

Identifying the Review Standard for Administrative Decisions

“Deference in a Nutshell: Sort Of!”

By

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“I currently favour likening thinking about [deference] to attempting to extract oneself from fly-paper; once you get started with the exercise it is virtually impossible to break free.”

[From: H. Wade MacLauchlan “Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?”, (1986) 36 U.T.L.J. 343 at note 3, but referring to the concept of “jurisdiction” rather than “deference”]

- [1] The volume of Supreme Court jurisprudence dealing with the review of decisions rendered by administrative decision-makers and the application of the deference doctrine is impressive. While *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 (“*New Brunswick Liquor*”) and *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 (“*Dunsmuir*”) remain the lead decisions, there are close to two hundred precedents, spanning six decades, underscoring the doctrine’s evolution. Most were rendered over the last 35 years. Most did not prove to be of long-term precedential significance. Even those often regarded as “lead decisions” would in time be shelved under the category of “historical interest”. Of course, the vast majority of precedents simply demonstrate the proper application of the deference doctrine, as it stood at the time the case was decided, while affirming the Court’s error-correcting role. [For an historical account of the Supreme Court’s deference jurisprudence see: J.T. Robertson, “Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence” in J. Robertson, P. Gall and P. Daley, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future*

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[2] I sympathize with those who may ultimately conclude that today's presentation is but an oversimplification of a complex area of the law. Indeed, Professor Paul Daly writes of the Supreme Court's struggle to achieve "coherence" in Canadian administrative law, while Justice David Stratas, writing in his personal capacity, has openly declared that: "Doctrinal incoherence and inconsistency plague the Canadian law of judicial review." Prior to these declarations, it was David Mullan who identified fifteen issues that remained outstanding following the release of *Dunsmuir*. Having regard to such expressions of opinion, the prospect of distilling the tenets of the deference doctrine into a meaningful discourse seems entirely misguided as is the title of today's presentation: "Deference in a Nutshell". The reality is that reviewing courts are bound by the existing law and the "Sky is not falling". While criticisms of the deference doctrine are both expected and warranted, and should be welcomed, there is sufficient certainty in the law when it comes to the task of identifying the proper standard of review. As a practical matter, we have to start somewhere and invariably the task begins and most often ends with the analytical framework outlined in *Dunsmuir*. [See D. Mullan, "Unresolved Issues On Standard of Review In Canadian Judicial Review Of Administrative Action - The Top Fifteen!" (2013) 42 *Advocates' Quarterly* 1, Paul Daly's "Blog" – "Adminstrativelawmatters.com/blog", and the Hon. Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency": http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2512053".]

[3] As would be expected, today's presentation focuses on the bare necessities of the deference doctrine while seeking to tango around the perception that it is not always easy to reconcile some of the Supreme Court's more recent jurisprudence with its earlier precedents. Fortunately, there are common threads running throughout the jurisprudence that allow one to weave together generalized statements of the law; statements that should not generate animated disagreement.

[4] Due to time constraints, this presentation has focused on only one of two questions that every court must address when reviewing a decision of an administrative decision-maker. The first is whether the decision is owed deference on the review standard of “reasonableness”. Otherwise, the correctness standard obviously applies. Second, and assuming deference is owed, the reviewing court must decide whether that deferential standard has been met. Correlatively, this leads one to ask what it is that moves a tribunal decision from the category of “reasonableness” to “unreasonableness”? The relevance of that question becomes both acute and apparent in those cases where the reviewing court’s analysis is arguably consistent with the type of analysis that would have been expected if correctness had been the chosen review standard. In other words, it is not difficult to apply, and inadvertently so, the correctness standard under the banner of reasonableness. With increasing frequency, and with great respect, the Supreme Court has been doing precisely that. The majority opinion in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (December), discussed below, is on point.

[5] As stated earlier, this presentation focuses on the first question: the one that forces the parties and the reviewing court to identify the proper standard of review. The analysis to follow, however, is premised on the understanding that a distinction can and should be drawn between the decisions of adjudicative tribunals (*e.g.*, labour board) and those made by other statutory delegates (*e.g.*, Ministers of the Crown and their sub-delegates). That is why this presentation travels along two different branches. Admittedly, when it comes to administrative decision-makers falling within the residual category of statutory delegate, the analysis that ultimately follows is as much quarrelsome as it is descriptive. There is a reason why this must be so. While it is one matter to grant deference to a delegate’s exercise of discretion, it is quite another to accord deference to the delegate’s interpretation of his or her “home statute” based on the notion of “institutional” expertise.

[6] Recall that prior to *Dunsmuir* the analytical framework to be applied, when isolating the proper standard of review, was labeled the “pragmatic and functional approach” as articulated in *Pushpanathan v Canada (Minister of Citizenship and*

Immigration), [1998] 1 SCR 982 (“*Pushpanathan*”). And recall that the object of the exercise was to isolate the intent of Parliament or the legislature as to whether the tribunal decision was owed deference based on an examination of four factors: (1) the presence or absence of a privative clause in the tribunal’s home statute; (2) the purpose of the statute; (3) the expertise of the tribunal; and (4) the nature of the issue. And finally, recall that the law provided for two deferential standards of review as a result of the Supreme Court’s decision in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1997] 1 SCR 748 (“*Southam*”): “patent unreasonableness” and “reasonableness simpliciter”. Only the legal historian ever asks why the Supreme Court felt compelled to adopt two distinct deferential standards of review. What really mattered was how the reviewing court would go about the task of selecting one of the two deferential standards of review in those cases where the correctness standard was inapplicable. And for nearly a decade, reviewing courts went about their business imagining that a valid distinction could be drawn between the two deferential standards.

[7] *Dunsmuir* did away with the pragmatic and functional label and replaced it with another: “standard of review analysis”. Substantively, however, nothing changed with respect to the essential elements of the deference doctrine, save for the all-important reduction in the number of deferential standards of review. Thankfully, *Dunsmuir* left us with a single standard: “reasonableness”. It also left us with a simplified analytical framework for identifying the proper review standard. And for the record, *Dunsmuir* did not abandon the understanding that the search for the proper review standard was a search for legislative intent (see paras. 31 and 52). The abandonment occurred subsequently!

[8] *Dunsmuir* was the Court’s response to the doctrinal uncertainties that had accumulated over the years. Bastarache and LeBel JJ., writing for the majority of five, consolidated the doctrine’s tenets under the umbrella of the “standard of review analysis”. It is a two-step framework for assessing whether a tribunal decision is owed deference (at para 61): “First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to

a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.”

[9] The first step requires the reviewing court to ascertain whether the existing jurisprudence has already determined the review standard with respect to the issue at hand. In this way reviewing courts are relieved of the obligation to conduct an exhaustive review required under the second step. Fortunately, *Dunsmuir* provides us with a list of issues (categories) for which the proper review standard had already been identified in the earlier Supreme Court jurisprudence, thereby eliminating the need to turn to the second step of the analysis. The *Dunsmuir* list directs that the review standard of reasonableness applies to questions of fact, mixed law and fact and decisions involving the application of policy or the exercise of discretion. As well, we are told that deference will usually result where a tribunal is interpreting its home statute or those statutes closely connected to the tribunal’s functions and with which it will have particular familiarity. On the other hand, *Dunsmuir* also established that correctness is the proper review standard for those issues embracing: constitutional questions; questions of general law that are of central importance to the legal system as a whole and outside the tribunal’s field of expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and finally, the “exceptional category” of “true questions of jurisdiction”. Note: although *Dunsmuir* makes no specific reference to the correctness standard applying to alleged breaches of the fairness duty (*e.g.*, bias), the Supreme Court has not declared otherwise: see discussion below.

[10] It is also worth noting that, under the first step, the Supreme Court has on occasion turned to earlier case law involving the same tribunal and the same home statute in order to isolate the proper review standard with respect to a particular issue: see *Tervita Corp. v Canada (Commissioner of Competition)*, [2015] 1 SCR 161, discussed below. The Court of Appeal of New Brunswick has done likewise. In this way, reviewing courts are relieved of the obligation to conduct an exhaustive review required under the second step of the standard of review analysis. For example, historically our Court of

Appeal has reviewed the decisions of the Appeals Tribunal of the Workplace Health, Safety and Compensation Commission, involving a question of law, on the standard of correctness: see *Keddy v New Brunswick Workplace Health, Safety and Compensation Commission* (2002) 247 NBR (2d) 284, leave to appeal to SCC refused. Invariably, the questions of law involve the interpretation of the applicable legislation. The justification for not according deference to this specialized tribunal is embedded in the reality that, save perhaps for the Chair of the tribunal, membership has always consisted of those without legal training and who were more often than not representative of either the employee or employer. However, I offer this caveat: to the extent the relevant legislation has been amended to reflect the appointment of legally trained persons to the appeals tribunal, it may well be that the Court will be asked to reconsider whether that non-deferential standard of review applied to questions of law (*e.g.*, the interpretation of the tribunal's home statute) should remain in place.

[11] Should the first step of the standard of review analysis prove unproductive, *Dunsmuir* anticipated that reviewing courts would move to the second step. That step requires the examination of four (“contextual”) factors. The stated objective was to identify the intent of Parliament or the legislature with respect to whether the tribunal decision was to be accorded deference. In the abstract, and in theory, no one factor was or is determinative of the standard of review issue. Once again, the four factors are: (1) the presence or absence of a privative clause in the tribunal's home statute; (2) the purpose of the statute; (3) the expertise of the tribunal; and (4) the nature of the issue.

[12] In theory, a reviewing court could be forced to move to the second step of the standard of review analysis in order to identify the proper standard of review. In reality, however, it is unlikely anyone in this room will have to do so: that is to say, examine each of the four factors outlined above. I say this because, save for two cases under consideration at the time *Dunsmuir* was decided, and *Dunsmuir* itself, the Supreme Court has yet found the need to move to the second step: see *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 and *Nolan v Kerry (Canada) Inc.*, [2009] 2

SCR 678. Over the last seven years, the Supreme Court has identified the proper standard of review, in every case, by adopting the standard of review applied in the earlier jurisprudence or, alternatively, by deciding whether the issue at hand falls within one of the categories for which the correctness standard automatically applies. If the issue does not fall within one of those categories, it follows that the tribunal's decision must be accorded deference on the standard of "reasonableness". In short, and as a practical matter, the Supreme Court has been applying a one-step analytical framework! [All of that said, I understand that some intermediate courts of appeal have turned to the contextual factors, that is to say the second step of the standard of review analysis, when it comes to deciding whether deference should be accorded to the "interpretative decisions" rendered by other statutory delegates referred to earlier: see discussion below.]

[13] The stark reality is that few cases make their way to the Supreme Court in circumstances where reasonableness is not the chosen standard of review. Indeed, it was Binnie J., in *Dunsmuir*, at para 146, who observed that most decisions and rulings of "specialized tribunals" are owed deference. That very observation remains true today. Recently, in *Affinity Credit Union v United Food Commercial Workers Local 1400*, 2015 SKCA 22, at para 28, the Saskatchewan Court of Appeal observed that, since *Dunsmuir*, the Supreme Court has yet to settle on the correctness standard when reviewing a decision of a labour tribunal. The same Court of Appeal also observed that since the Supreme Court's decision in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, the correctness standard has been adopted on only three occasions: see *Rogers Communication Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39; and *Tervita Corp. v Canada (Commissioner of Competition)*, *supra*.

[14] Note that after the release of *Affinity Credit Union*, the Supreme Court adopted the correctness standard involving the same statute that was under review in *Rogers Communication Inc. v Society of Composers, Authors and Music Publishers of Canada*, *supra*: see *Canada Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57. To

the list may be added *Mouvementl laïque québécois v Saguenay (City)*, *supra*. However, like *McCormick v Fasken Martineau DuMoulin LLP*, *supra*, the decision in *Saguenay (City)* involved the decision of a human rights tribunal. With respect to those tribunals, the Supreme Court has remained steadfast in applying the correctness standard to questions of law dealing with matters such as discrimination: see discussion below.

[15] In truth, there is little room in the deference doctrine for the application of the correctness standard, making it relatively easy to predict and identify reasonableness as the proper review standard. There is a virtual presumption of deference to the decisions of specialized tribunals. That presumption hinges on yet another: a presumption of tribunal expertise. Admittedly, ten years prior to *Dunsmuir*, the Supreme Court laid out an analytical framework for assessing the relative expertise of a tribunal. The pertinent decision is *Pushpanathan* (at para 32). However, the Court continues to rely on the presumptions of deference and expertise. *Pushpanathan* is but one more decision that has been overtaken by subsequent precedents. While it has not been formally laid to rest, it seems to have been forgotten. The validity of that observation becomes self-evident when attention focuses on *Kanthasamy v Canada (Citizenship and Immigration)*, *supra*, discussed below.

[16] Some may continue to ask: “Surely the law draws a substantive distinction between the presence of a privative clause, as compared to a right of appeal lodged within the tribunal’s home statute!” Intuitively, the presence of a privative clause (“the tribunal’s decisions are final and not subject to review in any court”) indicates a legislative intention that the tribunal’s decisions are not reviewable let alone subject to review on a deferential standard such as reasonableness. But legal history teaches us that the plain (literal) meaning of the privative clause is not sufficient to oust the jurisdiction of the superior courts to review for jurisdictional error or error based on an excess of jurisdiction. With respect to the latter category, recall that *New Brunswick Liquor* established that a patently unreasonable interpretation of the the tribunal’s home statute would result in an excess of jurisdiction and, therefore, the error fell outside the ambit of the privative clause (no review of any tribunal decision in any court). On the other hand,

the law was clear at the time *New Brunswick Liquor* was decided. When it came to those home statutes that provided for a right of appeal to the Court of Queen's Bench, or directly to the Court of Appeal, correctness was automatically the proper standard of review.

[17] In brief, there was a time in this country when the distinction between judicial and appellate review truly made a difference when it came to isolating the proper standard of review. A right of appeal automatically signaled that correctness was the proper standard of review, typically on questions of law and, in particular, those involving the interpretation of the tribunal's home statute. On the other hand, a privative clause automatically signaled the need for curial deference according to *New Brunswick Liquor*. Eventually, however, Canadian law would hold that neither a privative clause nor a right of appeal is determinative, or for that matter presumptive evidence, of the legislature's intent regarding the issue of deference. The lead Supreme Court decision is *Dr. Q v College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 226.

[18] At this point there are two post-*Dunsmuir* decisions that warrant mention. Both involved the question of whether the statutory right to appeal the tribunal's decisions was a sufficient justification to warrant application of the correctness standard with respect to all questions of law raised on the appeal. In *Mouvement laïque québécois v Saguenay (City)*, *supra*, the Supreme Court remained true to its earlier precedents and answered "no". [For reasons to be explained below, the Court did apply the correctness standard to one of the central issues before the tribunal.] The second, post-*Dunsmuir* decision of relevance is *Tervita Corp. v Canada (Commissioner of Competition)*, *supra*. In that case, the majority of the Court held that, as the decisions of the Competition Tribunal on questions of law are appealable to the Federal Court of Appeal as if they were "a judgement of the Federal Court", the proper review standard had to be correctness: see *Competition Tribunal Act*, RSC 1985, c. 19 (2nd Supp), s. 13(1). The dissenting opinion refused to attach any significance to the wording of the appeal clause and insisted that the deferential standard of review applied. In response, the majority noted that the Federal Court of Appeal had consistently applied the correctness standard

to questions of law decided by the Competition Tribunal. Curiously, the Court in *Tervita* failed to acknowledge the potential relevance of an earlier and significant precedent dealing with a decision of the Competition Tribunal: *Southam*. Another forgotten precedent, but one that would have supported the Supreme Court's decision to apply the correctness standard in regard to the Tribunal's rulings on questions of law. In short, the Court has consistently applied the correctness standard to questions of law decided by the Competition Tribunal.

[19] Frankly, but for the Supreme Court's recent decision in *Tervita*, one has to ask (and I say this with the greatest of respect) whether the Supreme Court has all but forgotten the true (historical) distinctions between judicial and appellate review. This is so even though we are constantly reminded that there is a difference: *e.g.*, *Mouvement laïque québécois v Saguenay (City)*, *supra*, and *Canada Broadcasting Corp. v SODRAC 2003 Inc.*, *supra*. For those interested in the distinctions between judicial and appellate review of administrative decisions, a convenient summary is found in the McRuer Report (Royal Commission, Inquiry into Civil Rights, 1968, Ont.) Report No. 1, Vol. 1, Chpt. 15, Principles Governing Appeals, at 227.

[20] As already mentioned, the search for the proper standard of review is no longer a search directed at isolating the intent of Parliament or the legislature. Not since *Dunsmuir* has the Supreme Court alluded to the notion that the deference doctrine is driven by legislative intent. Indeed, once you abandon the historical distinction between a privative clause and a right of appeal, the notion of legislative intent is no longer relevant. What is relevant is whether the administrative decision was rendered by a specialized tribunal. If so, there is a virtual presumption of tribunal expertise which, in turn, supports a further presumption: that deference is owed to the tribunal's decision. Admittedly, you are also left with the understanding that all tribunals are created equally (one-size-fits-all). In other words, it really makes no difference whether you are dealing with the decisions of our national regulators, such as the National Energy Board, or underfunded provincial tribunals that depend heavily on lay members who are appointed for reasons unrelated to the work of the tribunal. What counts is that a specialized tribunal has been

created to deal with issues for which reviewing courts are deemed to lack a relative expertise. All of this adds another dimension to a doctrine that, at times, represents a challenge to conventional understandings of the rule of law: see Peter Gall, “Problems with a Faith-Based Approach to Judicial Review” in J. Robertson, P. Gall and P. Daley, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future*, supra at 183.

[21] In summary, the law has reached the point where there is a presumption that specialized tribunals possess a relative expertise not possessed by reviewing courts. This leads to a *de facto* presumption that the decisions of these specialized tribunals are owed deference. In turn, this leads to an obvious question: How does one rebut either of the presumptions? By now, the answer should be obvious! Just show that the issue at hand falls within one of the categories for which the Supreme Court has deemed correctness to be the proper review standard. Now is the time to elaborate upon those categories.

[22] As already noted, *Dunsmuir* made no specific reference to the correctness standard applying to alleged breaches of the fairness duty. For purposes of this presentation think of the fairness duty as an organizing principle which embraces matters such as bias, and procedural fairness, and any other matters that the common law recognized as sufficient grounds for setting aside a tribunal decision but that did not go to the merits of the underlying decision. Within this context, there is relatively little recent Supreme Court case law dealing with the proper standard of review in those cases where it is alleged the tribunal breached its duty of fairness. There is an obvious reason for this omission. Prior to and even after *New Brunswick Liquor*, a breach of the duty of procedural fairness (the old rules of natural justice) including freedom from a biased decision-maker, was treated as a jurisdictional error (excess of jurisdiction): see generally *Toronto Newspaper Guild, Local 87 v Globe Printing Company*, [1953] 2 SCR 18 and *Saltfleet (Township) Board of Health v Knapman*, [1956] SCR 877. That is why it is generally safe to proceed on the understanding that the presumption of tribunal expertise

dissipates when it comes to alleged breaches of the fairness duty. However, that observation is subject to qualification.

[23] One should not presume that correctness will always be the proper review standard in regard to alleged breaches of the fairness duty; at least when it comes to allegations of procedural unfairness. In cases where the tribunal is statutorily mandated to establish rules and policies with respect to the procedures to be followed in fulfilling its adjudicative mandate, the standard of review may revert to reasonableness. Room for the exceptional case was recognized in *Baker v Canada*, [1999] 2 SCR 817, at para 27, *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, [2007] 1 SCR 650, at para 231 and *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paras 79 and 89.

[24] Parenthetically, there is an existing debate as to whether reviewing courts should accord deference to all tribunal rulings involving procedural fairness issues: see Paul Daly, “Canada’s Bi-Polar Administrative Law: Time for Fusion” (2014) 40(1) *Queens Law Journal* 213 and C. Bredt and A. Melkov. “Procedural Fairness in Administrative Decision-Making: A Principled Approach to the Standard of Review” (2015) 28 *Can J Admin L & Prac* and compare with J.M. Evans, “Fair’s Fair: Judging Administrative Procedures” (2015) 28 *Can J Admin L & Prac* 111.

[25] I turn now to the four types of questions, outlined in *Dunsmuir*, for which correctness is automatically deemed to be the proper review standard. First, there are questions of law that are of central importance to the legal system as a whole and outside the tribunal’s field of expertise. Unfortunately, it is virtually forgotten that in *Dunsmuir* the Court was speaking of general questions of law: those that involve the application of civil or common law principles such as issue estoppel (*res judicata*). In such cases, the general rule is that no deference is owed to the tribunal’s rulings: *Toronto (City) v CUPE, Local 79*, [2003] 3 SCR 77, and see also *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487 at para 39. However, *Dunsmuir* acknowledged that there was room in the law for the exceptional case - those cases where the tribunal has

developed a particular expertise in the application of a particular principle. Here is what the Court held: “Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v CUPE*, at para 72” (at para 54).

[26] All of that said, I respectfully suggest that the Supreme Court’s decision in *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616, stretches the law far beyond the tenets of the deference doctrine as articulated in *Dunsmuir*. In *Nor-Man*, the labour arbitrator modified the common law principles of estoppel in order to deal with a particular labour law problem. Importantly, his decision was consistent with the arbitral jurisprudence that had long ago abandoned certain aspects of the classical tenets of the doctrine in order to redress a labour law problem that could not be adequately resolved under the common law framework. Within this narrow context, one could insist that *Nor-Man* is consistent with the exceptional category outlined in *Dunsmuir*. However, the Court in *Nor-Man* went much further when it declared that: “Labour arbitrators are not legally bound to apply equitable and common law principles — including estoppel — in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.” Correlatively, the Supreme Court also held that the application of the estoppel doctrine did not qualify as a question of central importance to the law and, therefore, the tribunals’ decision to modify the common law principles of estoppel was owed deference. [Query: How does a labour arbitrator’s “mission” differ from that any of any other decision-maker who is called upon to act in accordance with the rule of law?]

[27] It is not disrespectful to ask whether the above quote is compatible with what was said in *Dunsmuir*: “As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). (at para. 60)” *Dunsmuir* went on to state that: “Because of their impact on

the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process - issues that are at the heart of the administration of justice.”

[28] The foregoing leads one to ask, for example, whether a tribunal’s application of the common law principle of issue estoppel (*res judicata*) is owed deference. Applying *Dunsmuir* and the two *City of Toronto* cases, cited above, one would have thought that the answer would be “no”. However, our Court of Appeal, relying on *Nor-Man*, decided otherwise in a recent case for which leave of the Supreme Court has been sought: *City of Saint John v Canadian Union of Public Employees, Local 18 and M.B.*, 2015 NBCA 35 (“*CUPE, Local 18*”). [Leave was denied on February 25, 2016.]

[29] In *CUPE, Local 18*, a unionized employee of the City was dismissed for misconduct. His application for employment insurance benefits was dismissed by a Board of Referees established under the federal legislation. The Board concluded that the employee had been dismissed for cause and, therefore, he was ineligible for employment benefits. Subsequently, the employee grieved the City’s dismissal decision and the arbitrator was presented with a preliminary issue: whether the grievance was precluded on the ground of issue estoppel having regard to the Board’s decision. The arbitrator answered “no”. On judicial review, the Court of Queen’s Bench chose the deferential standard of reasonableness. The Court of Appeal agreed as the issue did not involve a question of law of central importance to the legal system as a whole and outside the tribunal’s field of expertise. This leads one to ask why the application of a civil or common law principle, such as issue estoppel, does not qualify as a general question of law of central importance to the the legal system under the *Dunsmuir* framework? Regrettably, the search for the answer is beyond the scope of this presentation: see generally - *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCR 460, *British Columbia (Workers’ Compensation Board) v Figliola*, [2011] 3 SCR 422 and *Penner v Niagara (Regional Police Service Board)*, [2013] 2 SCR 125.

[30] As the Supreme Court has declared that all questions of law of central importance to the legal system, and outside the scope of the tribunal's expertise, are to be assessed on the review standard of correctness, it is only natural to ask how one goes about identifying those questions which are of central importance to the legal system. Regrettably, the Court has offered little insight with respect to the legal criteria to be applied. Admittedly, in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2011] 3 SCR 471 ("*Mowat*") the Court acknowledged that questions involving human rights concepts should continue to attract a correctness standard (e.g., "family status" and "discrimination") but that observation is consistent with the fact that the decisions of human rights tribunals involving such issues, and that qualify as a question of law, have always been reviewed on the correctness standard: see discussion below. Other than in this context, I am unaware of any Supreme Court precedent declaring a question of law to be of central importance to the legal system. Attempts by intermediate courts of appeal to recognize such a question have been "summarily" dismissed. Two Supreme Court decisions are on point.

[31] In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, reversing 2011 NBCA 58, 375 NBR (2d) 92 ("*Irving Pulp & Paper*") both the majority and minority rejected the Court of Appeal's attempt to apply the correctness standard having regard to the public importance of the case. Let me explain. [Parenthetically, and for the record, the Court of Appeal (Robertson JA) held that, in the alternative, the tribunal decision also failed to meet the deferential threshold of reasonableness.]

[32] *Irving Pulp & Paper* was a case in which the employer had exercised its rule-making authority, under the collective agreement, so as to require random alcohol testing of employees who held safety-sensitive positions within a kraft paper mill. Everyone agreed the mill qualified as a "dangerous workplace". At the same time, the employer's policy limited testing to 34 random samplings in a calendar year (10% of the workers who held safety-sensitive positions). And, as most in this room know, the kraft mill is located within the boundaries separating the north and west ends of the City of

Saint John. The majority of the arbitration panel declared the employer rule to be unreasonable on the ground the employer was unable to establish a “significant problem” with respect to alcohol related impairment performance at the plant and, therefore, the employer was unable to justify the infringement of an employee’s privacy rights. Curiously, under the existing arbitral jurisprudence, the threshold test being applied was much lower. The employer had only to establish “evidence of a problem”. [Curiously, the majority opinion does not deal with the discrepancy even though it is central to the reasoning of the minority.]

[33] The Court of Appeal advanced three reasons in support of assessing the panel’s decision on the standard of correctness. First, the case raised a question of “general importance in the law” and of “importance to the public at large having regard to the location of the kraft mill”. Second, was the reliance of arbitrators on judicial precedents, dealing with random alcohol and drug testing, when assessing the reasonableness of an employer’s impugned rule. The fact that arbitrators were relying on decisions of the Ontario Court of Appeal to develop a legal framework for dealing with the issue was thought to support the inference that the presumption of expertise had been rebutted. Finally, the Court of Appeal referred to tribunal decisions involving privacy rights and the application of the correctness standard when the matter came on for judicial review.

[34] By the time *Irving Pulp & Paper* was heard in the Supreme Court, intervener status had been accorded to 22 interested groups from across the country. There were those representing the major transportation companies, including Canada’s two national railways, as well as employee associations and representatives of the oil and mining industries throughout Canada. Yet the majority of the Supreme Court was unequivocal in its summary rejection of the correctness standard applying to the issue of random alcohol testing in dangerous work environments. The majority’s reasoning is confined to a solitary sentence: “It cannot be seriously challenged, particularly since *Dunsmuir v New Brunswick* that the applicable standard of review for reviewing the decision of a labour arbitrator is reasonableness” (at para 7). The minority agreed: “This

dispute has little *legal* consequence outside the sphere of labour law and that, not its potential real-world consequences, determines the applicable standard of review” (para 66). In short, the Supreme Court held that while the issue of random alcohol testing may be of utmost importance (interest) in the context of labour relations, the issue was and is not of central importance to the legal system.

[35] The next Supreme Court decision to adopt a narrow view of questions that are of central importance to the law is *Martin v Alberta (Workers’ Compensation Board)*, 2014 SCC 25 (“*Martin*”). In that case, the issue centered on the interpretation of federal legislation governing federal employees who are eligible to apply for workers’ compensation benefits under the various provincial schemes. The issue was whether a federal employee had to meet the provincial eligibility requirements of the province in which the employee was injured or whether the eligibility requirements were to be fixed under the federal legislation such that the requirements were uniform throughout the country. The Supreme Court held that the interpretation which the Alberta tribunal placed on the federal legislation was owed deference. The federal statute qualified as a ‘home’ or ‘constituent’ statute for which reasonableness was the presumptive standard of review. More importantly, the question of law to be decided was held not to be of central importance to the legal system and was squarely within the specialized functions of such tribunals. This was held to be so even though the Supreme Court’s ruling meant that it was possible for the provincial tribunals to adopt competing interpretations of the federal legislation. That possibility bears on what many believe to be a shining deficiency in the law of deference. The Supreme Court has held that inconsistency in tribunal decisions is not an independent ground for moving the standard of review to correctness: see *Domtar Inc. v Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 (“*Domtar*”), discussed below.

[36] Collectively, both *Irving Pulp & Paper* and *Martin*, reveal a Supreme Court unwilling to expand upon the types of cases or questions for which the review standard will move to correctness from the presumptive category of reasonableness. This is particularly true having regard to the Supreme Court’s most recent pronouncement on

the scope of those questions of law which fall into the category of “general importance” and outside the tribunal’s presumed field of expertise. In *Commission scolaire de Laval v. Syndicat de l’enseignement de la région de Laval*, 2016 SCC8, the majority of the Court held the arbitrator’s decision, requiring three members of the employer’s executive committee be examined in regard to the reasons underlying the committee’s in camera decision to dismiss an employee, was to be assessed on the standard of reasonableness. Not only did the majority declare that the procedural and evidentiary issues (deliberative secrecy) at stake did not qualify as questions of central importance, the majority arguably restricted the ambit of that category. Here is what was held (at para. 34): “Questions of [central importance] are rare and tend to be limited to situations that are detrimental to ‘consistency in the country’s fundamental legal order of our country’.” The down-east legal realist is apt to ask whether the Court is willing to fess up and admit that the only questions of central importance to the law are those with constitutional implications! It is to that topic I now turn.

[37] The next category for which correctness is automatically the proper standard of review embraces constitutional rulings. No one ever quibbles with the understanding that such rulings, including those requiring the application of the *Charter of Rights and Freedoms*, must fall outside the deference obligation. Intuitively, the rule of law, however formulated, dictates that correctness must be the proper standard of review. But if one sifts carefully through the Supreme Court jurisprudence, it is possible to isolate the anomalous case.

[38] In *Doré v Barreau du Québec*, [2012] 1 SCR 395, the Court accorded deference to a disciplinary decision that impacted on a lawyer’s right to freedom of speech under the *Charter*. This was the case in which Maitre Doré had sent an insulting letter, to the presiding judge, immediately following a court hearing. The lawyer was disciplined notwithstanding his plea that the letter fell within his right to freedom of speech. The Supreme Court held the disciplinary committee was no longer under an obligation to apply the *Oakes* test when dealing with s. 1 of the *Charter* (for which correctness would have been the proper review standard). The “new” administrative law

approach requires the tribunal to balance the severity of the interference with the *Charter* protected right and the objectives of the tribunal's home statute. As well, the Court held the committee's ultimate ruling was owed deference. In so holding, the Court effectively overruled cases such as *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038 and *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.

[39] The next category for which correctness is automatically deemed the proper standard of review embraces the "who gets to decide" cases. These are the ones in which the reviewing court is asked to decide what at one time would have been regarded as a "preliminary question" of law: who has the jurisdiction to decide the issue placed before the tribunal. The jurisdiction may rest exclusively with the tribunal, a superior court or another tribunal. Correlatively, the jurisdiction may be concurrent. For example, it has been asked whether an arbitrator possesses the jurisdiction to rule on the issue of employer discrimination or whether the jurisdiction rests with a human rights tribunal. Alternatively, the jurisdiction may be concurrent: see generally *Dunsmuir*, at para 61; *Regina Police Assn. Inc. v Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, [2004] 2 SCR 185; *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513; *Syndicat des professeurs du Cégep de Ste-Foy v Quebec (Attorney General)*, [2010] 2 SCR 123; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654; and *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422.

[40] There are also cases in which a tribunal has been asked to determine whether it possesses the jurisdiction to rule on the constitutional validity of a provision of its home statute. A negative response means the issue must be referred to the Court of Queen's Bench. In fact, the Supreme Court has provided a qualified response. A tribunal may address the constitutional issue provided it has either the express or implied right to decide questions of law. However, and as explained earlier, note that even if the tribunal possesses the jurisdiction to decide the issue, the constitutional ruling must be reviewed on the standard of correctness: see generally *Westcoast Energy Inc. v Canada (National*

Energy Board), [1998] 1 SCR 322; *Nova Scotia (Workers' Compensation Board) v Martin*, [2003] 2 SCR 504; *Tranchemontagne v Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513; and *R. v Conway*, [2010] 1 SCR 765.

[41] Finally, it must be acknowledged that in those cases where two tribunals possess the concurrent jurisdiction to decide an issue and one of those tribunals has already made a determination, the second tribunal will be forced to deal with the matter of issue estoppel. In other words, the second tribunal will be forced to defer to the ruling of the first tribunal unless the tenets of the estoppel doctrine dictate otherwise. Perhaps this is as good a place to curtail the analysis on this point and move on to the next category. After all it's easy to fall prey to the "fly-paper" syndrome.

[42] The next category for which correctness is automatically the proper review standard is that of the "true jurisdictional question". Curiously, the Supreme Court no longer characterizes the "who gets to decide cases", just discussed, as falling within this category. Fortunately, the oversight, if it is such, has no substantive impact on the deference doctrine. Above all, the oversight does not or should not detract from the following analysis.

[43] Regrettably, too much ink has been spilled trying to articulate a legal framework for isolating the true jurisdictional question from the non-jurisdictional one. At one time, the law embraced what was referred to as the "preliminary and collateral approach" to defining jurisdictional questions. Applying that approach, it was all too easy to declare the issue at hand qualified as a true jurisdictional question for which correctness was the proper review standard. Take, for example, those cases where the tribunal had to decide whether an applicant had filed its review application within the time prescribed by the tribunal's home statute. Assume also that the relevant provision had to be interpreted before the tribunal could rule on whether, in fact, the limitation period had been missed. As neither the interpretative nor factual issue went to the merits of the underlying case, those issues were classified as "preliminary questions" and, therefore, correctness became the proper review standard. Better still, take the case where

a labour board must decide whether the affected person is an employee under the legislation or an independent contractor. Of course, independent contractors fall outside the ambit or protections of the legislation. But, as the issue involves a preliminary determination that did not go to the underlying merits of the case, it would have been treated as a true jurisdictional question under the “preliminary and collateral approach” to isolating true jurisdictional questions.

[44] The approach of isolating “preliminary questions” was also adopted in regard to “collateral questions”. Such questions were collateral in the sense that the tribunal was being asked to rule on whether it possessed the jurisdiction to grant certain relief to the successful party, or to impose certain sanctions against the unsuccessful one. For example, a tribunal may have concluded that one of the parties was in breach of its statutory obligations and, therefore, the successful party was entitled to relief. But, there was a disagreement as to whether the tribunal possessed the jurisdiction to grant the relief contemplated. This type of disagreement would have been classified as collateral to the underlying dispute and, therefore, would have qualified as a true jurisdictional question under the “preliminary and collateral” doctrine.

[45] Too many cases involving preliminary and collateral questions made their way to the Supreme Court. This is true even though the Supreme Court formally abandoned that approach in 1988, with the release of *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048. In that case, the Court replaced the “preliminary and collateral approach” with the “pragmatic and functional approach”. Ten years later the Court would adopt the latter for purposes of identifying the proper standard of review: a point I shall come back to shortly. Regrettably, the jurisprudence continued to produce conflicting decisions on whether the remedial powers of a tribunal fell within the true jurisdictional category, even with the application of the pragmatic and functional approach. Fortunately, the more recent jurisprudence of the Court settles the issue.

[46] For example, in *Mowat*, the Court held the authority of a human rights tribunal to award costs to the successful party was not a true jurisdictional question and,

therefore, the tribunal's decision was owed deference. And in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, *supra*, the Court was unanimous in holding that a question of law dealing with the interpretation and application of a provision governing a limitation period did not qualify as a true jurisdictional question.

[47] The precedential significance of *Alberta Teachers' Association* is greater than the narrow issue decided therein. A divided Supreme Court left unanswered whether there was a need to retain the category of "true jurisdictional question". The majority could not identify a workable definition for the concept and, therefore, questioned the need for its retention. The minority argued for its preservation on historical grounds and so a compromise of sorts was reached. In the future, there would be a presumption of deference to a tribunal's interpretative rulings with respect to its home statute and those statutes with which it has familiarity. [*Dunsmuir* effectively said the same thing.] Anyone arguing that the interpretative ruling qualifies as a true jurisdictional question would now have to rebut the presumption. But how does one rebut the presumption? I confess ignorance while counseling that there may be only one answer. Unless the issue at hand falls within one of the categories for which the Supreme Court has already declared the correctness standard to automatically apply, the deferential standard of reasonableness is applicable. While the pragmatist might accuse me of advancing a circular type of reasoning, the reality is that there is very little, if any, room left in administrative law for the concept of the true jurisdictional question. To be blunt, at the moment, the only true jurisdictional question is the one which requires the reviewing court to determine which of two or more tribunals gets to decide a particular issue. [This is dealt with in J.T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" in J. Robertson, P. Gall and P. Daley, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future*, at p. 38.]

[48] Finally, I want to emphasize that I am not suggesting that the concept of jurisdiction is no longer relevant to administrative law. The notion that the tribunal exceeded its jurisdiction because of a breach of the fairness duty, in the face of a

privative clause anchored within the tribunal's home statute, will provide solace for those who seek doctrinal coherence. And the same holds true in regard to what *New Brunswick Liquor* classified as a patently unreasonable interpretation of the same statute. Of course, those were the days when the distinction between judicial and appellate review was determinative of the intent of Parliament or the legislature when it came to deciding whether a tribunal decision, involving a question of law, was owed deference. Today, the distinction between a privative clause and a right of appeal is of little moment when it comes to identifying the proper standard of review.

[49] To this point, the analytical framework for identifying the proper standard of review has been consistent with the one articulated in *Dunsmuir*. But there is another. One that remains true to the tenets of that influential decision and yet, in my view, simplifies the approach to identifying the proper review standard. The starting point is to isolate the nature of the issue(s) under review. This requires the reviewing court to place each issue within one of three categories. Either the issue advanced qualifies as a question of fact, a question of mixed law and fact or a question of law alone. For example, the tribunal may make several factual rulings, together with a ruling on a "procedural matter", followed by an interpretation of a provision of the tribunal's "enabling", or what is more commonly referred to as the tribunal's "home" statute (including its subordinate legislation). Collectively, those rulings support the tribunal's ultimate disposition. What matters is that "segmentation" of a tribunal decision may result in the reasonableness standard applying to some issues while the correctness standard applies to others.

[50] I pause here to explain that segmentation of a tribunal decision has its antagonists. In the Supreme Court, Abella J. has consistently maintained that a tribunal decision should be subjected to only one review standard. While the weight of Supreme Court jurisprudence does not embrace that view, it would be remiss not to acknowledge the existence of two conflicting decisions, released within a day of one another, dealing with the segmentation issue: *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, [2007] 1 SCR 650 and *Lévis (City) v Fraternité des policiers de Lévis Inc.*, [2007] 1

SCR 591. The first decision rejected outright the notion of segmentation. The second embraced it wholeheartedly. However, the Supreme Court jurisprudence predating those two decisions is consistent with the understanding that segmentation of a tribunal decision is permissible. Were the law otherwise, there would have been no need for the Supreme Court to list “the nature of the issue” as one of the four factors to be addressed in those instances where it is theoretically necessary to move to the second step of the standard of review analysis set out in *Dunsmuir*. As to the earlier jurisprudence see: *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc.*, [2001] 2 SCR 100, wherein Major J. stated: “In general, different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters” (para 27). The same view was expressed in *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247 at para 41, and again in *Mattel, Inc. v 3894207 Canada Inc.*, [2006] 1 SCR 772 at para 39.

[51] It also bears noting that Abella J. continues to insist that segmentation of tribunal decisions should not be permitted. In *Irving Pulp & Paper*, she emphasized that a tribunal’s decision should be approached as “an organic whole” and “without a line-by-line treasure hunt for error” (para 54). That decision, however, should be contrasted with two more recent decisions of the Supreme Court that expressly reject her insistence that segmentation of a tribunal decision be proscribed: see Abella J’s dissenting opinions in *Mouvement laïque québécois v Saguenay (City)*, *supra*, and *Canada Broadcasting Corp. v SODRAC 2003 Inc.*, *supra*. In the latter case, Abella J. conveniently and succinctly expressed her (dissenting) reasons underscoring her opposition to segmentation in the following manner (at para 191): “Breaking down a decision into each of its component parts also increases the risk that a reviewing court will find an error to justify interfering in the tribunal’s decision, and may well be seen as a thinly veiled attempt to allow reviewing courts wider discretion to intervene in administrative decisions.” [My response to Abella J’s objections to segmentation can be found at: J.T. Robertson, “Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence” at 112-16, in J. Robertson, P. Gall and P. Daley, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future.*]

[52] Accepting that segmentation is permissible, it is all too easy to identify the standard of review with respect to issues that qualify as questions of fact or questions of mixed law and fact. The standard is “reasonableness”. And the same holds true of tribunal decisions requiring the application of tribunal policy or the exercise of discretion, in those cases where the tribunal must balance competing interests: see *Dunsmuir* which speaks of deference to a tribunal’s policy making functions. In that vein, administrative law is content to apply the “palpable and overriding error” standard, in regard to questions of fact and mixed law and fact, being applied in the context of civil proceedings, and which the Supreme Court has explained in its two lead decisions: *Housen v Nikolaisen*, [2002] 2 SCR 235, and *H.L. v Canada (Attorney General)*, [2005] 1 SCR 401; see also the concurring reasons of Deschamps J. in *Dunsmuir*.

[53] Finally, it would be remiss not to acknowledge that in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 45, the Supreme Court cautioned that the appellate standards of “correctness” and “palpable and overriding error” and the administrative law standards of “correctness” and “reasonableness” should not be confused with one another. However, I am not confident that this observation was meant to suggest that the threshold test for setting aside a finding of fact, or a finding of mixed law and fact, is different in an appeal setting (palpable and overriding) than it is in the context of judicial review (reasonableness). If the threshold tests were different, I am at a loss to explain the variance and, most certainly, the Court made no attempt to do so. In the absence of an immediate and plausible rationale for establishing different threshold tests, I presume that a finding of fact, or mixed fact and law, that is infected by a “palpable and overriding error” qualifies as an “unreasonable” finding.

[54] For certain, the palpable and overriding framework seeks to prevent appellate courts from reweighing evidence and drawing their own inferences from the decision-maker’s primary findings of fact. In other words, the palpable and overriding threshold seeks to prevent *de novo* review of a decision rendered at first instance. Indeed,

in the administrative law context, Wilson J. in *National Corn Growers Assn. v Canada (Import Tribunal)*, [1990] 2 SCR 1324, cautioned her own colleagues against rehearing cases. And before her, there was the dissenting opinion of Dickson J. (as he then was) in *Jacmain v Attorney General (Can.)*, [1978] 2 SCR 15. Therein, he emphasized the distinction between judicial and *de novo* review.

[55] In brief, just as deference is owed to the findings of trial judges with respect to questions of fact and questions of mixed fact and law, so too is deference owed to the same rulings when made by an administrative tribunal. Admittedly, it is not always easy to distinguish between questions of law and questions of mixed law and fact. Suffice it to say, the matter was addressed by Iacobucci J. in *Southam* and before that in *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557. More recently, the analytical framework developed in *Southam* was applied in *Sattva Capital Corp. v Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53, albeit in the context of a commercial arbitration decision.

[56] In brief, the jurisprudence tells us that the greater the precedential significance of the tribunal's decision the more likely the issue or question will be classified as one involving a question of law. For example, take a statute which requires disclosure of information involving a "material change in circumstances" with respect to the affairs of a company. As a "material change in circumstances" is heavily dependent on the underlying facts of the case, the issue is likely to be classified as a question of mixed law and fact. On the other hand, should the tribunal adopt a legal test or framework for determining whether a change in circumstances is material that test or framework raises a question of law alone.

[57] Typically, tribunal decisions involving a question of law fall within one of two categories. Either the issue at hand involves the interpretation of the tribunal's home statute or the application of civil or common law principles. The latter category has already been dealt with. When it comes to the interpretative rulings of a tribunal's home statute, and those statutes "closely connected" to its mandate and with which the tribunal

has a “particular familiarity”, there is most certainly a “presumption” of deference. More often than not such interpretative rulings are characterized as involving a question of law. The Supreme Court’s lead decisions are: *Dunsmuir* and *Alberta Teachers’ Association*.

[58] In summary, it is settled law that a tribunal’s rulings with respect to the following are owed deference: (1) questions of fact; (2) questions of mixed law and fact; (3) tribunal’s rulings on matters involving an exercise of discretion or the application of tribunal policy. There is also a rebuttable presumption of deference to (4) questions of law tied to the interpretation of the tribunal’s home and related statutes. However, when it comes questions of law alone, the correctness standard applies to tribunal decisions raising: (1) constitutional questions; (2) the application of civil law and common law principles, save in the exceptional case and more generally in the context of labour arbitrators; (3) questions of law that are of central importance to the legal system as a whole and outside the tribunal’s field of expertise; (4) questions regarding the jurisdictional lines between two or more competing specialized tribunals; and (5) true jurisdictional questions. As already mentioned, there is little chance of a case falling within the fifth category, save for those falling within the ambit of the fourth, otherwise labeled the “who gets to decide” cases. Finally, tribunal rulings that give rise to an allegation of a breach of the fairness duty (6) are generally reviewed on the standard of correctness. The exceptional cases will embrace procedural rulings flowing from the tribunal’s statutory right to prescribe procedural rules or guidelines with respect to the adjudicative process to be followed.

[59] I caution that my summary does not take into account the unique treatment which the Supreme Court has accorded to the decisions of human rights tribunals. Historically, the Court has consistently applied the correctness standard to tribunal rulings that qualify as questions of law and involve, for example, the notion of discrimination in one of its various manifestations. This understanding is reinforced by the Court’s recent decision in *Mouvement laïque québécois v Saguenay (City)*, *supra*. In that case the Court was dealing with a decision of the Quebec’s Human Rights Tribunal involving the state’s duty of “religious neutrality” that flows from freedom of conscience

and religion. Therein, the Court accepted that the proper standard of review in regard to that issue was correctness (at para. 49). But note, however, that deference was granted in regard to the tribunal's rulings on other matters.

[60] As to the pre-*Saguenay* jurisprudence, see *Mowat* cited above, and the earlier jurisprudence beginning with *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, which deals with a question of fact, and cases such as *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 571, which consolidates the earlier precedents including *University of British Columbia v Berg*, [1993] 2 SCR 353; *Dickason v University of Alberta*, [1992] 2 SCR 1103; *Zurich Insurance Co. v Ontario (Human Rights Commission)*, [1992] 2 SCR 321; and *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554.

[61] Correlatively, my summary does not account for those cases in which the tribunal is chaired by a "sitting judge": see generally J.T. Robertson "Judicial deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence", at 90.

[62] While one should never foreclose the possibility that future cases may present factual scenarios that warrant displacement of the presumption in favour of deference, the existing case law counsels against the expectation that the Supreme Court is open to expanding upon the categories for which the correctness standard applies. As noted earlier, attempts by intermediate appellate courts to characterize an issue as one involving a question of central importance to the law have been summarily dismissed.

[63] For those of you who are not convinced that there is little room in administrative law for the application of the correctness standard, I remind you of the Supreme Court's approach to dealing with those instances where the reviewing court is dealing with conflicting tribunal decisions. Take the case where a tribunal panel interprets a provision of its home statute in one manner, and the next panel adopts a different and conflicting interpretation of the same provision. Assume also that only the

second panel decision is subjected to judicial review. Does the reviewing court owe deference to the second panel's interpretation or is the court free to resolve the conflict by adopting the review standard of correctness? The short answer is that the deferential review standard must be applied to the second tribunal decision. A brief explanation is warranted.

[64] In *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*, *supra*, a unanimous Supreme Court, recognized that although the requirement of consistency in the law was a valid objective, it could not be separated from the autonomy, expertise and effectiveness of specialized tribunals. Prior to *Domtar*, academic commentators believed otherwise. However, the Court consciously chose a different path. As Professor Hawkins observed: "L'Heureux-Dubé J. was not prepared to compromise the principle of deference even given the argument that a 'primary purpose of judicial review was to prevent arbitrariness'." [See R.E. Hawkins "Whither Judicial Review", [2009] 88 Can Bar Rev 603 at 631.]

[65] For those troubled by the understanding that inconsistent tribunal decision-making is not a sufficient ground for moving to the correctness standard of review, it is worthwhile revisiting two other Supreme Court decisions: *UES, Local 298 v Bibeault*, *supra* and *Ivanhoe Inc. v. United Food and Commercial Workers' Local 500*, [2001] 2 SCR 565. Those decisions reveal that, on occasion, the Supreme Court has skirted the *Domtar* ruling. With respect to tribunal consistency in decision making in New Brunswick, see *Jones' Masonry Ltd. v Labourers' International Union of North America, Local 900*, [2013] NBCA 50 (leave to appeal refused, [2013] SCCA No. 356) and compare the majority opinion authored by Robertson JA with the dissenting opinion of Bell JA (as he then was).

[66] While the focus of this presentation has been on the application of the deference doctrine to the adjudicative decisions of administrative tribunals, I now move to the doctrine's application in the context of administrative decisions made by other statutory delegates such as Ministers of the Crown and, correlatively, civil

servants that act as sub-delegates or who hold “office” under a statutory scheme (e.g., Registrar of Land Titles). I do so because of the relatively recent Supreme Court jurisprudence which represents a direct challenge to the soundness of three decisions of our Court of Appeal (which I authored on behalf of the Court): *O’Dell v New Brunswick (Minister of the Environment and Local Government)* 2005 NBCA 58, 286 NBR (2d) 115; *Greenisle Environmental Inc. v New Brunswick (Minister of the Environment and Local Government)*, 2007 NBCA 9, 311 NBR (2d) 161; *Carter Brothers Ltd. v New Brunswick (Registrar of Motor Vehicles)*, 2011 NBCA 81, 377 NBR (2d) 291. In the same vein, see *Takeda Canada Inc. v Canada (Minister of Health)*, 2013 FCA, [2013] FCJ No. 31 (Stratas JA in dissent), and *Prescient Foundation v Canada (Minister of National Revenue)*, 2013 FCA 120, [2013] FCJ No. 512, at para 13.

[67] I pause here to acknowledge that in *Hovey v Registrar General of Land Titles*, [2014] NBJ No. 50, Walsh J. noted the potential conflict between the decisions of the Court of Appeal and the three Supreme Court cases to be discussed momentarily. However, on the facts, he was not required to address the issue.

[68] In recent years, the New Brunswick Court of Appeal has consistently held that a statutory delegate, such as a Minister of the Crown, is owed no deference when it comes to the interpretation of his or her “home statute” and of the subordinate legislation. Correlatively, the Court was not prepared to grant deference to the interpretative decisions rendered by government officers such as the Registrar of Motor Vehicles and Registrar of Land Titles. To be blunt, and with great respect, the Court was not prepared to grant deference to government lawyers who provide legal advice to statutory delegates under the guise of “institutional expertise”. If, however, the decision under review involves, for example, the exercise of Ministerial discretion, deference is required in accordance with the Supreme Court’s decision in *Baker v Canada*, [1999] 2 SCR 817. I hasten to add that in none of the New Brunswick cases was the decision of the statutory delegate insulated from review because of a privative clause anchored within the enabling

or home statute. Nevertheless, there are three recent Supreme Court cases which represent a direct challenge to the correctness of the New Brunswick jurisprudence.

[69] In *Agraira v Canada (Public Safety and Emergency Preparedness)*, *supra*, (“*Agraira*”) the Federal Court of Appeal had reviewed the federal Minister’s interpretation of the term “national interest” (a question of law) on the standard of correctness, while according deference to the Minister’s application of that interpretation to the facts of the case (a question of mixed law and fact). On further appeal, the Supreme Court applied the first step of the *Dunsmuir* framework to hold that the Minister’s interpretation was to be assessed on the deferential standard of reasonableness. Why? In a solitary sentence the Court declared: “[...] because such a decision involves the interpretation of the term “national interest” in s. 34(2), it may be said that it involves a decision maker “interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity” (quoting from *Dunsmuir*, at para. 54).

[70] In *Canadian National Railway Co. v Canada (Attorney General)*, 2014 SCC 40, one of the issues was whether s. 40 of the *Canadian Transportation Act* vested the Governor in Council with the authority to vary or rescind a decision of the Canadian Transportation Agency on a point of law. The Governor in Council had so concluded. In upholding that interpretative decision, the Supreme Court first held the standard of review analysis set out in *Dunsmuir* applies to the decisions of the Governor in Council. The Court’s reasoning is oracular in nature: “*Dunsmuir* is not limited to judicial review of tribunal decisions” (at para 53). The decision of the Federal Court of Appeal in *Public Mobile Inc. v Canada (Attorney General)*, 2011 FCA 194, was cited in support of that proposition. [Parenthetically, and with respect, I do not read that decision as establishing that the interpretative decisions of the Governor in Council are owed deference.] The Supreme Court went on to hold that as the interpretative issue did not fall within one of the categories for which correctness is automatically the standard of review, the Governor in Council’s interpretative decision had to be assessed on the standard of reasonableness.

[71] Once again, it must be emphasized that no one ever challenges the understanding that decisions of statutory delegates, involving the exercise of “discretion” (questions of mixed law and fact), have always been subject to the deferential standard of review. And that reality remains true irrespective of what was decided in *Agraira* and *Canadian National Railway*: see *Baker v Canada*, *supra*.

[72] It remains to be asked whether the rulings in *Agraira* and *Canadian National Railway* will render all administrative decisions, involving the interpretation of the decision-maker’s home statute (questions of law), subject to the deferential standard of reasonableness. The difficulty with accepting that understanding of the law lies in the unchallenged premise that statutory delegates possess a relative expertise when it comes to the task of statutory interpretation. Arguably, the validity of the policy considerations underscoring the presumption of deference are displaced in those cases where there is no expectation that the statutory delegate will have been legally trained. Indeed, no one has been as critical of a deference doctrine that accords deference to such interpretative decisions as Professor Daly. His influential administrative law “Blog” offers an incisive analysis with respect to a Federal Court of Appeal decision in which the review standard of reasonableness was applied to decision made by a frontline immigration officer.

[73] The Federal Court decision involved the interpretation of the *Immigration and Refugee Protection Act*, a pure question of law, by those with no apparent legal training. Professor Daly’s case comment is titled: “A Snapshot of What’s Wrong with Canadian Administrative Law: *MPSEP v Tran*, 2015 FCA 237”. While his comments merit reading in their entirety, I need only reproduce his last two sentences to reinforce the understanding that *Agraira* and *Canadian National Railway* are, to say the least, troubling decisions:

“But if *Tran* is right, then deference is due to decision-makers who have no legal expertise, who do not address relevant arguments expressly in their reasons, and who may reasonably come to diametrically opposed conclusions as to similarly situated individuals. And the courts cannot intervene to resolve the issues authoritatively even though there is a strong indication that parliament intended

for them to do so. Somewhere along the line, something has gone rather badly wrong.”

[74] However, shortly, after the release of the Federal Court’s decision in *Tran*, the Supreme Court released yet another decision that reinforces, if not affirms, the understanding that the interpretative decisions rendered by non-tribunal statutory delegates are owed deference. This is true even though it is evident the delegates in question had no legal training. The decision is *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (December). Therein, the majority adopted the deferential review standard of reasonableness with respect to an issue of law involving s. 25(1) of the *Immigration and Refugee Protection Act* as interpreted by the Minister and a front-line immigration officer. This is so despite the fact that an earlier Supreme Court decision had adopted the standard of correctness in similar circumstances: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, *supra*. Regrettably, that decision did not make its way into the majority opinion. But there was something else that did not make its way into the reasons for judgment. Professor Daly points out that, in oral argument before the Supreme Court, counsel emphasized the lack of legal expertise of front-line immigration officers and yet there is no mention in the Court’s reasons of that argument. Professor Daly laments: “Another week, another underwhelming standard-of-review from the Supreme Court of Canada...” The social media views of others are even less kind! See Paul Daly, “Can This Be Correct? *Kanthisamy v Canada (Citizenship and Immigration)*, 2015 SCC 61” [administrativelawmatters.com/blog]

[75] One final remark with respect to *Kanthisamy*. In my respectful view, the majority effectively applied the review standard of correctness under the banner of reasonableness. Admittedly, the Court reached a result that “gives a boost to refugees” (see Allan C. Hutchinson, *Globe & Mail*, Monday, December 21, 2015). And indeed, many have applauded that development. But surely some will insist that the same result could have been achieved easily without further blurring the tenets of a deference doctrine that, at times, give the appearance of being a direct challenge to principled decision-making. On that observation, I close with three unvarnished questions: (1) What policy reasons justify the granting of deference to a civil servant’s interpretation of a

statute in circumstances where the delegate obviously lacks legal training and the home statute is without a privative clause?; (2) Why should legal counsel within the office of the Attorney General or departmental lawyers be entitled to raise the plea of “institutional expertise”?; and (3) Whatever happened to the understanding that citizens are entitled to independent and impartial decision-makers?