S.C.C. File No. 37748

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

ALEXANDER VAVILOV

Respondent

JOINT MOTION RECORD OF THE PROPOSED INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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[Style of cause continued inside cover.]

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S.C.C. File No. 37896

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

S.C.C. File No. 37897

B E T W E E N :

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC, and NFL PRODUCTIONS LLC

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and –

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

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TABLE OF CONTENTS

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Secondary Sources

S.C.C. File No. 37748

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[Style of cause continued.]

S.C.C. File No. 37897

B E T W E E N :

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Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

NOTICE OF MOTION OF THE PROPOSED INTERVENER,

ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

TAKE NOTICE that Advocates for the Rule of Law ("**ARL**") hereby applies to a Judge of this Honourable Court, pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156 for an Order:

1. Granting ARL leave to intervene in these appeals on the following terms and conditions:

   (a) ARL shall serve and file a single factum not exceeding ten pages;

   (b) ARL shall be permitted to make oral submissions not exceeding five minutes in length; and

(c) no costs will be ordered for or against ARL on this motion or on the appeals themselves.

2. Any further or other Order that this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

3. ARL intends to intervene on the question of standard of review and the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and subsequent cases.

4. ARL will make two submissions in these appeals:

(a) ***Legislative supremacy and the rule of law are not in tension.*** The standard of review framework has come to be applied in a manner that assumes a tension, or at least a clear distinction, between legislative supremacy and the rule of law. ARL will argue that this reflects a false dichotomy; in all but exceptional circumstances, the rule of law and legislative supremacy are mutually reinforcing. Indeed, the rule of law requires courts to determine whether and to what extent the legislature intended courts to defer to administrative decision makers on questions of law. By adopting a nearly irrefutable presumption of deference for home statute interpretation in the name of legislative supremacy, courts have too often neglected ***both*** legislative supremacy and the rule of law.

(b) ***The rule of law requires reviewing courts to interpret legislation.*** Judges cannot assess the legality of administrative decisions without first understanding the scope of the authority that the legislature intended to delegate. This obliges courts to engage in at least limited interpretation of the decision maker's "home" statute. ARL will propose a principled approach to integrating statutory interpretation into the curial oversight of administrative action — one that not only clarifies the limits of deference, but that also aligns legislative supremacy with the rule of law by ensuring that public authorities do not overreach their lawful powers.

5. As discussed in its Memorandum of Argument and the Affidavit of Justin W. Anisman, sworn August 28, 2018:

(a) ARL has a genuine interest in these appeals; and

(b) ARL will make submissions that are relevant, useful, and different from those of the parties.

6. Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156.

Dated at Toronto, in the Province of Ontario, this 29th day of August, 2018.

SIGNED BY

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NOTICE TO THE RESPONDENTS TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the application for leave to appeal, then the Respondents may serve and file the response to the motion with the response to the application for leave to appeal.

S.C.C. File No. 37748

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

ALEXANDER VAVILOV

Respondent

AFFIDAVIT OF JUSTIN W. ANISMAN
(Sworn August 28, 2018)
(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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[Style of cause continued inside cover.]

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BETWEEN:

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Appellants

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Intervener (Rule 22(2)(c)(iii))

S.C.C. File No. 37897

BETWEEN:

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC, and NFL PRODUCTIONS LLC

Appellants

- and –

ATTORNEY GENERAL OF CANADA

Respondent

- and –

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

I, **Justin W. Anisman**, of the City of Vaughan, in the Province on Ontario, **MAKE OATH AND SAY**:

1. I am a co-founder and member of the Board of Directors of Advocates for the Rule of Law (**"ARL"**), and as such have personal knowledge of the matters deposed to herein.

Advocates for the Rule of Law

2. ARL is a non-partisan Canadian think tank dedicated to promoting the rule of law in Canada and abroad. It was founded in 2014. Our members come from diverse backgrounds and have divergent political views. What unites us is a shared belief in the rule of law, and the following ten propositions which flow from that basic concept:

(a) The Constitution is the supreme law of the land and can only be amended pursuant to its own amending formula. All government power is derived from and limited by the Constitution;

(b) Everything is permitted except that which is proscribed by law, and no individual should be deprived of life, liberty, security of the person or enjoyment of property unless that person has been afforded a fair hearing before an independent and impartial tribunal;

(c) Laws should be legislated by the legislature, executed by the executive, and applied by an independent judiciary;

(d) Laws should be of general application and should avoid exemptions and regulatory discretion wherever possible;

(e) Statutes should establish rights, obligations and prohibitions in clear and precise language;

(f) Laws that are not enforced or enforceable undermine faith in the rule of law;

(g) The courts should strictly apply judicial precedents except where the precedent in clearly wrong and/or has proven unworkable in practice;

(h) Statutes should be interpreted by looking to the ordinary meaning of the text in its full statutory context;

(i) Legal disputes should be decided in accordance with general principles, not the sympathies of the particular case; and

(j) All legislative and administrative actions should be subject to judicial review, but the role of the courts is "to apply the law, not to make it".[1]

3. ARL's mission is to ensure that the rule of law is upheld by laws that are equally, predictably, and consistently applied. Because the administrative state is so ubiquitous, administrative decision making affects Canadians' everyday lives in many ways. How such decision making is judicially reviewed can thus further or radically undermine the rule of law. Accordingly, the standard of review framework in administrative law has been and remains a significant interest and focus of ARL.

4. To further its mission of promoting the rule of law in the administrative context, ARL frequently publishes commentary that discusses developments in the standard of review jurisprudence from a rule of law perspective. Recent publications include:

(a) L. Sirota, "Is Deference Possible Here? The *Groia* Decision and Disguised Correctness" (June 17, 2018), a copy of which is attached as **Exhibit "A"**;

(b) M. Mancini, "The Dark Art of Deference: Dubious Assumptions of Expertise on Home Statute Interpretation" (March 14, 2018), a copy of which is attached as **Exhibit "B"**;

(c) L. Sirota, "RIP Reasonableness" (February 21, 2018), a copy of which is attached as **Exhibit "C"**;

(d) A. Honickman, "Getting Back to the Basics of Judicial Review" (December 24, 2017), a copy of which is attached as **Exhibit "D"**;

(e) M. Mancini, "Not Just A Pillowfight: How the SCC Has Muddied the Standard of Review" (March 21, 2017), a copy of which is attached as **Exhibit "E"**); and

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[1] *Severn v. Ontario*, (1878), 2 S.C.R. 70, at 103, per Strong J., dissenting; *Currie v. Harris Lithographing Co.* (1917), 41 D.L.R. 227 (Ont. C.A.), at 242.

(f) G. Kennedy, "*Wilson v. AECL*: A Missed Opportunity to Protect the Rule of Law in Administrative Law" (September 1, 2016), a copy of which is attached as **Exhibit "F"**.

5. Beyond administrative law, ARL's mandate extends to rule of law issues that arise in other areas of law, including but not limited to constitutional law, criminal law, tort, and contract law. ARL seeks to foster dialogue and promote education on a broad range of rule of law issues and, to that end, ARL's members routinely publish articles, attend conferences, and make media appearances. ARL's website may be found at http://www.ruleoflaw.ca/.

6. ARL recently intervened before this Court in *Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v. Governor General in Council, et al.*, S.C.C. File No. 37441.

7. As part of its efforts to promote dialogue and education on rule of law issues, ARL also partnered with the Canadian Constitution Foundation, a registered charity dedicated to defending the constitutional freedoms of Canadians, to form the Runnymede Society in 2016. The Runnymede Society is a law-school-based membership group that specializes in holding provocative and enlightening debates and education symposia across Canada focused on constitutional and other rule of law issues.

8. Since commencing operations in 2014, ARL has continued to grow. It was recently incorporated as a Canadian not-for-profit corporation. The directors of the corporation include me — a civil litigator at Brauti Thorning Zibarras LLP in Toronto — and the following individuals:

(a) **Alana M. Daley**, a civil litigator at Matthews Abogado LLP in Toronto;

(b) **Matthew Gurney**, a print and broadcast journalist with Toronto's AM640 and Global News;

(c) **Asher Honickman**, a civil litigator at Matthews Abogado LLP in Toronto;

(d) **Michael Katz**, a Chartered Professional Accountant and Certified Public Accountant in Toronto; and

(e) **Dwight Newman**, Professor of Law and Canada Research Chair, University of Saskatchewan.

ARL's Interest in these Appeals

9. ARL has a strong interest in these appeals, as they raise unique issues about the rule of law in the context of the judicial review of administrative decisions. The Court has indicated that it will use these appeals as an opportunity to consider the nature and scope of judicial review of administrative action — an area of significant concern for ARL and its members.

10. ARL's mandate to promote the rule of law is premised on a number of core principles. These include the supremacy of the Constitution, the separation of powers, and Parliamentary sovereignty. ARL consequently seeks to ensure that administrative decision makers are subordinate to the law, that the general public is governed by fixed rules known in advance, and that the courts apply the law equally, impartially, and predictably. The question of whether — and the degree to which — courts should defer to administrative decision makers on questions of law is precisely the sort of issue that ARL exists to address.

11. The standard of review also engages the proper allocation of authority between branches of government and the judicial role in ensuring that state power is exercised in accordance with the law. These matters lie at the heart of ARL's mandate; indeed, ARL's most basic purpose is to further its members' interest in them. It seeks leave to intervene in these appeals in order to do so.

The Assistance to be Provided by ARL

12. I believe that ARL can draw on its members' considerable expertise in administrative law, and specifically in the standard of judicial review, to make submissions that will be of assistance to the Court in the resolution of these appeals. Moreover, I believe that ARL can do so while offering a different perspective from that of the parties.

13. The parties in these appeals are primarily concerned with their respective interests and the particular outcomes of their cases. While their submissions take up the Court's invitation to consider the standard of review more generally, they do so only to the extent that the parties feel is necessary to resolve their respective disputes in their favour. In contrast, ARL is concerned

with, and proposes to make submissions regarding: (i) the broader rule of law implications of the relationship between administrative decision makers and courts; (ii) the respective roles of administrators, courts, and legislatures; and (iii) the importance of maintaining predictability and consistency in administrative law.

14. An outline of ARL's proposed submissions is contained in its Memorandum of Argument. ARL does not intend to repeat or duplicate the submissions of the parties or other interveners. ARL undertakes not to seek to enlarge the record or raise any new issues in the appeal. It will not seek costs and asks that it not be held liable for the costs of any other party or intervener on this motion or on the appeals.

SWORN BEFORE ME at the City of Toronto in the Province of Ontario, this 28th day of August, 2018.

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc., Province of Ontario, while a Student-at-Law. Expires May 19, 2020.

JUSTIN W. ANISMAN

This is **Exhibit "A"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 19, 2020.

Is Deference Possible Here? The Groia Decision and Disguised Correctness

Posted by: Léonid Sirota in Commentary, Featured June 17, 2018 0

In *Groia v Law Society of Upper Canada*, 2018 SCC 27, decided last week, the Supreme Court of Canada once again fractured over the approach to take to the judicial review of an administrative decision — and, once again, the majority chose correctness review disguised as reasonableness as its methodology. The substantive issue in *Groia* was whether the Law Society was entitled to discipline a lawyer for advocacy that took "the form of personal attacks, sarcastic outbursts and allegations of professional impropriety, grinding the trial to a near standstill". [12] I have no articulate views on this, except a general sense that the fewer

powers law societies have, and the more circumscribed these powers are, the better. But I do want to comment on the administrative law aspects of the decision.

* * *

As Justice Moldaver, writing for the majority, describes its decision, the Law Society's

> *Appeal Panel grappled with the issue of when in-court incivility amounts to professional misconduct under the Law Society's codes of conduct in force at the relevant time. It reasoned that incivility "capture[s] a range of unprofessional communications" and ultimately settled on a multifactorial, context-specific approach for assessing a lawyer's behaviour. [36; references omitted]*

The Panel then applied this test to Mr. Groia's case. The issue for the Supreme Court is twofold: first, it must review the approach devised by the Panel; second, the Panel's application of this approach. However, although all distinguish the two questions they must answer, the majority, Justice Côté, who concurs, and Justices Karakatsanis, Gascon, and Rowe, who jointly dissent, all consider that the Panel's decision on both must be reviewed on the same standard. The majority and the dissent opt for reasonableness, though they apply it differently. Justice Côté goes for correctness.

As Justice Moldaver notes, the Supreme Court's earlier decisions "establish that law society misconduct findings and sanctions are reviewed for reasonableness". [43] This is because both the elaboration of the applicable analytical framework and its application "involve the interpretation of the Law Society's home statute" — or, as in this case, rules enacted under this statute — "and the exercise of discretion". [45] While the question of "the permissible scope of [lawyers'] in-court behaviour is arguably of central importance to the legal system as a whole", [51] it is not "outside the Law Society's expertise". [51] Indeed, "Law Society disciplinary panels are composed, in part, of other lawyers". [52] Justice Moldaver also rejects the claim, advanced by a dissenting judge at the Court of Appeal for Ontario and accepted by Justice Côté, that sanctions for lawyers' behaviour *in the courtroom* are different in that imposing them risks trenching on judicial independence. In Justice Moldaver's view, this is simply not so: "a trial judge is free to control the conduct in his or her courtroom irrespective of the degree of deference accorded to a law society's disciplinary decision by a different court". [55]

Having established reasonableness as the standard of review, Justice Moldaver considers the arguments advanced against the framework developed by the Panel in detail. I will not describe his reasons, partly because I have little to say on their substance, and partly because this part of them alone runs for almost 60 paragraphs. What matters for my present purposes is this: on each point and sub-point, after reviewing the Panel's decision in at most a single paragraph, Justice Moldaver gives extensive explanations of what the Panel's decision means, and why it is appropriate. Though these explanations are occasionally couched in the language of reasonableness, there is no doubt that Justice Moldaver provides his own views on the approach to judging alleged incivility by lawyers, instead of merely ratifying the Panel's.

As for the application of the framework to Mr. Groia's conduct, Justice Moldaver concludes that the Panel's decision was unreasonable. In Justice Moldaver's view — explained over the course of over 30 paragraphs —, the Panel failed to apply the test it had itself articulated, and to take into account the factors that, on its own stated approach, ought to have mattered. For Justice Moldaver, "there is only one reasonable outcome in this matter: a finding that Mr. Groia did not engage in professional misconduct on account of incivility".

[125] (Now, here's a question: would it be good if someone could reverse the Supreme Court's decisions when they don't follow the Court's stated approach?)

As already noted, Justice Côté is of the view that the applicable standard of review is correctness, because lawyers' in-court behaviour must be subject to the ultimate control of the judiciary. She insists that

> *An inquiry by a law society into a lawyer's in-court conduct risks intruding on the judge's function of managing the trial process and his authority to sanction improper behaviour. It does so by casting a shadow over court proceedings — in effect, chilling potential speech and advocacy through the threat of ex post punishment, even where the trial judge offered the lawyer no indication that his or her conduct crossed the line. And it permits an administrative body to second-guess the boundaries of permissible advocacy in a courtroom that is ultimately supervised by an independent and impartial judge. [168]*

Justice Côté agrees with Justice Moldaver on the application of the test for misconduct, and thus concurs in the result.

The dissenters, by contrast, agree with Justice Moldaver that the standard of review is reasonableness, and also that the Panel's approach was reasonable. However, they disagree with the way Justice Moldaver applied this standard, accusing him of

> *fundamentally misstat[ing] the Appeal Panel's approach to professional misconduct, and reweigh [ing] the evidence to reach a different result. This is inconsistent with reasonableness review as it substitutes this Court's judgment for that of the legislature's chosen decision maker. [177]*

The dissent faults Justice Moldaver with being insufficiently deferential to the Panel. "[D]eference", they write, "recognizes that delegated authorities will have greater expertise in matters under their scope of authority", [178] and when the applicable standard of review is reasonableness, it "is not optional". [179] In particular, "deference bars a reviewing court from conducting an exacting criticism of a decision in order to reach the result that the decision was unreasonable", or from "supplement[ing] the decision maker's reasoning for the purpose of undermining it". [180]

The dissenters "consider that Justice Moldaver reformulates" [188] the framework articulated by the Panel. As a result, they disagree with Justice Moldaver's application of this framework too: "[i]t is not a respectful reading of the ... Panel's reasons to articulate a novel test ... then fault the Panel for failing to apply it". [199] The Panel's decision is intelligible and defensible, and this is not a case where only one outcome could be reasonable. Indeed, such cases will be anomalies, because

> *[t]he existence of reasonableness review is, rather, premised on the fact that "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result". [215, quoting Dunsmuir v New-Brunswick, 2008 SCC 9, [2008] 1 SCR 190 at [47]]*

The dissent then describes — at some length, and with limited reference to the Panel's decision — what it expects to be the pernicious consequences of the majority's decision. The majority, the dissent fears, "sends the wrong message to those who look to this Court for guidance". [227]

* * *

Therein, it seems to me, lies the rub. People look to the Supreme Court for guidance — not for mere affirmation that an administrative decision-maker's reasons were good enough and that in any event there is no right answer to the question they addressed. The whole point of having what the *Constitution Act, 1867* foreshadows as a "general court of appeal for Canada" is that such an institution can explain what the law is. If such a court does not say what the law is, but only indicates that an administrative decision is within the bounds of what the law will tolerate — without explaining where these bounds actually are — then it is not doing its job.

It is no surprise, then, that Justice Moldaver's reasons show little sign of deference to the Panel. What lawyers across Canada are interested in is what the Supreme Court itself thinks about their standards of conduct — not in whether it thinks that the opinion of a single provincial disciplinary body on this subject was "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". [*Dunsmuir*, [47]] Indeed, the dissenters, for all the bitterness with which they chide Justice Moldaver for his failure to defer, and despite their own ostentatious display of deference, cannot help but enter the debate with their own comments about the appropriate standards of civility. If the question the Court is deciding is indeed one of central importance to the legal system, as Justice Moldaver concludes (and the dissent specifically agrees with this part of his reasons), this is entirely comprehensible.

Hence the question that, with apologies to Ronald Dworkin, I ask in this post's title. Earlier this year, I wondered whether "the Court is growing disenchanted with deference to administrative decision-makers' decisions on questions of law", and perhaps even trying to kill off reasonableness review without telling anyone. The cases decided since then only provide more evidence for the proposition that the default standard of review in Canadian administrative law is disguised correctness, not reasonableness as the Supreme Court would have us believe. But perhaps the Supreme Court has a defence of necessity to the charge of attempted murder. No court in its position could do otherwise.

Yet even if this be so, the Rule of Law issues I raised earlier do not go away. Law should be clear, and the fact of its change, transparent. The law of judicial review applied by the Supreme Court is opaque and hidden. And there is a further issue to think about: is it permissible for an apex court to apply a different law than the one it instructs other courts to apply, just because of its position within the legal system? It is, to say the least, not obvious that this is so — which presumably is precisely why the Supreme Court engages in so much obfuscation. Once again, I conclude that it would be better — more transparent, more conducive to the coherence of our legal system — for the Supreme Court to (openly and publicly) abandon reasonableness review on questions of law in most or in all cases.

* * *

Groia illustrates a couple of additional problems with reasonableness review, as theorized and practised by the Supreme Court. On a theoretical level, it exposes the deficiencies in the Court's justifications for deference, which I have already discussed at some length. Justice Moldaver explains that, while of central importance, the issue of lawyers' behaviour is within the expertise of law society adjudicators. Indeed these adjudicators are themselves lawyers! But what, one would like to ask Justice Moldaver, are judges? Aren't they lawyers too, and aren't they, in principle (though, granted, not necessarily in practice) more eminent

lawyers than those who sit on law society tribunals? As the dissenting opinion in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293, co-written by Justice Brown — who joined Justice Moldaver's majority opinion in Groia —, and joined by Justice Moldaver himself, pointed out, "expertise is a relative concept. It is not absolute." [84] Sometimes administrative decision-makers are more expert than courts, which might be at least a practical reason for deference — though not a legal one, as Mark Mancini's contribution to the Dunsmuir Decade symposium pointed out. But this justification is implausible here.

For their part, the dissenters appeal to a different justification for deference: "reasonableness review is premised" on the existence a multiplicity of possible answers to questions to which it applies. Yet, as I noted in the posted linked to in the previous paragraph, deference is the presumptive standard of review for *any* question concerning the interpretation of administrative decision-maker's "home statute", and

> *the great variety of statutes setting up administrative tribunals, and indeed of particular provisions within any one of these statutes, makes it unlikely that all of the interpretive questions to which they give rise lack definitive answers. Perhaps the suggestion is that the very legislative choice of setting up administrative tribunals to address these questions means that legislatures think that these questions lack definitive answers, but that too seems implausible.*

Indeed, the dissent's reasoning is circular: reasonableness "is premised" on there being multiple possible answers, and since reasonableness applies, it follows that the question under review must have multiple answers.

The practical concern with reasonableness review that *Groia* illustrates has to do with the supplementation of an administrative decision-maker's reasons by a reviewing court. The dissent says that Justice Moldaver is wrong to do this to "undermine" the Panel's review. Yet one of its author's, Justice Karakatsanis wrote, and another, Justice Gascon, joined, the majority judgment in *Edmonton East*, which did not so much supplement as outright made up the administrative decision in order to uphold it. Both of these positions — no supplementation to undermine, any amount of supplementation to uphold — seem consistent with the Supreme Court's jurisprudence. But they are quite inconsistent with one another.

A clarification: what I've said above primarily concerns the first issue in *Groia*, that of the applicable framework. On the second one, the application of that framework, without entering into the substance of the debate between majority and dissent, and subject to my comments regarding the supplementation of reasons, I think that reasonableness is the appropriate standard of review. To me, Justice Côté's concerns about judicial independence seem misplaced, for the reasons given by Justice Moldaver. Besides, while this case did not turn on a credibility issue, other, similar ones may well do so. How are courts supposed to engage in correctness review on that? It seems to me that the two issues in *Groia*should have been addressed on different standards of review. But no opinion takes that approach.

* * *

Groia provides further confirmation, if any were yet needed, that the Canadian law (if it may be called law at all) of judicial review of administrative action is in a dire state. Its theoretical foundations, which have long been weak, are being eroded decision by decision; its practical construction is falling apart. Perhaps these concerns are soon bound to be a thing of the past, as the Supreme Court's coming review of the *Dunsmuir* framework simplifies what is abstruse, clarifies what is opaque, and cuts through what is

impenetrable. Perhaps. But considering the confusion and the acrimony that seem to be the most remarkable features of the Court's latest administrative law pronouncements, I suggest that you should not hold your breath.

This article was originally published on Double Aspect, Professor Sirota's award-winning blog

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This is **Exhibit "B"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
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Expires May 19, 2020.

The Supreme Court of Canada panel that decided Dunsmuir in 2008

The Dark Art of Deference: Dubious Assumptions of Expertise on Home Statute Interpretation

Posted by: Mark Mancini in Commentary, Featured March 14, 2018 0

The 10th anniversary of *Dunsmuir* presents an opportunity to revisit perhaps its most controversial aspect: the seeds it planted for a presumption of deference on home statute interpretation. As Professor Daly notes, the presumption is a "black hole" which engulfs questions of statutory interpretation in administrative law: Paul Daly, "Unreasonable Interpretations of Law" in *Judicial Deference to Administrative Tribunals in Canada* at 235-36. To the Supreme Court, the presumption exists because "expertise ...inheres in a tribunal itself as an institution" (*Edmonton East*, at para 33).

In this contribution, I will engage with what I call the "dark art of deference" that *Dunsmuir* entrenched: the seamless transfer that courts make from expertise in policy to expertise in other matters, including statutory interpretation (*Edmonton East*, at para 83). The mere fact of membership in a shadowy guild of expertise does not a *legal* expert make.

Here, I aim to: (1) demonstrate that expertise *writ large* does not provide a sound justification for deference on questions of law, unless incorporated into the decision-maker's enabling statute and (2) relatedly, argue that deference is not prescribed by extralegal justifications such as expertise, but only by *statutory language*, which determines the leeway a court should afford to a decision-maker. The presumption of deference, which could run against statutory language, should be abandoned.

My comments start from three propositions which are rooted in constitutional theory: (1) absent constitutional objection, legislation binds; (2) administrative decision-makers enabled by statute can only go so far as their home statute allows (3) it is a court's job, on any standard of review, to enforce those boundaries; in American terminology, to "say what the law is" (*Marbury v Madison*; *Edmonton East*, at para 21).

***

As early as the seminal case of *CUPE v NB Liquor*, "expertise" has been used to justify deference on questions of home statute interpretation. Yet beyond this general proposition, Canadian administrative law history "reveals...that little work has been done to pinpoint exactly what the concept of expertise means...": Laverne Jacobs and Thomas Kuttner: "The Expert Tribunal." Perhaps as a result, the problems associated with expertise as a basis for deference have not been extensively explored.

Most basically, expertise may be a valid practical justification for deference, but it is hardly doctrinally valid. To treat a decision-maker's decision as binding on the basis of expertise abdicates the role of courts in enforcing statutory boundaries. While the court still nominally retains this power under the presumption of reasonableness, the presumption is virtually irrebuttable. As Justice Scalia once wrote:

If I had been sitting on the Supreme Court when Learned Hand was still alive, it would similarly have been, as a practical matter, desirable for me to accept his views in all of cases under review, on the basis that he is a lot wiser than I, and more likely to get it right. But that would hardly have been theoretically valid. Even if Hand would have been *de facto* superior, I would have been *ex officio* so. So also with judicial acceptance of the agencies' views...

This criticism, compelling as it is, has not been so for Canadian courts, with *Edmonton East* as proof positive. Courts on judicial review *do* view expertise as a valid doctrinal reason for deference, and are willing to put aside their own interpretation of a statute in favour of a decision-maker's. This could be defensible, at least practically, if courts deferred on the basis of expertise which existed empirically. But in the post-*Dunsmuir* world, courts do not investigate expertise empirically before determining whether the presumption of deference applies. The presumption, though justified by expertise, can exist despite it. Yet as Professor (now Premier) MacLachlan says, if expertise is to support a presumption of deference, interrogation of a decision-maker's expertise cannot be avoided indefinitely.

In the "pragmatic and functional era" which predated *Dunsmuir,* the courts did not avoid the question of expertise in determining the standard of review. Even though privative clauses were given less emphasis as clear statutory signals (see *Pezim* and the discussion in *Khosa*, at para 87), there was still a focus on determining relative expertise. For example, in *Pasiechnyk*, the Court was faced with a question of home statute interpretation. The Court considered the composition, tenure, and powers of the Saskatchewan Workers' Compensation Board before holding that the decision-maker was expert on the matter before it. In *Pushpanathan*, at para 33, the Court noted that "expertise must be understood as a relative, not an absolute concept" and reasoned that courts must conduct an analysis in each case to compare its expertise to the decision-maker's on the matter before it.

Contrast *Edmonton East,* where there was an *assumption* of the decision-maker's expertise, but no actual analysis. Professor Sirota calls this "post-truth jurisprudence" and justifiably so—the dissent noted that the decision-maker did not have expertise in matters of statutory interpretation, and noted that expertise acted as an unjustified "catch-all" for deference (*Edmonton East*, at paras 82-83).

The *Edmonton East* dissent points out the problem with an automatic presumption of deference. The role of courts on judicial review, to have the last word on the statutory boundaries of administrative decision-makers, is limited to reviewing whether the presumption is rebutted. Unfortunately, *Dunsmuir,* let alone *Edmonton East*, gave little guidance on when the fortified presumption of home statute interpretation could be rebutted: see Justice Cromwell's reasons in *Alberta Teachers.* If legislative intent is the "polar star" of judicial review (*CUPE v Ontario (Minister of Labour),* at para 149), the search for that intent is attenuated by a game of categorical whack-a-mole with the correctness categories set out in *Dunsmuir.*

A presumption could be a useful legal device if it were true that *most* administrative decision-makers were expert in matters of statutory interpretation. Perhaps, it could be argued, decision-makers develop "field sensitivity" in legal decision-making even if they are not expert at the outset. As Professor Green notes, a presumption along these lines could save judicial review courts the transaction costs associated with conducting an exhaustive review of the expertise of decision-makers in every case.

But such a presumption is only useful if (1) the facts supporting its existence are generally, empirically true; (2) courts themselves actually conduct the analysis to determine whether the presumption is rooted in fact, as in the *Pushpanathan* analysis (assuming that something like "field sensitivity" could be measured empirically) and (3) there is clear guidance on how to rebut the presumption. None of these exist with the current presumption of reasonableness.

***

What is the alternative if expertise *writ large* is simply a bad proxy for deference in the post *Dunsmuir* world? The answer is that expertise could be a justification for deference, but it must be based in a statute which recognizes it with respect to the precise legal issue before the court. Professor Martin Olszynski

argues that the court should adopt a presumption of correctness for home statute interpretation, based on the principle of legislative supremacy. I agree that legislative supremacy is a better justification for deference than an unsupported concept of expertise, but the simple fact that a decision-maker has been delegated statutory power is not enough to justify deference, and it is not enough to demonstrate that a decision-maker is expert. What matters is what the legislature says about the merits of the matter before the court, including whether the enabling statute codifies any indication of expertise on that matter.

The Supreme Court does not accept this position. In *Khosa,* at para 25 the Court noted that the mere fact of delegation to a decision-maker justifies deference on the basis of generalized expertise. But this is imprecise. Simply because the legislature delegates power to a decision-maker says nothing about how intensely a court should review that exercise of power and it says nothing about the expertise of the delegated decision-maker. Any logical leap from the mere fact of delegation to deference is a legal fiction. As Professor Vermeule notes in his splendid book *Law's Abnegation*: "The delegation fiction is modern administrative law's equivalent of the fiction that the Queen-in-Parliament still rules England—although she is bound always to act on the advice of her 'ministers' " (30).

While the legal fact of delegation is irrelevant to deference, *the terms of the delegation itself* are relevant. This is because a legislature may speak in capacious terms, setting out requirements for expertise in a decision-maker and justifying a wide scope of options for a decision-maker. It may also speak in narrow terms, implying the opposite. In other words, the legislature can mandate deference through language, and the court on judicial review can recognize this deference, and apply that range to the decision taken by the decision-maker. This is nothing more or less than statutory interpretation by the judicial review court; and there is no need for a complex standard of review analysis to determine the intensity of review. The Supreme Court in *McLean* recognized as much: sometimes, statutory language will only permit one reasonable outcome. But in other situations, where the court finds that there are multiple permissible outcomes available, a decision within the range will be legal.

This approach is consistent with the role of courts on judicial review to have a final say on the law. It is also consistent with the notion of deference "itself a principle of modern statutory interpretation" (*McLean,* at para 40), because a court will not interfere with an administrative decision unless the principles of statutory interpretation honestly say so. This is demonstrated on the facts of *McLean.* The Court upheld the interpretation of the British Columbia Securities Commission's home statute because it fell within the range of alternatives which the statutory language could bear. On the interpretation undertaken by the Court of the text, context, and purpose of the statute, a number of reasonable options were available to the Commission, and it chose one. This meant its decision was reasonable.

The *McLean* approach moves us away from imputed expertise in the post-*Dunsmuir* world to a real analysis of the intent of the legislature. Under this analysis, there is no need for an abstracted notion of expertise justifying a lawerly presumption of deference; nor is there a need for the labels of "reasonableness" or "correctness." There is only a need for a court to defer where there is some indication in language to do so, including a statutory indication of expertise.

This is similar to the approach to judicial review of agency determinations of law in the United States under *Chevron.* Under *Chevron,* unlike Canada's current standard of review framework, there is no specific analysis to determine the standard of review. For all its warts, *Chevron* at least avoids the protracted standard of review analysis, with its attendant standards, presumptions, categories, and factors which are confusing for the most learned of administrative lawyers. Its focus is properly on the enabling statute.

In fact, *Dunsmuir* and its progeny complicate the fact that judicial review on questions of law is fundamentally about statutory interpretation, nothing more or less. While there may be some trepidation associated with using the principles of statutory interpretation to discern whether deference is due, this is unavoidable. If administrative decision-makers are set up by statute, we cannot avoid an analysis of the decision-maker's statutory powers, and the principles of statutory interpretation are the best we have. The key point is that the principles should not be used to determine if the statute is ambiguous or not, à la *Chevron*—they should be used to determine whether the statute's language is sufficiently "open textured" to justify deference.

To come full circle, how does this approach square with the problem of expertise? In *Edmonton East*, the Court listed a number of justifications for a presumption of deference, including "access to justice" and expertise. These justifications exist outside of the statutory context, in the abstract. They are not necessarily tethered to the scope of the delegation afforded to the decision-maker. However, if statutory language is the focus, expertise can be a supporting justification for deference if represented in statutory language. The problem with the current presumption of deference is that it is based on expertise which *may or may not be represented in statute.*

Dunsmuir, 10 years on, has instantiated the dark arts of deference into the fabric of the Canadian law of judicial review in a manner untethered to statute. This is not a welcome development. Expertise should not be a "free standing" justification for deference (*Khosa*, at para 84). Perhaps it is time to pull back the curtain on the dark arts and drill down to the root of the law of judicial review: statutory interpretation.

This article was originally published on Double Aspect as part of the Dunsmuir Decade symposium.

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This is **Exhibit "C"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 19, 2020.

RIP Reasonableness

Posted by: Léonid Sirota in Commentary, Featured February 21, 2018 Comments Offon RIP Reasonableness

The Supreme Court recently issued its decision in *Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3, which may, or may not, be another sign that the Court's love affair with deference to administrative decision-makers is coming to an end — in practice if not yet in theory. I address the majority's approach to deference in this post. Time permitting, I will, in a subsequent one, argue that if Justice Abella's opinion is anything to go by, any hopes — or fears — that the end of deference would mean a return to judicial enforcement of the actual law are unwarranted.

Caron concerns the relationship between Québec's workers' compensation statute and its anti-discrimination law, colloquially known as the *Québec Charter* (and, I suspect, the relationship between similar statutes in other Canadian jurisdictions too, since this legislation tends to be fairly similar). The

question was whether, in the context of an injured employee's endeavour to return to work, the the duty to accommodate, long understood to be part of anti-discrimination law in the employment context, imposed obligations on an employer beyond those created by the workers' compensation scheme. The administrative tribunal responsible for the application of the workers' compensation legislation decided that it did not. The majority of the Supreme Court (as well as the courts below) disagreed.

When courts review a decision made by an administrative tribunal, they must begin by determining the "standard of review". As Justice Stratas put it in his *précis* of Canadian administrative law, "how 'fussy' should the court be"? (33) Should the court insist that the tribunal's decision be correct, or is it enough for the decision to be reasonable? Justice Abella, writing for a five-judge majority, is confident that "[t]his case is in classic reasonableness territory" because the tribunal "is interpreting the scope and application of its home statute". [4] Classic, because under the framework articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, judges are indeed generally required to defer administrative decision-makers interpreting their enabling legislation. However, the concurring opinion, written by Justice Rowe (with the agreement of Justice Côté) disagrees, endorsing the Québec Court of Appeal's view that the issue of whether the tribunal had to apply the *Québec Charter* both goes to the determining the bounds of the tribunal's jurisdiction and is of central importance to the legal system as a whole — both factors which *Dunsmuir* said triggered correctness review.

I have no firm opinion on which of these views is right under the current law. Suffice it to say that Justice Abella's is at least plausible. After all, *Dunsmuir* said courts should defer to a tribunal's interpretation not only of its "home" statute, but also to that of "statutes closely connected to its function, with which it will have particular familiarity". [54] Arguably, the *Québec Charter*'s anti-discrimination provisions are "closely connected" to the function of a workers' compensation tribunal. It is too bad, however, that Justice Abella neither acknowledges nor engages with the concurrence's view.

Be that as it may, the disagreement between majority and concurrence turns out to be quite irrelevant. Having declared in favour of reasonableness, Justice Abella never once shows a sign of actually deferring to the tribunal's reasoning. Of course, even on a reasonableness standard, courts will sometimes overturn tribunals' decisions. However, as defined in *Dunsmuir* — which Justice Abella doesn't actually cite —

> *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. ... Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. [47], [49]*

There is no "due consideration", or any consideration, of the tribunal's determination in Justice Abella's reasons. She is uninterested in whether it justified its decision in a transparent and intelligible way. In fact, she does not even bother summarizing the tribunal's opinion, as Justice Rowe does (and as is customary), let alone paying it any attention. Justice Abella proceeds with her own analysis of the applicable law, and never pauses to show why the tribunal's different conclusion was not just mistaken but unreasonable. There is, in reality, no difference between the pretended "reasonableness" analysis like Justice Abella's and avowedly non-deferential review like that undertaken by Justice Rowe. Justice Stratas calls this sort of thing "disguised correctness review", but calling the disguise in this case flimsy is already giving it too much credit.

Now, one might ask just what proper reasonableness review, as described in *Dunsmuir*, would have involved in *Caron*. The administrative tribunal's reasons on the point in issue (at [61]-[91]) are fastidious, but they consist in an analysis of the relevant judicial decisions. In effect, the tribunal functions as a lower court, and not as a specialized, expert decision-maker bringing a unique policy-informed perspective or "field sensitivity" to the issue before it. Even if one accepts that such factors can justify judicial deference to tribunals, it is not obvious why the Supreme Court would or should defer to a decision where they are absent.

So Justice Abella *could* have said that no deference is due when a tribunal's expertise is not in play. Such a position would be defensible. Indeed, it would arguably be more consistent with the original *Dunsmuir* framework, which as I see was intended to be a flexible one, than the Supreme Court's post-*Dunsmuir* decisions that elevated deference into dogma, notably *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293. In that case, the majority attributed expertise and pretended to defer to reasons not actually given by a tribunal that hadn't even addressed the issue that the Supreme Court was deciding. I described that process as a judge "playing chess with herself, and contriving to have one side deliberately lose to the other". But, as with *Edmonton East*, it seems to me that a position cannot be defensible unless it is actually defended. Justice Abella, to repeat, could have defended the position I have just outlined — but she doesn't, and we are left to wonder why exactly she approached *Caron* as she did (and not as she said she did).

Unexplained departures from previous pronouncements on standard of review are becoming a trend in the Supreme Court's administrative law jurisprudence. This trend previously manifested itself in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 and *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55. As I noted here, in neither of these cases did the Court adopt the approach to judicial review which its precedents seemed to dictate — an approach that called for deference to adjudicative or discretionary administrative decisions involving the *Canadian Charter of Rights and Freedoms*. The Court simply undertook its own constitutional analysis, without explaining whether the previous framework was still good law, and if not, why, or to what extent.

This trend, if that's what it is, is disturbing. As I wrote in my comment on *Ktunaxa* and *Justice* Counsel, I would be very happy to see the Supreme Court nix its deferential review of administrative decisions involving the *Charter*. I am inclined to think that getting rid of deference on most, perhaps on all, questions of law would be a good thing too. But if that's what the Supreme Court wants to do, it must tell us, instead of saying one thing (or nothing at all) and doing another, which makes it possible for the seemingly disfavoured approaches to be used again, without litigants being able to predict when or why they will be. As I previously argued, the Court's behaviour is problematic from the standpoint of the Rule of Law, because it makes the law unstable and obscures the fact of legal change, and fails the "justification, transparency, and intelligibility" test articulated in *Dunsmuir*, by which judicial decisions, no less (and perhaps more) than administrative ones, should be assessed.

Between *Ktunaxa*, *Justice Counsel*, and now *Caron*, it is tempting to conclude that the Court is growing disenchanted with deference to administrative decision-makers' decisions on questions of law. Yet perhaps such a conclusion would be premature. We cannot know, with the court systematically failing to explain itself and even individual judges changing tack, unpredictably, from case to case. In *Caron*, that the Supreme Court actually engages in correctness review is clear enough, but why it does so, whether it still thinks that there is a place for reasonableness review, and if so, in what circumstances, is anybody's guess.

This uncertainty is problematic. If deference is indeed dead, the Supreme Court should ensure that it stays so, and doesn't come back to eat the brains of Canadian lawyers and judges.

This article was previously published on Double Aspect, Professor Sirota's award-winning blog

Tagged with: ADMINISTRATIVE LAW | CONSTITUTIONAL LAW | CORRECTNESS STANDARD | DUNSMUIR | EDMONTON EAST | JUDICIAL REVIEW | JUSTICE ABELLA | JUSTICE STRATAS | PUBLIC LAW | REASONABLENESS | REASONABLENESS STANDARD | STANDARD OF REVIEW

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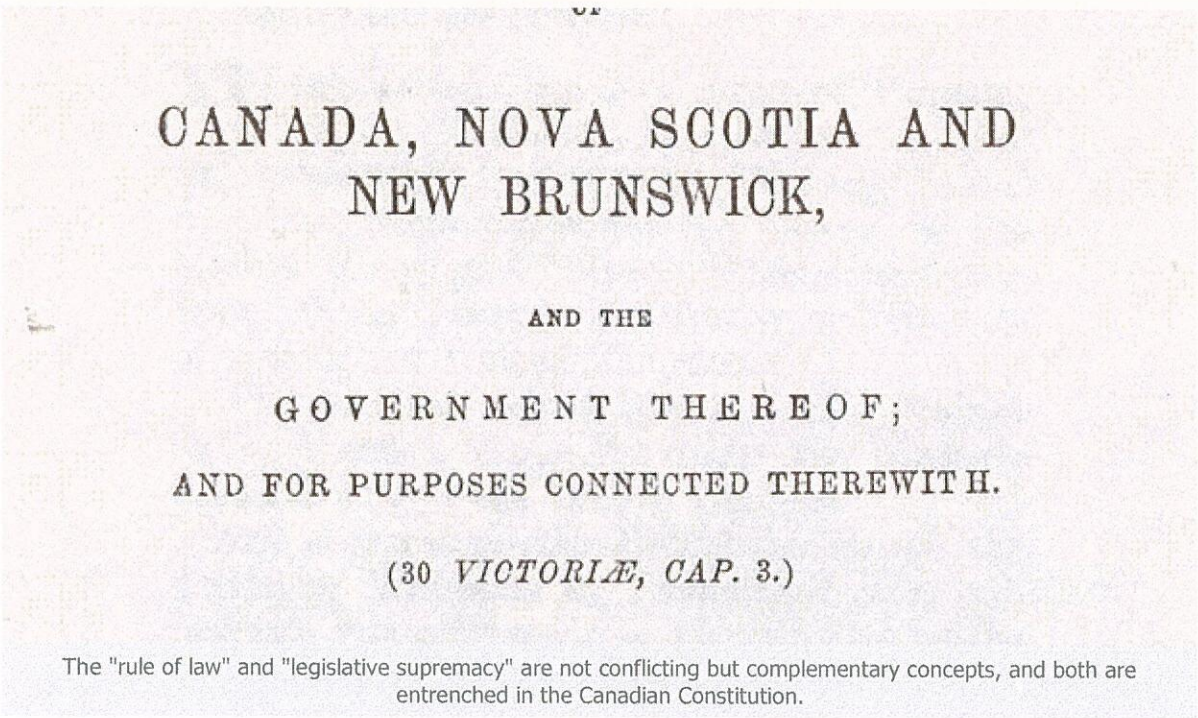
This is **Exhibit "D"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 19, 2020.



CANADA, NOVA SCOTIA AND NEW BRUNSWICK,

AND THE

GOVERNMENT THEREOF;

AND FOR PURPOSES CONNECTED THEREWITH.

(30 *VICTORIÆ, CAP.* 3.)

The "rule of law" and "legislative supremacy" are not conflicting but complementary concepts, and both are entrenched in the Canadian Constitution.

Getting Back to the Basics of Judicial Review

Posted by: Asher Honickman in Commentary, Featured December 24, 2017
Comments Offon Getting Back to the Basics of Judicial Review

One could scarcely find an area of law so muddied as administrative law. In a recent blog post on Double Aspect, Leonid Sirota argues (omitting some far more colourful language) that our courts continue to struggle with reconciling the basic concepts of parliamentary supremacy and the rule of law, which are said to be in conflict with one another. The Supreme Court offered what appeared to be a definitive framework in the *Dunsmuir* decision of 2008, but subsequent cases have "refined" that framework to put it mildly.

Professor Sirota is of course just one of many commentators who have criticized the state of administrative law. Justice David Stratas of the Federal Court of Appeal, who is one of the foremost experts in administrative law, made administrative law the centerpiece of his keynote address at the Canadian Constitution Foundation's Law and Freedom Conference in January 2016. Justice Stratas's address was entitled "Reflections on the Decline of Legal Doctrine" and nothing better exemplifies that decline than the ever-changing frameworks that have characterized administrative law.

My own practice intersects with administrative law only from time to time, and I would never claim to be an expert on the topic. However, it seems apparent from reading recent case-law and academic commentary that the problems plaguing administrative law cannot and will not be solved until the courts and academics get back to the basics, as it were, so that they may properly understand the principles at play and how they do and ought to interrelate with one another.

Professor Sirota attempts to do just this in his blog post, and I would say successfully for the most part. He argues that the rule of law effectively trumps legislative supremacy, at least in the administrative law realm, and that this principle requires a "correctness" standard of review often, if not always. I wholeheartedly agree with Professor Sirota that the decisions of administrative bodies should be reviewed on a correctness standard to a much greater extent than they are now. But it is not because the rule of law trumps legislative supremacy. Rather, in my view, it is because the rule of law and legislative supremacy *both* militate in favour of a correctness standard. Contrary to popular wisdom, my own view is that, properly understood, legislative supremacy and the rule of law are not in conflict, but are complementary concepts.

The Rule of Law and Legislative Supremacy in the Common Law Tradition

When judges speak of the "rule of law" in the administrative law realm, I think they are referring more particularly to the "separation of powers," which should be understood as a sub-species of the rule of law. At base, the rule of law means that all public officials are subject to and subordinate to the law. This can only be achieved, however, through the creation of an independent and impartial judiciary to say what the law is and apply it to specific facts and cases. Without it, the executive branch could interpret the law to mean whatever it wished and execute its own policy preferences in place of the law.

The twin concepts of the separation of powers and judicial independence have been part of the British Constitution for centuries. But it wasn't always so. In the 14th century, judges in England were often members of the King's Council. The common wisdom was that only those who had had a hand in making the law could be trusted with its interpretation. Thus, in Aumeye's Case (1305), Chief Justice Hengham admonished counsel for attempting to interpret a statute saying **"Do not gloss the statute, we understand it better than you do, for we made it."** Fortunately, the English began to see the value of an independent judicial branch beginning in the 15th century (For further reading see Theodore Plucknett, *A Concise History of the Common Law,* 5th ed, 1956, republished by Liberty Fund Inc., 2010).

The corollary to an independent judiciary empowered to say what the law is and decide cases is an equally independent legislative branch possessing the exclusive authority to make laws. It is no coincidence that the first English Parliament was established in the wake of Magna Carta and that document's call for no taxation without representation. In the beginning, Parliament's primary function was not that it represented the people – for the most part, it did not – but that it provided a check on arbitrary executive authority. It is also no coincidence that Parliament became supreme in Britain around the same time that the judiciary cemented its independence as a separate branch of the state. If judges are merely agents of the Crown,

then they will interpret Parliament's laws to mean whatever the Crown wishes them to mean. Parliamentary sovereignty therefore necessitates an independent judiciary that will interpret and apply its enactments faithfully, and thereby ensure that the people are ruled by law and not by the will of other men.

What we call "legislative supremacy," then, is really a function of the separation of powers, which is itself a function of the rule of law. In other words, the concept of legislative supremacy does not stand in opposition to the rule of law; on the contrary, it is ***derived from the rule of law.***

These various concepts are all entrenched in the Canadian Constitution. The *Constitution Act, 1867* states that Canada shall have a Constitution "similar in principle" to that of the United Kingdom, and this would undoubtedly include the principles of legislative supremacy, judicial independence and the separation of powers (and the rule of law generally). The *Constitution Act, 1867* separates the executive, legislative and judicial branches of governments and sections 91 and 92 expressly provide that Parliament and the provincial legislatures shall have the "exclusive" right to make laws (see Stratas J.A.'s decision in *Canada (Citizenship and Immigration) v. Ishaq,* [2016] 1 FCR 686, 2015 FCA 151 (CanLII), at para 26). The preamble to the *Constitution Act, 1982* (and the *Charter*) further affirms the "supremacy" of the rule of law. Section 52 of the *Constitution Act, 1982* states that the Constitution is the supreme law of Canada, and Part V of that Act establishes that the Constitution may only be amended by the legislative branch.

Professor Sirota takes issue with the Supreme Court's contention that Canada was transformed in 1982 from a system of "legislative supremacy" to one of "constitutional supremacy," noting that the Canadian constitutional system has always been one of "constitutional supremacy" and that the *Charter* simply imposed additional constraints upon legislatures. I generally agree with him; the *Charter* brought a change of degree not of kind. But in my view, our system has also been and remains one of *legislative* supremacy. The Constitution is the supreme law of the land and supersedes ordinary legislative majorities; but the Constitution can only be amended through legislative consensus (in most cases requiring a super-majority). The legislature thus remains supreme in that it is the source of all positive law including the Constitution and its amendments.

The Standard of Review

Once we accept this basic interplay of constitutional principles, the issue of the standard of review in administrative law becomes clearer. The concepts of "legislative supremacy" and "rule of law" are not in conflict and need not be balanced. Both concepts point toward a standard of correctness, at least where questions of pure law are concerned.

The administrative tribunal or decision-maker only exists because a statute says it does, and it derives its powers entirely from that statute. Legislative supremacy requires the tribunal to apply the law as written. Where the tribunal exceeds its legislative jurisdiction or otherwise misinterprets its "home statute," it is, in essence, doing something other than what the legislature said it could do and is thereby undermining the supremacy of the legislature. To restore legislative supremacy, the court must step in to correct this mistake. In doing so, the court is also giving effect to the "rule of law" by serving as the final arbiter of what the law is.

Some commentators have argued that a reviewing court should defer on matters of law where the tribunal has expertise in the area. This strikes me as a difficult and perhaps inherently subjective standard to apply, since expertise will vary not only between tribunals, but, more importantly, between tribunal members.

There is, I suppose, nothing wrong with acknowledging a decision maker's expertise in considering the correct interpretation, especially in "hard cases" (indeed, appellate courts are known to acknowledge the expertise of certain trial judges). But this nominal level of "deference" should not be confused or conflated with the more robust concept of deference that requires the court to accept the view of the tribunal absent an unreasonable finding. The former can perhaps be justified on pragmatic grounds; the latter offends the rule of law and legislative supremacy. As the late Justice Scalia explained in his article, "Judicial Deference to Administrative Interpretations of Law" "deference" to the tribunal on matters of law does not necessarily mean **"anything more than considering those views with attentiveness and profound respect, before we reject them"** (see p.515).

Things naturally become more complicated when issues of fact or mixed fact and law enter the picture. Pure issues of fact justify a level of deference to the tribunal. In creating the tribunal, the legislature has expressed its will that the tribunal be granted a fact-finding role. At the same time, the separation of powers does not necessarily require courts to make findings of fact, and unlike matters of law that typically point to a single correct interpretation, findings of fact tend to be more discretionary in nature, and often require the trier of fact to weigh conflicting evidence. As such, a court's deference to the tribunal's findings of fact will not ordinarily offend the rule of law principle. On the other hand, where a tribunal's findings of fact are palpably wrong or unreasonable, the result will be, in effect, a misapplication of the law, and thus of the legislature's enactment.

For example, under the *Workplace Safety and Insurance Act ("WSIA")*, a worker will not be entitled to sue a "Schedule 1" employer if he or she is injured in the "course of employment". Much ink has been spilled on what the phrase "course of employment" means in law. The tribunal's jurisprudence on the issue has been somewhat inconsistent and unpredictable precisely because there is no uniform "correct" standard that has come from an appellate court (this doctrinal inconsistency is another problem with a "reasonableness" standard on questions of law). But even if an appellate court established the correct test or framework to be applied and followed in all future tribunal cases, individual decision makers could still make grossly unreasonable findings of fact to tip the result in one direction or another (for example, finding that the employer was supervising the worker's activity – and thus the worker was acting in the course of his employment – when there is no evidence of supervision). Administrative tribunals should be granted discretion to make findings of fact, and the purpose of judicial review should not be to conduct a hearing *de novo*. But by the same token, a tribunal should not be permitted to accomplish indirectly what it cannot do directly. If a tribunal makes findings of fact that are not supported by the evidence and these unreasonable findings change or colour the result, then the tribunal has effectively made its own law, and, in so doing, has failed to execute the will of the legislature. The principle of legislative supremacy therefore not only permits but *requires* the courts to review and overturn these unreasonable findings of fact.

With respect to questions of mixed fact and law, in my experience the "legal" and "factual" elements are usually extricable (see *Canadian National Railway Company v. Emerson Milling Inc.* at paras. 21 – 28). When one is dealing with a vague or value-laden term such as "reasonable" or "public interest," this becomes more difficult. Generally speaking, a court should approach the problem as one of traditional statutory interpretation. Where the tribunal has misinterpreted or misapplied a provision in the statute, the courts should not shy away from getting it right. But where the term does not lend itself to one definitive meaning or is heavily dependent on the factual matrix, the court should afford the tribunal some deference (and it is perhaps in these situations that the expertise of the tribunal or a consensus of tribunal decisions on the matter becomes more relevant from a practical standpoint; though I leave the issue of whether the standard of review should remain one of correctness or reasonableness to future commentators).

Regardless of the standard of review, the court should never lose sight of its role as the guardian of the rule of law and, indeed, of legislative supremacy.

Privative Clauses and the Constitution

The section above presupposes that the legislature has not said anything in the tribunal's enabling statute about the standard of review. In some cases the legislature will mandate a correctness standard on matters of law, and this naturally buttresses the alliance between legislative supremacy and the rule of law. But, often legislatures will include privative clauses that purport to limit if not outright eliminate judicial review (see for example s.123(4) of the *WSIA*: *"An action or decision of the Appeals Tribunal under this Act is final and is not open to question or review in a court"*). Surely, in the case of a strong privative clause, the argument goes, legislative supremacy comes into direct conflict with the rule of law and the two must be balanced (usually in favour of greater deference).

Here, however, we must recall that legislative supremacy does not mean that *any* act of the legislature is supreme, but rather that the legislative branch is supreme in a fundamental sense in that it possesses the exclusive and supreme authority to make law. This subtle distinction is what differentiates the Canadian and United Kingdom Constitutions, which are similar in principle, but not the same in all detail. In the UK, Parliament can amend the unwritten Constitution through a simple majority, and is therefore supreme in all of its enactments; in Canada, however, the legislatures are constrained by the written Constitution – a Constitution which, as discussed above, is itself a legislative enactment and can only be amended by way of substantial legislative consensus.

Where a simple majority of the legislature enacts a law that purports to oust judicial review even on questions of law, that legislature has acted unconstitutionally. It has attempted to circumvent the separation of powers embedded in the Constitution by transforming an administrative tribunal into a section 96 court. This naturally undermines the rule of law principle, but it is also at odds with legislative supremacy. The "super-majority" of the legislative branch has, in effect, said that a simple majority of one or more legislatures shall not be permitted to do certain things. Thus, the conflict is not between legislative supremacy and the rule of law, but rather between two conceptions of legislative supremacy – one in which a super-majority has the power to bind future simple majorities, and one in which it does not. Canada opted for the former model in 1867.

There is a tendency is the jurisprudence to treat a privative clause as a "factor" to be weighed in assessing the proper standard of review. Respectfully, this is a misguided approach that respects neither the rule of law nor legislative supremacy. Either a privative clause is constitutionally valid, in which case the rule of law demands that the courts give it full effect, or it is unconstitutional, in which case it should typically be struck down. If the clause is capable of being read down to mean something that would pass constitutional muster, then it is appropriate to do so, but in the case of the *WSIA* privative clause cited above, I do not see how a court could interpret it to mean anything other than what it clearly says.

Conclusion

This article is not meant to serve as a formula for all future administrative law decisions. My limited intention here has been to return to first principles so that we may better understand the framework within which we are operating. The many questions facing administrative lawyers are undoubtedly complex, but I am hopeful that these questions can be answered more easily with a firmer appreciation of the relevant constitutional principles and how they interrelate. If we are finally to achieve doctrinal stability and consistency in administrative law, then we must first recognize that the rule of law and legislative supremacy are two sides of the same coin, and that deference to the legislature means deference to its enactments, not to the administrative body it has created to perform certain specified tasks.

Tagged with: ADMINISTRATIVE LAW | ADMINISTRATIVE TRIBUNALS | CONSTITUTION ACT 1867 | CONSTITUTION ACT 1982 | CORRECTNESS STANDARD | DEFERENCE | DUNSMUIR | JUDICIAL INDEPENDENCE | JUDICIAL REVIEW | JUSTICE STRATAS | LEGISLATIVE SUPREMACY | REASONABLENESS STANDARD | RULE OF LAW | S.96 | S.96 COURTS | SEPARATION OF POWERS | STANDARD OF REVIEW

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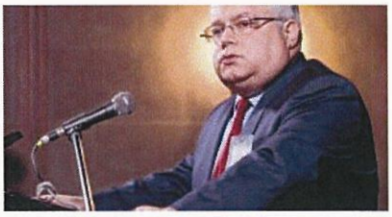

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This is **Exhibit "E"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires May 19, 2020.

ADVOCATES FOR THE RULE OF LAW

Not Just A Pillowfight: How the SCC Has Muddied the Standard of Review

Posted by: Mark Mancini in Commentary March 21, 2017
Comments Offon Not Just A Pillowfight: How the SCC Has Muddied the Standard of Review

Recently, Justice David Stratas of the Federal Court of Appeal released an extremely helpful summary of almost every aspect of administrative law in Canada. Administrative law students, practitioners, and academics would be well-served to carefully read the document. But Justice Stratas' piece is far from merely descriptive—in it, he provides a number of recommendations for a return to sound and principled doctrine in administrative law. His recommendations are welcome on the thorny issue of determining the

appropriate standard of review. He is providing leadership in administrative law where the Supreme Court has provided nothing but confusion.

In this short piece, I will first review Justice Stratas' contribution on the issue of standard of review in light of the Court's holding in *Dunsmuir*. Then, I will demonstrate (using Justice Stratas' critiques) that the Court got it wrong in its recent decision in *Edmonton East*, and goes some way toward overturning *Dunsmuir*. Finally, I will attempt to outline a path forward on the issue of standard of review, again relying on Justice Stratas's apt suggestions.

The overall point: statutes mean something. Courts on judicial review should interpret the constating statute to determine the legislature's intent. It should not ignore clear legislative signals by sacrificing those signals at the altar of idealized "expertise," which may not be demonstrated on the facts of a case. The effect of *Edmonton East* does so. It should not be followed.

JUSTICE STRATAS AND *DUNSMUIR*

Before turning to the standard of review, it is important to set out the context of Justice Stratas's project. In the preamble, Justice Stratas reiterates the point he made in a previous article:

> *Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan. Roughly forty years ago, the Supreme Court told us to categorize decisions as judicial, quasi-judicial, or administrative. Then, largely comprised of different members, the Court told us to follow a "pragmatic and functional" test. Then, with further changes in its composition, it added another category of review, reasonableness, to joint patent unreasonableness and correctness. Then, with more turnover of judges, it told us to follow the principles and methodology in Dunsmuir. Now it appears that we may be on the brink of another revision: as we shall see, the Supreme Court-mysteriously—is often not deciding cases in accordance with the principles in Dunsmuir and other cases decided under it.*

In light of this laughable-if-not-true situation, Justice Stratas decries the lack of academic and judicial engagement with the fundamental tenets of administrative law doctrine. In his view, the lack of doctrinal analysis means that the legitimate expectations of litigants are thrown to the winds and that the law changes based on the rolling, political tide of Supreme Court appointments. As an aid in the search for doctrine, he presents his annotated bible of administrative law.

One of the areas where he provides his most engaging criticism is in the determination of the appropriate standard of review. He indicates that the *Dunsmuir* approach to that issue may be under significant stress, particularly because of the Supreme Court's recent puzzling ruling in *Edmonton East*. As a refresher, *Dunsmuir* held that certain presumptions will point to the applicable standard of review; the level of deference afforded to statutory administrative decision-makers. Specifically, the deferential review of reasonableness will follow where an administrative decision-maker interprets its own home statute. This introduction of presumptions was designed to improve upon the highly flexible and unpredictable "pragmatic and functional approach" which only consisted of a list of contextual factors. *Dunsmuir* also

offered certain narrow categories of correctness review— constitutional questions and *true* questions of jurisdiction. It should be noted that the Court has, slowly but surely, narrowed both of these categories into nothingness (see *Doré*, where the Court decided that the constitutional determinations of administrative decision-makers are entitled to deference).

Categories alone would be insufficient to account for the varied nature of administrative decision-makers. The overall goal of judicial review is to discern legislative intent: see *CUPE* at para 149. What that requires is a review of the actual statute which vests the decision-maker with powers. As Justice Stratas notes in his piece, administrative decision-makers come in all shapes and sizes. What is required is a contextual approach, which focuses on the expertise of the administrative decision-maker *and* the statute in which it operates, in order to discern legislative intent. As Justice Stratas convincingly argues, administrative decision-makers are not monolithic; a categorical approach would be fine if they were (70). But that is not reality. And so, *Dunsmuir* concluded that the analysis "must be contextual" (para 64).

As part of the contextual approach, *Dunsmuir* and its progeny insist that the presumptive categorization can be rebutted by a consideration of other factors; where those factors point to a differing legislative intent, that intent should be dispositive. Obviously, clear legislative language is such a factor and can rebut the presumption of expertise. So, where a statute provides that an administrative decision is reviewable "as if it were a judgment of the Federal Court," the Federal Court of Appeal is entitled to review that decision on a correctness standard, even if the decision-maker was originally interpreting its home statute: see *Tervita* at para 36. The Supreme Court has also relied on broader instances of legislative language, such as concurrent jurisdiction on questions of law, to apply a correctness standard: see *Rogers*. As Justice Stratas notes, this is consistent with the "hierarchy of law," which provides that statutes are determinative of the standard of review, subject only to successful constitutional attack (11). Where a statute says correctness, the standard of review should be correctness. Seems simple enough.

HOW THE SUPREME COURT GOT IT WRONG IN *EDMONTON EAST*

In *Edmonton East*, Justice Stratas correctly notes that the Court complicates matters, and turns *Dunsmuir*'s rebuttable home statute presumption into an irrebuttable assumption of expertise (68). The case concerned whether a municipal Assessment Review Board could increase the value of a property assessment where a taxpayer had actually applied for a decrease. The Board determined that an increase in the assessment was justified. For a majority of five, Justice Karakatsanis decided that the appropriate standard of review was reasonableness. She noted that the presumption of home statute interpretation applied; and because the legislature intended to vest this particular Board with powers because of its expertise, that intent should be respected (see paras 22 and 33). In particular, Justice Karakatsanis disregarded the fact that the Board had a statutory right of appeal. She distinguished this right of appeal from that in *Tervita* by holding that the provision was not "unusually worded." (para 34). More importantly, Justice Karakatsanis tossed cold water on *Dunsmuir*'s contextual approach, noting that such an approach could lead to endless and expensive litigation (para 35). This is troubling. Distinguishing significant precedent such as *Dunsmuir* and *Tervita* on such narrow grounds risks doing violence to predictability in administrative law, proving Justice Stratas' core thesis. What's more, while the Court soothingly tells us that it is not revisiting *Dunsmuir* (para 20), it does the opposite by effectively making a normally rebuttable presumption irrebuttable. This is not an honest way of dealing with precedent.

The minority, penned by Justices Brown and Côté, had the better view. They found that the statutory right of appeal was dispositive, meaning that the Board's decision was subject to correctness review. The minority persuasively reasoned that "...an administrative decision maker is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional" (para 83). Clearly, the minority took more seriously the legislative language, à la Justice Stratas.

It is true that, in the Court's pragmatic and functional case law, statutory rights of appeal were not dispositive (see *Pezim* and *Southam* on this point), and *Dunsmuir* largely confirmed that idea. Those cases concerned particularly expert tribunals, (the British Columbia Securities Commission and the Competition Tribunal, the latter of which is composed primarily of judges). Arguably, deference arose squarely in those cases because of the niche expertise of both tribunals, and the largely regulatory flavour of their jurisdiction. But this specified expertise cannot be imputed to all sorts of administrative decision-makers, and so the precedential value of *Pezim* and *Southam* is limited. Post-*Dunsmuir*, the Court has routinely looked to the *Dunsmuir* contextual factors (including rights of appeal) to determine whether a presumption of expertise is rebutted: again, see *Tervita*, *Rogers*, and *McLean*. The point is that the presumption of expertise should be rebuttable with clear legislative intent in the form of statutory language. In some cases, a statutory right of appeal could do the trick. To the extent *Edmonton East* fortifies the presumption, as Justice Stratas argues, it is unlikely to be followed (71).

THE WAY FORWARD: FORGET THE NAME GAME

It should be said that some leading commentators have heartily criticized the majority's reasons along these lines: see Sirota and Daly (Sirota aptly calls *Edmonton East* "post-truth jurisprudence"). Sirota raises the prospect of simply ridding ourselves of deference; on questions of law, correctness should apply. This suggestion has the benefit of clarity. But barring constitutional objection, there still might be good practical reasons to defer to proven, demonstrated expertise on questions of law—*where the constating statute says so.* For his part, Justice Stratas notes that a leading cause of endless litigation is not a contextual approach, which correctly accounts for the variability of administrative decision-makers, but rather "doctrinal and conceptual inconsistency and uncertainty." As he correctly argues, "Contextual approaches—fact-based approaches guided by loose factors—actually settle the law very well" (70). Deference can work, so long as it arises on the interpretation of the statute. It doesn't work if a court assumes its existence in every case.

It seems to me that Justice Stratas' criticism of the Court's approach (which is particularly apt because, as Daly notes, the Court had undergone a shift in personnel since its last decision on this issue) puts our task into stark relief. What is required is an honest approach from the Supreme Court, not a wink-wink, nudge-nudge methodology which throws increasing-doubt on *Dunsmuir*.

Unfortunately, there is little reason to believe that we will get such an honest assessment from the Supreme Court. After all, Justice Abella (who often writes opinions on the subject of administrative law) recently referred the standard of review debate as a mere "pillowfight." Justice Abella has also led the way on the erroneous "assumption" of expertise theory (see, again, *Doré*). If we take Justice Stratas at his word, Justice Abella's summary dismissal of the importance of the standard of review debate is downright disturbing. It is important that we honestly assess this issue because it involves an appraisal of the

relationship between the courts and the state; in a constitutional democracy, that relationship is fundamental (28).

Justice Stratas' way out of the mess is an extension of the Federal Court of Appeal's standard of review methodology. He argues that the dichotomy on which *Dunsmuir* is based (between reasonableness and correctness) is bunk. Instead, our concern should be whether the decision falls within a range of acceptable outcomes. Sometimes, this will mean that a decision will admit of only one correct (reasonable) answer. But, in Justice Stratas' view, we must move away from rigid categories of review. This is not dissimilar to the approach advocated for by Justice Abella in *Wilson*. There, at para 33, Justice Abella reasons in *obiter* that one standard which provides for the mandate of only one reasonable outcome would safeguard the rule of law values undergirding judicial review.

I must admit that I am partial to the status quo. I like to call a spade a spade. Correctness means the tribunal's answer must be correct. That seems clear to me. The effect of the "only one reasonable answer" framework is the same. So why not just call it what it is? A mushy standard might make it easier for courts to grant deference when only one correct answer is warranted or vice-versa.

Regardless, this whole "number of standards debate" seems to miss the point if we will only insist on one correct answer in some circumstances. We should be less concerned with labels. What matters are the circumstances under which courts will be less deferential ie) when will only one answer be "reasonable?" This is what strictly separates Justice Abella from Justice Stratas. Justice Abella in *Wilson* provides that only one reasonable answer will be acceptable in "rare" circumstances (para 35). Justice Stratas indicates, in the spirit of this article, that legislative words matter and that there are many contextual factors which might provide that a presumption of deferential review (or reasonableness, whatever we want to call it), is rebutted, and a narrower margin must be accepted: for example, "statutory recipes that must be followed," statutory purposes, settled case law, discretionary decisions, and importantly, clear statutory language. On this last front, Justice Stratas predicts that going-forward, a "full right of appeal from an administrative decision-maker will mean *Housen* review, not *Dunsmuir* review" (71). In other words, what is currently known as correctness review (or in the alternative approach, the "only reasonable answer") will apply on a statutory right of appeal. This is the right approach—it takes legislative words seriously. Justice Abella, on the other hand, seems much less willing to ever find that correctness review would apply. Such an approach simply ignores legislative words.

With these thoughts in mind, what the Court should do is affirm the basic soundness of *Dunsmuir's* contextual factors (as Justice Stratas suggests). They provide sound guideposts as to when the presumption of deference can be rebutted. Narrowing those factors should not accompany a putative move to one standard of review. At the end of the day, the name we give to the standard of review does not matter.

Justice Stratas' compilation of administrative law doctrine is useful from the perspective of knowing what the law actually is. But it also presents a challenge to those of us interested in administrative law: urge the Supreme Court to take a principled approach to administrative law which is clear and honest and which takes legislative words seriously. Justice Stratas should be celebrated for his contribution to this herculean-intellectual effort.

Tagged with: ADMINISTRATIVE LAW | CORRECTNESS STANDARD | DEFERENCE | DUNSMUIR | EDMONTON EAST | JUDICIAL REVIEW | JUSTICE ABELLA | JUSTICE STRATAS | LEGISLATIVE SUPREMACY | REASONABLENESS | REASONABLENESS STANDARD | RULE OF LAW | STANDARD OF REVIEW

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This is **Exhibit "F"** referred to in the Affidavit of **JUSTIN W. ANISMAN** sworn before me this 28th day of August, 2018

A Commissioner for taking Affidavits

Jacob Eli Klugsberg, a Commissioner, etc.,
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Former Quebec premier, Maurice Duplessis, speaking during the 1952 provincial electoral campaign. Duplessis's refusal to renew Frank Roncarelli's liquor license because he was a Jehovah's Witness is the quintessential example of an administrative actor violating the rule of law by acting outside his prescribed authority.

Wilson v. AECL: A Missed Opportunity to Protect the Rule of Law in Administrative Law

Posted by: Gerard Kennedy in Articles September 1, 2016 1 Comment

This summer saw a sharply divided Supreme Court of Canada on many points. The case of *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 illustrated this perhaps better than any other, with the Court issuing four separate opinions. Many issues are raised in the case, from whether certain non-unionized federally regulated employees can be dismissed without cause to the number of standards of review appropriate in administrative law. But what stands out most as a concern for the rule of law is the condoning of an administrative decision-maker's ability to make inconsistent decisions, potentially indefinitely. With respect, the dissent of Justices Côté and Brown (which Justice Moldaver joined) better appreciated the importance of judicial review and the rule of law.

Statutory Regime

By way of background, the case considered whether a federally regulated employee could be terminated "without cause". Under the *Canada Labour Code*, when an employee believes she is "unjustly dismissed", she may submit a complaint that can be adjudicated by a federally-appointed arbitrator. The arbitrator's decision may be reviewed by the Federal Court at a later date. Since the 1970s, the vast majority of labour adjudicators have taken the position that a non-unionized federally regulated employee cannot be terminated "without cause" (the "Adams Approach"). But a notable minority (the percentage of which was disputed by the various judges on the Supreme Court) have taken the position that such an employee may be dismissed without cause, so long as reasonable notice (or pay in lieu of notice) is given to the employee. This minority view (the "Wakeling Approach") is a reflection of longstanding common law principles of employment law.

In this case, the adjudicator followed the Adams Approach, though that decision was overturned by the Federal Court and Federal Court of Appeal.

Deference in Administrative Law

The rule of law mandates that everyone who has been affected by a decision of a government actor has the right to seek judicial review of that decision in Court. This ensures that the government actor actually had the authority to make their decision. To cite the quintessential example of this principle, Maurice Duplessis had no right to refuse to renew Frank Roncarelli's liquor license because he was a Jehovah's Witness. Mr. Roncarelli thus had Mr. Duplessis's decision overturned. The need to uphold the rule of law means that the right to judicial review is guaranteed even if a statute purports to immunize an administrative decision from judicial review.

Most actions of administrative decision-makers are made pursuant to authority granted to them by democratically enacted statutes and take place within a broader context of government actors making policy decisions. As such, the administrative decision-makers' decisions are presumptively entitled to deference. At times, many reasonable options are available to an administrative decision-maker. At times,

few or perhaps only one decision is reasonable. This all depends on the legal context in which the decision-maker is acting, and the types of factors that must be considered when they are coming to a decision.

But there are exceptions to giving the decision-maker any deference at all — in these cases, courts review the decision on a "correctness" standard. This can occur if there is a dispute about whether the decision-maker had jurisdiction to make the decision in the first place. Historically, the constitutionality of administrative decision-makers' decisions is also reviewed by a court on a "correctness" standard. (Though that is doubtful after the decision in *Doré v. Barreau du Québec*; the Supreme Court of Canada will likely revisit this issue when the Trinity Western saga ends up there — apologies for the digression.) And in rare cases, judicial review takes place on a "correctness" standard because the statute specifies it should (as seen in the case of *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3).

At the heart of judicial review — both whether there should be judicial review and the standard applied to the process of reviewing — is a concern for the rule of law. What should happen, therefore, when a body of administrative decision-makers — in this case, labour adjudicators — come to conflicting interpretations of the same statute and are unable to resolve it?

A Supreme Court Divided

Justice Abella (writing for a majority of the Court on this point) held that reasonableness remained the standard of review. In her view, less than 2% of the cases took the Wakeling Approach, and this did not warrant departing from the presumption that administrative decision-makers are entitled to deference. In any event, she found that the Adams Approach was the only reasonable interpretation of the relevant provisions of the *Canada Labour Code*.

With respect, Justice Abella's short analysis is, at best, a missed opportunity to clarify when correctness review is necessary to vindicate the rule of law in the face of administrative decision-makers coming to inconsistent interpretations of their home statute. Justices Côté and Brown (with Justice Moldaver concurring) felt that the percentage of cases following the Adams Approach was much less than what Justice Abella implied as many of the cases she suggested followed the Adams Approach did not need to decide whether to follow the Adams Approach or the Wakeling Approach.

In any event, the dissent accurately observed that the case "expose[d] a serious concern for the rule of law posed by presumptively deferential review of a decision-maker's interpretation of its home statute." Justices Côté and Brown's decision at paragraphs 79-88 was particularly acute as they noted:

- deference in these circumstances could result in differing interpretations of the same statutory provision, thereby resulting in rights and responsibilities being "dependent on the identity of the decision-maker, not the law";
- these disagreements could last forever, and, in this case, this disagreement lasted for over twenty years;
- As a result, there is not "one law for all", even though such universal application is a necessary component of the rule of law;
- Individuals, businesses, and government entities are unable to plan their affairs, as different decision-makers may hold that the same statutory provision establishes different rights and/obligations (this

happened to the Respondent in this case). This jeopardizes the principles of certainty and predictability;and

- the rationale for deference disappears in the face of persistent disagreements: "It makes little sense to defer to the interpretation of one decision-maker when it is clear that other similarly situated decision-makers — whose decisions are equally entitled to deference — have reached a different result."

Justices Côté and Brown went on to hold that the Wakeling Approach was correct. They thus would have upheld the Federal Court of Appeal's decision.

Conclusion

It may be true that, ***on the facts of this case***, there was enough clarity about the law to render the Wakeling Approach unreasonable. Perhaps stronger arguments can be made that Justice Abella's interpretation of the *Labour Code* is not only reasonable but correct. The appropriateness of Adjudicator Wakeling (as he then was) departing from the Adams Approach in 1994 is also highly questionable. And Justice Abella deserves praise for recognizing in lengthy *obiter dicta* that administrative law continues to be in need of clarification. But her decision is problematic on the need for clarity amongst administrative decision-makers. One's legal rights and obligations being dependent on which adjudicator one comes before is simply incompatible with the rule of law.

Courts must respect legislatures' considered decisions to give power to administrative decision-makers. But that respect cannot trump the purpose of judicial review, which is the need to vindicate the rule of law. It is rare to see a judicial opinion that "gets" this like Justices Côté and Brown do at paragraphs 79-88 of *Wilson v. AECL*.

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S.C.C. File No. 37748

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N :

MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

ALEXANDER VAVILOV

Respondent

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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[Style of cause continued inside cover.]

[Style of cause continued.]

S.C.C. File No. 37896

B E T W E E N :

BELL CANADA and BELL MEDIA INC.

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

S.C.C. File No. 37897

B E T W E E N :

NATIONAL FOOTBALL LEAGUE, NFL INTERNATIONAL LLC, and NFL PRODUCTIONS LLC

Appellants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Intervener (Rule 22(2)(c)(iii))

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TABLE OF CONTENTS

PART I—OVERVIEW

1. This is a motion by Advocates for the Rule of Law (**"ARL"**) for leave to intervene on the question of standard of review and "the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*… and subsequent cases".[1] Specifically, ARL proposes to make submissions on ***the role of statutory interpretation*** in navigating what this Court described in *Dunsmuir* as the "underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers".[2]

2. ARL is a non-profit, non-partisan, Canadian think tank.[3] Its members seek to foster dialogue and promote education on a broad range of rule of law issues, including the standard of review in administrative law, by encouraging scholarship and informed commentary and by intervening constructively in appellate proceedings.[4] The Court's potential reconsideration of the *Dunsmuir* framework in these appeals will engage the rule of law — and thus ARL's mandate and the interests of its members — directly, and potentially with profound consequences.

3. Accordingly, if granted leave to intervene, ARL will make two interrelated submissions:

(a) ***Legislative supremacy and the rule of law are not in tension.*** The standard of review framework has come to be applied in a manner that assumes a tension, or at least a clear distinction, between legislative supremacy and the rule of law. ARL will argue that this reflects a false dichotomy; in all but exceptional circumstances, the rule of law and legislative supremacy are mutually reinforcing. Indeed, the rule of law requires courts to determine ***whether and to what extent the legislature intended courts to defer*** to administrative decision makers on questions of law. By adopting a nearly irrefutable presumption of deference for home statute interpretation in the name of legislative supremacy, courts have too often neglected ***both*** legislative supremacy and the rule of law.

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[1] *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (S.C.C.); *Bell Canada, et al. v. Attorney General of Canada*, 2018 CanLII 40808 (S.C.C.); *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (S.C.C.).
[2] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27.
[3] Affidavit of Justin W. Anisman, sworn August 28, 2018 [the "**Anisman Affidavit**"], ¶2, Motion Record ("**MR**"), Tab 2, p. 11.
[4] See Anisman Affidavit, ¶4, 6, MR, Tab 2, pp. 12 and 13.

(b) ***The rule of law requires reviewing courts to interpret legislation.*** Judges cannot assess the legality of administrative decisions without first understanding the scope of the authority that the legislature intended to delegate. This obliges courts to engage in at least limited interpretation of the decision maker's "home" statute. ARL will propose a principled approach to integrating statutory interpretation into the curial oversight of administrative action — one that not only clarifies the limits of deference, but that also aligns legislative supremacy with the rule of law by ensuring that public authorities do not overreach their lawful powers.

4. These submissions are different from those advanced by the parties. In the *Vavilov* appeal, the appellant argues for a streamlined and simplified approach to the standard of review, the principal justifications for which are practical; by adopting a virtually unlimited rule in favour of deference, eliminating contextual analysis, and rejecting margins of appreciation, the *Vavilov* appellant suggests that the Court can streamline the analysis and thus advance the goals of access to justice and judicial economy. In the *Bell Canada* and *National Football League* appeals, by contrast, the appellants' submissions chiefly build on the *Dunsmuir* framework, particularly with respect to identifying true questions of jurisdiction, rebutting the presumption of deference for home statutes, and applying the reasonableness standard to questions of law.

5. ARL's submissions will focus instead on the broader, principled, rule of law considerations that ARL says must inform the ***entire*** standard of review analysis — and thus the implications that these appeals will have on judicial review for all types of decision makers in Canada. In this way, ARL's contribution will be useful to the Court in developing a common normative vocabulary that can be applied to all three appeals.

6. ARL therefore requests that it be granted leave to intervene in all three appeals, with permission to present a total of five minutes of oral argument and to file a single 10 page factum.

PART II—STATEMENT OF QUESTION IN ISSUE

7. The issue is whether ARL satisfies the test for an intervention order pursuant to Rule 59 of the *Supreme Court Rules*.[5] ARL must establish that it: (i) has an interest in the appeals; and (ii) will make submissions that are useful and different from those of the other parties.[6]

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[5] *Rules of the Supreme Court of Canada*, SOR/2002-156 ["***Rules***"], R. 59.

PART III—STATEMENT OF ARGUMENT

1. ARL Has an Interest in the Appeals

8. This Court has a wide jurisdiction in deciding whether to allow a person to intervene.[7] As it has emphasized, ***any*** interest is sufficient, subject to the Court's discretion.[8] ARL clearly has an interest, as an organization devoted to promoting the rule of law and in particular the separation of powers, in the limits that this Court may place on judicial oversight of the executive when the latter purports to act with authority delegated to it by the legislature. ARL is thus a public interest organization with a "direct stake" in the appeal through both its members and its mandate.[9]

9. ARL's mandate to promote the rule of law is premised on a number of core principles. These include but are not limited to the supremacy of the Constitution, the separation of powers, and Parliamentary sovereignty. ARL consequently seeks to ensure that administrative decision makers are subordinate to the law, that the general public is governed by fixed rules known in advance, and that the courts apply the law equally, impartially, and predictably.[10] In advancing these objects in other contexts, ARL has previously participated as an intervener before this Court.[11] The question of whether — and the degree to which — courts should defer to administrative decision makers on questions of law is precisely the sort of issue that ARL exists to address.

10. The standard of review engages a number of issues fundamental to the legal order, including the proper allocation of authority between branches of government and the judicial role in ensuring that state power is exercised in accordance with the law. ARL and its members have contributed, and continue to contribute, to scholarly and judicial conversations about these and other rule of law issues that arise in administrative law.[12] In particular, ARL and its members have articulated principled objections to jurisprudential moves towards presumptive deference and away from statutory interpretation as a means of discerning and effectuating legislative

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[6] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339; *R. v. Finta*, [1993] 1 S.C.R. 1138 (Chambers), at 1142; *Rules*, R. 57.
[7] *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, at 667; *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339.
[8] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 339.
[9] *R. v. Finta*, [1993] 1 S.C.R. 1138 (Chambers), at 1142.
[10] See Anisman Affidavit, ¶2, MR, Tab 2, pp. 11-12.
[11] Anisman Affidavit, ¶6, MR, Tab 2, p. 13.
[12] See Anisman Affidavit, ¶4, MR, Tab 2, pp. 12-13.

intent.[13] As set out below, ARL proposes to advance its interests by participating in these appeals and seeking a return to "the polar star of legislative intent" in the standard of review analysis.[14]

11. Finally, ARL's interest in these appeals is that of a public interest organization, rather than of a private litigant. As this Court has emphasized, ***"[p]ublic interest organizations are, as they should be, frequently granted intervener status.*** The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts".[15]

2. ARL Will Make Useful Submissions from a Different Perspective

12. A potential intervener must make useful submissions from a different perspective. As Sopinka J. explained:

> ***This criteria is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter***. As stated by Brian Crane: …"an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue".[16]

13. ARL meets this standard. It will "present the court with submissions which are useful and different from the perspective of a non−party who has a special interest or particular expertise in the subject matter of the appeal".[17] It will draw on its experience as an exponent of rule of law principles to propose a normative framework, grounded in the search for legislative intent that will advance ***both*** legislative supremacy and the rule of law in judicial review of administrative action. These are important submissions that will provide the Court with a distinct contribution on the appeal.[18]

A. The Rule of Law Requires Respect for Legislative Supremacy

14. *Dunsmuir* teaches:

> Judicial review seeks to address ***an underlying tension between the rule of law and the foundational democratic principle***, which finds an expression in the

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[13] See Anisman Affidavit, ¶4, 12, MR, Tab 2, pp. 12-13 and 14.
[14] *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶149, per Binnie J.
[15] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, at 256, *emphasis added.*
[16] *Reference re Workers' Compensation Act 1983 (Nfld.)*, [1989] 2 S.C.R. 335 (Chambers), at 340, *emphasis added.*
[17] *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (Chambers), at 463.
[18] *R. v. Finta*, [1993] 1 SCR 1138 (Chambers) at 1143–44.

> initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.[19]

15. In recent years, the Court has made similar pronouncements about the relationship between legislative supremacy ("the foundational democratic principle") and the rule of law. In some cases, it has suggested that the two are opposing forces, which the standard of review analysis seeks to reconcile.[20] In other cases, it has merely framed them as distinct.[21] This dichotomy, however presented, has come to justify a strong presumption in favour of deference to an administrative decision maker's interpretation of its "home" statute; as the majority put it in *Edmonton East*, the "presumption of deference on judicial review respects ***the principle of legislative supremacy*** and ***the choice made to delegate decision making to a tribunal***, rather than the courts".[22] The rule of law has been left to do little work, other than to justify the existence of judicial review itself.[23]

16. ARL will argue that these developments do not reflect the true relationship between legislative supremacy and the rule of law. Unless the legislature has sought to ***insulate*** a decision maker from curial oversight — either altogether, as with a privative clause,[24] or with respect to a legal question on which the rule of law requires uniformity, as with one of the "correctness categories" identified in *Dunsmuir*[25] — the rule of law ***requires*** respect for legislative supremacy

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[19] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶27, *emphasis added.*
[20] See, e.g., *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, ¶72, per Côté and Rowe JJ.; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶30, per Abella J.; see also P. Daly, "Struggling towards Coherency in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness" (2016), 62 McGill L.J. at 527, 533-34, MR, Tab 6.
[21] See, e.g., *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, ¶140, per Rowe J.
[22] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶22; see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, ¶178, per Karakatsanis, Gascon and Rowe JJ.
[23] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶21; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, ¶28-29, per Abella J.
[24] See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at 236-37; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶74, per Rothstein J.
[25] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶58-61; see *Ready v. Saskatoon Regional Health Authority*, 2017 SKCA 20, at ¶63, 108-19, and 116; *Loewen v. Manitoba Teachers' Society*, 2015

in the context of judicial review of administrative action.[26] To uphold the rule of law, courts must ensure that a statutory delegate has acted within its mandate — as the legislature, in its supremacy, has defined it.[27] As the Court recognized in *Dunsmuir*:

> A decision maker may not exercise authority not specifically assigned to him or her. ***By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.*** Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, ***the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter***. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers….
>
> In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining ***the applicable standard of review is accomplished by establishing legislative intent***.[28]

17. There is thus an inescapable nexus between legislative supremacy ("what did the legislature intend?") and the rule of law ("is the administrative decision at issue consistent with the legislature's intent?") in undertaking judicial review. This is equally so in determining whether and how much deference is due; both legislative supremacy and the rule of law require the court to inquire as to "whether the legislature intended the delegated decision-maker or the reviewing court to answer a particular question".[29] Yet, the jurisprudence has come instead to ***presume*** an inconsistency between legislative supremacy and the rule of law — that legislative supremacy pushes for deference, while the rule of law pulls the other way — when in fact this is

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MBCA 13, 380 D.L.R. (4th) 654, at ¶46, 48 and 69; see also P. Daly, "The Scope and Meaning of Reasonableness Review" (2014), 52 Alta. L. Rev. 799, at 809, MR, Tab 7.

[26] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶65, per Brown J., dissenting.

[27] See *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, ¶39; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.

[28] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶29 and 30, *emphasis added*; see also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, ¶15; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶31-33; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, ¶149; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at ¶26; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at ¶18, per Sopinka J.

[29] P. Daly, "Deference on Questions of Law" (2011), 74 Modern L. Rev 694, at 706, MR, Tab 5; see also *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶98, per Cromwell J.

so only rarely; in most cases, the rule of law demands that courts respect legislative supremacy by identifying and adhering to legislative intent, whether in favour of deference or against it.[30]

18. ARL will argue that, by assuming a dichotomy between legislative supremacy and the rule of law, the standard of review analysis has too often neglected both. Instead, courts have embraced a principle of ***administrative*** supremacy, reflected most notably in the "presumption of reasonableness" that applies to a decision maker's interpretation of "its own statute or statutes closely connected to its function, with which it [has] particular familiarity".[31] The act of delegation has come to be seen as such a strong signal in favour of deference that, as the *Vavilov* appellant proposes, only an explicit legislative instruction to the contrary can overcome it.[32] Otherwise, absent such "unusual statutory language",[33] it is the decision maker and not the court that will have the "last word" on what the law requires.[34] Courts have thus abandoned any search for actual legislative intent and have elevated the presumption into an inflexible legal rule.

19. ARL will argue that the mere act of exercising delegated authority, without more, cannot warrant deference on all questions of law. Such a presumption undermines legislative supremacy — and thus also the rule of law — in the name of upholding it.[35] Instead, courts must consider the actual expression of the legislature's intentions, both in creating and delineating the scope of a decision maker's authority, to determine the appropriate level of deference.

B. The Rule of Law Requires Reviewing Courts To Interpret Legislation

20. Since the rule of law requires respect for legislative supremacy, it also requires statutory interpretation to be an integral part of the standard of review analysis. As the Court noted in *Edmonton East*, deference is inappropriate "if the context indicates the legislature intended the

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[30] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶77-79, per Rothstein J.
[31] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶54; *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶¶32 and 34.
[32] Appellant's Factum (*Vavilov*), ¶47; see also *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.
[33] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.
[34] *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶94, per Cromwell J.
[35] See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶87, per Rothstein J; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶85, per Côte and Brown JJ.

standard of review to be correctness".[36] To determine the standard of review, then, the reviewing court must look to the decision maker's "home" statute to determine whether, and to what extent, the legislature intended the decision maker to be the arbiter of the question in issue.

21. This is why, in *Pushpanathan*, the Court framed the former "pragmatic and functional approach" as a means of statutory interpretation. As Justice Bastarache put it, "[t]he ***central inquiry*** in determining the standard of review … is ***the legislative intent of the statute creating the tribunal*** whose decision is being reviewed".[37] In *Dunsmuir*, Justices Bastarache and LeBel maintained this line; they affirmed that "legislative supremacy is assured because ***determining the applicable standard of review is accomplished by establishing legislative intent***".[38]

22. Yet, as the Court has since simplified the standard of review analysis, legislative intent has been submerged. When, in *Alliance Pipeline*, the Court embraced a highly categorical approach to selecting the standard of review,[39] Fish J.'s majority opinion made only passing reference to legislative intent, and not in describing the purpose of the standard of review analysis.[40] When the Court embraced the "presumption of reasonableness" in *Alberta Teachers*,[41] Rothstein J.'s reasons for the majority did not refer to legislative intent in the context of determining the standard of review at all.

23. Finally, in *Edmonton East*, the Court not only failed to present the standard of review analysis as a means to discern and give effect to legislative intent, but it also held that a statutory appeal provision — an obvious indicator of legislative intent — was insufficient to justify even a contextual analysis of the legislative scheme.[42] But the *Edmonton East* majority was unable to jettison legislative intent altogether. It acknowledged that "the legislature can specify the standard of review" and confirmed that "clear legislative guidance on the standard of review" must bind a

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[36] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32.
[37] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, ¶26, *emphasis added*; see also *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, ¶21.
[38] *Dunsmuir v. New Brunswick*, 2008 SCC 9, ¶30, *emphasis added*; see also *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶33; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, ¶93, per Rothstein J.
[39] *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶25-26.
[40] See *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, ¶31.
[41] *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61.
[42] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶34.

reviewing court.[43] The implication of *Edmonton East*, then, is that courts are only required to give effect to the intent of the legislature in determining whether and how much deference is due when the legislature has expressed its intent in a specific way — i.e., by expressly prescribing a particular standard of review. Such "legislative guidance on the standard of review" will only be sufficiently "clear", for the *Edmonton East* majority's purposes, if it requires almost no statutory interpretation whatsoever.

24. ARL will argue that the Court's efforts to limit the role of statutory interpretation in the standard of review inquiry have been counterproductive. Rather than simplify matters, the Court has provided conflicting guidance; it has rejected lower courts' efforts to use the tools of statutory interpretation to discern and apply legislative intent, while continuing to pay lip service to legislative intent as a feature of the standard of review inquiry.[44] The result has been more tussling over the standard of review, not less.[45]

25. The way forward, ARL will submit, is for the Court to endorse the established tools of statutory interpretation, i.e., the text and context of the decision maker's enabling statute,[46] as a universal means of determining whether the question at issue on judicial review is one on which the legislature intended curial deference,[47] and, if so, how much deference the legislature intended for courts to accord.[48] ARL will canvass legislative signals that may indicate that more or less deference is warranted in respect of a particular statutory provision, and explain how such signals may be discerned and deployed. A wide grant of administrative authority will indicate that more deference is due, while a narrow grant will point to less. A specific requirement that a decision maker possess particular expertise will suggest greater deference, while statutory language that does not lend itself to multiple reasonable interpretations will suggest less, or none

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[43] *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶35.
[44] See *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶32, 35; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, ¶46.
[45] See D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at 32-35, MR, Tab 4.
[46] See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, ¶21.
[47] See *Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, ¶99, per Cromwell J.
[48] See *Wilson v. Atomic Energy of Canada* Ltd. 2016 SCC 29, ¶35, per Abella J.; see also M. Mancini, "Statutory Interpretation from the Stratasphere" (July 19, 2018), *Advocates for the Rule of Law Blog*, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/>.

at all. Statutory rights of appeal, meanwhile, will indicate that the legislature intended for a court, not the decision maker, to have the final say on the issue on which the appeal is taken.[49]

26. Finally, ARL will explain how these indicators of legislative intent interact with the "presumption of reasonableness". It is fundamentally a tool of statutory interpretation, after all; it reflects the assumption that, because the legislature created an administrative decision maker, ***the legislature intended*** that the decision maker's decisions be accorded deference by a reviewing court. So construed, the "presumption" can operate comfortably, predictably, and consistently within a standard of review analysis that is rooted in the search for legislative intent.

27. By returning to these first principles, the Court can ensure that judicial review advances legislative supremacy and the rule of law in tandem. If granted leave to intervene in these appeals, ARL will assist the Court in doing so.

PART IV—SUBMISSIONS CONCERNING COSTS

28. ARL requests that no costs be awarded either for or against it.

PART V—ORDER SOUGHT

29. ARL seeks an order granting it leave to intervene in these appeals, on the following terms: (i) ARL be permitted to file a single factum not exceeding 10 pages; (ii) ARL be permitted to make a single set of oral submissions of not more than five minutes at the hearings of the appeals; and (iii) no costs be awarded against ARL on this motion or on the appeals themselves.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2018

Adam Goldenberg / Robyn Gifford / Asher Honickman

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[49] See, e.g., *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, ¶124, per Brown J.; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, ¶36; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, ¶90-09; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, ¶42-44; *Walchuk v. Canada (Justice)*, 2015 FCA 85, ¶33, 34 and 56; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, ¶53.

PART VI—TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Memorandum of Argument
Alberta Teachers' Association v. Alberta (Information & Privacy Commissioner), 2011 SCC 61	17, 18, 22, 25
Bell Canada, et al. v. Attorney General of Canada, 2018 CanLII 40808 (S.C.C.)	1
Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42	25
C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29	10, 16
Canada (Attorney General) v. Almon Equipment Limited, 2010 FCA 193	25
Canada (Attorney General) v. Boogaard, 2015 FCA 150	25
Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2018 SCC 31	15
Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 SCR 339	16, 17, 19, 21
Canada (Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56	25
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Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220	16
Dr. Q. v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 , [2003] 1 S.C.R. 226.	16, 21
Dunsmuir v. New Brunswick, 2008 SCC 9	1, 14, 16, 18, 21
Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd., 2016 SCC 47	15, 16, 18, 19, 20, 23, 24
Groia v. Law Society of Upper Canada, 2018 SCC 27	15
Loewen v. Manitoba Teachers' Society, 2015 MBCA 13, 380 D.L.R. (4th) 654	16
McLean v. British Columbia (Securities Commission), 2013 SCC 67	21, 25
Minister of Citizenship and Immigration v. Alexander Vavilov, 2018 CanLII 40807 (S.C.C.)	1
Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16	24

Authority	Paragraph(s) Referenced in Memorandum of Argument
National Football League, et al. v. Attorney General of Canada, 2018 CanLII 40806 (S.C.C.)	1
Norcan Ltd. v. Lebrock, [1969] S.C.R. 665	8
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Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982	16, 21
R. v. Finta, [1993] 1 S.C.R. 1138	7, 8, 13
R. v. Morgentaler, [1993] 1 S.C.R. 462	13
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Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 35	16
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Tervita Corp. v. Canada (Commissioner of Competition), 2015 SCC 3	16
Walchuk v. Canada (Justice), 2015 FCA 85	25
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Secondary Sources	
D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 27, at 32-35	24
M. Mancini, "Statutory Interpretation from the Stratasphere" (July 19, 2018), *Advocates for the Rule of Law Blog*, online: <http://www.ruleoflaw.ca/statutory-interpretation-from-the-stratasphere/>	25
P. Daly, "Deference on Questions of Law" (2011), 74 Modern L. Rev 694, at 706	17

Authority	Paragraph(s) Referenced in Memorandum of Argument
P. Daly, “Struggling towards Coherency in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness” (2016), 62 McGill L.J. 527, 533-34	15
P. Daly, “The Scope and Meaning of Reasonableness Review” (2014), 52 Alta. L. Rev. 799, at 809	16

PART VIII—LEGISLATION RELIED UPON

Legislation	**Paragraph(s) Referenced in Memorandum of Argument**
*Rules of the Supreme Court of Canad*a, S.O.R./2002-15, R. 57, 59	7

The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency

*The Honourable Justice David Stratas**

The standard of judicial review rests at the very core of administrative law. For decades now, analytical approaches to judicial review have been constructed and demolished, and new ones offered in their place. In recent years, judges—including those on the Supreme Court of Canada—have openly expressed dissatisfaction with the current state of judicial review in administrative law and its application in Canada's highest court. Today, we have an incoherent and inconsistent jurisprudence that remains at risk of further change. Doctrinal clarity is the solution, but to achieve it, certain fundamental questions must be settled. Does the standard of review matter? What fundamental concepts animate judicial review? What is "reasonableness" and how should reasonableness review be conducted? Answering these questions and others, the author aims to close the never-ending construction site and allow for responsible renovations based on settled doctrine using accepted pathways of legal reasoning.

* Justice, Federal Court of Appeal, LLB (Queen's University), BCL (Oxon), LLD (*Honoris Causa*, Queen's University). I acknowledge the assistance of Paul Warchuk, law clerk. The views expressed in this paper are mine alone.

Introduction

Doctrinal incoherence and inconsistency plague the Canadian law of judicial review. This must stop.

Professor Emeritus David Mullan—the dean of the Canadian administrative law academy—has identified at least fifteen fundamental, unresolved problems in the law of judicial review.[1] For some time now, these have festered and remain unaddressed. Other academic commentators highlight the growing pile of unanswered questions and doctrinal confusion.[2] One rising member of the

1. David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action: The Top Fifteen!" (2013) 42:1&2 Adv Q 1.

2. See e.g. Peter A Gall, QC, "Problems with a Faith-Based Approach to Judicial Review" (2014) 66 SCLR (2d) 183 at 223–31; Matthew Lewans, "Deference and Reasonableness Since

review arising from Supreme Court of Canada jurisprudence. Then I offer some constructive suggestions for consideration.

I. Fundamental Questions

A. Does the Standard of Review Matter?

In the seminal case of *Dunsmuir*, the Supreme Court of Canada instructs us to determine the standard of review in every case, deciding between correctness review and reasonableness review.[12] This is consistent with the importance of the standard of review, explained above.

But today, the Supreme Court of Canada itself does not always settle the standard of review.[13] In fact, in some cases, it does not discuss the standard of review at all.[14] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* and *Febles v Canada (Citizenship and Immigration)*, both administrative law cases, were so devoid of administrative law discussion the Court did not even caption them as administrative law cases.[15] In those cases, the Court itself interpreted the law and applied it to the facts in the face of legislative regimes that vested the decision-making power with administrators, not the courts.

So does standard of review still matter? As explained above, it should.

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of Canada recognizes that it does not have a monopoly on developing the law, and that it is best developed by a dialogue among the Supreme Court of Canada, appellate courts and trial courts in the decided cases, with the assistance of the academy and counsel. See *R v Henry*, 2005 SCC 76 at para 56, [2005] 3 SCR 609; *Canada v Craig*, 2012 SCC 43 at para 21, [2012] 2 SCR 489; *R v Mentuck*, 2001 SCC 76 at para 17, [2001] 3 SCR 442. In the end, the Supreme Court of Canada's word is final and judges in lower courts must comply regardless of their personal views. See *Canada v Craig*, *supra*.

12. *Supra* note 9.

13. See e.g. *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010*].

14. See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431, aff'g 2012 FCA 324, 357 DLR (4th) 343 [*Febles*, SCC] (a case where there was substantial disagreement and discussion in the Federal Court of Appeal on the standard of review).

15. See *ibid.*

B. What Authorities Are Relevant to the Standard of Review Analysis?

Dunsmuir grandparents certain pre-*Dunsmuir* cases on the standard of review.[16] But recently, the Supreme Court of Canada suddenly overturned this aspect of *Dunsmuir* and decreed a different rule: pre-*Dunsmuir* cases on the standard of review survive only if consistent with "recent developments in the common law principles of judicial review" (i.e., *Dunsmuir* and post-*Dunsmuir* cases).[17] In effect, this ends grandparenting.

Why suddenly the new rule? It is a mystery left unexplained, a rule decreed with no stated doctrinal justification or explanation.

Kanthasamy v Canada (Citizenship and Immigration) adds to the confusion by both dismissing the helpfulness of pre-*Dunsmuir* cases and then relying exclusively on pre-*Dunsmuir* cases to determine the standard of review, all in the same paragraph.[18]

Assuming standard of review is still relevant—and it should be—what cases are relevant to it?

C. When Must We Go Beyond the Dunsmuir *Presumptions and Conduct a Full Standard of Review Analysis?*

Dunsmuir gave us certain presumptive rules to assist us in determining the standard of review. It also gave us factors to consider when determining whether the presumptive rules are rebutted.

But *Dunsmuir* never explained when we should resort to the factors rather than the presumptions. Early on, by and large, the Supreme Court of Canada used the presumptions and ignored the factors. Now, suddenly, the Supreme Court of Canada has gone to the factors without instructing us when we should do this.[19] So which should we follow: presumptions or factors?

D. Does the Principle of Legislative Supremacy Matter?

Absent constitutional or *vires* objection, legislation binds everyone. No one is above the law.

16. *Supra* note 9 at para 62.

17. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48, [2013] 2 SCR 559 [*Agraira*].

18. *Supra* note 5 at para 44.

19. See *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3.

This principle, enshrined in the English *Bill of Rights, 1668*,[20] was won at the cost of long struggle, bloodshed and revolution centuries ago. It has been part of the Canadian Constitution since our foundation.[21] And like any other constitutional principle, no court can ignore it.[22] It forms part of the core of our doctrine of judicial review.[23]

Legislation sometimes signals that the standard of review should be correctness—no deference at all to the administrative decision maker. In some cases, the Supreme Court of Canada reads these signals and properly carries out the legislator's intent, reviewing the decision for correctness.[24]

But sometimes not. In cases where the legislator has enacted a full, untrammelled right of appeal from the administrative decision maker to the reviewing court, the legislator is instructing the reviewing court to interfere as it would in any appeal. This means, for example, that errors by the administrative decision maker in interpreting legislation would be legal errors that the reviewing court can correct. Yet, that is not the case. Even where the legislator has granted a full right of appeal, there is a presumption that administrative interpretations of legislation are subject to deferential reasonableness review.[25]

Sometimes legislative provisions suggest that the standard of review in a case should be reasonableness—deference to the administrative decision maker. For example, privative clauses—clauses forbidding or greatly restricting judicial review—should matter.[26] But there are many Supreme Court of Canada cases where the presence of a privative clause in legislation goes unmentioned.

More questions about legislative supremacy arise in the area of the jurisdiction of administrative decision makers to consider "values" inherent in

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20. (UK), 1 Will & Mar c 2, s 2.

21. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (opening words of sections 91 and 92 and the preamble stating that we have a Constitution "similar in Principle" to that of the United Kingdom).

22. See generally *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 63, 161 DLR (4th) 385 [*Secession Reference*]; *JP Morgan Asset Management (Canada) Inc v MNR*, 2013 FCA 250 at para 35, [2014] 2 FCR 557.

23. See *Dunsmuir*, *supra* note 9 at paras 27–30.

24. See e.g. *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283.

25. See *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339.

26. See *Dunsmuir*, *supra* note 9 at para 52. See also the appropriate attention paid to the privative clause in the decision *New Brunswick (Board of Management) v Dunsmuir*, 2006 NBCA 27 at paras 10–17, 297 NBR (2d) 151, Robertson JA.

the *Canadian Charter of Rights and Freedoms*.[27] The Supreme Court of Canada has held that administrative decision makers can import "*Charter* values" into any matter before them, even where the legislative provision setting out the decision maker's powers is limited and even where that provision seems inconsistent with the proffered *Charter* values.[28] This conflicts with earlier holdings based on the constitutional principle of legislative supremacy to the effect that the *Charter* does not add to or affect the subject-matter jurisdiction of subordinate bodies.[29]

Doré v Barreau du Québec also conflicts with the seminal *Charter* case of *Slaight Communications Inc v Davidson*.[30] In *Slaight*, the Supreme Court of Canada said, in accordance with the principle of legislative supremacy, that in such cases the administrative decision maker must follow the legislative provision, and a litigant must constitutionally challenge the provision directly, either by asking the administrative decision maker to disregard the provision or, where permissible, through court proceedings for a declaration of invalidity.[31]

In *Doré*, the Supreme Court of Canada, disparaging *Slaight*, suggests there is a growing departure from "Diceyan principles", in other words, the principle that legislation governs the scope of authority of administrative decision makers.[32] This is contrary to the constitutional principle of legislative supremacy, is unsupported by authority and conflicts with many authorities, including the foundational case of *Dunsmuir*.[33]

The recent case of *Kanthasamy* is seen by some as another example where the principle of legislative supremacy has been flouted.[34] Under section 74 of the *Immigration and Refugee Protection Act*,[35] appeals can only be taken to the Federal Court of Appeal if the Federal Court states a certified question on a question of law. This is a legislative signal that the Federal Court of Appeal should, in

27. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

28. See *Doré v Barreau du Québec*, 2012 SCC 12 at para 24, [2012] 1 SCR 395 [*Doré*].

29. See *R v 974649 Ontario Inc*, 2001 SCC 81 at paras 22–23, [2001] 3 SCR 575; *Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 63–65, 24 OR (3d) 358.

30. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

31. See the combined effect of *ibid* and *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504.

32. *Supra* note 28 at para 29.

33. See *Dunsmuir*, *supra* note 9 at para 29.

34. *Supra* note 5.

35. SC 2001, c 27, s 74.

return, answer the question correctly. But in *Kanthasamy*, the majority of the Supreme Court of Canada disagreed, holding that the standard of review was reasonableness. It read section 74 down to a gate-keeping function, though it did not disagree with the fact that the Federal Court of Appeal must answer the certified question correctly. The majority did this without looking at the text, context and purpose of the provision, as it normally does. And in relegating section 74 to a gate-keeping function, it contradicted some of its own relevant authority to the contrary, without explanation.[36]

As a result of *Kanthasamy*, in some cases the federal courts will now have to answer the certified question of law correctly, find that the administrative decision maker applied an incorrect view of the law but then go on to consider whether its decision should still stand (i.e., be regarded as a legally acceptable decision, despite the answer to the certified question). Surely Parliament did not have in mind this result when it enacted section 74.

E. How Do We Conduct Reasonableness Review? What Does "Reasonableness" Mean?

The main effect of *Dunsmuir* has been to subject most administrative decisions to reasonableness review rather than correctness review. Thus, the proper methodology of reasonableness review and the meaning of reasonableness is very much the core of judicial review and must be doctrinally settled. Unfortunately, the core is a mash of inconsistency and incoherence.

- I -

The reasonableness standard of review means entirely different things in different cases, but we know not why.[37]

Often the Supreme Court of Canada purports to engage in reasonableness review—a "deferential standard"[38]—but acts non-deferentially, imposing its own view of the facts or the law or both over the view of the administrative decision maker, without explanation.[39]

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36. See Daly, "Can This Be Correct?", *supra* note 3.

37. See generally Lewans, *supra* note 2 at 82–92; Daly, "Reasonableness Review," *supra* note 2 at 814–27.

38. See *Dunsmuir*, *supra* note 9 at para 47.

39. See e.g. *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*,

There are sometimes exceptions where the Supreme Court of Canada defers to administrative decision making quite consistently with the words of *Dunsmuir*.[40] Why deference prevails in these cases but not in so many others has never been explained.

Kanthasamy[41] adds to the confusion by doing several inconsistent things at once: The Court begins by interpreting afresh the legislative provision that the administrative decision maker interpreted as if the standard of review were correctness, then it considers the standard of review and decides that the standard of review is reasonableness, and finally it parses the administrative decision maker's reasons for error on an exacting basis as if the standard of review were correctness.

What does the reasonableness standard mean and how should it be applied? After reading the decisions of the Supreme Court of Canada, many are baffled.

- II -

Reasonableness review requires us to start with the administrative decision and inquire "into the qualities that make [it] reasonable".[42] This makes sense: The legislator has chosen the administrative decision maker to decide the merits and so reviewing courts should respect that choice by beginning with a careful examination of what the administrator decided.

2012 SCC 37, [2012] 2 SCR 345; *Quebec (Commission des normes du travail) v Asphalte Desjardins Inc*, 2014 SCC 51, [2014] 2 SCR 514; *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp*, 2014 SCC 45, [2014] 2 SCR 323; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, [2014] 2 SCR 197; *John Doe v Ontario (Finance)*, 2014 SCC 36, [2014] 2 SCR 3; *Dionne v Commission scolaire des Patriotes*, 2014 SCC 33, [2014] 1 SCR 765; *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] SCR 546; *B010*, *supra* note 13; *Kanthasamy*, *supra* note 5; and many, many more. Many commentators describe these cases and others like them as "disguised correctness cases".

40. See e.g. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 [*Nor-Man*]; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Canada (Attorney General) v Kane*, 2012 SCC 64, [2012] 3 SCR 398; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] 3 SCR 405; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364; *Agraira*, *supra* note 17; and many, many more.

41. *Supra* note 5.

42. *Dunsmuir*, *supra* note 9 at para 47.

Deference on Questions of Law

Paul Daly*

Contrary to the modern English position, it may be appropriate for reviewing courts to accord deference to interpretations of law rendered by administrators. There is no basis for the current strong presumption against according such deference. It is possible that the legislature intended to delegate the resolution of many questions of law to administrators, rather than to courts. Moreover, relative to administrators, courts may lack institutional competence to resolve questions of law. Courts must always police the boundaries of interpretation, in order to keep administrators in check and safeguard the rule of law, but the general presumption that the resolution of questions of law is a matter for courts should be jettisoned.

INTRODUCTION

One Vale Close, Maida Vale, is, we know from the law reports, 'a good-sized house with three floors'.[1] It is also enviably located. Maida Vale tube station, on the Bakerloo line, is a five-minute walk away. Also within walking distance is Lord's Cricket Ground and, at a stretch, Regent's Park. The house is located on a private road, protected from the A5 by an electronic barrier. It is, in short, a very valuable property. In 1976, it was occupied by Sidney Pearlman, who held a lease that had been granted by the property's owners, the Keepers of Harrow School. Recent legislative changes had permitted tenants such as Mr Pearlman to purchase the underlying freeholds on 'very favourable terms'.[2] Understandably, Mr Pearlman was interested in exercising this statutory right. Unfortunately for him, the right was only exercisable in respect of properties with a rateable value of less than £1,500; the rateable value of One Vale Close was £1,597. Anticipating possible unfairness in the operation of these provisions, Parliament had further provided for a diminution in the rateable value where certain improvements had been made by the tenant. Precisely, any 'improvement made by the execution of works amounting to structural alteration, extension or addition'.[3] Mr Pearlman claimed that he had made such an improvement. Out of his own pocket, he had funded the replacement of the house's old heating system with a modern, gas-fired central heating system. Holes had to be drilled in the walls and pipes laid to connect the new gas boiler to the radiators and towel rails located throughout the house. It was a 'substantial affair' and increased the rateable value of the house.[4]

Unsurprisingly, given the value of the property, Mr Pearlman's landlords did not agree to the reduction in the rateable value which would have allowed him to purchase the house, so the matter went to the county court. The court found

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1 *Pearlman* v *Keepers of Harrow School* [1979] QB 56, 65, *per* Lord Denning MR (*Pearlman*).
2 *ibid.*
3 Housing Act 1974, sched 8, para 1(2).
4 *Pearlman* n 1 above, 72, *per* Geoffrey Lane LJ.

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'whether in the whole circumstances the words of [a] statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved'.[71] However, in his discussion, he spoke neither to the difficulty of drawing a line between law and fact nor the difficulty of deciding on which side of that line to place a particular decision. He commented that the distinction between law and fact 'causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question', but gave no guidance as to the meaning of the elusive phrase, 'the nature of the question'.[72]

The malleable nature of the distinction between law and fact has prompted significant judicial scepticism in Canada: '[t]here is no clear line to be drawn between questions of law and questions of fact, and, in any event, many determinations involve questions of mixed law and fact'.[73] As Iacobucci J recognised in *Canada (Director of Investigation and Research)* v *Southam*, 'the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versâ*.[74] If the lines between law, fact and application cannot be drawn clearly and confidently, it is doubtful that the distinction between 'law' and 'fact' is an appropriate means of allocating decision-making authority between delegated decision-makers and reviewing courts. It is more likely that 'law' and 'fact' are used as labels, affixed *ex post facto* to conclusions reached on other grounds: 'distinctions between law, fact, and policy, acquire a concrete content only in relation to specific instances of administrative action, where they reflect the court's conclusions about the most appropriate division of responsibility between court and agency in all the circumstances'.[75] If this is the case, then it would presumably be preferable that the court should explain what justifies the allocation of decision-making authority: an inquiry into legislative intent would, it is submitted, be much more appropriate.

In short, a decision to follow either the narrow or broad approach carries with it the risk of frustrating legislative intent, with the additional problem in the case of the broad approach that it requires concrete reliance on an abstract concept ('law') and a difficult and malleable distinction between law and fact. A holistic approach is preferable:

> Congress may, within limits, expressly authorise an agency to define 'employees' within the labour acts through the exercise of substantive rule-making power. Precisely the same kind of law-making delegation is achieved if, instead, Congress mandates judicial deference on that issue to either an 'interpretive' agency rule or to

71 *Brutus* n 43 above, 861, *per* Lord Reid.

72 n 70 above, 169.

73 *Pushpanathan* v *Canada (Citizenship and Immigration)* [1998] 1 SCR 982, 1010, *per* Bastarache J. See also *Baker* v *Canada (Immigration and Citizenship)* [1999] 2 SCR 817, 853–854.

74 [1997] 1 SCR 748, 767. Cf the new, categorical approach that the Supreme Court of Canada has endorsed, in *Smith* n 20 above. This approach relies to a significant extent on a distinction between legal and factual questions. For that reason, I think that it is misguided.

75 T. R. S. Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563, 570 See also M. Aronson, 'Unreasonableness and Error of Law' (2001) 24 UNSWLJ 315; G. L. Peiris, 'Jurisdictional Review and Judicial Policy: the Evolving Mosaic' (1987) 103 LQR 66, 94.

> the results of agency adjudication having 'a reasonable basis in law'. In each instance, the crucial judicial question is the scope of the authority delegated to the agency.[76]

An inquiry into whether the legislature intended the delegated decision-maker or the reviewing court to answer a particular question, whether it is one of law, fact or an inhabitant of the grey area, will be more appropriate, with any interpretation then subject to the relevant standard of review.

PRACTICAL JUSTIFICATIONS

The foregoing analysis suggests that the narrow or broad approach has to rely for support on something other than an assumption that there is a 'general law of the land' which reviewing courts ought to enforce. Perhaps practical justifications for the narrow or broad approach can be identified.

Expertise

Ivan Hare's argument that expertise justifies the broad approach begins with a reference to the separation of powers: '[i]t seems an obvious distribution to give to the judicial branch the decision on what the law means in order to serve the principle of separating the functions of law-making (the legislative), and law enforcement (the executive) from legal interpretation . . .'[77] In addition, the High Court is the 'only part of the judicial branch which is sufficiently independent of the legislature and the executive to be able to impose any meaningful check or balance upon them'.[78] Inasmuch as it is based on the separation of powers, Hare's argument is deficient because it does not address why the three functions need to be separated and whether law-making and law-interpreting powers can be vested in bodies other than courts.[79] In reality, Hare's argument relies not on the separation of powers but on the expertise of the High Court: 'this is the area in which the judicial branch can claim a special expertise'.[80] The argument based on expertise was recently echoed by Rothstein J of the Supreme Court of Canada: 'appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision-makers'.[81]

76 H. Monaghan, '*Marbury* and the Administrative State' (1983) 83 Colum LR 1, 26 Internal citation omitted.

77 'The Separation of Powers and Judicial Review for Error of Law' in C. Forsyth and I. Hare (eds), *The Golden Metwand and Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford: Hart, 1998) 113, 131.

78 *ibid*, 132.

79 Indeed, one might ask if a tripartite division between the powers can be maintained, especially in the modern administrative state, where they are so often enmeshed. An example, perhaps extreme, is the Panel on Takeovers and Mergers, which 'combines the functions of legislator, court interpreting the Panel's legislation, consultant, and court investigating and imposing penalties in respect of alleged breaches . . .' R v *Panel on Takeovers and Mergers, ex p Datafin* [1987] QB 815, 841, *per* Sir John Donaldson MR.

80 n 77 above, 131.

81 *Khosa* n 11 above, 394.

It may well be the case, however, that the delegated decision-maker has greater familiarity with the purposes of the statute and its underlying policies and principles than a reviewing court. The best answer to a question of law might come from a delegated decision-maker more familiar than a court with the particular area of law. In her concurring reasons in the *National Corn Growers* case,[82] Wilson J of the Supreme Court of Canada suggested that the forerunner to *Page*,[83] and a similar Canadian case,[84] were evidence of

> a lack of sympathy for the proposition that if administrative tribunals are to function effectively and efficiently, then we must recognise (1) that their decisions are crafted by those with specialised knowledge of the subject-matter before them; and (2) that there is value in limiting the extent to which their decisions may be frustrated through an expansive judicial review.[85]

However, Wilson J noted that Canadian courts came to realise that they were, relative to delegated decision-makers, inexpert in many fields. Moreover – a point of critical importance for present purposes – '[c]ourts have also come to accept that they may not be as well-qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work'.[86] Some complex questions are best resolved by expert decision-makers.

A practical risk is that by permitting courts to follow the narrow or broad approach, deleterious consequences may follow. 'Administrative law is not for sissies',[87] was Scalia J's pithy, extra-judicial means of drawing attention to the difficulties faced by reviewing courts: applying the general principles of judicial review to the output of the modern administrative state requires judges to grapple with abstract principles and with various substantive areas of law. Environmental law, employment law, planning law and immigration law, to name but several, are discrete but huge silos of rules and regulations. To fully comprehend such great volumes of law and the regulatory creatures who inhabit these silos requires concentration of almost Herculean qualities. When the informal components of, say, employment law and the accompanying dynamics of the relationships between employers and employees are added to the mix, the need for delegated decision-makers, better able than courts to comprehend the intermingling of law and custom, becomes more pressing: 'the "correct" interpretation of a term may be directed by the mandate of the [delegated decision-maker] and by the coherent body of jurisprudence it has developed'.[88] Ossification of regulation is

82 *National Corn Growers Association* v *Canada (Import Tribunal)* [1990] 2 SCR 1324.
83 *Anisminic* n 54 above.
84 *Metropolitan Life Insurance* v *International Union of Operating Engineers, Local 796* [1970] SCR 425. See also D. Mullan, 'Judicial Deference to Administrative Decision-making in the Age of the *Charter*' (1986) 50 Sask LR 203, 204–205.
85 *National Corn Growers Association* v *Canada (Import Tribunal)* [1990] 2 SCR 1324, 1335.
86 *ibid*, 1336. See similarly J. M. Evans, 'Developments in Administrative Law: the 1984–1985 Term' (1986) 8 *Sup Ct LR* 1, 27–29.
87 'Judicial Deference to Administrative Interpretations of Law' [1989] Duke LJ 511.
88 *Canada (Att Gen)* v *Mossop* [1993] 1 SCR 554, 599–600, *per* L'Heureux-Dubé J, dissenting. See generally MacLauchlan, n 17 above, 357–359.

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STRUGGLING TOWARDS COHERENCE IN CANADIAN ADMINISTRATIVE LAW? RECENT CASES ON STANDARD OF REVIEW AND REASONABLENESS

*Paul Daly**

Although the Supreme Court of Canada's seminal decision in *Dunsmuir v. New Brunswick* has now been cited more than 10,000 times by Canadian courts and administrative tribunals, many of its key features remain obscure. In this article, the author analyzes recent cases decided under the *Dunsmuir* framework with a view to determining where Canadian courts might usefully go next. The author's argument is that the two important principles said to underlie the *Dunsmuir* framework—the rule of law and democracy—can provide guidance to courts in simplifying and clarifying judicial review of administrative action. In Part I, the author explains how the relationship between *Dunsmuir*'s categorical approach and the contextual approach that it replaced is uncertain and causes significant confusion, and explores the potential utility of the two underlying principles in simplifying the law. The application of the reasonableness standard of review is the focus of Part II, in which the author criticizes the general approach to reasonableness review in Canada, but suggests that the rule of law and democracy may assist in clarifying the law, by setting the boundaries of the "range" of reasonable outcomes and structuring the analytical framework for identifying unreasonable administrative decisions. Finally, the author draws the strands of Parts I and II together by arguing for the adoption of a unified, context-sensitive reasonableness standard, underpinned by the rule of law and democracy, with the aim of providing clarity and simplicity to Canadian administrative law in a manner faithful to the Supreme Court of Canada's decision in *Dunsmuir*.

Bien que la décision de la Cour suprême du Canada dans *Dunsmuir c. Nouveau-Brunswick* ait maintenant été citée plus de 10 000 fois par les cours de justice et les tribunaux administratifs, un nombre important de ses caractéristiques principales demeurent obscures. Dans le présent article, l'auteur analyse les décisions récentes jugées suivant *Dunsmuir* afin de déterminer le parcours que les cours de justice devraient emprunter. L'auteur maintient que les deux principes fondamentaux censés sous-tendre le cadre d'analyse de *Dunsmuir* — la primauté du droit et la démocratie — peuvent fournir des directives aux tribunaux en vue de simplifier et de clarifier le contrôle judiciaire des actes de l'Administration. Dans la partie I, l'auteur explique comment la relation entre l'approche catégorielle de *Dunsmuir* et l'approche contextuelle qui l'a remplacée est incertaine, provoquant ainsi une confusion majeure, et explore l'utilité potentielle des deux principes fondamentaux en vue de simplifier le droit. L'application de la norme de contrôle de la raisonnabilité est au cœur de la partie II, dans laquelle l'auteur critique l'approche générale du contrôle judiciaire de la raisonnabilité au Canada, mais suggère que la primauté du droit et la démocratie pourraient aider à clarifier le droit en définissant les limites des issues raisonnables et en structurant le cadre d'analyse permettant d'identifier les décisions administratives déraisonnables. Enfin, l'auteur resserre le lien entre les parties I et II en soutenant l'adoption d'une norme de raisonnabilité unifiée et contextuelle qui repose sur la primauté du droit et sur la démocratie, et qui confère clarté et simplicité au droit administratif canadien tout en restant fidèle à la décision de la Cour suprême du Canada dans l'arrêt *Dunsmuir*.

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lyze recent cases decided under the *Dunsmuir* framework with a view to determining where Canadian courts might usefully go next.

My focus in Part I will be on the first step in the standard of review analysis: selecting the standard of review. In and subsequent to *Dunsmuir*, the Supreme Court of Canada explained the required categorical analysis. Correctness applies to: constitutional questions; questions of general law "that [are] both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise;"[23] jurisdictional conflicts between two or more specialized tribunals; and "true questions of jurisdiction or *vires*."[24] Meanwhile, the deferential standard of reasonableness "is normally the governing standard" for: the interpretation of an administrative decision-maker's "home" statute or statutes closely related to its function; matters of fact, discretion, or policy; and "inextricably intertwined legal and factual issues."[25]

Lurking on the edges of this new "analytical framework" were the contextual factors that formed part of the discarded pragmatic and functional analysis: statutory language relating to appeals or privative clauses; relative expertise; statutory purpose; and the nature of the question.[26] These contextual factors were retained in *Dunsmuir* and, in *Alliance Pipeline*, served to resolve "[a]ny doubt" as to whether the categorical analysis identified the appropriate standard.[27] Yet, as we will see, the precise relationship between categories and context remains uncertain and continues to cause confusion.

In Part II, I will address the second step—applying the appropriate standard of review—with an emphasis on reasonableness review because its application is much more complex than the substitution of judgment permitted by correctness review. In *Dunsmuir*, Justices Bastarache and LeBel offered an elegant definition of reasonableness as "a deferential standard" that gives administrative decision makers "a margin of appreciation within the range of acceptable and rational solutions" but which nonetheless requires courts to inquire into "the existence of justification,

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J Admin L & Prac 117; Lauren J Wihak, "Wither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014) 27:2 Can J Admin L & Prac 173.

23 *Dunsmuir*, *supra* note 1 at paras 58, 60, citing *Toronto (City of) v CUPE, Local 79*, 2003 SCC 63 at para 62, [2003] 3 SCR 77, 59.

24 *Dunsmuir*, *supra* note 1 at paras 61, 59.

25 *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160 [*Alliance Pipeline*], citing *Dunsmuir*, *supra* note 1 at paras 51–54.

26 *Alliance Pipeline*, *supra* note 25 at para 27. See also Diana Ginn, "New Words for Old Problems: The Dunsmuir Era" (2010) 37:3 Adv Q 317.

27 *Alliance Pipeline*, *supra* note 25 at para 29. See also *Dunsmuir*, *supra* note 1 at para 55.

transparency and intelligibility within the decision-making process" and into "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[28] Turning this definition into concrete guidance has proved difficult, however, and much ink has been spilled on "justification, transparency and intelligibility" and the "range of possible, acceptable outcomes."[29]

For all the confusion, perhaps we are edging toward coherence in standard of review analysis. I will suggest that both in selecting the standard of review and in applying the reasonableness standard, context is reasserting itself. Moreover, context is reasserting itself in a way that has the potential to be consistent with the two principles said to hold the *Dunsmuir* project together: "the rule of law and the foundational democratic principle."[30]

The thesis of this article is that the rule of law and democracy can and should now be used to guide the contextual inquiry required of reviewing courts, a contextual inquiry that would take the form of a flexible but robust standard of reasonableness review. Obviously, much has been said about these two principles as a matter of legal and political theory.[31] Without wishing to sidestep important theoretical issues altogether, for the purposes of this article, I think it is sufficient to say that the understanding of these principles set out in *Dunsmuir* is relatively straightforward. On the one hand, the rule of law requires courts to ensure that administrative decision makers "do not overstep their legal authority."[32] On the other hand, the democratic principle "finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers" and, in order to respect legislative intent, the courts must avoid "undue interference with the discharge of administrative functions" duly delegated to administrative decision makers.[33] The rule of law is firmly associated with legality, or the idea

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28 *Dunsmuir*, *supra* note 1 at para 47.

29 See e.g. Paul Daly, "Unreasonable Interpretations of Law" in Robertson, Gall & Daly, *supra* note 22, 233 at 242–47 [Daly, "Unreasonable Interpretations"]; Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799 [Daly, "Scope and Meaning"]; The Honourable John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27:1 Can J Admin L & Prac 101 at 107–11; Lewans, *supra* note 22 at 82–92.

30 *Dunsmuir*, *supra* note 1 at para 27.

31 See e.g. David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17:1 Rev Const Stud 87 at 105–06 (arguing that the two principles are not in tension at all).

32 *Dunsmuir*, *supra* note 1 at para 28.

33 *Ibid* at para 27.

that reviewing courts have an important oversight role in ensuring that administrative decision makers stay within acceptable boundaries, and the protection of important individual interests.[34] Meanwhile, democracy means primarily that reviewing courts ought to respect the legislative choice to vest decision-making authority in bodies other than courts; that is, administrative law doctrine should aim to protect the administrative autonomy accorded by legislatures.[35]

I will leave it to other work to consider whether these understandings of the principles of the rule of law and democracy are defensible in theoretical terms and whether they give courts or administrative decision makers roles that are not normatively defensible. The apparent loss of faith in—or at least frustration with—the *Dunsmuir* framework suggests that there is great wisdom in Matthew Lewans' comment that *Dunsmuir*'s "enduring value ... lies in its illustration of two persistent problems with judicial review," namely, the perennial attraction of jurisdictional error and correctness review, and the inability to articulate a reasonableness standard that is capable of consistent application in different contexts.[36] In this article, I take up the challenge of responding to those problems with the principles articulated in *Dunsmuir* in hand.

This is not my first contribution to debates about the standard of review in Canadian administrative law. In a pair of essays published in 2012, I strongly attacked the decision in *Dunsmuir* and its subsequent application by the Supreme Court of Canada.[37] My two lines of attack related to the replacement of context by categories and were neatly summarized in "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review."[38] First, "the categorical approach is unworkable and ... a reviewing court cannot in fact apply the categorical approach without reference to the much-maligned four [contextual] factors (or some variant thereon)."[39] Second, "the single standard of reasonableness is similarly impracticа[ble]" without reference to some version of the four contextual factors.[40] While I continue to believe that context is an inescapable feature of the modern Canadian law of judicial review, I hope to build on my

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34 See e.g. *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at paras 70–78, 161 DLR (4th) 385.

35 See *Dunsmuir*, *supra* note 1 at para 27.

36 Lewans, *supra* note 22 at 97–98.

37 See Daly, "Unfortunate Triumph" *supra* note 17; Daly, "*Dunsmuir*'s Flaws Exposed", *supra* note 22.

38 See Daly, "*Dunsmuir*'s Flaws Exposed", *supra* note 22.

39 *Ibid* at 488.

40 *Ibid*.

2012 essays by proposing a means by which the contextual analysis can be cabined. Rather than casting courts adrift on a sea of context, I describe the instruments that they can use to navigate the vast seas of administrative law in a more effective and predictable manner.[41]

Finally, I should acknowledge that, elsewhere, I have developed my own preferred standard of review framework;[42] one which differs from the unified reasonableness standard I advocate below. There are, as Justice Abella observed in *Wilson*, "many models" for standard of review analysis.[43] Accordingly, this article should be understood as an attempt to articulate a rational next step for Canadian standard of review jurisprudence, not an elaborate scheme developed from first principles.

I. Step One: Selecting the Standard of Review

Several recent Supreme Court of Canada cases merit attention for their treatment of the question of how to select the standard of review. They signal two things: an obvious openness from the country's apex court to the application of correctness review and a return to context. These cases are the subject of Part I-A. Meanwhile, in Part I-B, I identify lower-court cases that employ contextual analysis and explore the implications of the reasoning there employed.

A. Correctness and Context

Tervita Corp v. Canada (Commissioner of Competition)[44] is a long, complex, and important decision on competition law. It also contains a spirited disagreement between Justices Rothstein and Abella on the appropriate standard of review for determinations of law made by the Competition Tribunal.

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41 I have also assailed the Supreme Court of Canada's efforts to apply the reasonableness standard to interpretations of law, arguing that the Court's approach is analytically weak (see Daly, "Unreasonable Interpretations", *supra* note 29 at 247–58). See also Daly, "Scope and Meaning", *supra* note 29 at 819–27. In this article, I build on my earlier work by laying out an analytically robust conception of reasonableness review; one that draws its structure from the rule of law and democratic principles.

42 See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012) at 36–185.

43 *Wilson* SCC, *supra* note 10 at para 19. See also Dean R Knight, "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context" [2016] 1 NZLR 63 (elaborating a model for differentiating between different approaches to judicial review of administrative action).

44 2015 SCC 3, [2015] 1 SCR 161 [*Tervita*].

THE SCOPE AND MEANING OF REASONABLENESS REVIEW

PAUL DALY*

*This article draws attention to the post-*Dunsmuir *framework regarding the standard of review of administrative action and the Supreme Court of Canada's reluctance to engage in grand theorizing about the general principles of judicial review. The article explores the uncertainty surrounding the application of the standard of reasonableness and what factors can or should be taken into consideration during its application. The article identifies four key problems — the scope of the post-*Dunsmuir *framework, the scope of its correctness category, the difficult relationship between the reasons given for a decision and the substantive reasonableness of the decision in question, and the emergence of difficult distinctions bedevilling the application of the reasonableness standard. Through identifying weaknesses in the current administration of reasonableness review, it is hoped that the courts, sooner rather than later, will adopt a unified approach for using the reasonableness standard of review.*

Cet article attire l'attention sur le cadre de travail suite à la cause Dunsmuir *en ce qui concerne la norme de contrôle judiciaire et l'hésitation de la Cour suprême du Canada à élaborer de grandes théories sur les principes généraux du contrôle judiciaire. Cet article examine l'incertitude relative à l'application de la norme du raisonnable et les facteurs qui doivent, ou devraient, entrer en compte lors de cette application. Quatre grands problèmes y sont définis, notamment la portée de la décision de la cause* Dunsmuir, *la portée de la catégorie du bien-fondé, la difficile relation entre les raisons invoquées pour la décision et le caractère raisonnable important de la décision en question, ainsi que l'émergence de distinctions difficiles embrouillant l'application du raisonnable. Il faut espérer qu'en déterminant les faiblesses de l'administration actuelle de la norme du raisonnable dans le contrôle judiciaire, les tribunaux adopteront, dès que possible, une démarche unifiée quant à l'application de la norme du raisonnable pour le contrôle judiciaire.*

TABLE OF CONTENTS

* Associate Dean and Faculty Secretary, Faculty of Law, University of Montreal. A version of this article was presented as the keynote *Year in Review* address to the Law Society of Upper Canada's 6-Minute Administrative Lawyer event in March 2014. Portions were also presented at the Ontario Bar Association's annual *Year in Review* event in October 2013. Many thanks to the organizers, participants, and audience members at those events for allowing me the opportunity to hone the points made. Two anonymous reviewers made insightful comments. Extracts have also appeared on my blog, *Administrative Law Matters*. Thanks are also due to my online interlocutors in the blog's comments section and on Twitter.

I. INTRODUCTION

Questions continue to abound about the standard of review of administrative action in Canada. For something apparently simplified in *Dunsmuir v. New Brunswick*[1] and subsequent cases,[2] it provokes a great many questions.[3]

The key question now, in light of the "triumph" of reasonableness,[4] is the scope and meaning of reasonableness review. To what does the standard of reasonableness apply and, when it does, what does it mean? Unfortunately, we have had little concrete guidance from the Supreme Court of Canada in recent years.[5]

There are four difficult issues, each of which is shrouded in uncertainty. The first is the scope of the post-*Dunsmuir* framework: does it apply to regulations issued by a Minister or a cabinet, and are questions of procedural fairness now covered as some appellate judges have suggested? The second is the scope of the categories to which a standard of correctness applies. The third is the ability of decision-makers to bolster their decisions after judicial review proceedings have been commenced. The fourth is the revival and development of troublesome distinctions — between "law" and "policy," "clear" and "unclear" statutory provisions, and "implied" and "express" components of decisions. The latter are designed to implement a unified reasonableness standard that varies according to a "context"[6] created by an amorphous group of "all relevant factors."[7]

A unifying "meta" theme is the Court's reluctance to engage in grand theorizing about the post-*Dunsmuir* framework. Some of the Court's interventions have had the unfortunate effect of increasing the uncertainty about the scope and meaning of reasonableness review. Without some grand theorizing, it is likely that questions about the standard of review analysis will continue to abound. This article does not offer much in the way of a grand theory.[8] Rather, it attempts to identify the key problems that require some sustained engagement from the Court and other actors in the legal community. It also offers some modest suggestions on how to improve the current state of the law.

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1 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

2 See most notably, *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 [*Alliance Pipeline*], which set out categories of decision to which the standards of correctness and reasonableness apply; and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers'*], which established a presumption of deference when a decision-maker is interpreting its home statute.

3 See generally, David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — the Top Fifteen!" (2013) 42:1 Adv Q 1.

4 The Honourable John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27:1 Can J Admin L & Prac 101.

5 As we shall see, the Court's recent decision in *Canadian National Railway Co v Canada (AG)*, 2014 SCC 40, [2014] 2 SCR 135 [*Canadian National*] represents a welcome step towards greater clarity.

6 *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*].

7 *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 18 [*Catalyst Paper*].

8 See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) [Daly, *Theory of Deference*].

In the instant case, Justice Stratas held that deference ought to be accorded:

> In my view, the case at bar is one where the Board should be given some leeway under reasonableness review. The Board understood the requirements of procedural fairness, citing two of its own decisions that were based on relevant jurisprudence from the Supreme Court of Canada. The Board's task in this case was to apply those standards in a discretionary way to the factually complex matrix before it, a task informed by its appreciation of the dynamics of the case before it and its knowledge of how its procedures should and must work, all in discharge of its responsibility to administer labour relations matters fairly, justly and in an orderly and timely way. It did so under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures when it considers it appropriate....
>
> Maritime Broadcasting does not point to any particular misunderstanding of the Board as to the relevant legal concepts. Rather, it invites us to stand in the shoes of the Board and apply the principles in this case. As I have said, this is inapt.[61]

Undoubtedly, the company had particular procedural rights, in particular to notice and to an opportunity to make submissions. But the Board's determination of the content of these rights was entitled to deference.

Significantly, there are now three categories of case in which Canadian courts have deferred to administrative determinations of procedural fairness questions. On the *scope* of procedural fairness, there is the (relatively) old, unrepudiated authority of *Bibeault v. McCaffrey*.[62] On whether a particular *right* exists, there is Justice Bich's decision in *Au Dragon Forgé*. And now, on the *content* of procedural fairness, there is *Maritime Broadcasting* (as well as the remarks of Justice Evans in *Re Sound*) which, moreover, involves a set of discretionary decisions by the Board rather than the interpretation of a statutory provision (as was the case in *Bibeault* and *Au Dragon Forgé*).

The case for deference on questions of procedural fairness is thus being made ever more loudly. Yet the outcome is not a foregone conclusion; the UK Supreme Court recently rejected deference,[63] and the deferential turn in the Canadian cases is by no means uniform.[64] However, the Court's recent insistence on orthodoxy rings somewhat hollow.[65] Even if it

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61 *Ibid* at paras 63-64 [citation omitted]. Moreover, he criticized Justice Evans' approach in *Re Sound*, *supra* note 11, an approach which would accord "weight" to administrative decision-makers' choice of procedural arrangements. Justice Stratas wrote that describing the giving by courts of weight to administrative decision-makers' procedural determinations is a "*non-sequitur*," "like describing a car as stationary but moving" (at para 60). This recalls an American quarrel. So-called *Skidmore* deference also involves the giving of "weight" to determinations of administrative decision-makers: *Skidmore v Swift & Co*, 323 US 134 (1944) [*Skidmore*]. In a memorable dissent in *United States v Mead Corp*, 533 US 218 (2000), Justice Scalia described *Skidmore* deference as "an empty truism and a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers" (at 250). *Skidmore* nonetheless remains an important part of American administrative law. See e.g. Peter L Strauss, "'Deference' is Too Confusing — Let's Call Them '*Chevron* Space' and '*Skidmore* Weight'" (2012) 112:5 Colum L Rev 1143. I suggest that the desire to recognize "weight" as something distinct from correctness and reasonableness is evidence of the need for three standards of review in Canadian law. See Parts V.D and V.E, below.

62 [1984] 1 SCR 176.

63 *Osborn v The Parole Board* (2013), [2013] UKSC 61, [2014] AC 1115.

64 See e.g. *Rezmuves v Canada (Minister of Citizenship and Immigration)*, 2013 FC 973, [2015] 1 FCR 366.

65 *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79.

could be said that the jurisprudence has "satisfactorily" established correctness as the standard of review of procedural fairness claims, "the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review,"[66] as the appellate jurisprudence has pointed out.

Whether procedural questions fall under the post-*Dunsmuir* framework at all and, if so, what categories they fall into is therefore a live question. And it must be said that the logic underpinning the post-*Dunsmuir* framework strongly suggests that procedural questions too should often be subject to review on a deferential standard.[67]

III. THE SCOPE OF THE CORRECTNESS CATEGORIES

Six years on from *Dunsmuir*, the Court took the opportunity presented by *Canadian National* to define two of the correctness categories: "true" questions of jurisdiction or vires; and questions of general law of central importance to the legal system falling outside the expertise of a particular specialized decision-maker. The significance of this development is best understood after a consideration of *McLean*.[68] This too is a significant case about the scope of the correctness categories, as much for what it does not say as for what it actually says.

M had misconducted herself in the Ontario securities market in the early 2000s. She and the Ontario Securities Commission eventually arrived at a settlement in 2008. M was barred from activities in Ontario. Subsequently, the British Columbia Securities Commission ("the Commission") took action against M under a statutory provision that allows it to impose sanctions on a person who "has agreed with a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, to be subject to sanctions, conditions, restrictions or requirements."[69]

The difficulty raised by M was that the Commission cannot commence proceedings "more than 6 years after the date of the events that give rise to the proceedings."[70] The key question was the meaning of the term "events"; if the term referred to the underlying misconduct, the limitation period had expired before the Commission imposed the sanctions on M, but if the term included the conclusion of the settlement agreement, then the Commission's action was not time-barred. The parties more or less lined up behind these alternative interpretations.

In its analysis, the majority of the Court reaffirmed the "categorical" approach set out in *Dunsmuir*.[71] Here, M argued cogently that the question of the proper interpretation of the limitation period provision was one of general law of central importance to the legal system.

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66 *Agraira*, *supra* note 15 at para 48.

67 See generally, Paul Daly, "Canada's Bi-Polar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 214.

68 *Supra* note 22.

69 *Securities Act*, *supra* note 23, s 161(6)(d).

70 *Ibid*, s 159.

71 As has been observed elsewhere, however, the appeal of these categories is superficial; as in previous decisions, the Court had to do quite a bit of work to find the appropriate category: Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483 [Daly, "*Dunsmuir*'s Flaws Exposed"].

Such provisions appear in securities statutes across the country. And the underlying principles of limitation of actions are common to public and private law regimes.

Yet the Court — as it has almost always done since *Dunsmuir*[72] — applied a standard of reasonableness. Justice Moldaver gave three reasons. First, while limitation periods "are *generally* of central importance to the fair administration of justice, it does not follow that the Commission's interpretation of *this* limitation period must be reviewed for its correctness."[73] Second, the possibility of divergent outcomes across the country did not provide "a basis for correctness review" but was rather an inevitable "function of our Constitution's federalist structure."[74] Third, the decision-maker did have expertise with regard to the interpretation of limitation periods, contrary to the applicant's suggestion that the issue fell outside the specialized knowledge of a securities regulator:

> While such a view may have carried some weight in the past, that is no longer the case. The modern approach to judicial review recognizes that courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work."[75]

Despite the vaunted simplicity of the categorical approach,[76] the Court had to do a great deal of explaining to justify the choice of reasonableness as the standard of review. So much for simplicity.[77] Nonetheless, the Court chastised counsel who make "fashionable" claims for correctness review.[78] Yet given the uncertain scope of the correctness categories — and the advantage of having a second kick at the can if the correctness standard applies — counsel would be doing a disservice to their clients if they were not to make such claims. Notably, *McLean* itself contained no guidance on the scope of the correctness categories: the standard of review was resolved only by reference to external factors and not by means of definition of the categorical approach.

This was of a piece with the treatment of true questions of jurisdiction or vires in *Alberta Teachers'*. There, Justice Rothstein pronounced himself "unable to provide a definition" of such a question,[79] but twice emphasized that true jurisdictional questions are "exceptional"[80] and concluded without further explanation that this was not such an exceptional case. In

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72 *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678 (claim of jurisdictional error); *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 [*Nor-Man Regional Health Authority*] (question of general law); *Alberta Teachers'*, *supra* note 2 (jurisdictional error); *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458 [*Irving Paper* SCC]. A correctness standard was applied to a jurisdictional issue in *Northrop Grumman Overseas Services Corp v Canada (AG)*, 2009 SCC 50, [2009] 3 SCR 309, but only because previous case law had satisfactorily identified the appropriate standard (at para 10).

73 *McLean*, *supra* note 22 at para 28 [emphasis in original].

74 *Ibid* at para 29.

75 *Ibid* at para 31 [citations omitted].

76 For a subtle defence, see Green, *supra* note 13.

77 One is tempted to ask: why not just double down on *Dunsmuir* and apply a standard of reasonableness *all the time*? Maybe it is time to do away with these categories altogether and impose reasonableness review across the board. As David Mullan notes, however, this might require the Court to revisit the constitutional basis of judicial review, see *supra* note 3. Given the Court's reluctance to engage in grand theorizing, the probability of this happening is low.

78 *McLean*, *supra* note 22 at para 25.

79 *Alberta Teachers'*, *supra* note 2 at para 42.

80 *Ibid* at paras 34, 39.