DUNSMUIR, STATUTORY INTERPRETATION AND REASONABLENESS REVIEW: MUCH ADO ABOUT VERY LITTLE?

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[Speaking notes for an address given in Ottawa on May 26, 2016 at an advanced administrative law conference for federally appointed judges organized by the Canadian Institute for the Administration of Justice.]

I INTRODUCTION

Specialist tribunals' interpretation of their enabling legislation has been the single most controversial issue in administrative law in Canada. Over the last thirty odd years the debate has focussed increasingly on the standard to be applied by a court when reviewing a tribunal's decision. As a result of the *Dunsmuir* decision, reasonableness is the default standard of review of a specialist tribunal's interpretation of its enabling statute and closely related laws.[1]

[1] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 *(Dunsmuir*). The Court said that a tribunal's interpretation of its home statute was normally to be reviewed on a reasonableness standard (at para. 54) *and* that, if the jurisprudence had not already satisfactorily resolved the issue, the applicable standard should be determined on the basis of the four factors of the former pragmatic and functional approach (at paras. 55-57). It did not clarify the relationship between these two quite different methodologies for selecting the standard of review.

The confusion was cleared up In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 (*ATA*) at paras. 30, 39, 41, and 44, where the Court stated that reasonableness is the presumptive standard of review of an administrative decision maker's interpretation of the home statute. The Court selected the reasonableness standard in the case before it on the basis of the presumption, without considering the four factors of the standard of review analysis. When referred to at all, the four-factor approach tends to play the modest role of supporting the conclusion reached on the basis of the presumptions: see, for example, *Commission scolaire de Laval v. Syndicat de l'enseignment de la région de Laval*, 2016 SCC 8 (*Laval School Board*) at para. 33.

"Closely related laws" comprise not only legislation, but also rules of common law, equity and civil law: see, for example, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616.

More recently, attention has shifted to the conduct of a reasonableness review of questions of law on which the court is supposed to show deference to the tribunal. To be frank, it is often difficult to see much difference in Supreme Court decisions between review for reasonableness and review for correctness. I find it hard to identify any decision where the choice of reasonableness standard had any discernible effect on the result.

In 2013 I wrote an article[2] arguing that the adoption of reasonableness as the presumptive standard for reviewing tribunals' interpretation of their enabling statute has proved of much less practical significance than champions of curial deference had imagined. In these introductory remarks I shall revisit these conclusions in light of Supreme Court of Canada decisions of the past three years.

Throughout today's program you will be examining in depth the many dimensions of the law relating to the standard of review eight years after *Dunsmuir* gave us another new template for this troublesome area of the law. I shall try to frame all that learning within the larger questions that this Conference asks: Is *Dunsmuir* done for? And, is there relief in sight for what ails the current law on standard of review?

As I have already said, I shall be focussing on the judicial review of specialist tribunals' interpretation of their enabling legislation, which has seemed particularly resilient to a culture of

[2] "The Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *Canadian Journal of Administrative Law and Practice*, 101.

curial deference.[3] It is the point of most obvious tension between the constitutional values identified in *Dunsmuir*[4] as the principal animators of the law governing judicial review of administrative action. On the one hand is the rule of law, which confers on the courts ultimate responsibility for ensuring that governmental action is authorized by law. On the other, parliamentary supremacy requires courts to respect the choices made by our democratically elected representatives in the design of public programs and the institutional arrangements for delivering them, including the allocation of the power to interpret the statutory framework within which they operate.

II IS REASONABLENESS STILL THE DEFAULT STANDARD OF REVIEW?

In a word, the answer is yes. However, the Court remains divided on two issues. The first is the strength of the presumption that a tribunal's interpretation of its home statute only constitutes an error of law if it is unreasonable. The second is the extent to which it is appropriate to segment the tribunal's decision into its component parts and determine the standard of review applicable to each. I will say something about both these issues.

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[3] A question not explored in this paper is the extent to which the *Dunsmuir* presumption applies to administrative decision makers that are not traditional adjudicative tribunals (such as labour boards, human rights tribunals). In *Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*) at para. 50), the Court held on the basis of *Dunsmuir* that the Minister's interpretation of the words "national interest" in s. 34(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*) was reviewable for reasonableness. In *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 136, the Court applied *Dunsmuir* presumption of reasonableness to the Cabinet's interpretation of a statute closely connected to its rate setting function on an appeal from the Canadian Transportation Agency: see paras. 51-62.

[4] Note 1, *supra* at paras. 27-30. Since this tension does not exist in respect of levels of administrative tribunals, *Dunsmuir* does not apply to determining the standard of review applicable by an appellate tribunal to a first instance decision maker: *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93 (*Huruglica*) at para. 47.

(i) Rebutting the presumption of reasonableness

(a) *appeals*

It was made clear in *Mouvement laïqe québécois v. Saguenay (City)*[5] that the existence of a right of appeal from an administrative tribunal to a court does not in itself displace the *Dunsmuir* methodology for determining the standard of review. Appeals from specialized administrative tribunals are not subject to the *Housen v. Nikolaisen*[6] standards of review that govern appeals from a trial court to an appellate court. However, it was also said in *Saguenay* that a right of appeal may "affect" the deference due under *Dunsmuir* to a tribunal's decision.[7]

Indeed, in *Tervita Corp. v. Canada (Commissioner of Competition)*[8] the Court held that the unusual wording of the right of appeal from the Competition Tribunal to the Federal Court of Appeal indicated that Parliament intended the Tribunal's decisions on question of law, including

[5] 2015 SCC 16, [2015] 2 S.C.R. 3 (*Saguenay*).

[6] 2002 SCC 33, [2002] 2 S.C.R. 235. On an appeal from a trial court, questions of "pure" law (including questions of statutory interpretation) are reviewed on a standard of correctness: paras. 8-9.

[7] Note 5, *supra* at para, 43. In contrast, in *McLean v. British Columbia (Securities Commission*), 2013 SCC 67, [2013] 3 S.C.R. 895 (*McLea*n) the Court selected reasonableness as the applicable standard of review of the Commission's interpretation of its enabling statute without even mentioning that there was a right of appeal from the Commission. The Court in *Saguenay* held that the reasonableness presumption did not apply to the interpretative question in dispute in that case because it came within the *Dunsmuir* exception for questions of law that are of general importance to the legal system as a whole and are outside the area of expertise of the decision maker: see pp. 9-12, *infra*.

[8] 2015 SCC 3, [2015] 1 S,C,R, 161.

the interpretation of its home statute, to be reviewed for correctness.[9] In reasons concurring in the result, Justice Abella took issue with the majority on the standard of review.[10] She said that by departing from the presumption that reasonableness was the applicable standard, the majority was elevating statutory language over tribunal expertise. Justice Abella saw nothing in the statutory language creating the right of appeal that warranted carving an exception to what

> the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard … .[11]

This sharp disagreement did not, however, lead to a difference of opinion on the result. The majority held that that Tribunal's interpretation of the relevant provision of the *Competition Act*[12] was wrong. Justice Abella held it was unreasonable, but without further explanation.[13]

For what it is worth, I would have applied the correctness standard here, emphasizing the fact that panels of the Tribunal must be chaired by a Federal Court Judge who, as the Judicial Member, is solely responsible for deciding questions of law.[14] I would, however, agree with

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[9] *Ibid*.at paras. 34-39. The *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s.13(1) provides that an appeal lies from the Tribunal to the Federal Court of Appeal "as if it were an appeal from the Federal Court." On an appeal from the Federal Court, the Federal Court of Appeal applies a correctness standard to questions of law.

[10] *Ibid*. at paras. 169-179.

[11] *Ibid*. at para. 179.

[12] R.S.C. 1985, c. C-34, s. 96.

[13] Note 8, *supra* at para. 180. Karakatsanis J. dissented on the interpretation of the statutory provision in dispute, and would have upheld the Tribunal' s decision. While she did not address the standard of review, there is little indication of curial deference in her reasons.

[14] *Competition Tribunal Act* (note 9, *supra*), paras. 12(1)(*a*) and 3(2)(*a*),and s. 10(2).

Justice Abella that, taken alone, the wording of the right of appeal was insufficiently clear to rebut the presumption of reasonableness review.

Finally, I should mention *Kanthasamy v. Canada (Citizenship and Immigration),*[15] where the Court held that the presumption of reasonableness was not rebutted by a statutory provision precluding an appeal from the Federal Court to the Federal Court of Appeal, unless the Federal Court Judge certifies that a serious question of general importance is involved and states that question.[16] Writing for the majority, Justice Abella rejected the argument that this provision rebuts the presumption that reasonableness is the applicable standard for reviewing administrative interpretations of the *IRPA*. She concluded that the certified question provision was designed to filter out appeals in routine cases (in an area of the law where the volume of cases is very high), not to intensify judicial scrutiny of the Board's interpretation of its enabling statute.[17]

(b) *concurrent jurisdiction*

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[15] 2015 SCC 61 (*Kanthasamy*).

[16] *IRPA*, s. 74(*d*).

[17] Note 15, *supra,* at paras. 43-44. Any other result would have produced some illogical results. In particular, once a question has been certified, an appellant may challenge the decision on any ground: *Baker v, Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817(*Baker*) at para. 12. It would be anomalous to apply correctness to the certified question, and the presumption of reasonableness to others. In addition, while the Federal Court Judge might have had to apply the reasonableness standard to the question of statutory interpretation that she had certified, it would be reviewed on appeal for correctness. It has not been suggested that the leave requirement for applications for applying for judicial review in the Federal Court (*IRPA*, s. 72(1)) attracts the correctness standard.

But see *Huruglica* (note 4, *supra*) at para. 28, where Gautier J.A. noted that the Immigration and Refugee Board had welcomed receiving "correct" answers from the Federal Court of Appeal to certified questions on which divergent views had been expressed. She also observed (at para. 29) that it was open to Parliament to amend the *IRPA* to provide for correctness review, but it must do so "very clearly".

In *Saguenay*[18] and *Canadian Broadcasting Corpn. v. SODRAC 2003 Inc.*[19] the Court confirmed its decision in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*[20] that the presumption of reasonableness may be rebutted when legislation permits a litigant to pursue a claim in either a specialist tribunal or a court. The rationale is that it would be anomalous to apply different standards of review depending on whether the interpretative issue comes to a court on a judicial review of a tribunal's decision (reasonableness), or comes to the court directly (correctness). In my view, this makes a lot of sense, provided that the scope of the exception remains narrow.

(ii) Segmentation

Despite vigorous rearguard action by Justice Abella, the Supreme Court affirmed in *Saguenay*[21] and *SODRAC*[22] that a court must determine the standard of review applicable to the different questions on which the tribunal based the decision under review. The majority firmly rejected Justice Abella's view that a court ought only to look at the tribunal's ultimate decision and ask what standard should apply to it. Thus, for Justice Abella the question that the tribunal

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[18] Note 5, *supra* at para. 51.

[19] 2015 SCC 57 (*SODRAC*) at paras. 35-42.

[20] 2012 SCC 35, [2012] 2 S.C.R. 283 at paras. 13-20. Abella J.disagreed (paras. 63-73), arguing that there were many statutory contexts in which the same legal issue could be decided by either a tribunal or a court, and that the majority view would create an unduly large and ill-defined loophole in the *Dunsmuir* presumption of reasonableness. She also dissented on the result, but this seems to be attributable more to her view of the dominant effect to be given to the principle of technological neutrality in the interpretation of the statute than to her adoption of the reasonableness standard of review.

[21] Note 5, supra at paras. 49-51. Abella J. dissented on this issue at paras. 165-173.

[22] Note 19, *supra* at paras. 35-42. For Abella J.'s dissent on this issue, see paras. 189-194. Karakatsanis J. agreed with the majority that correctness was the standard applicable to the interpretative issue, but with Abella J. on the merits: see paras. 193-194.

had to decide was whether Saguenay City council's practice of starting council meetings with a prayer was discriminatory on the ground of religion. Since this question could not be answered without regard to the factual context of the case, she concluded that the reasonableness standard was applicable.

Since *Dunsmuir* determines the applicable standard of review by reference to the nature of the question in dispute it seems logical to "segment" the tribunal's decision into its component parts to which different standards may apply, as appellate courts already do when applying *Housen*[23] to determine the standard of review to apply to the various issues decided by a trial court.

However, Justice Abella is surely right to caution reviewing courts against too readily elevating to the level of general questions of law what are essentially questions relating to the contextual application of a legal concept.[24] I share her unease at the conclusion of the majority in *Saguenay* that the scope of the principle of state neutrality in matters of religion in the context of a human rights case involving an allegation of freedom of religion raised a question of general law, rather than one that cannot readily be separated from the facts of the particular dispute.

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[23] Note 6, *supra*.

[24] I find less persuasive her objection that segmentation is impractical particularly when, as in *SODRAC*, a tribunal decision is said to have multiple components to which different standards of review may apply: see *SODRAC*, note 19, *supra* at para. 190. How many issues, she asked, must a tribunal have decided unreasonably or incorrectly before a reviewing court will set the decision aside?

However, this is not a problem confined to the application of different standards of review to the different questions decided by a tribunal. Appellate courts regularly have to decide whether legal or factual errors by a trial judge are sufficiently significant to vitiate the decision and warrant reversal. I do not see why a similar inquiry into the materiality of an error is any more difficult when the decision maker under review is a specialized tribunal.

To conclude, for the most part I see little in the decisions of the Supreme Court since 2014 that seriously threatens the stability of the *Dunsmuir* presumption that reasonableness is the standard of review to be applied to administrative decision makers' interpretation of their "home" statute. True, new circumstances may arise to rebut the presumption, and judges may differ as to whether in any given context the presumption has indeed been rebutted. But such uncertainties are inherent in all adjudication: in framing legal rules, judges are blessed with no greater powers of foresight than legislative drafters. Nor are any legal rules so precise that judges will always agree on their application in every case.

That said, I do wonder if the Court may be becoming uneasy about the prospect that the reasonableness standard creates too much uncertainty in the law. After all, it is implicit in the concept of curial deference that conflicting interpretations of a statutory provision may in principle both be found to be reasonable.[25]

This concern may be reflected in the majority judgment in *Saguenay*.[26] As already noted, the Court in that case identified the scope of the concept of state neutrality as the issue of statutory interpretation decided by Québec's Human Rights Tribunal in the course of its determination of whether the saying of a prayer at the start of meetings of the City council breached the right to freedom of religion and conscience guaranteed by the Québec *Charter of*

[25] As Moldaver J. acknowledged in *McLean* (note 7, *supra*) at para. 32.

[26] Note 5, *supra*.

human rights and freedoms.[27] Justice Gascon observed that *Dunsmuir* had held that the standard of correctness applies to a tribunal's interpretation of a provision of its enabling statute that involves a question of law of general importance to the legal system as a whole and is outside the specialized tribunal's area of expertise.[28]

So far, so good. What is more puzzling, however, is the Court's explanation for its conclusion that the "question of law of general importance" exception to the reasonableness presumption applied in this case. The disputed question, the Court said, was important to the legal system, was broad and general in scope, and thus needed to be decided in a consistent and uniform manner.[29] Notably absent from Justice Gascon's reasons is any consideration of whether this question also fell outside the area of the Tribunal's expertise. Further, the words "as a whole" are omitted from his formulation of the requirement that the question of law must be of general importance to "the legal system as a whole". It might be thought to follow from this that, since all questions of statutory interpretation are general in scope in that they are not limited to the facts of a particular case, they should be answered consistently and therefore be subject to correctness review.

Taken at face value, *Saguenay* might be thought to have broadened what has generally been regarded as a narrow exception to the reasonableness presumption. However, like statutory provisions, judicial utterances must also be read contextually.

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[27] c. C-12, ss. 3 and 10.

[28] Note 5, *supra* at para. 47

[29] *Ibid.* at para. 51.

First, Justice Gascon subsequently stated in the *Laval School Board* case that questions of law that are of central importance to the legal system as a whole and are outside the tribunal's area of expertise are "rare and tend to be limited to situations that are detrimental to 'consistency in the fundamental legal order of our country'".[30]

Second, Justice Gascon's remarks should be read in the context of the issue in dispute in *Saguenay*: the interpretation of the guarantee of freedom of religion and conscience in Québec's *Charter of human rights and freedoms.* That *Saguenay* should be understood as limited to human rights statutes is supported by *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* where Wagner and Côté JJ. writing for the majority said:

> The Court also favours a *consistent* interpretation of the various provincial human rights statutes unless a legislature intends otherwise."[31]

A judicial quest for interpretative consistency requires the correctness standard of review.[32] Given the quasi-constitutional nature of human rights statutes, *Saguenay* may be no more than a

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[30] Note 1, *supra* at para. 34. Dissenting on the standard of review in this case, Côtė J. nonetheless agreed that such questions are rare, but held that "basic rules" outside a decision maker's expertise must be "applied uniformly and consistently": *ibid.* at paras. 78-79.

[31] 2015 SCC 39, [2015] 2 S.C.R. 789 (*Bombardier*) at para. 31. The emphasis is mine.

[32] While not expressly addressing the applicable standard of review, the majority in *Bombardier* upheld the Tribunal's interpretation of the statute after conducting its own interpretative analysis.

However, consistency of interpretation across the country may be less of a concern with respect to the adjectival or procedural aspects of human rights legislation, which are more likely to vary and to have no counterpart in the Canadian Charter. Thus, in *Canada (Human Rights Commission) v. Canada (Attorney General),* 2011 SCC 53, [2011] 3 S.C.R. 471, the Court held that the Tribunal's interpretation of a provision in the *Canadian Human Rights Act*, R.S.C.1985, c. H- 6 as empowering it to compensate successful complainants for their legal expenses was reviewable for reasonableness.

minor extension of the *Dunsmuir* rule that a tribunal's interpretation of the Constitution is subject to correctness review.[33]

More light may be shed on the importance of the notion of consistency in the selection of the standard of review when the Court releases its opinion in *Wilson v. Atomic Energy of Canada Ltd*,[34] In that case, the Federal Court of Appeal[35] had applied the correctness standard to an Adjudicator's interpretation of the protection against unjust dismissal in the *Canada Labour Code*.[36] The Court held that rule of law concerns trumped deference to legislative choice because some Adjudicators had interpreted the same provision differently, thereby producing "persistent discord" in the jurisprudence with little prospect of resolution.[37]

III REASONABLENESS IN ACTION: CORRECTNESS BY ANOTHER NAME?

Even if the Court remains committed to the view that reasonableness is the presumptive standard of review of tribunals' interpretation of their home statute, its application of that standard often seems to leave little room for curial deference to administrative decision makers.

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[33] Note 1, *supra* at para. 60. The majority in *Bombardier* also said (*ibid.)* that human rights statutes should be interpreted in light of the Canadian Charter, but need not mirror it. This also supports correctness review.

[34] SCC Case Number 36354. The appeal was heard on January 19, 2016.

[35] 2015 FCA 17.

[36] R.S.C. 1985, c. L-2, ss. 240(1).

[37] Note 35, *supra* at para. 54. In *Domtar Inc. v. Québec (Commission d'appel en matière de lésions professionelles)*, [1993] 2 S.C.R. 756 at 795, the Court had held that even "serious and unquestionable" interpretative inconsistencies do not attract the correctness standard. See also to the same effect *Smith v. Alliance Pipeline Ltd*., 2011 SCC 7, [2011] 1 S.C.R. 160 at para. 38, a case decided after *Dunsmuir*.

In other words, although the Court may say that it is reviewing only for reasonableness, is it making a meaningful distinction between review for reasonableness and review for correctness? I argued in my 2013 article[38] that it was difficult to discern any such distinction in the Court's decisions. There is little, if anything, in the Court's subsequent record that suggests otherwise.

Telltale signs abound that the choice of standard generally has little bearing on the outcome of cases involving a tribunal's interpretation of its home statute. For example, in some cases the Court has remained silent about the applicable standard when conducting a correctness review,[39] or has stated that it was unnecessary to select a standard because the tribunal's decision fails to meet the reasonableness standard.[40] In another case, a Judge dissented vigorously from the majority's choice of correctness, and yet agreed that the tribunal's decision should be set aside, without explaining what made it unreasonable as opposed to being merely wrong as the majority had held.[41] And in yet another, it was difficult to attribute a difference of opinion on the result to the difference of opinion on the applicable standard of review.[42] More generally, while

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[38] Note 2, *supra.*

[39] *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, is the most striking but by means unique example. The Court below was not unanimous on the issue (2012 FCA 324), and there was a dissent in the Supreme Court on the proper interpretation of the statutory provision in question.

[40] See, for example, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras. 22-26 (not necessary to decide whether the presumption of reasonableness was rebutted). And in *Kanthasamy* (note 15, *supra*), Moldaver J. expressed no opinion on the standard because, he said, if the officer had applied the proper legal test she was bound to have reached the same result: *ibid*. at para. 87.

[41] *Tervita* (note 8, *supra*) at para. 180. Although dissenting on the standard review in *the Laval School Board* case, Côté J. said it made no difference to the result: note 1, *supra* at para. 86.

[42] See *SODRAC* (note 19, *supra*), where the primary substantive point of disagreement between the majority (*per* Rothstein J.) and Abella J. was whether the text of the statutory provision in question excluded the application of the principle of technological neutrality in interpreting the *Copyright Act*, R.S.C. 1985, c. C- 42. Karakatsanis J. agreed with the majority that correctness was the standard of review on the interpretative issue, but with Abella J. on the merits: see paras. 193-194.

the Court may say that reasonableness is the applicable standard for reviewing a tribunal's interpretation of its enabling statute, it generally sets about the task in much the same way as it would if reviewing for correctness.

In fairness, *Dunsmuir* offered only limited and general guidance on the conduct of reasonableness review.[43] It did not specifically address how a court should apply the reasonableness standard to a tribunal's interpretation of its home statute, which is somewhat surprising since this was one of the bases of the decision.[44]

The Court started its discussion of the reasonableness standard in *Dunsmuir* by stating that many questions decided by tribunals do not lend themselves to "one specific, particular result", but to a number of possible reasonable conclusions.[45] This observation is equally applicable to questions of law, fact, mixed fact and law, and discretion. The interpretation of a statute may not lend itself to "one specific, particular result" for a number of reasons, such as the open-ended quality of the statutory term in dispute ("human and compassionate circumstances", for example), poor drafting, limited legislative foresight, or a gap in the statutory scheme. *Dunsmuir* can thus be said to make the absence of "one specific, particular result" and,

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[43] See note 1, *supra* at paras. 47-49. In contrast, the Court explained the bases for selecting the applicable standard of review over paras. 51-64. For a recent request for more guidance on the conduct of reasonableness review of questions of statutory interpretation, see *Hurulgica* (note 4, *supra)* at para. 41.

[44] For the Court's application of the reasonableness standard to the Adjudicator's interpretation of the relevant statutory provisions, see paras. 72-76. It is not clear to me that the Court's reasoning would have been materially different if it had been reviewing for correctness.

[45] *Ibid.* at para. 47

conversely, the presence of multiple reasonable interpretations, a necessary condition for curial deference to a tribunal's interpretation of its enabling statute.[46]

This point was expressly addressed in *McLean*.[47] Writing for the majority, Justice Moldaver acknowledged that "on occasion" a statutory provision may be susceptible of multiple reasonable interpretations. In these circumstances, the task of interpretation involves policy considerations which are best left to the specialized tribunal, provided, of course, that the tribunal's interpretation falls within the range of the reasonable possibilities.[48] However, when the "ordinary tools of statutory interpretation" lead to a single reasonable interpretation, any other interpretation must be unreasonable and hence erroneous in law.[49] In the absence a range of reasonable interpretations, there is no room for deference to a policy-based choice among multiple possibilities.

Whether reasonableness review is a concept with any content at all depends on the extent to which courts are willing to conclude, after applying the principles of statutory interpretation, that the legislation has more than one reasonable interpretation. Justice Moldaver concluded that

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[46] Compare *Carrick (Re),* 2015 ONCA 866 at para. 24 (*per* Huscroft J.A.). In the foundational case of *Canadian Union of Public Employees, Local 693 v. New Brunswick Liquor Corpn.,* [1979] 2 S.C.R. 227 (*New Brunswick Liquor*), Dickson J. (as he then was) noted (at 237) the ambiguity of the relevant provision and that there was no one interpretation of it that could be said to be "right".

[47] Note 7, *supra* at paras. 32-34.

[48] When an issue of interpretation arises on judicial review, argument generally focuses on the two interpretations advanced by the parties.

[49] *Ibid*. at para. 38.

the different interpretations of the statutory limitation period advanced by the parties in *McLean* were both reasonable: the statutory language was not "crystal clear". [50]

Nonetheless, I suspect that it will be unusual case where judges in a judicial review are left in sufficient doubt about statutory meaning as to persuade them that the tribunal had much interpretative discretion, if any, to which it could apply its policy insights into the effective implementation of the regulatory scheme.[51] This is because the tools of statutory interpretation are designed to enable adjudicators, whether judges or members of specialized tribunals, to discern legislative intent after considering: the ordinary and grammatical meaning of the statutory text; the statutory context of the words in dispute; and the legislative objectives underlying both the contested provision and the statute as a whole.[52]

Nor does the text-context-purpose approach to statutory interpretation exhaust the interpretative tools available to courts to determine statutory meaning. While many of the more detailed traditional presumptions of statutory interpretation may feature less prominently than once they did in courts' interpretation of legislation, they are by no means dead.[53] The more

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[50] *Ibid*. at para. 37. Karakatsanis J., however, concluded (at paras. 75=76) that the tribunal had adopted the only reasonable interpretation of the disputed provision.

[51] Perhaps Moldaver J. was suggesting this when he said in *McLean* (note 7, *supra* at 32) that the principles of statutory interpretation will "*on occasion*" yield multiple reasonable meanings. In *Wilson v. British Columbia (Superintendent of Motor Vehicles),* 2015 SCC 47 he stated (at paras. 23 and 25) that Charter values may only be used as a tool of statutory interpretation when the statute is capable of "two or more plausible readings, each *equally* in accordance with the intentions of the statute" (my emphasis). If this test were also applicable to standard of review, it would effectively eliminate the need for curial deference.

[52] *Rizzo and Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 21.

[53] The presumptions against retroactive legislation and the exclusion judicial review, for example, are still very much alive. More controversial, especially in the context of regulatory legislation, is the presumption that the legislature does not intend to change the common law: see, for example, *Wilson* (note 35, *supra*),

numerous the interpretative tools at a reviewing court's disposal, the less room there will be for multiple reasonable interpretations.[54]

Even if the reasonableness standard as applied to an administrative decision maker's interpretation of a statute does not have much discernible impact on outcomes, it has the merit of relieving courts of the need to disentangle law from discretion at the stage of selecting the appropriate standard of review.[55] Reasonableness applies to both. However, while explicit statutory grants of discretion always give the decision maker some degree of choice in its exercise, the interpretation of a statutory provision may or may not. The broader the grant of discretion, explicit or implicit, the more difficult it will be for a reviewing court to conclude that it was exercised unreasonably.

IV SOME CONCLUDING THOUGHTS

The Supreme Court's jurisprudence over the last few years gives off contradictory messages. On the one hand, the Court continues to attach great significance to the selection of the appropriate standard for reviewing administrative decision makers' interpretation of their

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where Stratas J.A. relied heavily on this presumption to limit the scope of the Adjudicator's inquiry. On the other hand, it is presumed that social benefit-conferring legislation is to be interpreted liberally (see, for example, *Abrahams v. Canada (Attorney General*), [1983] 1 S.C.R. 2 at 10). See generally on the presumptions of statutory interpretation, Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th edn. (Markham: LexisNexis Canada Inc., 2008).

[54] For a judicial plea for more guidance on the weight to be given to presumptions and other interpretative tools in the conduct of a reasonableness review, see *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 237 at para. 45 (*per* Gauthier J.A.).

[55] For an important judicial recognition of the interconnectedness between law and discretion, see *Baker* (note 17, supra) at para. 54. All explicit grants of discretion are subject to legal limits, express or implied. Conversely, a decision maker is exercising implicit discretion when interpreting a statutory provision that does not have a single "correct" meaning.

enabling statute. How else can one understand the Court's regular formulations, reformulations, and fine-tuning of the methodology, or the passion of the disagreements within the Court about the standard applicable in a given case? In contrast, the reasonableness standard is applied to the interpretation of tribunals' enabling legislation it seems devoid of much practical content. Indeed, it is only relevant in those relatively rare cases where the tools of interpretation produce more than one reasonable meaning.[56] Two factors may explain this paradox.

First, while intellectually attracted to the idea of legal pluralism, many judges have never really "bought into" the notion of deference to tribunals' interpretation of legislation. It is impossible to underestimate the strength of the ideological assumption of judges that it is the role of an independent judiciary, learned in the law, to interpret the legislation that defines individuals' right and duties, and to ensure a level of certainty and consistency in the law. This, after all, is what judges do every day of the week when deciding cases in other areas of the law: deferring to others' views of the meaning of a statute in an administrative law case is fundamentally counter-intuitive for judges.[57] The rule of law has a more powerful hold on the judicial imagination than respect for the allocation of decision-making by a democratically elected legislature.

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[56] Strictly, of course, when reasonableness is the standard, the court should only say in dismissing the challenge that the tribunal's interpretation is reasonable, not that is also correct. By definition, the statutory provision has no "correct" meaning for the court to impose. Further, for a reviewing court to say that the tribunal's interpretation is both reasonable and correct effectively precludes the tribunal from changing its mind on the issue.

[57] Courts have generally had much less difficulty in deferring to administrative decision makers' findings of fact and exercises of discretion, in part, no doubt, because appellate courts have experience in applying deferential standards of review to trial judges' conclusions on these questions.

Second, at one time there was a wide chasm between the way that judges and mature administrative tribunals, especially in the areas of labour relations and human rights, approached the interpretation of their enabling legislation. Courts leaned towards a literal, textual approach that emphasized the primacy of common law concepts and presumptions of statutory interpretation that tended to limit tribunals' powers. This approach reflected a philosophical antipathy to the regulatory and redistributive programs of the administrative state and the institutions that administered them. Tribunals, in contrast, were likely to have taken a more purposive approach, keeping an eye firmly on the consequences of the competing interpretations for the effectiveness of the program that they were administering. No surprise, then, that legislatures resorted to tough privative clauses to try to exclude judicial intervention, which the courts effectively nullified by adopting an expansive concept of jurisdictional error.[58]

In the last twenty years or so, the judicial and administrative approaches to statutory interpretation have become more in sync. The courts' text-context-purpose approach is more likely to be attentive to the efficacy of the administrative program, and less concerned to adopt an interpretation that incorporates common law concepts and unduly restrains the decision maker.[59] This reflects a greater acceptance by the courts of the legitimacy of the administrative

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[58] The high water mark of judicial intervention was *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, where, despite the presence of a strong preclusive clause, the Court in effect made the interpretation of every provision in a tribunal's enabling statute a "jurisdictional question" which it had to decide "correctly". When a legislature came up with a "judge proof" preclusive clause, the Court held it invalid under s. 96 of the *Constitution Act, 1867*: *Crevier v. Québec (Attorney General),* [1980] 2 S.C.R. 220. However, *Crevier* was decided after the Court's adoption in *New Brunswick Liquor* (note 46, *supra*) of a much more restrained view of jurisdictional error.

[59] In this regard, s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 (and analogous provisions in provincial legislation) is particularly important. It enacts the presumption that all legislation is deemed to be remedial and is to be given such fair, large and liberal construction as best ensures the attainment of its objectives.

state and respect for legislative choices of institutional design. This is not to say, of course, that judges all view the world through a single philosophical lens, as strong dissenting judgments often reveal; but the spectrum of opinions within the Canadian judiciary is relatively narrow.

How, then, can a conscientious reviewing judge ensure that, as applied to administrative tribunals' interpretation of their enabling statute, the reasonableness standard has some content? I have three modest suggestions.

First, *Dunsmuir* contains the important idea that curial deference, the driving force of the reasonableness standard, is "an attitude of the court", as well as a legal doctrine, that imports the notion of respect for the processes and decisions of other institutions, and of the legislative choices to create them.[60] Important as they are, courts are not the only pebbles on the adjudicative beach! A tribunal's experience from administering a particular statutory regime can, and should, provide insights that inform its interpretation of the statute and may produce a result that, without the benefit of the tribunal's perspective, a judge would not have reached. Humility and a willingness to learn from those outside the courts, even on the interpretation of legislation, are important but often overlooked judicial virtues. Furthermore, a court should think particularly long, and very hard, before concluding that a well-established administrative interpretation is unreasonable.[61]

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[60] Note 1, *supra* at para. 48.

[61] This is not to say, of course, that a tribunal cannot change its mind on a question of interpretation, or that a decision that departs from the interpretative consensus is necessarily unreasonable. However, "maverick" administrative decisions are apt to be regarded by courts with suspicion, particularly when the reasons for decision do not explain the basis of the departure from precedent.

Second, the tribunal's reasons should be the starting point for a judge to understand the problem facing the tribunal and why it resolved it as it did. The tribunal's reasons may also reveal some obvious errors. *Dunsmuir* said that the tribunal's reasons should be the primary focus of reasonableness review and to ask if they demonstrate the "existence of justification, transparency and intelligibility within the decision-making process". In addition, a reviewing court must consider whether the decision itself falls within "a range of possible, acceptable outcomes which are defensible on the facts and the law."[62]

However, preaching the importance of reasons in reasonableness review is one thing, practice is another. When reviewing for reasonableness the Supreme Court often gives little, if any, attention to the tribunal's reasons, but plunges straight into its own interpretative analysis. This could be because the tribunal's reasons were not very illuminating, which may explain why the Court held in *Newfoundland Nurses'*[63] that the inadequacy of a tribunal's reasons is not a free standing ground of review, provided that they disclose the basis of the decision and enable the reviewing court to determine the reasonableness of the outcome. Reasonableness is to be assessed by an "organic" consideration of reasons and outcome together. Nonetheless, a court may be warranted in concluding that a tribunal's decision is unreasonable when its reasons contain material misstatements of the law or illogical reasoning

[62] *Ibid.* at paras. 47-48.

[63] *Newfoundland and Labrador Nurses' Union v. Association v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 702 at paras. 11-18.

Another indication that the tribunal's reasons are less important in a reasonableness review than *Dunsmuir* may suggest is that reviewing courts may supplement the reasons given by the tribunal with those that it could have given.[64] Indeed, even if a tribunal has given no reasons for decision, in circumstances where neither the duty of fairness[65] nor statute requires them, a court reviewing for reasonableness may supply reasons to support the decision.[66]

Third, outside administrative law, a court must always decide for itself what a statute means; the process of interpretation is designed to resolve any ambiguities or gaps in the statute. In contrast, reasonableness review requires a court to be open to the possibility that a statutory provision may have no single "correct" meaning and to defer to the tribunal's interpretation if it is reasonable. Since reasonableness cannot be assessed in the abstract, a reviewing court must consider the tribunal's interpretation against the text of the statute, the context of the disputed provision, and the statutory objectives. The applicant has the burden of persuading the court that the tribunal's decision fell outside the range of options reasonably open to it on the basis of the statute. The difference between this exercise and reviewing on a correctness standard may often be no more than nuance.[67]

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[64] *Dunsmuir*, note 1, *supra* at para. 48.

[65] See *Baker* note 17*, supra* at paras. 35-44.

[66] *ATA*, note 1, *supra* at paras. 52-55. In this case, the decision maker had not explicitly addressed the interpretative issue in dispute on judicial review because it had not been raised at the administrative level. In these circumstances, the Court said, a reviewing court should not set aside the decision as unreasonable without giving the decision maker an opportunity to provide reasons. Paradoxically, in *ATA* the Court had the benefit of well-articulated reasons that the decision maker had given on the issue in other cases, upon which Rothstein J. relied in order to demonstrate the reasonableness of the decision. The Court went further in *Agraira* (note 3, *supra*) by implying an interpretation although none had ever been expressly given: see para. 58.

[67] Although appellate courts review the correctness of trial courts' interpretation of statutes, an appellate court will generally pay close attention to the reasoning of the trial court before deciding the issue.

So, to go back to where we started, is *Dunsmuir* done for when it comes to the review of tribunal's interpretation of their enabling statute? The Supreme Court seems to me at this point to have no appetite for reneging on *Dunsmuir*'s presumption of reasonableness. However, I see little evidence that the notion of deference has had much visible impact on whether the Court upholds or sets aside a given tribunal decision. Thus, while *Dunsmuir* may seem healthy enough on paper, its continuing vitality may be of little significance in defining the roles of courts and tribunals in statutory interpretation.