta Human Rights Commission	6 months[54]
Alberta Human Rights Tribunal	30 days[55]
Canadian Human Rights Commission	30 days[56]
Canadian Human Rights Tribunal	30 days[57]
Information and Privacy Commissioner of Alberta	45 days[58]
Privacy Commissioner of Canada	30 days[59]
Appeal Division of the Social Security Tribunal[60]	30 days[61]
Appeals Commission for Alberta WCB	6 months[62]

[52] "There is no appeal of an umpire's award" per *Employment Standards Code*, *supra* note 28, s 107(3), and the Act is silent with regard to judicial review. *Alberta Rules of Court*, *supra* note 39, r 3.15(2). See *Becker v. Alberta (Director of Employment Standards)*, 2000 ABCA 329, [2000] A.J. No. 1578 at paras 9-13 (QL), leave to appeal to SCC refused, [2001] S.C.C.A. No. 80 (QL) ["*Becker*"].

[53] *Federal Courts Act*, *supra* note 7, s 18.1(2). Adjudicators appointed under *Canada Labour Code*, *supra* note 26, s 242 are subject to a full privative clause per s 243. However, see *supra* notes 3-5 and accompanying text. See also *Deschênes*, *supra* note 29.

[54] *Alberta Human Rights Act*, *supra* note 31, ss 26(3), 35; *Alberta Rules of Court*, *supra* note 35, r 3.15(2).

[55] Distinguish judicial review of a "decision of the Chief of the Commission and Tribunals or another member of the Commission" from a statutory appeal of a decision of the Tribunal per s 37(1), the latter having a time limit of 30 days per s 37(2). Statutory appeal of decisions of the Alberta Human Rights Tribunal are not limited to questions of law or jurisdiction, or at all, unlike appeals of decisions of the Appeals Commission for Alberta Workers' Compensation, for example; see footnote 61, *infra*, for related discussion.

[56] *Federal Courts Act*, *supra* note 7, ss 18(1). See eg *Kleckner v. Canada (Canadian Armed Forces)*, 2016 FC 1206, [2016] F.C.J. No. 1202 (QL) ["*Kleckner*"].

[57] *Federal Courts Act*, *supra note 7, ss 18(1).* See eg *Millbrook First Nation v. Tabor*, 2016 FC 894, [2016] F.C.J. No. 854 (QL) ["*Millbrook*"].

[58] *Personal Information Protection Act*, SA 2003, c P-6.5, s 54.1(1); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, s 74(3).

[59] *Federal Courts Act*, *supra* note 7, s 18(1).

[60] Hears administrative appeals of decisions of the Employment Insurance Commission pursuant to *Employment Insurance Act*, S.C. 1996, c. 23, s 113.

[61] *Federal Courts Act*, *supra* note 7, ss 18(1), 18.1(2), 28(1)(g), 28(2).

[62] *Workers Compensation Act*, *supra* note 38, s 13.1(1); *Alberta Rules of Court*, *supra* note 37, r 3.15(2). Note that a statutory appeal "on a question of law or jurisdiction" is available in relation to decisions of the Appeals Commission per *Workers Compensation Act*, *supra* note 35, s 13.4, which also has a 6 month limitation period. "'If there is a clear right of appeal, and the appeal would be an adequate remedy, only in

The above examples evidence the variations in time limitations within a relatively narrow area of law, and underscore the imperative that counsel research the applicable limitation period as soon as an administrative decision is being considered as to whether judicial review should be sought. Such a consideration must necessarily include whether there are "grounds" for judicial review of the particular administrative decision.

V. Grounds for Judicial Review

In relation to the judicial review of a "federal board, commission or other tribunal" decision, the *Federal Courts Act* sets out the following grounds for review:

> The Federal Court[63] may grant relief … if it is satisfied that the federal board, commission or other tribunal
>
> > (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
> >
> > (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

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very exceptional circumstances will the courts grant judicial review instead" (*Patrus v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2011 ABQB 523, [2011] A.J. No. 1346 at para 14 (QL), citing *Merchant v. Law Society (Alberta)*, 2008 ABCA 363 at para. 3; emphasis added). On grounds other than "a question of law or jurisdiction", such as alleged errors of fact, mixed fact and law, discretion, etc., judicial review must be resorted to. As a practical matter, when faced with alleged errors of law or jurisdiction and other grounds, counsel should file a hybrid Originating Application for Statutory Appeal and Judicial Review within the relevant (shortest) time limitation period. In the case of the Appeals Commission for Alberta Workers' Compensation ("ACAWC"), both time limitation periods are the same—6 months. However, in some regulatory regimes the time limitation for statutory appeal of an administrative decision is shorter than the time limitation for judicial review. As mentioned in Part II above, a provincial legislature (or the federal Parliament) does not have the constitutional competence to insulate an administrative decision from judicial review. This is true whether the legislative body has enacted a full privative clause purporting to insulate an administrative decision from any judicial review, or as in the case of the *Workers Compensation Act*, *supra* note 35, ss 13.1(1), 13.4 where the Alberta legislature has purported to insulate decisions of the ACAWC from "question or review in any court" except for statutory appeal strictly limited to "a question of law or jurisdiction." The Court retains an inherent (constitutional) jurisdiction to judicially review decisions of the ACAWC on grounds other than "a question of law or jurisdiction" to ensure they are not unreasonable. See e.g. *Tompkins v. Alberta (Appeals Commission for Workers' Compensation)*, 2012 ABQB 418, [2012] A.J. No. 690 (QL) ["*Tompkins*"]; *Patrus v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2011 ABQB 523, [2011] A.J. No. 1346 paras 9-11 (QL) ["*Patrus*"]; *Sarcee Gravel Products Inc. v. Alberta (Workers' Compensation Board)*, 2006 ABQB 56, [2006] A.J. No. 67 at para 9 (QL) ["*Sarcee*"]; *Alberta (Workers' Compensation Board) v. Appeals Commission*, 2005 ABCA 276, [2005] A.J. No. 1012 at para 17 (QL) ["*Appeals Commission*"].

[63] Or the Federal Court of Appeal if the federal board, commission or other tribunal is one of those enumerated in *Federal Courts Act*, *supra* note 7, s 28, such as Canadian Industrial Relations Board (s. 28(1)(h)), Public Service Labour Relations and Employment Board (s 28(1)(i)), and Appeal Division of the Social Security Tribunal (s 28(1)(g).

> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> (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;
>
> (e) acted, or failed to act, by reason of fraud or perjured evidence; or
>
> (f) acted in any other way that was contrary to law.[64]

The Supreme Court of Canada[65] has made it clear that the grounds listed above *are* "grounds" for judicial review, and do not contain "standards of review", which are discussed in Part VIII below. In *Khosa* Justice Binnie, for the majority, wrote:

> … the legislature can by clear and explicit language oust the common law in this as in other matters. Many provinces and territories have enacted judicial review legislation which not only provide guidance to the courts but have the added benefit of making the law more understandable and accessible to interested members of the public. The diversity of such laws makes generalization difficult. In some jurisdictions (as in British Columbia), the legislature has moved closer to a form of codification than has Parliament in the *Federal Courts Act*. Most jurisdictions in Canada seem to favour a legislative approach that explicitly identifies the grounds for review but not the standard of review.[66] In other provinces, some laws specify "patent unreasonableness".[67] In few of these statutes, however, is the content of the specified standard of review defined, leading to the inference that the legislatures left the content to be supplied by the common law.[68]

Alberta has enacted the *Administrative Procedures and Jurisdiction Act*,[69] which is silent in relation to both grounds for judicial review, and standards of judicial review. The *Act* is limited to rules relating to notice,[70] evidence[71] and fair procedure[72] required of persons

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[64] *Federal Courts Act*, *supra* note 7, s 18.1(4)(a)-(f).
[65] *Khosa*, *supra* note 6 at paras 49.
[66] See. e.g., federally, the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 147(1); *Canada Agricultural Products Act*, R.S.C. 1985, c. 20 (4th Supp.), s. 10(1.1); *Employment Insurance Act*, S.C. 1996, c. 23, s. 115(2); in Newfoundland and Labrador, *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8, s. 46(1); in New Brunswick, *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2, s. 26(5); *The Residential Tenancies Act*, S.N.B. 1975, c. R-10.2, s. 27(1); in P.E.I., *Judicial Review Act*, R.S.P.E.I. 1988, c. J-3, s. 4(1); in Quebec, *Code of Civil Procedure*, R.S.Q., c. C-25, s. 846; *Youth Protection Act*, R.S.Q., c. P-34.1, s. 74.2; in Ontario, *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 2; in Manitoba, *The Certified General Accountants Act*, C.C.S.M., c. C46, s. 22(2); *The Gaming Control Act*, C.C.S.M., c. G5, s. 45(2); *The Human Rights Code*, C.C.S.M., c. H175, s. 50(1), and in the Yukon Territory, *Education Labour Relations Act*, R.S.Y. 2002, c. 62, s. 95(1); *Liquor Act*, R.S.Y. 2002, c. 140, s. 118(1); *Rehabilitation Services Act*, R.S.Y. 2002, c. 196, s. 7.
[67] See e.g. *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 47.1(3); *Administrative Tribunals Act*, S.B.C. 2004, c. 45, s. 58; *Health Professions Act*, S.Y. 2003, c. 24, s. 29, or "correctness", e.g., *Back to School Act*, 1998, S.O. 1998, c. 13, s. 18(3).
[68] *Khosa*, *supra* note 6 at paras 50; emphasis added and in-text footnotes renumbered.
[69] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c. A-3 ["*APJA*"].
[70] *Ibid*, ss 3, 12.
[71] *Ibid*, ss, 4-6, 9.
[72] *Ibid*, s 7-8.

authorized to exercise a statutory power to which the *Act* applies,[73] as well as setting out those administrative tribunals in Alberta that have no jurisdiction to determine a question of constitutional law,[74] those that do,[75] and of those that do, which of them that can answer "all questions of constitutional law", which of them are limited to answering "questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada", and which of them are limited to answering "questions of constitutional law relating to the *Charter*." For example, the following Alberta administrative tribunals have the following jurisdiction over constitutional questions:

Alberta Labour Relations Board	All questions of constitutional law[76]
Labour Arbitration Boards appointed under the Alberta *Labour Relations Code*	All questions of constitutional law[77]
Umpires appointed under the Alberta *Employment Standards Code*	Not empowered[78]
Alberta Human Rights Commission	Not empowered[79]
Alberta Human Rights Tribunal ("Panel")	Questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada[80]
Information and Privacy Commissioner of Alberta	Not empowered[81]
Alberta Workers' Compensation Board	Questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada[82]

[73] *Ibid*, s 2.
[74] *Ibid*, s 11.
[75] *Ibid*, s 10; *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006 ["*DCDMR*"].
[76] *DCDMR*, *ibid*, Schedule 1.
[77] *Ibid.*
[78] *APJA*, *supra* note 69, s 11.
[79] *Ibid.*
[80] *DCDMR*, *supra* note 75, Schedule 1.
[81] *APJA*, *supra* note 69, s 11.
[82] *DCDMR*, *supra* note 75, Schedule 1.

Alberta Workers' Compensation Dispute Resolution and Decision Review Body	Not empowered[83]
Appeals Commission for Alberta Workers' Compensation	Questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada[84]

In the absence of, or in addition to, or as adopted into, statutorily enumerated grounds for judicial review, the common law has developed various grounds for judicial review of administrative actions and decisions, including, but not limited to: acting without or beyond jurisdiction;[85] failing or refusing to exercise jurisdiction;[86] breach of the duty of fair procedure (natural justice);[87] and generally reviewable errors of law, fact or mixed fact and law. Of course, "reviewable errors of law, fact or mixed fact and law" begs the question of reviewable by the Court on what standard of review? This question is discussed in Part VIII below.

VI. Reviewable Decisions—Final Decisions

Not every decision of an administrative decision-maker is subject to judicial review. Generally only "final" administrative decisions are subject to judicial review; judicial

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[83] *APJA*, *supra* note 69, s 11.
[84] *DCDMR*, *supra* note 75, Schedule 1.
[85] *Dunsmuir*, *supra* note 17 at para 59, relating to "true questions of jurisdiction or *vires*." Note: "True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] S.C.J. No. 61 at para 39 (QL) ["*AIPC*"]; see also *Edmonton*, *supra* note 9.
[86] See e.g. *Danson v. Alberta (Labour Relations Board)*, 47 A.R. 274, 27 Alta. L.R. (2d) 338, [1983] A.J. No. 782 at para 14 (QL) ["*Danson*"] (where "the Board empaneled to hear this complaint failed to exercise their jurisdiction by not considering relevant matters").
[87] See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at paras 18-50 (QL) ["*Baker*"] in relation to factors affecting the content of the duty of fairness; but see *Nurses*, *supra* note 10 in relation to the adequacy of reasons as an element of the duty of fair procedure in light of the requirement of "justification, transparency and intelligibility within the decision-making process" (read within the reasons for decision) on the "reasonableness" standard of review.

review applications in respect of preliminary or interim administrative decisions may be dismissed as premature. In *ATA*,[88] Justice Graesser wrote:

> **108** I note further that there is a general principle that judicial review of interlocutory decisions should only be permitted in exceptional cases: ***Robertson v. Edmonton (City) Police Service***, 2003 ABCA 279, ***Martselos v. Poitras***, 2008 FC 1413 at paras. 13 -15, ***Bear Hills Charitable Foundation v. Alberta (Gaming and Liquor Commission)***, 2008 ABQB 766, and ***A.D.M. v. Canadian Institute of Actuaries***, 2008 ABQB 522.
>
> **109** In my view this principle is certainly applicable to matters under *PIPA*. It can be seen from a review of *PIPA* that the Legislature intended that complaints be dealt with expeditiously. The Court of Appeal decision in ***ATA News*** is confirmation of that principle. Specifically, a complainant must raise a complaint within 30 days of the matter arising (s. 47). Even the time frame for judicial review is shortened to 45 days by s. 54.1 instead of the standard 6 months under the Rules of Court (R 3.15(2, unchanged from the previous Rules of Court).
>
> **110** In the context of these time frames, it is inconsistent to think that the Legislature intended that there be multiple opportunities for judicial review along the way, especially for interlocutory matters.
>
> **111** Verville J. considered this principle in ***Alberta (Employment and Immigration) v. Alberta Federation of Labour (No. 1)***, 2009 ABQB 344, and in that case found that there were exceptional circumstances there warranting judicial intervention notwithstanding that the decision reviewed was interlocutory.

In *Northern Lights*,[89] Justice Murray wrote:

> **24** In considering the question of whether this application for judicial review is premature it should be noted that in this case the Board dismissed the Employer's application for a non-suit. The Employer has cited a number of cases in our courts and indeed of other labour arbitration boards and in particular ***Edmonton (City) v. City Fire Fighters Union, Local 209*** (1995), 164 A.R. 383 and ***International Brotherhood of Electrical Workers, Local 348 v. AGT Ltd.*** (1997), 199 A.R. 74. In both those cases the decision of the tribunal had been to non-suit the applicant. Clearly, that amounted to a final decision by the tribunal and therefore an application for judicial review was the only option available. …
>
> **31** In discussing this matter the authors refer to a procedure used by some arbitrators in which if the arbitrator elects to dismiss the non-suit application it stipulates that its reasons for doing so will be deferred to when it gives its final decision following the closure of the cases of both parties. See ***Canadian Union of Public Employees, Local 3705 and Northern Gateway Regional Division No. 10 (Pay Grid Grievance)***, [1999] A.G.A.A. No. 32.
>
> **32** As I understand the position of the Employer, this case falls within the exception described by O'Leary J.A. in ***Paterson***; or, as stated by Veit J. in ***Stirrat***, if this Court refuses to hear this interlocutory application, a later judicial review at the conclusion of the hearing would fail to produce a just result. With the greatest of respect, I fail to see how this can be so. …
>
> **34** I agree with Madam Justice Veit and the above-noted authors. Despite the fact that Rule 260 does not require the Defendant to elect in the case of a non-suit, it would in my view, be most appropriate in the case of such a motion in an administrative tribunal hearing such as this. Possibly a panel might set its own procedural rules in this regard. However, I am satisfied that the approach taken and proposed by Madam Justice Veit and the authors is not the approach

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[88] *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19, [2011] A.J. No. 38 (QL) ["*ATA*"].

[89] *Northern Lights Health Region v. United Nurses of Alberta, Local 124*, 2007 ABQB 202, [2007] A.J. No. 366 at paras 24-34 (QL) ["*Northern Lights*"].

> which our Courts have been applying for the most part. Therefore, I am not going to dismiss this application on the basis of prematurity which in my view would be the proper disposition. …

It should be noted that issues that were not raised before the administrative tribunal generally should not be raised on judicial review, and the Court has discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so. In *AIPC*,[90] the majority of the Supreme Court of Canada wrote:

> **22** The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, for example, *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies" (para. 30).
>
> **23** Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).
>
> **24** There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts ... must be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> **25** This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
>
> **26** Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue *(Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-67; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of*

[90] *AIPC*, *supra* note 85.

> *Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).[91]

It should also be noted that "implied" decisions of administrative decision-makers may be subject to judicial review.[92]

VII. Admissible (New) Evidence in Judicial Review Hearings

The starting point in relation to evidence that the Court may consider in an application for judicial review is the *Alberta Rules of Court*:[93]

> **3.15 Originating application for judicial review**
> …
> (5) An affidavit or other evidence to be used to support the originating application for judicial review, other than an originating application for an order in the nature of habeas corpus, must be filed and served on every other party one month or more before the date scheduled for hearing the application.
>
> **3.21 Limit on questioning**
>
> On an originating application for judicial review, no person may be questioned as a witness for the purpose of obtaining a transcript for use at the hearing without the Court's permission
>
> **3.22 Evidence on judicial review**
>
> When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> (a) the certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
>
> (b) if questioning was permitted under rule 3.21, a transcript of that questioning;
>
> (c) anything permitted by any other rule or by an enactment;
>
> (d) any other evidence permitted by the Court.

Under *Alberta Rules of Court*, r 3.18 and 3.19, the person or body whose decision is subject to judicial review must file a certified record of proceedings or written reasons why it cannot. The certified record of proceedings should contain:

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[91] *Ibid* at paras 22-26. See also *ATA*, *supra* note 88 at paras 71-81; *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3, [2011] A.J. No. 2 at para 7 (QL) ["*Luka*"]; *United Nurses of Alberta, Local 160 v Chinook Regional Health Authority*, 2002 ABCA 246, [2002] A.J. No. 1337 (QL) ["*Chinook*"].

[92] See e.g. *AIPC*, *supra* note 85 at para 53: "If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere." In AIPC the Supreme Court of Canada upheld the "implied decision of the Commissioner" on the reasonableness standard of review (para 5).

[93] *Alberta Rules of Court*, *supra* note 39.

> (a) the written record, if any, of the decision or act that is the subject of the originating application for judicial review,
>
> (b) the reasons given for the decision or act, if any,
>
> (c) the document which started the proceeding,
>
> (d) the evidence and exhibits filed with the person or body, if any, and
>
> (e) anything else relevant to the decision or act in the possession of the person or body.[94]

In *Bekker*,[95] the Federal Court of Appeal wrote:

> …barring exceptional circumstances such as bias or jurisdictional questions, which may not appear on the record, the reviewing Court is bound by and limited to the record that was before the judge or the Board. Fairness to the parties and the court or tribunal under review dictates such a limitation.[96]

Thus, only in exceptional circumstances, new evidence may be admitted in judicial review hearings. In *Dodd*,[97] Justice Ross wrote:

> **20** Justice Slatter's comment on the effect of the application to admit fresh evidence in ***Alberta Liquor Store Assoc. v. Gaming and Liquor Comm. (Alta.)***[98] finds a parallel in the present application. Slatter J. stated, at para. 46:
>
> > Whenever it may be appropriate to file affidavits on judicial review applications one thing is clear: the applicants are not entitled to turn the judicial review application [into] a trial de [*novo*] on the merits of the issue before the tribunal. Here, the Applicants are entitled to show that the Board was incorrect, unreasonable or patently unreasonable, depending on the ultimate standard of review that is selected. They are not however entitled to ask the Court to usurp the jurisdiction of the Board, and decide *de novo* whether the Respondents are conducting "separate businesses". In their brief the Applicants assert, at para. 58, "these facts [set out in the affidavits] bear on a decisive issue: is Real Canadian operated as a separate business": that is not the issue before the Court. The issue is whether the Board's decisions meet the appropriate standard must be based on the record that was before the Board, and the reasonableness of the decisions must be determined in accordance with what was on that record.
>
> **21** These comments apply equally to attempts to obtain evidence for judicial review applications under *Rules* 266 and 267 [now *Rules* 3.13, 3.21, 6.8, 6.11(1)].

More recently, Justice Stevens has written: "Judicial review is conducted on the basis of the return, and affidavit evidence is generally not admissible"[99] and "[a] party seeking to

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[94] *Alberta Rules of Court, supra* note 39, r 3-18.
[95] *Bekker v. Canada*, 2004 FCA 186, [2004] F.C.J. No. 819 (QL) ["*Bekker*"]. See also *Ady v. Law Society of Alberta*, 29 Admin. L.R. (2d) 56, [1994] A.J. No. 903 (QL) (CA) ["*Ady*"].
[96] *Ibid* at para 11.
[97] *Dodd v. Alberta (Registrar of Motor Vehicle Services)*, 2010 ABQB 184, [2010] A.J. No. 293 (QL) ["*Dodd*"].
[98] *Alberta Liquor Store Assn. v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, [2006] A.J. No. 1597 (QL) ["*Alberta Liquor Store*"].

introduce affidavit evidence in a judicial review application should make application to do so."[100] In other words, "fresh evidence is not admissible in a judicial review, without leave of the Court."[101] Leave of the Court to admit fresh evidence will only be granted in "exceptional circumstances":

> Slatter J. (as he then was) in *Alberta Liquor Store Assn v. Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904, 406 AR 104 at paras 40 to 42 observed the general rule that judicial review is conducted based on the return filed by the tribunal, and that additional affidavits and evidence are exceptional, for example to show bias, breach of natural justice not apparent on the record, or to supplement an inadequate record. Evidence that was not before the tribunal, relating to the merits of the decision, is not permitted on judicial review; a board's decision cannot be rendered unreasonable by referring to matters that were never put before it: *Sarg Oils Ltd v. (Alberta) Environmental Appeal Board*, 2007 ABCA 215, 75 Admin LR (4th) 314 at para 15.[102]

VIII. Standards of Review—Selecting and Applying

"In the context of judicial review, the standard of review determines what degree of deference will be accorded to the administrative tribunal's decision."[103] At common law there are two standards of review—correctness and reasonableness.[104] The majority of the Supreme Court of Canada in *Dunsmuir* set out the following approach to the "standard of review analysis":

> [51] … we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.
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> [52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given

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[99] *McClary v. Geophysical Services Inc.*, 2011 ABQB 112, [2011] A.J. No. 198 at para 25 (QL) ["*McClary*"], citing *979899 Alberta Ltd. v. Alberta*, 2008 ABQB 57, [2008] A.J. No. 379 at para 5 (QL) ["*979899*"] and *Alberta Liquor Store, supra* note 98 at paras 40, 43.
[100] *McClary, Ibid* at para 24.
[101] *Ibid*, at heading between paras 22, 23. See also Court of Queen's Bench Civil Practice Note 2 Special Applications, online: <https://albertacourts.ca/docs/default-source/Court-of-Queen's-Bench/qb-civil-pn-2.pdf?sfvrsn=0> at para 2 ["Practice Note 2"]: "Pursuant to R. 6.11(1)(g), viva voce evidence may be adduced on the hearing of a Special Application only with the prior leave of the Court on notice, if appropriate, to the other parties involved.."
[102] *United Food & Commercial Workers Canada Union, Local 401 v North Country Catering Ltd.*, 2012 ABQB 306, [2012] A.J. No. 498 at para 35 (QL) ["*North Country*"]; per Goss J., emphasis added.
[103] *De Beers Canada Inc. v. Mackenzie Valley Environmental Impact Review Board*, 2007 NWTSC 24, [2007] N.W.T.J. No. 26 at para 15 (QL) ["*De Beers*"].
[104] *Dunsmuir*, *supra* note 17 at para 45.

greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

[53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; Dr. Q, at para. 29; Suresh, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[54] Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E.*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in McLeod v. Egan, [1975] 1 S.C.R. 517, where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

[55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

> A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> The nature of the question of law. A question of law that is of 'central importance to the legal system ... and outside the ... specialized area of expertise' of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

[57] An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (Cartaway Resources Corp. (Re), [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated. …

[62] In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves

> unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.
>
> [63] The existing approach to determining the appropriate standard of review has commonly been referred to as 'pragmatic and functional'. That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase 'pragmatic and functional approach' may have misguided courts in the past, we prefer to refer simply to the 'standard of review analysis' in the future.
>
> [64] 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. 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.[105]

If the "standard of review analysis" determines the appropriate standard of review of the impugned administrative action or decision is "correctness", the majority of the Supreme Court of Canada in *Dunsmuir* directs that:

> 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.[106]

However, if the "standard of review analysis" determines the appropriate standard of review of the impugned administrative action or decision is "reasonableness", the majority of the Supreme Court of Canada in *Dunsmuir* directs that:

> 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. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[107]

In *Nurses*,[108] the unanimous Supreme Court of Canada wrote:

> **13** This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility". To me, it represents a respectful

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[105] *Ibid* at paras 51-57, 62-64; emphasis added.
[106] *Ibid* at para 50.
[107] *Ibid* at para 47; emphasis added.
[108] *Nurses, supra* note 10.

> appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist. …restraint in assessing the decisions of specialized administrative tribunals. This decision oriented the Court towards granting greater deference to tribunals, shown in *Dunsmuir*'s conclusion that tribunals should "have a margin of appreciation within the range of acceptable and rational solutions" (para. 47).
>
> **14** Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses -- one for the reasons and a separate one for the result … It is a more organic exercise -- the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This … is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> **15** In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> **16** Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion … if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
>
> **17** The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
>
> **18** … *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" … "perfection is not the standard" and … reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" … I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
>
> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum - the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. …[109]

To recap our discussion so far, when legal counsel is considering an administrative action or decision as to whether judicial review may be available to challenge the action or

[109] *Ibid* at paras 13-18; emphasis added.

decision, counsel must: understand the concept of judicial review;[110] understand whose actions and decisions are subject to judicial review;[111] determine the time limitation period for filing and serving an application for judicial review;[112] determine the court in which the application for judicial review should be filed, which depends on who the decision-maker is;[113] understand what kinds of administrative decisions are subject to judicial review;[114] understand what kinds of evidence are admissible in judicial review hearings;[115] and determine which standard of review the court is likely to apply to the administrative action or decision.

Once counsel has determined judicial review would be viable and available to challenge the administrative action or decision, and has received client instructions to advance the judicial review, counsel must understand the requisite procedures involved in initiating an application for judicial review. The processes are markedly different at the Federal Court and Federal Court of Appeal, than they are at Alberta's superior court—the Court of Queen's Bench of Alberta. Parts IX – XII of this paper are confined to discussing rules, procedures, and specific forms involved in an application for judicial review at the Court of Queen's Bench of Alberta.[116]

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[110] See Part II above.
[111] See Part III above.
[112] See Part IV above.
[113] Superior court of the relevant province (Court of Queen's Bench of Alberta in Alberta), Federal Court or Federal Court of Appeal; see *supra* footnotes 43-62.
[114] See Part VI above.
[115] See Part VII above.
[116] Note that an application for judicial review is not brought in a Provincial Court, which is arguably an administrative tribunal itself, being enabled by provincial legislation (Provincial Courts are not "s 96 Courts" as discussed at footnote 4 above). In fact, in British Columbia decisions of the Provincial Court of British Columbia are subject to judicial review in the Supreme Court of British Columbia (*Judicial Review Procedure Act*, RSBC 1996, c 241, s 1 "statutory power of decision", which expressly "includes the powers of the Provincial Court."). *Contra* decisions of the Provincial Court of Alberta, which are subject to statutory appeal to the Court of Queen's Bench of Alberta per *Provincial Court Act*, RSA 2000, c P-31, s 46, and are not subject to judicial review (but see *Provincial Court Act*, s 9.1(7) relating to judicial review of certain decisions of the Chief Judge of the Provincial Court of Alberta).

IX. *Rules of Court* and Practice Directives Relating to Judicial Review in Alberta

The *Alberta Rules of Court*[117] specific to judicial review chambers applications are found at Part 3 Subdivision 2, rr 3.15 – 3.24. These rules are discussed elsewhere in this paper under the headings in which their context is applicable.

As judicial review applications are not amenable to a 20 minute combined limit on counsels' oral argument, and require written submissions, regular chambers applications do not suffice, and such applications must be heard in Special Chambers.[118] Therefore, the Court of Queen's Bench Civil Practice Note 2[119] relating to "Special Applications" also applies. These rules are also discussed elsewhere in this paper under the headings in which their context is applicable.

X. Forms and Notices Relating to Judicial Review in Alberta

The following rules of the *Alberta Rules of Court*[120] are relevant:

> **3.15 Originating application for judicial review**
> …
> (3) An originating application for judicial review must be served on
>
> (a) the person or body in respect of whose act or omission a remedy is sought,
>
> (b) the Minister of Justice and Attorney General or the Attorney General for Canada, or both, as the circumstances require,[121] and
>
> (c) every person or body directly affected by the application.
>
> (4) The Court may require an originating application for judicial review to be served on any person or body not otherwise required to be served. …
>
> **3.18 Notice to obtain record of proceedings**
>
> (1) An originating applicant for judicial review who seeks an order to set aside a decision or act must include with the originating application a notice in Form 8, addressed to the person or

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[117] *Alberta Rules of Court, supra* note 39.
[118] Practice Note 2, *supra* note 101 at para 1(b): "A Special Application is a contested application before a judge or master…likely to take longer than 20 minutes to argue but not longer than half a day..."
[119] *Ibid.*
[120] *Alberta Rules of Court, supra* note 39.
[121] Note *Alberta Rules of Court, supra* note 39, r 3.17: "The Minister of Justice and Solicitor General or the Attorney General for Canada, or both, as the case requires, is entitled as of right to be heard on an originating application for judicial review."

> body who made or possesses the record of proceedings on which the decision or act sought to be set aside is based, to send the record of proceedings to the court clerk named in the notice.

Originating Applications must be in Form 7, a generic editable form of which is available online.[122] The generic form should be re-titled "Originating Application for Judicial Review", filled in (the grounds for judicial review are set out under the heading "Basis for this claim"), filed in the appropriate Judicial Centre, and served on all those listed in *Rules of Court*, r 3.15(3). Form 8, mentioned in *Alberta Rules of Court* r 3.18 is also available online.[123]

XI. Arranging for a Special Chambers Judicial Review Hearing in Alberta

One method of arranging for a Special Chambers judicial review hearing has been to initially set the application down for hearing in regular justice chambers several months away; then once the application is filed and served (thus preserving the timeliness of the application), counsel for the respondent party(ies) and the Special Applications Clerk[124] are consulted to obtain a mutually agreed-to date and time for Special Chambers to which the regular justice chambers application can be adjourned.[125] Counsel should contact the Special Applications Clerk at the applicable Judicial Centre first to obtain several available dates and times,[126] and then canvass counsel for the parties to determine their availability on one of those dates. Once counsel have agreed on an available date, the Special Applications Clerk should be informed in writing so that the date can be secured, and the regular chambers application adjourned to the Special Chambers date. The Applicant's counsel must apply (with consent of respondent party(ies) counsel) for the adjournment of the regular justice chambers application date to the agreed-to Special Chambers date, and must advise the Special Applications Clerk forthwith upon the

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[122] Alberta Courts, "Form 7 Originating Application," online, Alberta Rules of Court - MS Word Forms for Lawyers <http://www.albertacourts.ab.ca/forms/LESAForm%20(7).doc>.
[123] Alberta Courts, "Form 8 Notice to Obtain Record of Proceedings," online, Alberta Rules of Court - MS Word Forms for Lawyers <http://www.albertacourts.ab.ca/forms/LESAForm%20(8).doc>.
[124] Practice Note 2, *supra* note 101, at para 1(a): "Reference in this Practice Note to the Special Chambers Applications Clerk means such court official(s) as the court clerk shall designate to handle Special Applications."
[125] *Ibid* at para 5.
[126] *Ibid* at para 3.

granting of the adjournment.[127] The Applicant's counsel must also, forthwith upon the granting of the adjournment, serve all interested parties with written advice that the matter has been converted to a Special Chambers application and give the assigned date.[128]

An alternative method of arranging for a Special Chambers judicial review hearing has been, if there is sufficient time before the relevant limitation period expires and if counsel for the parties can agree on an available date prior to filing the application, to initially file the Originating Application for Judicial Review as returnable on the assigned date, negating the need to adjourn a previously filed regular justice chambers application to the assigned date. The Applicant's counsel must then immediately file and serve on all interested parties the Originating Application for Judicial Review and any affidavit or other evidence in support of the application.[129]

Apparently a recent unpublished directive of the Chief Justice of the Court of Queen's Bench of Alberta requires an Order worded similarly to the following to set a Special Chambers Judicial Review Application:

1. The judicial review application in Action No _____ shall be heard in Special Justice Chambers on [__date___] commencing at 10:00 am – 1 day;

2. The Justice assigned to hear the judicial review application will require one day to read materials in preparation.

No matter which method of arranging for a Special Chambers judicial review hearing is used, the Originating Application for Judicial Review must indicate an estimated time required for argument,[130] and, unless the court otherwise permits: be in Form 7;[131] state briefly the grounds for filing the application;[132] identify the material or evidence intended to be relied on;[133] refer to any provision of an enactment or rule relied on;[134] specify any irregularity complained of or objection relied on;[135] state the remedy

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[127] *Ibid* at para 5.
[128] *Ibid* at para 6.
[129] *Ibid*; *Alberta Rules of Court*, *supra* note 39, r 6.3(3).
[130] Practice Note 2, *supra* note 101, at para 4.
[131] *Alberta Rules of Court*, *supra* note 39, r 6.3(2)(a); see footnote 122 *supra*.
[132] *Alberta Rules of Court*, *supra* note 39, r 6.3(2)(b).
[133] *Ibid*, r 6.3(2)(c).
[134] *Ibid*, r 6.3(2)(d).
[135] *Ibid*, r 6.3(2)(e).

claimed or sought;[136] and, state how the application is proposed to be heard or considered under the *Rules*.[137]

Adjournments of Special Chambers Judicial Review hearings are dealt with pursuant to Practice Note 2 paras 10-11.[138]

XII. Written Submissions in Judicial Review in Alberta

When a Special Chambers Judicial Review hearing date has been set down, the Applicant must file and serve a written brief and authorities before 16:30 on the third Friday before the week in which the assigned hearing date falls.[139] If the Applicant's written brief and authorities are not filed in time, the application will be struck automatically.[140] Leave of the court is thereafter required to re-instate a struck application.[141]

The Respondent(s) must file and serve a written brief and authorities before 16:30 on the second Friday before the week in which the assigned hearing date falls.[142] If the Respondent's written brief and authorities are not filed in time, the application may proceed as scheduled, and the Respondent may face costs or other penalties.[143] Leave of the court is thereafter required to file a brief late.[144]

The written briefs of all parties must: be short and concise,[145] and contain a written summary of the relevant facts and main points of law in issue.[146] Only those authorities that are expected to be referred to in the application should be included, full authorities should not be produced when a headnote or extract will suffice, and portions of the authorities that are intended to be relied on must be hi-lighted.[147]

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[136] *Ibid*, r 6.3(2)(f).
[137] *Ibid*, r 6.3(2)(g).
[138] Practice Note 2, *supra* note 101, at paras 10-11.
[139] *Ibid* at para 9(a). But if that Friday is a holiday, then the brief and authorities must be filed and served on the Thursday before the applicable holiday Friday (Practice Note 2, *supra* note 101, at para 9(b)).
[140] *Ibid* at para 7(a).
[141] *Ibid* at para 7(c).
[142] *Ibid* at para 9(a). But if that Friday is a holiday, then the brief and authorities must be filed and served on the Thursday before the applicable holiday Friday (Practice Note 2, *supra* note 101, at para 9(b)).
[143] *Ibid* at para 7(b).
[144] *Ibid* at para 7(c).
[145] *Ibid* at para 8(a).
[146] *Ibid* at para 8(b).
[147] *Ibid* at para 8(c).

XIII. Oral Advocacy in Special Chambers

Best practices relating to oral advocacy in Special Chambers Judicial Review hearings are the same best practices relating to legal oral advocacy in any other chambers applications, at trial or on appeal. Various publications are available to assist counsel with oral advocacy strategy and techniques.[148] The best tips in relation to oral advocacy come to advocates from those on the receiving end of it—judges.

In 1984 two judges of the Supreme Court of Ontario collaborated in writing *Advocacy: Views from the Bench*.[149] Their book is full of no nonsense tips from the bench to the bar, such as "Advocacy is a skill…that can be learned";[150] "advocacy [is] a largely self-taught skill. …try to get all the instruction you can where you can…go to the seminars, weekend courses… There are good books: read them. …but you cannot learn advocacy simply by reading…watch and listen [to accomplished legal advocates]";[151] when you are in chambers waiting your turn, stay and watch and profit from watching accomplished legal advocates because chambers is a "school of advocacy, as well as being a court; seize the chance simply by watching others";[152] "Counsel's task is…to paint a picture that the court will buy. …The practice of advocacy is the practice of persuasion…";[153] "be as forthright as you please… You may go further than that: you may be rigorous, sharp, aggressive and pointed; even harsh as the occasion requires. But you may never be devious, unfair, rude, ill-tempered, contemptuous, 'personal' or dishonest";[154] "know the Rules of Court [or] succeed…in looking foolish… first you learn the Rules, then you learn the forms, then you learn 'the law'. Before that you have no business being in court";[155] use good manners and learn court customs and

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[148] See e.g. David C. Frederick, *The Art of Oral Advocacy*, 2nd ed (St. Paul: Thomson/West, 2010); David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument*, 2nd ed (St. Paul: Thomson/West, 2010); Jo Thornton & Jessica Pegis, *Speaking with a Purpose: A Practical Guide to Oral Advocacy* (Toronto: Emond Montgomery Publications, 2005).
[149] Robert F. Reid & Richard E. Holland, *Advocacy: Views from the Bench* (Aurora: Canada Law Book Inc., 1984) ["*Views from the Bench*"].
[150] *Ibid* at 14.
[151] *Ibid* at 18-20.
[152] *Ibid* at 21.
[153] *Ibid* at 25.
[154] *Ibid* at 30.
[155] *Ibid* at 37-8.

traditions;[156] "Irritating personal mannerisms can severely interfere with your effectiveness in court";[157] "Successful counsel look successful… look the part";[158] "The techniques of persuasion include the visual. …Above all, in court counsel must control their facial expressions. …keep your face straight";[159] "Speak Up! …the likelihood that you will not be heard increases with the age of the court house and the age of the judge. …The importance of a clear, easily audible voice cannot be over-stated";[160] "when you are subjected to rudeness from the bench…remember that it is all being taken down by the court reporter, and that your courtesy and controlled demeanor will stand you in good stead in the Court of Appeal."[161]

Another good reference is *The Conduct of an Appeal*.[162] While the book is on all aspects of appellate advocacy, it has a section on "The Oral Argument"[163] with discussion around the following outline: opening; statement of points in issue; review of the evidence; review of the law as related to the facts; and conclusion. This approach to oral advocacy also works well in Special Chambers Judicial Review hearings. Do not read your written submission verbatim. Do not avoid questions from the judge; use them as opportunities to engage the judge.

XIV. Remedies Available in Judicial Review Proceedings

Justice Langston notes that "Judicial Review encompasses the traditional remedies of *mandamus*, prohibition, *certiorari* and *habeas corpus*."[164] In fact, the remedies available to applicants in Special Chambers Judicial Review applications are broader than the four mentioned; the *Alberta Rules of Court*[165] provide:

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[156] *Ibid* at 46-71.
[157] *Ibid* at 72.
[158] *Ibid* at 77.
[159] *Ibid* at 81-2.
[160] *Ibid* at 84, 86-7.
[161] *Ibid* at 89.
[162] John Sopinka & Mark A. Gelowitz, *The Conduct of an Appeal*, 3rd ed (Markham: LexisNexis Canada., 2012).
[163] *Ibid* at 374-378.
[164] *Blair, supra* note 1 at para 17.
[165] *Alberta Rules of Court, supra* note 39.

3.15 Originating application for judicial review

(1) An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:

> (a) an order in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeas corpus*;
>
> (b) a declaration or injunction.

3.24 Additional remedies on judicial review

(1) If an originating applicant is entitled to a declaration that a decision or act of a person or body is unauthorized or invalid, the Court may, instead of making a declaration, set aside the decision or act.

(2) The Court may

> (a) direct a person or body to reconsider the whole or any part of a matter,
>
> (b) direct a person or body to reconsider the whole or any part of a decision if the Court has set aside the decision under subrule (1), and
>
> (c) give any other directions it considers necessary.

(3) If the sole ground for a remedy is a defect in form or a technical irregularity, the Court may, if the Court finds that no substantial wrong or miscarriage of justice has occurred, despite the defect,

> (a) refuse a remedy, or
>
> (b) validate the decision made to have effect from a date and subject to any terms and conditions that the Court considers appropriate.

Pursuant to the *Federal Courts Act*:[166]

Subject to section 28,[167] the Federal Court has exclusive original jurisdiction

> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[168]

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[166] *Federal Courts Act, supra* note 7.
[167] *Ibid* s 28 provides that "[t]he Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of [specific enumerated] federal boards, commissions or other tribunals."
[168] *Ibid*, s 18(1)(a)-(b).

According to *Black's Law Dictionary*:[169]

- Injunction is a "court order commanding or preventing an action";[170]
- Declaration is a "formal statement, proclamation, or announcement";[171] and a declaratory judgment is a "binding adjudication that establishes the rights and other legal relations without providing for or ordering enforcement";[172]
- *Mandamus* is a "writ issued by a superior court to compel a lower court or a government officer [administrative decision-maker] to perform mandatory or ministerial duties correctly";[173]
- Prohibition is a "law or order that forbids a certain action [or an] extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a non-judicial officer or entity [administrative decision-maker] from exercising a power";[174]
- *Certiorari* is an "extraordinary writ issued by an appellate court, at it's discretion, directing a lower court [administrative decision-maker], to deliver the record in the case for review";[175] However, "the reference to *certiorari* in s. 18 of the *Federal Court Act* [and *Alberta Rules of Court*, r 3.15(1)(a)] is to the independent remedy of *certiorari* to quash [the decision of an inferior tribunal]."[176]
- Quash means to "annul or make void; to terminate …<quash proceedings>";[177]
- *Quo warranto* is a "common law writ used to inquire into the authority by which a public office is held or a franchise is claimed";[178]
- *Habeas corpus* is a "writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal."[179]

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[169] Bryan A. Garner, ed, *Black's Law Dictionary*, 7th ed (St. Paul: West Group, 1999) ["*Black's*"].
[170] *Ibid* at 788.
[171] *Ibid* at 414.
[172] *Ibid* at 846.
[173] *Ibid* at 973.
[174] *Ibid* at 1228.
[175] *Ibid* at 220. "certiorari is not confined to decisions required to be made on a judicial or quasi-judicial basis, but that it applies, in the words of Dickson J., as he then was, at pp. 622-23, "wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person": *R. v. Miller*, [1985] 2 S.C.R. 613, [1985] S.C.J. No. 79 at para 12 (QL) ["*Miller*"], citing *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 (QL) ["*Matsqui*"].
[176] *Miller*, *ibid.*
[177] *Black's*, *supra* note 169 at 1257.
[178] *Ibid* at 1264.
[179] *Ibid* at 715.

The most common remedies sought in the context of Special Chambers Judicial Review applications in the labour and employment law context are: a declaration (of the administrative decision-maker's reviewable error); an order in the nature of *certiorari* quashing the impugned action or decision; and an order in the nature of *mandamus* either remitting the matter back to the original decision-maker to decide the matter correctly (or reasonably), or referring the matter to a differently constituted decision-maker for rehearing of the matter *de novo*.

XV. Appeals from Judicial Review Judgments

Appeals from the decisions of Chambers Justices in judicial review applications are generally as of right (no leave of the Court of Appeal is required), except as noted below. The applicable procedure, provincial or federal, depends on which court the judicial review application was heard at—judicial review decisions of the superior court of the province are appealed to the applicable provincial Court of Appeal; judicial review decisions of the Federal Court are appealed to the Federal Court of Appeal; judicial review decisions of the Federal Court of Appeal are appealed to the Supreme Court of Canada, in which case leave to appeal is required.

XVI. Conclusion

When legal counsel is considering an administrative action or decision in relation to whether judicial review may be available to challenge the action or decision, counsel must: understand the concept of judicial review; understand whose actions and decisions are subject to judicial review; determine the time limitation period for filing and serving an application for judicial review; determine the court in which the application for judicial review should be filed, which depends on who the decision-maker is; understand what kinds of administrative decisions are subject to judicial review; understand what kinds of evidence are admissible in judicial review hearings; and determine which standard of review the court is likely to apply to the administrative action or decision. These topics were discussed in Parts II through VIII above.

Once counsel has determined judicial review would be viable and available to challenge the administrative action or decision, and has received client instructions to advance the judicial review, counsel must understand the requisite procedures involved in initiating an application for judicial review. The processes are markedly different at the Federal Court and Federal Court of Appeal, than they are at Alberta's superior court—the Court of Queen's Bench of Alberta. Parts IX – XII, discussed above, were confined to discussing rules, procedures, and specific forms involved in an application for judicial review at the Court of Queen's Bench of Alberta.

Parts XIII through XV briefly discussed oral advocacy in special chambers, remedies available in judicial review proceedings, and appeals from judicial review proceedings.