

Recent SCC decision casts doubt on pragmatic and functional test

By Chris Rootham

The Supreme Court of Canada has, on many occasions, affirmed the primacy of the pragmatic and functional approach as the method to conduct the preliminary step of determining the standard of review in judicial review or an appeal of any administrative decision. For example, in *Voice Construction v. Construction and General Workers' Union*, [2004] 1 S.C.R. 609, the court criticized lower courts for their failure to apply the pragmatic and functional approach as a preliminary step in any judicial review proceeding. In *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, the court confirmed the primacy of the pragmatic and functional approach, stating also that it is not sufficient "merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor."

Yet, in a recent decision, the Supreme Court of Canada has cast doubt on whether the pragmatic and functional approach applies in judicial review applications heard by the Federal Court of Canada. In *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] S.C.J. No. 39, the Supreme Court heard a case concerning whether Mugesera was guilty of inciting murder, genocide and

hatred, and guilty of crimes against humanity, because of a speech he made in Rwanda in 1992. Since the matter originated as a deportation hearing, it came before the Supreme Court by way of a judicial review application to the Federal Court, and subsequent appeals of the Federal Court's decision to deny judicial review and uphold the decision to deport Mr. Mugesera. Therefore, following its own dictates in *Voice Construction* and *Dr. Q*, the Supreme Court of Canada began its decision by

determining the appropriate standard of review.

However, instead of applying the pragmatic and functional approach, the court stated the following:

"Applications for judicial review of administrative decisions rendered pursuant to the *Immigration Act* are subject to s. 18.1 of the *Federal Court Act*. Paragraphs (c) and (d) of s. 18.1(4), in particular, allow the court to grant relief if the federal commission erred in law or based its decision on an erroneous finding of fact. Under these provisions, questions of law are reviewable on a standard of correctness."

For those lawyers who do not keep a copy of the annotated *Federal Court Practice* by their bedside, section 18.1 of the *Federal Court Act* governs the jurisdiction of the Federal Court to grant relief on an application for judicial review. Section 18.1(4) of the *Act* then sets out the grounds of review. For example, the Federal Court may grant relief if it is satisfied that a federal board acted without jurisdiction (s. 18.1(4)(a)), erred in law (s. 18.1(4)(c)) or based its decision on an erroneous finding of fact made in a perverse or capricious manner (s.

18.1(4)(d)). For years, however, both the Federal Court and the Supreme Court have been applying the pragmatic and functional approach to determine standard of review – they have not limited their analysis to categorize the nature of the error alleged, and determining the standard of review solely according to the wording of s. 18.1(4) of the *Act*. Yet, surprisingly, that is exactly what the Supreme Court of Canada has done in *Mugesera*.

To date, the Federal Court is divided on whether *Mugesera* means that it should abandon the pragmatic and functional approach in favour of determining the standard of review by identifying and

categorizing the error alleged. In some cases, the court has not cited *Mugesera* and continued to apply the pragmatic and functional approach: see, for example, *Ontario Harness Horse Assn. v. Canadian Pari-Mutuel Agency*, [2005] F.C.J. No. 1603. In one case, the court applied *Mugesera* without comment, simply stating that questions of law are reviewable on a standard of correctness: *Yaari v. Canada (Attorney General)*, [2005 F.C.J. No. 1662. (In fairness, the parties in that case had agreed on the standard of review prior to the hearing.)

One decision has commented on the problems in reconciling *Mugesera* with the pragmatic and functional approach. In *Heppel v. Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 1622, Justice Sean Harrington heard an application for judicial review of an adjudicator appointed under the *Public Service Staff Relations Act* (now *Public Service Labour Relations Act*). Justice Harrington discussed the appropriate standard of review at length, and concluded that the adjudicator only needed to be reasonable in his interpretation of the collective agreement at issue. However, in the course of his reasons, Justice Harrington commented on *Mugesera* and indicated a willingness to limit its application to decisions of the Immigration and Refugee Board.

One might wonder if the Supreme Court has signalled a change of approach to judicial reviews by the Federal Court on errors of law because of the express language of section 18.1(4)(c). If so, one would have thought that an explanation would have been provided. On the other hand, it may be that the broad lan-



Chris Rootham

guage of paragraph 37 in *Mugesera*, *supra* must be considered in context. The Federal Court was reviewing a decision of the Immigration and Refugee Board. It has been well established that the court owes that Board no deference on questions of law.

In short, it is too early to tell whether *Mugesera* means the end of the pragmatic and functional approach in Federal Court.

I will conclude by making one final comment, and that concerns British Columbia's *Administrative Tribunals Act*. That *Act* codifies the standard of review for tribunals in that province (see article on page 16), depending upon whether it is protected by a privative clause, and the nature of the issue before the Tribunal. To the extent that there was a concern that the *Administrative Tribunals Act* would be ignored in favour of applying the pragmatic and functional approach, the Supreme Court's decision in *Mugesera* indicates that the court will defer to a legislature's expressed choice concerning standard of review.

Chris Rootham is an associate with Nelligan O'Brien Payne, practising labour employment law.

End goal is to improve fetal oxygenation and fetal outcomes

NOTATIONS

—continued from p. 12—

documentation that an intravenous line was started at an infusion rate greater than 500 mls/hour. Information regarding I.V. fluid administration may be found in the progress notes, intravenous record or on the fetal monitor tracing.

Maternal "oxygen therapy" refers to applying a tightly fitted oxygen mask with oxygen delivered at a flow rate of 8-10 liters/minute. In the medical record, oxygen is most commonly referred to as O2 and followed by a flow rate in litres per minute and a method of delivery such as "O2 at 10 L/min by mask".

Evidence of oxygen therapy may be documented in the progress notes, the labour par-

togram or on the fetal monitor tracing.

Discontinuation of uterine stimulating drugs such as Syntocinon, Pitocin, Prostin and Cervidil may be referred to in the medical record as "Synto", "Pit", "drip" or PE2 and are usually followed by a dosage and an action; such as "Pit decreased to 2mu/min".

Medical information regarding administration of uterine stimulating drugs may be found on the medication record, progress notes, labour partogram or fetal monitor tracing. Look for corresponding doctors' orders and some documented form of consent.

If the nonreassuring status of the FHR continues following institution of initial intrauterine resuscitation measures, additional med-

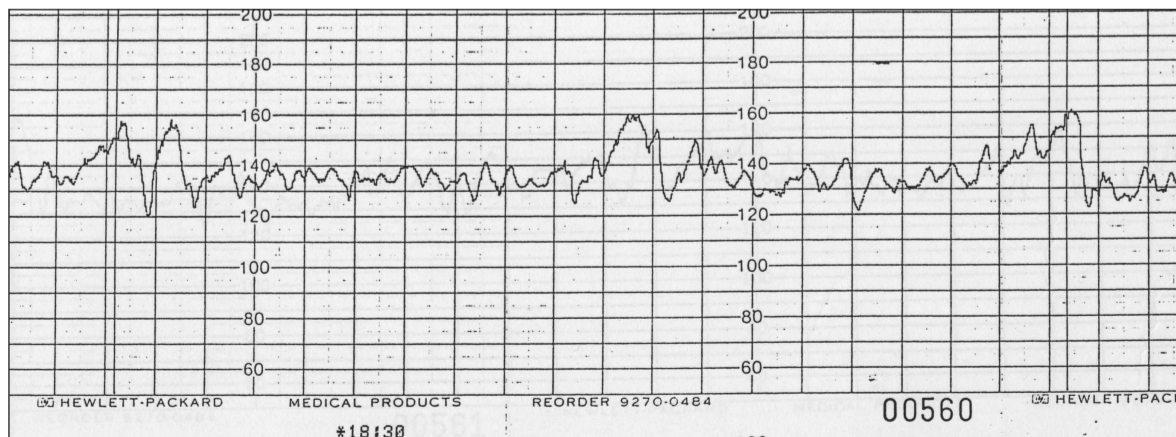
ical interventions must follow including amnioinfusion, fetal pulse oximetry, fetal scalp blood sampling and expedited delivery of the baby by vacuum, forceps or Caesarean section.

Although the rationale behind each intervention may vary, the end treatment goal is the same: to improve fetal oxygenation and

fetal outcomes. Intrauterine resuscitation measures are the same for all nonreassuring FHR patterns, can be performed simultaneously in a matter of minutes by either doctors or nurses and are considered the standard of care across Canada.

Chris Rokosh R.N. is the presi-

dent and chief nursing consultant of Legal Nurse Consulting Services in Calgary. She has over 20 years of nursing experience in obstetrical care, has recently completed *Managing Obstetrical Risk Effectively (M.O.R.E.)*, is an active member of AWHONN and has instructor level training in Fetal Heart Monitoring.



The fetal monitor tracing (above) can show documented evidence of position change, I.V. fluid administration, oxygen therapy and administration of uterine stimulating drugs. Photo courtesy of Chris Rokosh