a general question of correctness

It remains unclear just as to when a standard of review of correctness will be applied to tribunal decisions. In *Summitt Energy Management Inc. v Ontario Energy Board*[1] [*Summitt*], the Divisional Court held that the Ontario Energy Board's ("Board") treatment of Summitt's due diligence defence was reviewable on a standard of correctness but also used language suggesting it was employing a reasonableness standard. This possible contradiction is not surprising in light of the problems in the definition about what is properly reviewable on a standard of "correctness".

There is a clear trend in administrative law against reviewing decisions on a standard of correctness, at least for "true questions of jurisdiction".[2] The Supreme Court of Canada's 2011 decision in *Alberta (Information and Privacy Commissioner) the Alberta Teacher's Association*[3] stated as follows:

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[1] 213 ONSC 318. For a discussion of the Court's affirmation that the OEB can order restitution as a remedy, please see Neil Campbell and Adam Chisholm, "Ontario Energy Board's power to order restitution confirmed".

[2] Lest there be any doubt that similar standards apply to judicial reviews and statutory appeals of administrative decisions. The Ontario Court of Appeal has held that "standards of review […] apply not only to judicial review but also to statutory appeals from tribunals": *First Ontario Realty Corporation Ltd. v Deng*, 2011 ONCA 54 at para. 16.

[3] 2011 SCC 61.

the direction that the category of true questions of jurisdiction [reviewed on correctness] should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves a determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since Dunsmuir, this court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identify in the appropriate standard of review".[4]

Similarly in *Arlington v FCC*,[5] the United States Supreme Court recently considered whether deference (think congressional intent followed by administrative deference – "reasonableness"?) or correctness should apply to the interpretation of application processing times described in the *Communications Act*. The U.S. Supreme Court held that:

The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity concerns the scope of the agency's statutory authority (that is, its jurisdiction). The argument against deference rests on the premise that there exists two distinct classes of agency interpretation: some interpretations – the big, important ones, presumably – define an agency's "jurisdiction". Others – humdrum, run-of-the-mill stuff – are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "non jurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.

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[4] *Ibid*. at para. 34.

[5] 113 S Ct 1863, 668 F (3d) 229 (US 20 May 2013).

> The misconception that there are, for *Chevron* purposes, separate "jurisdictional" questions on which no deference is due derives, perhaps, from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts […] That is not so for agencies charged with administering congressional statutes. Both their power to act and how they are to act is authoritatively prescribed by congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires. Because the question – whether framed as an incorrect application of agency authority or an assertion of authority not conferred – is always whether the agency has gone beyond what congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional".

In light of these directions – one binding on Canadian courts, the other not – it is surprising that Ontario courts continue to so avidly apply a standard of correctness to tribunal decisions at all. "True questions of jurisdiction" are just one purpose for which the Supreme Court of Canada has maintained a standard of review of correctness.[6] But the same logic applicable to when a tribunal is determining if something was *ultra vires* or not is argued herein to be applicable to other categories of issues, such as "questions of general law central to the legal system and outside the tribunal's expertise". Is this not the same "big, important" vs. "humdrum" the U.S. Supreme Court has rejected? In any case, isn't the question being asked whether the tribunal had the authority to do what was done?

In *Summit*, the tension of trying to apply the correctness standard to questions of general law central to the legal system becomes apparent. In a hearing before the Board, Summitt marshalled a due diligence defence to the allegations against it. On appeal to the

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[6] Others being "constitutional questions", "questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise" and "questions regarding the jurisdictional lines between two or more competing specialized tribunals".

Divisional Court, Summitt argued that the Board made several errors with respect to its due diligence defence.

The Divisional Court stated that, "the Board's ruling on the standard of proof and its treatment of due diligence are subject to a standard of review of correctness. They are issues of general law that are both central to the legal system as a whole and outside the Board's specialized area of expertise."[7]

However, under the heading of "Due Diligence Defence" in the decision, the court discussed the reasonableness of the Board's consideration of due diligence issues:

- "Summitt submits that [...] the Board unreasonably rejected Summitt's due diligence defence before it determined whether the *actus reus* of the offences had been proven.";[8]
- "The Board's review of the evidence of this order was reasonable.";[9] and
- "Similarly, the Board did not unreasonably put Summitt's training in compliance programs as a whole on trial."[10]

The only instance in which it appears, from the reasoning in *Summitt*, that the court could have applied a correctness standard was in holding that a due diligence defence was not available for the liability phase of compliance proceedings before the Board.[11] However, it is respectfully submitted that there is little basis for review of that issue as one of general law, of central importance to the legal system as a whole and outside the Board's specialized area of expertise. This is particularly true when every other facet of how the Board dealt with Summitt's due diligence defence appears to

[7] *Summitt* at para. 37.

[8] *Summitt* at para, 71.

[9] *Summitt* at para. 73.

[10] *Summitt* at para. 74.

[11] *Summitt* at para. 72.

have been reviewed on a standard of reasonableness and the compliance in question relates to one of the statutes that the Board is tasked with interpreting. In asking whether due diligence is a defence to non-compliance liability at the Board, the court is effectively asking "*whether the agency has stayed within the bounds of its statutory authority*".

The elimination of the standalone standard of patent unreasonableness from review of most decision-making several years ago has added clarity to Canadian administrative law. However, until Canadian courts find a way to abolish or clarify the standard of review of correctness for certain decisions of administrative tribunals, parties and counsel should expect to continue to deal with ambiguity about when a court will review a particular issue on the standard of correctness or reasonableness.

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a cautionary note