

QUANTIFYING *DUNSMUIR*: AN EMPIRICAL
ANALYSIS OF THE SUPREME COURT OF
CANADA'S JURISPRUDENCE ON
STANDARD OF REVIEW†

*In this empirical study, the author assesses an argument advanced by several scholars that the framework for the selection of standards of review articulated by the Supreme Court of Canada in *Dunsmuir v New Brunswick* leads to less deference being shown by judges to administrative decision makers than the prior pragmatic and functional approach. An examination of the Court's voting record in 177 cases dating back to *Pushpanathan v Canada* suggests that, to the contrary, members of the Court have shown greater deference to administrative decision makers in the years since *Dunsmuir* was decided than they did under the prior framework. For example, the rate at which the correctness standard was selected after a standard of review analysis was undertaken decreased from 43 per cent before *Dunsmuir* to 17 per cent in subsequent years. The rate at which members of the Court voted to overturn administrative decisions after identifying the applicable standard decreased from 38 per cent before *Dunsmuir* to 23 per cent thereafter. While a multiple regression analysis to control for confounding factors was not undertaken, these changes appear to flow from a change in the Court's approach rather than from factors such as changes in the composition in the Court or changes in the kinds of cases that were heard after *Dunsmuir*. The author suggests, however, that this shift in approach is not necessarily inherent to the *Dunsmuir* framework itself and that there are signs that the Court may have already begun to adopt a somewhat less deferential posture.*

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I Introduction

The case law on the standard of review in Canadian administrative law is the jurisprudential equivalent of an intractable geo-political

* BSc (Toronto), LLB (Osgoode Hall), BCL (Oxford University), member of the Ontario and British Columbia bars, litigator with the Department of Justice, Vancouver, British Columbia

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conflict.¹ It has pitted the judiciary, the legislatures, the executive branch, and numerous administrative tribunals against one another in a power struggle over who should get the final say in the interpretation and application of the statutes and regulations that govern the vast administrative state. The front lines of this battle has been the ever-changing test articulated by the Supreme Court of Canada to govern the selection and application of the applicable standards of review.

Since its landmark decision in *Canadian Union of Public Employees Local 963 v New Brunswick Liquor Corporation*, the Supreme Court has struggled to articulate a simple and predictable test that does not unduly intrude into the exclusive sphere of decision making assigned by the legislature to the administrative state nor abdicate the constitutionally protected role of the courts as the ultimate guardians of the rule of law.² After each major recalibration of the standard of review framework by the Court, some critics argue that it acts as an insufficient break on the tendency of those ‘interventionist’ judges who wish to micromanage the administrative state regardless of the wishes of the legislatures or the relative expertise of specialized decision makers.³ The latest skirmish in the standard of review wars is no different.

In *Dunsmuir v New Brunswick*, the Supreme Court wearily decided to ‘consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals.’⁴ In its reassessment, the majority of the Court made a number of significant reforms to the system for selecting and applying standards of review. Most famously, it eliminated the patent unreasonableness standard, leaving a single deferential reasonableness standard and the non-deferential correctness standard as the two options from which reviewing judges can choose.⁵ The majority also attempted to streamline the process for determining which standard applied by moving away from the highly contextual four-part test formerly known as the ‘pragmatic and functional

1 In a recent extra-judicial speech, McLachlin CJ referred to Iacobucci J as a ‘veteran of the wars over standard of review.’ See Chief Justice Beverley McLachlin, ‘Administrative Tribunals and the Courts: An Evolutionary Relationship’ (27 May 2013), online: <<http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>> (accessed 19 April 2016) [McLachlin, ‘Administrative Tribunals’].

2 *Canadian Union of Public Employees Local 963 v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417 [*New Brunswick Liquor*].

3 See e.g. D Mullan, ‘Baker and Deference: Interpreting the Conflicting Signals’ in D Dyzenhaus, ed, *The Unity of Public Law* (London: Hart, 2003) 21; David Mullan, ‘Deference: Is It Useful Outside of Canada?’ (2006) *Acta Juridica* 42 at 54–5 [Mullan, ‘Deference’].

4 2008 SCC 9 at para 1, [2008] 1 SCR 190 [*Dunsmuir*].

5 *Ibid* at para 34.

approach⁶ and towards a system where the standard of review is determined primarily by the kind of question that is under review.

Under the *Dunsmuir* framework, if the applicable standard of review has not been settled by prior case law involving the particular question at issue, deference (that is, reasonableness) will ‘usually’ apply to the review of questions of fact, discretion, or policy or of questions involving the interpretation of statutes with which the decision maker has particular familiarity.⁷ By contrast, the correctness standard will always apply to the review of questions that are of ‘central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker,’ ‘true’ questions of jurisdiction, constitutional questions, and questions that involve the drawing of jurisdictional lines between two or more competing specialized tribunals.⁸

As with its prior jurisprudence, the Supreme Court’s approach in *Dunsmuir* was criticized on the basis that the analysis permits reviewing courts to exhibit less deference to administrative decision makers than under the former approach. For example, David Mullan⁹ and Gerald Heckman¹⁰ have suggested that by allowing courts to review questions of jurisdiction on the correctness standard the Court may have allowed a return to the non-deferential approach that prevailed before *New Brunswick Liquor*.¹¹ Prior to that decision, courts were able to review almost any administrative decision on the correctness standard by characterizing it as jurisdictional, a term that was defined broadly.¹² In *New Brunswick Liquor*, however, Justice Brian Dickson (as he then was) introduced the patent unreasonableness standard and famously cautioned that courts ‘should be alert not to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.’¹³

6 *Dunsmuir*, supra note 4 at para 63. The four-part test involved the weighing of four factors, none of which was determinative: (a) the presence or absence of a privative clause; (b) the purpose of the tribunal as determined by interpretation of enabling legislation; (c) the nature of the question at issue; and (d) the expertise of the tribunal (see e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at paras 29–38, 11 Admin LR (2d) 117 [*Pushpanathan*]).

7 *Dunsmuir*, supra note 4 at paras 53–4.

8 *Ibid* at paras 58–61.

9 David Mullan, ‘Dunsmuir v New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again’ (2008) 21 Can J Admin L & Prac 117 at 128–30 [Mullan, ‘Dunsmuir’].

10 Gerald P Heckman, ‘Substantive Review in Appellate Courts since *Dunsmuir*’ (2009) 47:4 Osgoode Hall LJ 751 at 770–5.

11 *New Brunswick Liquor*, supra note 2.

12 Mullan, ‘Dunsmuir,’ supra note 9 at 130.

13 *New Brunswick Liquor*, supra note 2 at 233.

Another critic of the *Dunsmuir* framework who has focused on its potential for more intrusive review is Paul Daly. Daly argues that the former approach ‘provided a bulwark against interventionist judges’¹⁴ and that ‘the barriers between a decision maker and a non-deferential court . . . have been torn down by *Dunsmuir* and the Court’s subsequent decisions.’¹⁵ He argues that this is so, first, because the categories of questions that dominate the *Dunsmuir* framework logically overlap.¹⁶ For example, a question of statutory interpretation involving a decision-maker’s home statute, which presumptively attracts deference, could also be characterized as a question of jurisdiction, which does not. A question of policy or discretion, which calls for deference, could also be characterized as a question of law that is central to the judicial system as a whole and outside the decision maker’s specialized expertise. According to Daly, the *Dunsmuir* framework does not tell a judge how to resolve such conflicts. Instead, the courts are left to do so on their own on the basis of whichever factors they may deem relevant.¹⁷

To make matters worse, unlike the process under the pragmatic and functional approach, a judge applying the *Dunsmuir* framework need not explicitly identify what factors motivated her choice.¹⁸ By contrast, the pragmatic and functional approach forced judges to explicitly weigh four enumerated factors in each case before selecting the applicable standard.¹⁹ In other words, under the old system, ‘[a] reviewing court bent on applying a standard of review of correctness would have to jump through all the hoops of the [pragmatic and functional approach] before doing so.’²⁰ Daly suggests that being forced to explicitly justify the choice of standard through a contextual balancing exercise acted as a deterrent against interventionist judges. The absence of this deterrent in the *Dunsmuir* framework, he argues, opened the door to greater interventionism and less judicial deference.

Before considering the matter at the level of doctrine, I would like to examine whether critics such as Mullan, Heckman, and Daly are correct from an empirical perspective. More specifically, I would like to explore whether there is quantitative evidence to support the assertion that the *Dunsmuir* framework permits judges to show less deference to

14 Paul Daly, ‘The Unfortunate Triumph of Form over Substance in Canadian Administrative Law’ (2012) 50:2 Osgoode Hall LJ 317 at 322 [Daly].

15 Ibid.

16 Ibid at 348–51. See also Paul Daly, ‘*Dunsmuir*’s Flaws Exposed: Recent Decisions on Standard of Review’ (2012) 58:2 McGill LJ 483 at 488.

17 Daly, *supra* note 14 at 357.

18 Ibid.

19 Ibid.

20 Ibid.

administrative decision makers than under the prior approach. Indeed, if this framework allows judges to be less deferential than the pragmatic and functional approach, then, all things being equal, one would expect to see judges selecting the correctness standard and overturning administrative decisions at a higher rate than they did before *Dunsmuir*. This is a hypothesis that can be tested.

As is discussed in the second Part of this article, two existing empirical studies contain data that are relevant to the testing of this hypothesis. Both studies, however, suffer from methodological limitations caused at least in part by the fact that they were designed primarily to answer other empirical questions. As such, there remains an important gap in the empirical literature. In an effort at starting to fill this gap, I examined every case in which the Supreme Court reviewed an administrative decision on substantive (as opposed to purely procedural) grounds, beginning with the Court's landmark decision in *Pushpanathan v Canada*²¹ and ending with its recent decision in *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*.²² I then compared the pre-*Dunsmuir* and post-*Dunsmuir* cases in order to discern whether there was any measurable difference in how deferential the Court had been. This investigation involved gathering a variety of data, including a tabulation of every instance in which a judge of the Court passed on the validity of an administrative decision and a determination of which standard of review (if any) had been applied. The methodology that I employed in this regard – and some of its limitations – is set out in the third Part of this article.

In the fourth Part of the article, I set out the results of this empirical study. While no definitive conclusions can be drawn in the absence of more rigorous statistical analysis, the results suggest that the *Dunsmuir* framework is not necessarily less deferential than the pragmatic and functional approach. The basis for this conclusion can be observed in the Court's treatment of administrative decisions overall as well as at the level of individual judges' voting patterns. With regard to the Court as a whole, the rate at which the Court overturned administrative decisions dropped from 46 per cent of all administrative decisions that were reviewed before *Dunsmuir* to 34 per cent of decisions reviewed in the intervening years. Similarly, the overall rate at which members of the Court cast votes to overturn administrative decisions (whichever standard was applied) also decreased, from 38 per cent before *Dunsmuir* to 23 per cent in subsequent years. Finally, rather than having increased, the rate at which members of the Court voted to select the correctness standard after conducting a

²¹ *Pushpanathan*, supra note 6.

²² 2016 SCC 8 [*Commission scolaire de Laval*].

standard of review analysis decreased in the years since *Dunsmuir* was decided, from 43 per cent before *Dunsmuir* to 17 per cent thereafter.

It is also noteworthy – and, indeed, rather disconcerting – that both before and after *Dunsmuir* members of the Supreme Court routinely voted to uphold or overturn administrative decisions without identifying any standard of review at all. This occurred in 35 per cent of all votes in the pre-*Dunsmuir* period and in 31 per cent of all votes thereafter. When this happened, members of the Court voted to overturn at a high rate – 40 per cent of the time before *Dunsmuir* and 41 per cent thereafter.

In the fifth Part of the article, I consider whether the results of the empirical analysis truly reflect the effect of the *Dunsmuir* framework on the level of deference shown by the Court, as opposed to some other cause (or causes). Despite the fact that I did not undertake any statistical analysis to isolate potentially confounding factors, there are good reasons to believe that some of the most obvious factors were not responsible for the trends observed in the data. These factors include changes in the proportion of the Court's judges appointed by prime ministers of different political parties during the period under scrutiny and changes in the mix of administrative decisions that were reviewed by the Court. In addition, I examined a number of similar cases that the Supreme Court decided before and after *Dunsmuir* and found that the jurisprudence was indeed consistent at a more qualitative level with the apparent trends in the level of deference shown by the Court at the broader quantitative level (that is, increased use of a deferential standard and decreased rate of overturn).

In the sixth Part of the article, I consider some potential reasons why the *Dunsmuir* framework might have led to an increased show of deference by the Court. I conclude that this phenomenon is likely the result of a complex mix of factors including the possibility that the pragmatic and functional approach is more subjective and amenable to judicial manipulation than the *Dunsmuir* framework. Finally, in the concluding section of the article, I observe that the increase in deference shown by the Court since *Dunsmuir* is not necessarily inherent to the standard of review framework itself. Indeed, there are some recent signs in the Court's jurisprudence of a possible shift away from its prevailing posture of deference towards administrative decision makers.

II Existing literature

There have been only two studies that have tracked either the application of the standard of review and/or the rate at which courts have overturned administrative decisions before and after *Dunsmuir*. The results in both of these studies do not support the thesis that the *Dunsmuir* framework is less

deferential than the pragmatic and functional approach. Unfortunately, however, both studies suffer from methodological limitations. They are also limited in that they are restricted to measuring the judicial treatment of individual administrative decision makers that may not necessarily be representative of the overall trend in the law.

A LEONARD MARNY AND VOY STELTNASZYNSKI

Shortly after *Dunsmuir* was decided, Marny and Steltnaszynski examined all of the judicial review applications that concerned decisions of the Ontario Labour Relations Board (OLRB) as well as any appeals of those applications between 1979 (the year *New Brunswick Liquor* was decided) and March 2010. The data set thus included 210 cases from the twenty-nine years that preceded *Dunsmuir* and twenty-three cases from the two subsequent years.²³ The goal of the study was to answer a series of questions similar to those posed in an earlier empirical study by Erika Ringseis and Allen Ponak with respect to Alberta labour arbitration awards.²⁴ Namely, what proportion of the tribunal's decisions were taken to judicial review? How often were its decisions quashed? Did the outcome vary with the standard of review used by the court? How often was the application for review brought by an employer, a trade union, or an employee? Was there any difference in outcome depending on which party was the applicant?²⁵ The authors, however, did separate and analyze the results based on whether the cases at issue were rendered before or after *Dunsmuir*.

The authors reported that the rate at which the correctness standard was selected in their data set dropped from 10 per cent of all pre-*Dunsmuir* cases to just 4 per cent thereafter. This data point would seem to contradict the suggestion made by Mullan, Heckman, and Daly that the opposite would occur. By contrast, Daly's implicit suggestion that the overall rate of overturn would increase after *Dunsmuir* seems to have at least some support in this study. The rate of overturn increased after *Dunsmuir*, though only slightly, from 7.2 per cent before *Dunsmuir* to 8.7 per cent thereafter.²⁶ Nevertheless, little weight should be placed on these conclusions since the study suffered from some important methodological limitations.

²³ Leonard Marny & Voy Steltnaszynski, 'Judicial Review of Ontario Labour Relations Board Decisions: From *CUPE* to *Dunsmuir* and Beyond' (2009–10) 15 CLEJ 555 [Marny & Steltnaszynski].

²⁴ Erika L Ringseis & Allen Ponak, 'Judicial Review of Arbitration Awards in Alberta: Frequency, Outcomes and Standard of Review' (2006–07) 13 CLEJ 415 [Ringseis & Ponak].

²⁵ Marny & Steltnaszynski, *supra* note 23 at 555–6.

²⁶ *Ibid* at 560. This is significantly lower than the finding of Ringseis and Ponak that challenges to Alberta arbitration awards were successful 34% of the time between 1997 and 2001. Ringseis & Ponak, *supra* note 24 at 422.

These methodological limitations manifested themselves in both over- and under-inclusivity in the data.

First, though their data set was comprised entirely of decisions by panels of judges (including those on the Ontario Divisional Court, the Ontario Court of Appeal, and the Supreme Court), the authors did not track dissenting or concurring votes.²⁷ By doing so, Marny and Steltnaszynski's data set was under-inclusive because – while not legally binding – such votes are nevertheless instructive in terms of elucidating the relationship between the applicable standard of review framework and the degree of deference shown by judges over time.

Second, the authors did not seem to track instances in which multiple OLRB decisions were considered in a single application or where a single decision was 'segmented' into multiple components and then assessed on different standards.²⁸ As is discussed in the third Part of this article, in order to include as much relevant information about the relationship between the applicable standard of review and the degree of deference shown by members of the judiciary, one should tabulate every instance in which judges pass on the validity of administrative decisions or components of decisions.

Third, Marny and Steltnaszynski's data set was under-inclusive in that, as the authors themselves acknowledged,²⁹ their post-*Dunsmuir* sample size (twenty-three cases, all decided within two years of *Dunsmuir*) was too small. In addition, as is discussed in greater detail below, the Supreme Court has since given further direction in a number of cases that explain the manner in which the *Dunsmuir* framework ought to apply.

Finally, the data set was over-inclusive because it extended too far back in time. That is, the pre-*Dunsmuir* cases that Marny and Steltnaszynski included extend more than a decade before the Supreme Court's decision in *UES, Local 298 v Bibeault*, which is when the 'preliminary questions doctrine' was abandoned in favour of the pragmatic and functional approach.³⁰ The data set thus includes a large number of cases that were

²⁷ See e.g. *Greater Essex County District School Board v International Brotherhood of Electrical Workers, Local 773*, (2007) 83 OR (3d) 601 (DivCt), [2007] OJ No 185 (QL) (Div Ct), in which Carnwath J dissented, finding that the impugned decision was patently unreasonable.

²⁸ See e.g. *Mississauga of Scugog Island First Nation v National Automobile Aerospace Transportation and General Workers Union of Canada (Caw-Canada)*, [2006] OJ No 2159 at paras 89, 101 (QL) (SCJDC), (2006) 142 CRR (2d) 148 (Ont SC JDC), in which the court found that the correctness standard applied to the review of a constitutional question and the patent unreasonableness standard applied to the review of the Ontario Labour Relations Board's procedural rulings.

²⁹ Marny & Steltnaszynski, *supra* note 23 at 571.

³⁰ [1988] 2 SCR 1048 at paras 101–26 [*Bibeault*].

governed neither by the pragmatic and functional approach nor the *Dunsmuir* framework.

B SEAN REHAAG

In his study, Rehaag reviewed over 23,000 applications for leave to judicially review refugee determination decisions of the Immigration and Refugee Board in Federal Court.³¹ These applications were made between 2005 and 2010. The central finding of Rehaag's study is that the rates at which individual Federal Court judges granted or denied leave or allowed applications for judicial review when leave was granted varied wildly. For example, some judges granted applications for judicial review on the merits in over 90 per cent of the applications they decided, whereas others granted such applications less than 10 per cent of the time.³²

In considering whether something other than the identity of the judge might have been driving these numbers, Rehaag examined a number of factors, including the impact of the Supreme Court's decision in *Dunsmuir*.³³ With regard to the effect of *Dunsmuir*, he reported that of the 1 683 cases in which leave was granted between 2005 and the release of the *Dunsmuir* decision in 2008, 42.42 per cent of the judicial review applications were allowed (that is, the decisions of the Immigration and Refugee Board were overturned). In the 1 429 judicial review applications that were decided after *Dunsmuir*, the rate of overturn dropped to 36.14 per cent.³⁴

Rehaag's data seem to suggest that, contrary to Daly's implicit suggestion, the application of the *Dunsmuir* framework in fact has led to a modest increase in the deference being shown by Federal Court judges to Immigration and Refugee Board decisions. Rehaag did not track what standards of review were selected by judges in his data set. This was understandable given that the purpose of his study was to measure the rates at which individual judges granted or denied leave or applications for judicial review. Unfortunately, however, this focus limited the extent to which the study can assist in understanding the effect of the *Dunsmuir* framework on the level of deference shown by the courts.

Other limitations include the fact that, like Marny and Steltnaszynski, Rehaag did not track whether more than one administrative decision was under review in particular cases or whether administrative decisions were segmented into multiple components that were reviewed

31 S Rehaag, 'Judicial Review of Refugee Determinations: The Luck of the Draw?' (2012) 38 *Queen's LJ* 1 [Rehaag].

32 *Ibid* at 27.

33 *Ibid* at 28–30.

34 *Ibid* at 29, 58.

separately.³⁵ Finally, Rehaag's study also only covered two years of post-*Dunsmuir* jurisprudence and, thus, may not reflect some of the Supreme Court's more recent refinements to the applicable framework. While both of these empirical studies are instructive, there is a need for further empirical research to determine whether, as a general proposition, the *Dunsmuir* framework would lead to less deference being shown to administrative decisions than the pragmatic and functional approach.

III Methodology

Deciding to test the hypothesis that the adoption of the *Dunsmuir* framework will result in decreased judicial deference raises a number of methodological questions. To begin with, what indicia of deference should be assessed? As discussed below, while the concept of deference is, to a certain extent, inherently subjective, there are at least two objective metrics that can be used in this regard – namely, the standard of review that was selected in any given case and whether the decision under review was ultimately overturned.

How should data on these indicia of deference be gathered? Though perhaps somewhat artificial, the ideal method might be to conduct a randomized study of some kind, which would involve, for example, using two cohorts of judges presented with identical cases to decide but with randomly assigned instructions to apply one of two different standard of review analyses (that is, the pragmatic and functional approach, on the one hand, and the *Dunsmuir* framework, on the other). Unfortunately, this kind of randomized study may not be logistically feasible. As a result, I decided to perform an observational study that sought to draw inferences from trends observed in a large number of decisions made by the Supreme Court before and after *Dunsmuir*.

More specifically, I chose to examine the jurisprudence of the Supreme Court beginning with its decision in *Pushpanathan* in 1998 and ending with its 2016 decision in *Commission scolaire de Laval*. Practically speaking, I moved chronologically through the Court's online Lexum

³⁵ It should be noted that multiple decisions are not usually reviewed by the Federal Court in light of Rule 302 of the *Federal Courts Rules*, SOR/98-106, which provides that 'unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.' The court will, however, grant leave under Rule 302 to e.g. review multiple decisions of the same decision maker, operating under the same statute, dealing with similar factual situations where an applicant is also seeking similar forms of relief. See e.g. *Whitehead v Pelican Lake First Nation*, 2009 FC 1270, 360 FTR 274 at para 52.

database,³⁶ examining each case first to determine whether it was relevant to the analysis. I considered a case to be relevant if it included the review of an administrative decision on the merits (that is, not procedural fairness alone) and did not concern a specialized area of the law where the standard of review was not typically decided with reference to the common law test prescribed by the Court (for example, security certificate reviews under immigration legislation, *habeas corpus* applications, and so on).

If a case was relevant, I recorded the votes of each member of the Court, including any concurrences or dissents. The coding matrix assessed whether judges found an administrative decision (or particular components of a decision)³⁷ to be ‘correct,’ ‘incorrect,’ ‘reasonable,’ ‘unreasonable,’ ‘patently unreasonable,’ ‘not patently unreasonable,’ ‘valid’ (with no standard being identified), ‘invalid’ (with no standard being identified), ‘procedurally fair,’ and ‘procedurally unfair.’ For each case, I also recorded whether the administrative decision under review was segmented into multiple components and ultimately overturned or upheld by the Court as well as whether the Court allowed or dismissed the underlying appeal. Finally, I recorded the administrative decision maker in each case and an explanation for any unusual coding issues. All of the entries in the data set were then double and triple checked in an effort to expose any coding errors.

A THE CHALLENGE OF EMPIRICALLY MEASURING DEFERENCE

Several months before he co-wrote the majority’s reasons in *Dunsmuir*, Justice Lebel wrote an illuminating extrajudicial paper in which he explored the concept of deference in administrative law in some depth.³⁸ He began by sketching out the important role that the deference principle is intended to play in Canada’s constitutional structure. Lebel J characterized deference as a form of restraint exercised by courts to ensure that they do not go too far when carrying out their constitutional responsibility of ensuring that the rule of law is respected by the administrative state.³⁹ Deference thus ensures proper respect for the separation of powers by allowing the courts to do their job while recognizing that ‘the

36 *Supreme Court Judgments*, online: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do> (accessed 19 April 2016).

37 See e.g. *Dunsmuir*, supra note 4 at para 142 (Binnie J).

38 Honourable Justice Louis Lebel, ‘Some Properly Deferential Thoughts on Deference’ (Paper delivered at the Continuing Legal Education Society of British Columbia, Administrative Law Conference, November 2007), online: <<https://www.cle.bc.ca/PracticePoints/BUS/12%2004%20Deference.pdf>> [Lebel].

39 *Ibid* at 0.0.3.

development of law and policy primarily lie within the purview of the legislature and executive.’

Lebel J went on to ask the following crucial question: how can the principle of deference be defined in a useful, concise, and yet comprehensive way? In attempting to provide an answer, Lebel J canvassed a number of academics’ definitions, all of which demonstrated the difficulty of objectively answering the question in any given case as to whether a court showed sufficient deference to an administrative decision under review.⁴⁰ For example, Lebel J cited David Dyzenhaus’s well-known characterization of deference as respect. This understanding of deference ‘requires not submission but a respectful attention to the reasons offered in support of a decision.’⁴¹ Lebel J also cited the formulation of Cora Hoexter, who defines deference as

a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.⁴²

As noted by Lebel J in his paper, similar characterizations of deference have been made by the Supreme Court itself on many occasions.⁴³

All of these characterizations of deference contain within them a normative and subjective element that will inevitably lead to disagreement among reasonable people. For example, there is no way to objectively ascertain whether a court properly appreciated the constitutionally ordained province of an administrative decision maker in any given case. Nor is there any

⁴⁰ All of these definitions would fall under the rubric of what Paul Daly refers to as ‘epistemic deference.’ Daly argues that this understanding of deference involves the paying of respect to the decisions of others by means of according weight to those decisions. See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) ch 1. For similar examples of epistemic deference, see e.g. Brian Foley, *Deference and the Presumption of Constitutionality* (Dublin: Institute of Public Administration, 2008) at 256; Trevor RS Allan, ‘Judicial Deference: Doctrine and Theory’ (2011) 127 LQR 96 at 102; Adrian Vermeule, ‘Holmes on Emergencies’ (2008) 61 Stan LR 163 at 164.

⁴¹ Lebel, supra note 38 at 0.0.3–0.0.4, citing David Dyzenhaus, ‘The Politics of Deference: Judicial Review and Democracy’ in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279.

⁴² Lebel, supra note 38 at 0.0.4, citing Cora Hoexter, ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484 at 501–2.

⁴³ See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 (SCC) [*Baker*] at para 65; *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 49.

way to objectively assess whether the court accorded *due* respect to administrative decision makers' interpretation of fact and law in a particular case.

While it may be difficult to objectively assess whether a court truly showed deference to an administrative decision under review based on most definitions of the concept, one can objectively measure whether a judge identified and applied a deferential or non-deferential standard of review as well as whether the judge ultimately upheld or overturned the administrative decision under review without having to make any normative assessments. With regard to the identification of the standard of review, there are many instances in which courts have been properly criticized for identifying a deferential standard but then going on to show very little deference at all to the decision under review.⁴⁴ Nevertheless, the identification of a deferential standard of review represents an explicit judicial expression of an intent to defer to the administrative decision maker.⁴⁵ Whether this intent is actually realized in any given case depends not only on the facts of the case and the court's reasoning but also, ultimately, on whether the court goes on to overturn or uphold the administrative decision under review. As a result, I would argue that the most objective way to test the hypothesis that the *Dunsmuir* framework leads to less deference being shown to administrative decision makers is to examine the rates at which judges have identified a deferential standard of review and overturned administrative decisions before and after *Dunsmuir*. These are the indicia that I have measured in this study.

B THE SUPREME COURT'S VOTING PATTERNS ARE WORTHY OF ANALYSIS

Having decided on the appropriate indicia of deference to measure, one has to determine which court's jurisprudence to examine. As noted above, in this study, I examined the jurisprudence of the Supreme Court. While looking at the case law of the Supreme Court has some obvious limitations, it represents a valuable starting point to answer the empirical questions at issue in this study. In terms of limitations, while the vast majority of judicial review applications are heard and decided by lower

⁴⁴ See e.g. Lorne Sossin, 'Developments in Administrative Law: The 1997–98 and 1998–99 Terms' (2000) 11 SCLR (2d) 37 at 49; Ian Holloway, '“A Sacred Right”: Judicial Review of Administrative Action as a Cultural Phenomenon' (1993) 22 Manitoba LJ 28 at 64–5.

⁴⁵ The selection of a deferential standard of review arguably falls within the rubric of what Paul Daly refers to as 'doctrinal deference.' Unlike epistemic deference, doctrinal deference focuses on the allocation of authority to make binding decisions. Such authority need not be absolute: its exercise might be subject to limitations of e.g. reasonableness. Under such circumstances decisions are binding so long as they are reasonable.

courts, the Supreme Court takes only a few administrative law cases each year, all of which must be sufficiently exceptional to have satisfied the 'public importance' test for the granting of leave.⁴⁶ The fact that the Court has the discretion to select the cases it hears means that changes in the applicable standard of review analysis might influence the kinds of cases that are granted leave and, thus, the overall level of deference shown by the Court. For example, if the Court granted leave in fewer cases that would have been subject to the correctness standard after *Dunsmuir*, then any increase in the rate at which it selected the reasonableness standard would not be attributable to the *Dunsmuir* framework itself but, rather, to a change in the kinds of cases that were granted leave. As a result, the Court may operate very differently than a judge that hears a typical judicial review application.

Therefore, there is a need to also examine the jurisprudence of lower courts that routinely hear judicial review applications in order to further test the hypothesis that the *Dunsmuir* framework is less deferential than the pragmatic and functional approach. As is discussed above, the two studies that have done so to date were not specifically designed to examine this question and, consequently, suffered from a number of methodological limitations.⁴⁷ Nevertheless, both illustrate the kinds of studies that ought to be done in order to round out the empirical literature in this area.

Limitations aside, there is significant value in examining the Supreme Court's standard of review jurisprudence, even if it is just one piece in the emerging empirical literature. Given that the Court itself develops the test for selecting the standard of review, its practice ought to be particularly well informed and internally consistent. More importantly, lower courts, administrative decision makers, and litigants look to the Court for guidance not only with respect to what the test is but also with respect to how the test ought to be applied.⁴⁸ If this empirical study serves to illuminate the Court's practice over a significant period, it may provide useful information to lower court judges and perhaps even to the members of the Court itself.⁴⁹

46 *Supreme Court Act*, RSC 1985, c S-26, s 40(1). See also e.g. *R v Hinse*, [1995] 4 SCR 597, 130 DLR (4th) 54 at paras 8–9.

47 See Marny and Steltnaszynski, *supra* note 23; Rehaag, *supra* note 31.

48 As noted by McLachlin CJ in a recent extra-judicial speech, '[u]ltimately, our job as judges of the Supreme Court of Canada is to settle questions about the law . . . and how it should be applied' [emphasis added]. Remarks of the Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, Mayor's Breakfast Series, Ottawa, Ontario (25 November 2014), online: <<http://www.scc-csc.ca/court-cour/judges-juges/spe-dis/bm-2014-11-25-eng.aspx>> (accessed 4 August 2015).

49 William Eskridge and Lauren Baer employ similar reasoning with respect to their empirical analysis of the extent to which deference was shown by the Supreme Court

C EACH VOTE ON THE VALIDITY OF AN ADMINISTRATIVE DECISION
SHOULD BE COUNTED

If at all possible, the goal in assessing the Supreme Court's jurisprudence should be not only to catalogue the behaviour of the Court as a whole but also to tabulate every instance in which a member of the Court applies the standard of review to a particular decision. This can be somewhat challenging to accomplish given that the Court sometimes reviews more than one administrative decision in a single case, segments a particular administrative decision into multiple components, each of which is assessed under its own standard, adopts the reasons of a lower court, or simply fails to identify a standard of review.

While most cases in the data set did not pose such challenges, my approach in each instance was to consider a particular set of reasons as a whole in order to elucidate the judge's intention in terms of what standard(s) of review (if any) the judge intended to apply and whether the judge intended to uphold or overturn the decision(s) (or components of the decision) under review.

1 *majority, dissenting, and concurring votes should all be counted*

One could go about quantifying the Supreme Court's standard of review jurisprudence by only counting the results in individual cases (as Marny and Steltnaszynski did) or perhaps just the individual votes of the majority of the Court in particular cases. This would have the advantage of considering only data points associated with the Court's binding conclusions. However, as discussed above, if the goal is to determine whether the *Dunsmuir* framework allows judges to more easily select the correctness standard in an effort to overturn administrative decisions, then counting individual cases or majority votes alone would exclude a valuable source of data.

For example, in *Dunsmuir* itself, a six-judge majority held that the standard that applied to the decision under review was reasonableness and that the decision was unreasonable. Three other judges held that correctness was the applicable standard and that the decision was incorrect. In order to fully capture the Court's approach in such a case, all of the individual choices made by members of the Court should be tabulated – that is, six votes to overturn on the reasonableness standard and three to overturn on the correctness standard.

of the United States to interpretations of statutes made by administrative agencies. See William N Eskridge Jr & Lauren E Baer, 'The Continuum of Deference: Supreme Court Review of Agency Statutory Interpretations from Chevron to Hamdan' (2008) 96 Georgetown LJ 1083 at 1096–7 [Eskridge & Baer].

2 cases should be counted where no standard was specified

As I began wading through the case law, I was quickly confronted with an unanticipated methodological dilemma. Namely, in a significant number of cases, the Supreme Court passed on the merits of an administrative decision without conducting a standard of review analysis or even perfunctorily stating what standard it was applying. For example, in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, the Court reviewed a decision of Quebec's minister of health and social services.⁵⁰ The minister had repeatedly promised a hospital that once it moved to a new location it would be permitted to alter its permit to reflect the fact that it had been providing both long-term and short-term care (as opposed to just long-term care as specified in its permit). When the hospital moved and made a formal request to the minister to regularize its permit, the minister refused to alter it. The hospital sought an order in the nature of *mandamus* that would require the minister to issue the permit. Without mentioning what standard of review it was applying, a five-judge majority of the Court held that the minister's promises constituted an exercise of discretion to approve the change to the hospital's permit that had not been 'validly' reversed.⁵¹ Notably, Chief Justice McLachlin and Justice Binnie concurred in the result but held that the decision should be overturned on the patent unreasonableness standard.⁵²

Rather than simply ignoring such cases, it seemed appropriate to record the relevant votes in order to properly reflect the Supreme Court's overall approach. In order to do so, I added two more options to the coding matrix: 'valid' for votes to uphold with no standard of review having been specified and 'invalid' for votes to overturn without identifying a standard. As is discussed further below, while somewhat tangential to the central question being addressed in this article, the frequency with which the Court failed to articulate a standard of review and the corresponding level of deference that it went on to show in such cases are themselves important findings in the data that merit some brief discussion.

3 every application of the standard of review should be counted

Another methodological complication arose from the fact that the Supreme Court sometimes applied multiple standards of review in a single case. This tended to happen either because the Court reviewed multiple administrative decisions in a single case⁵³ or because the Court

⁵⁰ 2001 SCC 41, [2001] 2 SCR 281 [*Mount Sinai*].

⁵¹ *Ibid* at paras 107–14.

⁵² *Ibid* at paras 52–66.

⁵³ This tended to happen either because the administrative decisions concerned the same parties or because the decisions raised similar legal issues. See e.g. *Ivanhoe Inc v*

segmented a single decision into multiple components, each of which was reviewed on its own standard of review. My approach in both cases was to record every instance in which members of the Court passed on the validity of a particular administrative decision or a component of a decision. This meant that, in several cases, individual judges contributed multiple ‘votes’ to the data set. As a result, references to votes in this article must be understood in this particular sense.

With regard to cases in which the Court segmented particular administrative decisions into component parts that were then reviewed separately, the most extreme example of this in the data set is *Mouvement laïque québécois v Saguenay (City)*.⁵⁴ This case concerned a decision by a provincial human rights tribunal that the presence of certain religious symbols in municipal council chambers, as well as a municipal by-law that codified a practice of prayer before municipal council meetings, violated an atheist’s right to freedom of conscience and religion under the Quebec Charter of Human Rights and Freedoms.⁵⁵

Writing for an eight-judge majority in *Saguenay*, Justice Gascon segmented his review of the tribunal’s decision into numerous components, each of which was treated individually in terms of the applicable standard of review. In discussing the standard of review, Gascon J held that the correctness standard applied to the tribunal’s determination on the scope of the state’s duty of religious neutrality because the issue was, *inter alia*, a matter of central importance to the legal system as a whole that was outside the decision maker’s expertise.⁵⁶ By contrast, the reasonableness standard applied to five other parts of the impugned decision.⁵⁷ Gascon J was silent as to which standard should be applied to the additional issue of whether the tribunal had the jurisdiction to consider the question of religious symbols, although he concluded that it did not.⁵⁸

To further complicate the coding of *Saguenay*, when Gascon J actually assessed the merits of the decision under review, he added an additional

UFCW, Local 500, 2001 SCC 47, [2001] 2 SCR 565 (two separate decisions of the Quebec Labour Court concerning the same parties); *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306 (four separate applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records).

⁵⁴ 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*].

⁵⁵ RSQ, c C-12.

⁵⁶ *Saguenay*, supra note 54 at para 49.

⁵⁷ Ibid: ‘[T]he question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant’s freedom, the determination of whether it was discriminatory, the qualification of the experts and the assessment of the probative value of their testimony.’

⁵⁸ Ibid at paras 53–60.

four components, three of which he assessed under the reasonableness standard (that is, compensatory damages, punitive damages, and reimbursement of extrajudicial fees)⁵⁹ and one of which was not subject to any standard at all (that is, the wording in the tribunal's declaration of invalidity).⁶⁰ In sum, the eight members of the majority in *Saguenay* voted to segment the decision under review into eleven separate components, one of which was reviewed on the correctness standard (and found to be incorrect), eight of which were reviewed on the reasonableness standard (and found to be reasonable), and two of which were reviewed without any standard (and found to be invalid).

Justice Abella concurred with the result in *Saguenay* but wrote separate reasons in which she criticized the majority for segmenting the decision under review into multiple components and for concluding that the question of religious neutrality attracted review on the correctness standard.⁶¹ Abella J held that a single standard (reasonableness) ought to have been applied to the tribunal's decision, which she considered to be reasonable.⁶² Combining the reasons of Gascon and Abella JJ, I coded *Saguenay* as representing eight votes under the 'correct' category, sixty-five votes under the 'reasonable' category, and sixteen votes under the 'invalid' (no standard) category.

D IRRELEVANT CASES SHOULD NOT BE COUNTED

Not all cases that technically fall into the administrative law category are helpful in determining whether the *Dunsmuir* framework leads to more deference being shown than the pragmatic and functional approach. Cases that are not relevant (and that were therefore excluded from the data set) include those dealing with procedural fairness alone, cases in specialized areas where the standard of review is decided without

⁵⁹ *Saguenay*, supra note 54 at para 160. Gascon J held that '[e]ven though it should not have taken certain factors into account in awarding compensatory damages, its decision on this subject, viewed as a whole, satisfied the reasonableness test.' He held that '[a]s for the Tribunal's decision on the issue of punitive damages, reasons that are intelligible were given for it, and the Tribunal is entitled to deference' (at para 161). And he held that 'the Tribunal's conclusion that no improper use of procedure had occurred and its refusal to award S and the MLQ the reimbursement of their extrajudicial fees were reasonable' (at para 163).

⁶⁰ In *Saguenay*, Gascon J held that '[t]he Tribunal declared the By-law to be 'inoperative and invalid' (ibid at para 151) [translation by the author]. The respondents 'submit that the Tribunal lacks the jurisdiction to make such a declaration, as only the Superior Court has the power to make a blanket declaration of invalidity. The respondents are right. The Tribunal's declaration on this point must be amended' (at para 355).

⁶¹ Ibid at paras 165–73.

⁶² Ibid.

reference to the common law test prescribed by the Supreme Court, and cases where the sole question was the constitutionality of legislation and that issue was not considered by the administrative decision maker.

With regard to procedural fairness, I excluded all instances from the data set in which the Supreme Court reviewed administrative decisions on procedural grounds alone.⁶³ The reason for this is that while courts may sometimes suggest that the standard of review in procedural fairness cases is correctness,⁶⁴ it is more accurate to say that the standard of review does not apply.⁶⁵ As Binnie J held in *CUPE v Ontario (Minister of Labour)*,⁶⁶ ‘the content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.’⁶⁷ Rather than determining what standard applies to procedural fairness issues, the proper approach in such cases is to ask whether the duty of procedural fairness was triggered and, if so, whether, considering the factors enumerated by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*,⁶⁸ the requirements of that duty were met in the circumstances of the case.⁶⁹

While I excluded cases from the data set in which members of the Supreme Court reviewed administrative decisions on procedural grounds alone, I included those instances in which administrative decisions were reviewed on both procedural and substantive grounds. This was to test for

⁶³ The following are examples of cases that were excluded from the dataset because they involved questions of procedural fairness only: *Ellis-Don Ltd v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 22; *Bell Canada v Canadian Telephone Employees Association*, 2003 SCC 36, [2003] 1 SCR 884.

⁶⁴ See e.g. *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502 [*Khela*].

⁶⁵ *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74, [2002] 1 SCR 249 [*Moreau-Bérubé*]. This point is also apparent from the Supreme Court’s decision in *Baker*, supra note 43, in which L’Heureux-Dubé J considered the ‘substantive’ aspects of the tribunal’s decision (at paras 55–62 of the Court’s reasons) based on the applicable standard of review but considered the procedural fairness issue (at para 43) without doing so. See also e.g. *Patient X v College of Physicians & Surgeons*, 2015 NSCA 41 at para 60; *Ontario Provincial Police v MacDonald*, 2009 ONCA 805 at para 36–7, 2009] OJ No 4834 (QL); *Edmonton Police Association v Edmonton (City of)*, 2007 ABCA 184 at paras 3–4, 76 Alta LR (4th) 64 (CA); *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 46, [2006] 3 FCR 392.

⁶⁶ 2003 SCC 29, [2003] 1 SCR 539.

⁶⁷ *Ibid* at para 102.

⁶⁸ *Baker*, supra note 43.

⁶⁹ It should be noted that there are some who have advocated in favour of the application of the reasonableness standard in at least some procedural fairness cases. See e.g. Paul Daly, ‘Canada’s Bi-Polar Administrative Law: Time for Fusion’ (2014) 40:1 Queen’s LJ 213; *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at paras 46–63, 373 DLR (4th) 167 (FCA).

the possibility of a ‘substitution effect’ in which interventionist judges wishing to circumvent a deferential standard of review focused on procedural fairness issues, which are not subject to deference under the reasonableness standard.

I also excluded from the data set all cases that concerned administrative decisions whose review was not subject to the Court’s prevailing common law standard of review analysis. Usually this was because either the courts or a legislature had prescribed a distinct standard of review that applied to that particular type of decision. Cases in this category include those decided under British Columbia’s Administrative Tribunals Act,⁷⁰ cases originating from the Tax Court of Canada,⁷¹ *habeas corpus* applications,⁷² reviews of security certificates issued under the Immigration and Refugee Protection Act,⁷³ review board decisions concerning the custody of individuals found to be not criminally responsible as a result of a mental disorder,⁷⁴ and commercial arbitration awards under the Quebec Code of Civil Procedure.⁷⁵

Finally, I also excluded from the data set cases in which the only issue was whether a statutory or regulatory provision was constitutional and where that issue had not been considered by the administrative decision

⁷⁰ SBC 2004, c 45 [ATA]. The standard of review with respect to enumerated administrative decision makers in British Columbia is prescribed by the ATA, based primarily on the presence or absence of a privative clause and the nature of the question under review. See e.g. *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360; *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.

⁷¹ Ministerial decisions in the tax context are typically appealed – and then decided *de novo* – in the Tax Court of Canada. *Tax Court of Canada Act*, RSC 1985, c T-2, s 12. Given that the Tax Court of Canada is a superior court of record, the courts do not use the administrative law standard of review analysis when reviewing its decisions. See e.g. *Canada v Potash Corp of Saskatchewan*, 2003 FCA 471, [2004] 2 CTC 91 at para 17; *Jastrebski v Canada (CA)*, [1994] 3 FCR 466 at paras 16, 17, [1994] 3 FC 466 (CA). Instead, the standard of review is determined with reference to the test governing the appellate review of lower courts established in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. See e.g. *DW Thomas Holdings Inc v Canada*, 2009 FCA 371 at para 3.

⁷² See e.g. *Khela*, supra note 64.

⁷³ SC 2001, c 27 [IRPA].

⁷⁴ See *R v Owen*, 2003 SCC 33 at paras 31–2, [2003] 1 SCR 779.

⁷⁵ RSQ, c C-25. See *Desputeaux v Éditions Chouette (1987) Inc*, 2003 SCC 17 at paras 68–9, [2003] 1 SCR 178. By contrast, *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, [2014] 2 SCR 633 [Sattva], which concerned the review of a commercial arbitration award under the *Arbitration Act*, RSBC 1996, c 55, was included in the dataset. This is because the Court in *Sattva* held that while the *Dunsmuir* framework is not directly applicable to arbitration appeals it is ‘analogous’ and ‘helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards’ (at paras 102–6). The Court then went on to apply the *Dunsmuir* framework in selecting the applicable standard of review.

maker.⁷⁶ When an administrative decision maker opines on a constitutional issue, a reviewing court ought to conduct a standard of review analysis and then apply that standard to its review on the merits.⁷⁷ However, where the constitutional issue is raised for the first time on judicial review or appeal, a reviewing court would not logically assign any standard at all.

E THE EXAMINATION SHOULD START WITH *PUSHPANATHAN*

In order to accurately compare the Supreme Court's post-*Dunsmuir* jurisprudence to that under the pragmatic and functional approach, it was important to obtain data that was comprehensive enough that a reliable statistical analysis could be conducted in each period. This objective was achieved by tracking the pre-*Dunsmuir* case law beginning with the Court's 1998 decision in *Pushpanathan*. The members of the Court cast 930 votes in eighty-eight relevant cases beginning with *Pushpanathan* and ending with *620 Connaught Ltd v Canada (Attorney General)*,⁷⁸ which was the last relevant case decided by the Court before *Dunsmuir*. The members of the Court cast 920 votes in eighty-nine relevant cases beginning with *Dunsmuir* and ending with *Commission scolaire de Laval*.

F THE DATA SHOULD BE INTERPRETED WITH CAUTION

The main methodological limitation with an observational study such as that in this study is that while there may be some similarities, the cases under observation will not be the same during the two periods of time under scrutiny. As such, one cannot simply equate higher or lower rates of overturn or selection of particular standards of review in the two different periods of time under scrutiny with greater or lesser deference *per se*.

Before any tentative conclusions can be drawn in this regard, one must first consider whether or not any confounding factors unrelated to the standard of review framework may be generating the quantitative trends at issue. One way to do this would be to conduct a multiple regression analysis. There are many potentially confounding factors that one could conceivably consider in this regard. For example, the level of deference shown to any given administrative decision might be affected by a

⁷⁶ Examples of cases excluded from the dataset because they fell into this category include *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, 175 DLR (4th) 193 (SCC); *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.

⁷⁷ See e.g. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*], in which the Court held that the standard of review with respect to a human rights tribunal's determination that a statutory provision was constitutional was correctness (at para 61).

⁷⁸ 2008 SCC 7, [2008] 1 SCR 131 [*620 Connaught*].

judge's particular policy preferences (as perhaps represented by the political party of the judge's appointing prime minister), the party in power at the time of the decision, whether there was high or low media scrutiny, whether the administrative decision maker was experienced or recently appointed, and whether or not the decision maker was legally trained, just to name a few. In part because I am sceptical that any statistical model could account for the innumerable factors that influence judicial decision making in this area,⁷⁹ I decided not to conduct any multiple regression analyses in this study. Nevertheless, it may very well be a worthwhile exercise for future research.

As a practical consequence of not controlling for potentially confounding factors, I cannot say with scientific certainty whether the data in this study confirms or refutes the hypothesis under scrutiny. Nevertheless, as I discuss in the fifth Part of the article, one can still examine the data to consider whether it was significantly skewed by some of the more obvious confounding factors such as changes in the composition of the Supreme Court in terms of the political party of appointing prime ministers and changes in the mix of administrative decision makers whose decisions were reviewed in the two periods under scrutiny.

In addition, it is important to complement the quantitative analysis in this study with a qualitative assessment of comparable cases that the Court decided before and after *Dunsmuir* to see whether the jurisprudence is consistent with the apparent trends in the level of deference shown by the Court at the broader quantitative level. As is discussed in further detail in the fifth Part of the article, this is precisely what I have sought to do in this study.

IV *Empirical results*

Tables 1–6 summarize the results of this study. Three central observations emerge out of the data. First, individual members of the Supreme Court voted to uphold or overturn administrative decisions without identifying a standard of review approximately one third of the time both before and after *Dunsmuir*. Second, members of the Court voted to select a deferential standard at a significantly higher rate under the *Dunsmuir* framework than they did under the pragmatic and functional approach. Finally, both individual members of the Court and the Court as a whole overturned administrative decisions at a significantly lower rate under the *Dunsmuir* framework than under the prior approach.

⁷⁹ For similar reasoning in an analysis of the jurisprudence of the Supreme Court of the United States, see Eskridge & Baer, *supra* note 49 at 1096.

Table 1: Selection of standards and overturn rates (by individual votes)

	Time period	Share of total votes (%)	Where a standard was identified (%)	Overturn rate (%)
No standard	<i>pre-Dunsmuir</i>	35	N/A	40
	<i>post-Dunsmuir</i>	31	N/A	41
Correctness	<i>pre-Dunsmuir</i>	28	43	47
	<i>post-Dunsmuir</i>	12	17	46
Reasonableness and patent unreasonableness	<i>pre-Dunsmuir</i>	37	57	31
	<i>post-Dunsmuir</i>	58	83	19
All votes where a standard was identified	<i>pre-Dunsmuir</i>	66	100	38
	<i>post-Dunsmuir</i>	69	100	23
Procedural fairness	<i>pre-Dunsmuir</i>	12	N/A	32
	<i>post-Dunsmuir</i>	3	N/A	6
Total	<i>pre-Dunsmuir</i>	100	N/A	38
	<i>post-Dunsmuir</i>	100	N/A	28

Table 2: Rate of overturn (court as a whole)

Time period	Administrative decisions reviewed	Administrative decisions overturned	Overturn rate (%)
<i>Pre-Dunsmuir</i>	92	42	46
<i>Post-Dunsmuir</i>	94	32	34

Table 3: The Supreme Court’s treatment of different decision makers

Decision maker	Time period	Cases	Reasonableness standard selection rate (%)	Overturn rate (by votes) (%)	Overturn rate (by decision) (%)
Labour adjudicators	<i>Pre-Dunsmuir</i>	17	76	31	40
	<i>Post-Dunsmuir</i>	21	88	25	18
Cabinet or departmental officials	<i>Pre-Dunsmuir</i>	14	54	56	57
	<i>Post-Dunsmuir</i>	20	80	29	35
Human rights tribunals	<i>Pre-Dunsmuir</i>	8	0	72	78
	<i>Post-Dunsmuir</i>	7	84	33	71
Adjudicative bodies	<i>Pre-Dunsmuir</i>	61	60	33	42
	<i>Post-Dunsmuir</i>	62	82	22	32
Non-adjudicative bodies	<i>Pre-Dunsmuir</i>	27	45	43	56
	<i>Post-Dunsmuir</i>	27	83	33	32

Table 4: Rate of overturn by political party of appointment (plus McLachlin J/CJ)

Political party of appointing prime minister	Time period	Rate of overturn (with standard) (%)	Overall rate of overturn (%)
Progressive Conservative*	Pre- <i>Dunsmuir</i>	38	39
McLachlin J/CJ	Pre- <i>Dunsmuir</i>	35	38
Liberal†	Pre- <i>Dunsmuir</i>	38	41
	Post- <i>Dunsmuir</i>	23	29
Conservative‡	Post- <i>Dunsmuir</i>	21	27
McLachlin J/CJ	Post- <i>Dunsmuir</i>	26	32

* Lamer CJ, McLachlin, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, and Major JJ.

† McLachlin CJ, Bastarache, Binnie, Arbour, Lebel, Deschamps, Fish, Abella, and Charron JJ.

‡ Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, and Côté JJ.

Notes: Justice Rothstein was the only judge appointed by a Conservative prime minister in the pre-*Dunsmuir* period. As such, he only cast votes in five cases. His votes are excluded from this table.

Table 5: Frequency of review by decision maker (partial)

Decision maker	Cases before <i>Dunsmuir</i> (% of total)	Cases after <i>Dunsmuir</i> (% of total)
Adjudicative bodies	61 (69)	62 (70)
Non-adjudicative bodies	27 (31)	27 (30)
Labour adjudicators	17 (19)	21 (24)
Cabinet or departmental officials	14 (16)	20 (22)
Human rights tribunals	8 (9)	7 (8)
Municipalities and school boards	7 (8)	3 (3)
Specialized economic tribunals	5 (6)	5 (6)
Workers' compensation or occupational health and safety tribunals	4 (5)	5 (6)
Copyright, trademarks, or patents boards	4 (5)	7 (8)
Professional/judicial discipline bodies	4 (5)	2 (2)
Immigration and refugee boards	3 (3)	3 (3)
Information and privacy commissioners	1 (1)	5 (6)

AN ADDITIONAL 'UNSPOKEN' STANDARD OF REVIEW

Throughout the period under scrutiny, members of the Supreme Court routinely passed on the substantive merits of administrative decisions without conducting any standard of review analysis or even perfunctorily declaring what standard was being applied. In quantitative terms, this was true in 35 per cent of all votes in the data set before *Dunsmuir* and in 31 per cent of votes thereafter.⁸⁰ This happened in cases involving a wide

⁸⁰ Interestingly, Marny & Steltnaszynski, *supra* note 23, reported that in 22% of the cases in their dataset (which spanned more than forty years) the Court applied no standard of review (at 562). If one excludes the twenty-two cases from their dataset in which only procedural fairness was at issue, this percentage rises to 25%.

Table 6: Frequency of review by legal area (partial)

Legal area	Cases before Dunsmuir (% of total)	Cases after Dunsmuir (% of total)
Labour	22 (25)	23 (26)
Human rights	14 (16)	9 (10)
Constitutional	10 (11)	13 (15)
Immigration/refugee	7 (8)	5 (6)
Access to information	4 (5)	7 (8)
Copyright, trademarks, or patents	4 (5)	7 (8)
Education	4 (5)	2 (2)
Aboriginal	4 (5)	5 (6)
Workers compensation/occupational health	3 (3)	3 (3)

array of administrative decision makers including human rights tribunals,⁸¹ the Immigration and Refugee Board,⁸² ministers of the Crown (including the prime minister),⁸³ labour boards and arbitrators,⁸⁴ the Copyright Board,⁸⁵ school boards,⁸⁶ municipalities,⁸⁷ workers' compensation

⁸¹ See e.g. *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 (SCC); *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc*, 2008 SCC 45, [2008] 2 SCR 604; *Saguenay*, supra note 54.

⁸² See e.g. *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 4, [2005] 2 SCR 100; *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539; *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431 [*Febles*].

⁸³ See e.g. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*]; *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44; *Nguyen v Quebec (Education, Recreation and Sports)*, 2009 SCC 47, 3 SCR 208 [*Nguyen*]; *Mount Sinai*, supra note 50; *Vancouver Society of Immigrant and Visible Minority Women v MNR*, [1999] 1 SCR 10, 169 DLR (4th) 34 (SCC) [*Vancouver Society*].

⁸⁴ See e.g. *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp*, 2014 SCC 45, [2014] 2 SCR 323; *Bernard v Canada (Attorney General)*, 2014 SCC 13, [2014] 1 SCR 227 [*Bernard*]; *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161; *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 SCR 360.

⁸⁵ See e.g. *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326; *Re: Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376.

⁸⁶ See e.g. *SL v Commission scolaire des Chênes*, 2012 SCC 7, [2012] 1 SCR 235 [*Commission scolaire des Chênes*]; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

⁸⁷ See e.g. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536 [*Lacombe*]; *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5, [2006] 1 SCR 227.

tribunals,⁸⁸ the commissioner of patents,⁸⁹ and the commissioner of official languages.⁹⁰

It is also notable that in those instances where the Supreme Court passed on the merits of an administrative decision without identifying a standard of review it showed very little deference. Before *Dunsmuir*, members of the Court voted to overturn 40 per cent of the time in such cases. After *Dunsmuir*, this rate rose slightly to 41 per cent. These figures are fairly similar to the rates of overturn in the two periods when the correctness standard applied (that is, 47 per cent before *Dunsmuir* and 46 per cent thereafter). These data suggest that when no standard was identified, the Court was effectively applying the correctness standard.

It is true that many – if not most – of the instances in which no standard was identified by the Court involved circumstances that would almost certainly have called for the application of the correctness standard. For example, there were eighteen cases in the data set (nine of which were decided before *Dunsmuir* and nine of which were decided after it) in which constitutional questions were reviewed by at least some members of the Court without the identification of a standard of review.⁹¹ Nevertheless, there are at least some instances in which members of the Court passed on the merits of an administrative decision without identifying a standard of review where a more deferential standard may have been appropriate.⁹²

⁸⁸ See e.g. *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 [Ryan Estate]; *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504.

⁸⁹ *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 SCR 45.

⁹⁰ *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773 [Lavigne].

⁹¹ *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613; *Ryan Estate*, supra note 88; *Tessier Liée v Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, [2012] 2 SCR 3; *Commission scolaire des Chênes*, supra note 86; *PHS*, supra note 83; *Communications, Energy and Paperworkers Union of Canada v Native Child and Family Services of Toronto*, 2010 SCC 46, [2010] 2 SCR 737; *NIL/TUO Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45, [2010] 2 SCR 696; *Lacombe*, supra note 87; *Ontario v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815; *Mullani*, supra note 86; *UL Canada Inc v Quebec (Attorney General)*, 2005 SCC 10, [2005] 1 SCR 143; *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357; *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381; *Smith v Canada (Attorney General)*, 2001 SCC 88, [2001] 3 SCR 902; *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3; *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, 186 DLR (4th) 1 (SCC); *Vancouver Society*, supra note 83; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 (SCC).

⁹² A pre-*Dunsmuir* example of a case where no standard was identified in circumstances where deference may have been called for under the pragmatic and functional approach is *Lavigne*, supra note 90. *Lavigne* concerned the exercise of discretion by

For example, in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, the question was whether the privacy commissioner had the statutory authority to compel the production of documents over which a claim of solicitor client privilege has been made so as to investigate that claim.⁹³ The language in the statute empowered the privacy commissioner to compel the production of any records that she considered necessary to investigate a complaint ‘in the same manner and to the same extent as a superior court of record’ and to ‘receive and accept any evidence and other information . . . whether or not it is or would be admissible in a court of law.’ The privacy commissioner concluded that she had the authority to review the documents in order to determine whether the claim of solicitor client privilege was justified. The Supreme Court unanimously disagreed. Binnie J, who wrote the Court’s reasons, did not specify what standard he was applying.

Since *Blood Tribe* was a post-*Dunsmuir* case and the question was one of home statute interpretation, the presumption of reasonableness would likely have applied.⁹⁴ Had the Supreme Court explicitly considered the issue, it may have concluded that the presumption was rebutted because, for example, the scope of solicitor client privilege is an issue of central importance to the legal system as a whole and, at least arguably, outside the decision maker’s area of expertise. However, as discussed below, the

the commissioner of official languages to refuse production of documents pursuant to a provision in the *Privacy Act*, RSC 1985, c P-21. The Court held, without identifying any standard of review, that the commissioner had not properly exercised his discretion. The Federal Courts had on several prior occasions concluded that the reasonableness *simpliciter* standard applied to the review of such questions. See e.g. *Kelly v Canada (Solicitor General)* (1992) 53 FTR 147 (TD) at 149, 6 Admin LR (2d) 54, aff’d [1993] FCJ No 475, 13 Admin LR (2d) 304 (FCA); *Thurlow v Canada (Solicitor General)*, 2003 FC 1414, 242 FTR 214 at para 28; *Blank v Canada (Minister of the Environment)*, 2006 FC 1253, 300 FTR 273 at para 26; *Elomari v Canada (Space Agency)*, 2006 FC 863, [2006] FCJ No 1100 at para 19; *Savard v Canada Post Corporation*, 2008 FC 671, 324 FTR 311 at para 17; *Canadian Assn of Elizabeth Fry Societies v Canada (Minister of Public Safety Canada)*, 2010 FC 470 at paras 45–6, [2011] 3 FCR 309.

⁹³ 2008 SCC 44, [2008] 2 SCR 574 [*Blood Tribe*].

⁹⁴ Another example of a post-*Dunsmuir* case in which the Court did not identify a standard of review despite the fact that the decision was one of statutory interpretation involving the decision maker’s home statute is *Febles*, supra note 82. Indeed, the reviewing judge in *Febles* considered the standard of review to be reasonableness on that very basis. See *Febles v Canada (Citizenship and Immigration)*, 2011 FC 1103, [2011] FCJ No 1360 (QL) at para. 29. The matter is not beyond dispute, however, as the Court of Appeal held that the presumption of reasonableness was rebutted since the statutory provision at issue incorporated by reference a provision from an international convention. The Court of Appeal held that such a provision should be interpreted as uniformly as possible, which would be best achieved through the application of the correctness standard. *Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324, 357 at para 24, DLR (4th) 343 (FCA).

Court has only rarely found that this exception applies in the years since *Dunsmuir* was decided.

B THE PATTERN OF DECLINING TO IDENTIFY A STANDARD OF REVIEW IS TROUBLING

While the central focus of this article is on testing the hypothesis that the *Dunsmuir* framework would lead to less deference being shown to administrative decision makers than the pragmatic and functional approach, the finding that in roughly one third of all of the Court's votes over a period spanning almost two decades the Court's members showed little deference to a wide range of administrative decision makers while making no mention of the standard of review whatsoever merits some brief comment. While credible arguments can be made that either the pragmatic and functional approach or the *Dunsmuir* framework provides a stronger bulwark against unduly interventionist judges, there can be no doubt that either provides significantly greater (and more principled) protection against such intervention than a system where courts can show little deference by simply ignoring the standard of review altogether.

It also bears noting that during the pre-*Dunsmuir* era, the practice of declining to identify a standard of review was expressly contrary to the Supreme Court's own jurisprudence. The Court repeatedly held that an analysis under the pragmatic and functional approach, which by its very nature is highly contextual and fact specific, was required in each case.⁹⁵ While the Court in *Dunsmuir* held that an exhaustive analysis is not required in every case, the Court did not hold that the identification of a standard of review could be dispensed with altogether at a reviewing court's discretion.⁹⁶

The fact that this practice persisted with such regularity after *Dunsmuir* is also surprising given that the majority of the Court criticized the doctrinal framework that prevailed in Canada before *New Brunswick Liquor*. Lebel J and Justice Bastarache criticized this historical approach because it enabled courts to easily engage in non-deferential review simply by branding a question as jurisdictional. However, it seems as though the Court can achieve precisely the same result simply by being silent on the question of standard of review. When courts engaged in such a practice before *New Brunswick Liquor*, the majority in *Dunsmuir* held that it was

⁹⁵ See e.g. *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 25, [2003] 1 SCR 226.

⁹⁶ *Dunsmuir*, supra note 4 at para 57.

‘often at the expense of a legislative intention that the matter lies in the hands of the administrative tribunal.’⁹⁷

This gets to the heart of why the Supreme Court’s practice of showing little deference while ignoring the standard of review should be anathema to the principles expressed in the Court’s own jurisprudence. The majority in *Dunsmuir* confirmed that, from a constitutional perspective, judicial review is designed to ‘address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.’⁹⁸ Courts, the majority admonished, ‘must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.’⁹⁹ This has long been the Court’s position.¹⁰⁰ By persisting in a practice of routinely passing on the merits of administrative decisions without identifying any standard of review, the Court runs the risk of usurping powers that were deliberately assigned by Parliament and the legislatures to administrative decision makers with specialized expertise without providing any justification for doing so.

C THE SELECTION OF THE CORRECTNESS STANDARD AND THE RATE OF OVERTURN DECREASED AFTER *DUNSMUIR*

As shown in [Figure 1](#), in the instances in which the judges of the Court explicitly considered what standard of review applied to the review of an administrative decision, the rate at which the correctness standard was selected decreased dramatically after *Dunsmuir*.¹⁰¹ Whereas the correctness standard was selected 43 per cent of the time under the pragmatic and functional approach, it was selected only 17 per cent of the time under the *Dunsmuir* framework. Conversely, the rate at which a deferential standard was selected (that is, either patent unreasonableness or reasonableness) went from 57 per cent under the pragmatic and functional approach to 83 per cent under the *Dunsmuir* framework.¹⁰²

If one includes every vote in which the Supreme Court passed on the merits of administrative decisions (including those instances in which no standard was identified), the rate at which the Court selected the

⁹⁷ Ibid at para. 35.

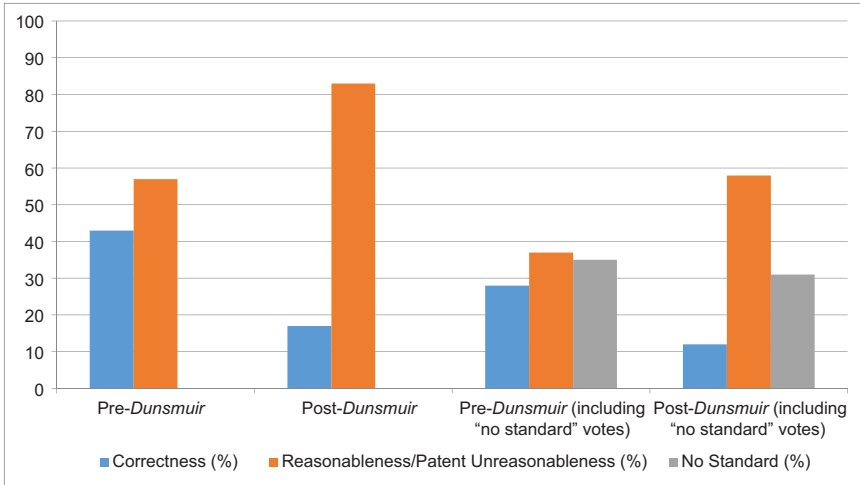
⁹⁸ Ibid.

⁹⁹ Ibid at para 27.

¹⁰⁰ See e.g. *Pushpanathan*, supra note 6 at paras 26–7.

¹⁰¹ This difference is statistically significant ($p < 0.03$) at a confidence level of 0.95.

¹⁰² This difference is statistically significant ($p < 0.001$) at a confidence level of 0.95.

Figure 1: Overall selection of standards of review before and after *Dunsmuir* (%)

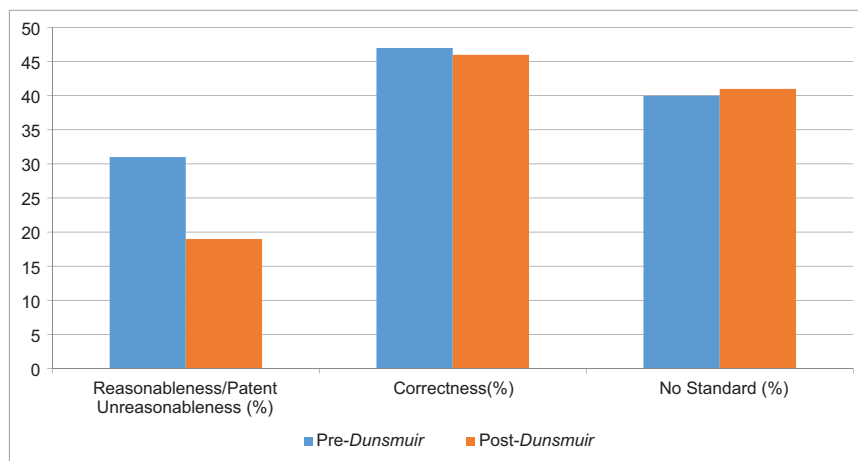
correctness standard fell from 28 per cent before *Dunsmuir* to just 12 per cent thereafter. By contrast, the rate at which a deferential standard was selected rose from 37 per cent before *Dunsmuir* to 58 per cent in subsequent years. As noted above, the rate at which no standard was identified remained fairly constant throughout the period under scrutiny (that is, 35 per cent before *Dunsmuir* and 31 per cent thereafter).

In terms of the rate at which members of the Supreme Court voted to overturn administrative decisions, if one counts only those instances in which members of the Court identified a standard of review, the rate of overturn dropped from 38 per cent before *Dunsmuir* to 23 per cent in the ensuing years.¹⁰³ If one includes all of the votes during the period under scrutiny (including those instances in which no standard was identified and cases involving procedural fairness), the rate of overturn dropped from 38 per cent before *Dunsmuir* to 28 per cent in subsequent years.¹⁰⁴

The decrease in the Court's rate of overturn is evident not only at the level of the votes cast by individual judges but also at the level of the Court's collective treatment of individual administrative decisions. More specifically, in the pre-*Dunsmuir* period, the Court as a whole overturned forty-two of the ninety-two administrative decisions that it reviewed, which results in a pre-*Dunsmuir* rate of overturn of 46 per cent. After

¹⁰³ This difference is statistically significant ($p < 0.001$) at a confidence level of 0.95.

¹⁰⁴ This difference is statistically significant ($p < 0.03$) at a confidence level of 0.95.

Figure 2: Overall rate of overturn by standard

Dunsmuir, the Court overturned thirty-two of the ninety-four administrative decisions it reviewed, which translates into a 34 per cent rate of overturn.¹⁰⁵

The decrease in the post-*Dunsmuir* rate of overturn was not merely the result of an increase in the rate at which the deferential reasonableness standard was selected. As is shown in Figure 2, it was also due to a decrease in the rate of overturn when that standard was applied. More specifically, before *Dunsmuir*, when either of the deferential standards was applied, the rate of overturn was 31 per cent. This included an overturn rate of 32 per cent under the patent unreasonableness standard and 29 per cent under the reasonableness *simpliciter* standard.¹⁰⁶ After *Dunsmuir*, the rate of overturn when the reasonableness standard was applied dropped to 19 per cent.¹⁰⁷ By contrast, the rate of overturn

¹⁰⁵ This difference is statistically significant ($p < 0.01$) at a confidence level of 0.95.

¹⁰⁶ The fact that the rate of overturn under the patent unreasonableness standard was higher than the rate under the reasonableness *simpliciter* standard would seem to support the collapsing of the two standards into a single deferential standard. In explaining that change, the majority of the Court in *Dunsmuir* noted that judges often had difficulty distinguishing between the two deferential standards (at paras 40–1). This was probably rooted in the fact that there is no practical way to distinguish between a patently unreasonable decision and a ‘merely’ unreasonable one. As Lebel and Bastarache JJ wrote, quoting David Mullan, ‘[I]ike ‘uniqueness,’ irrationality either exists or it does not. There cannot be shades of irrationality’ (at para 41).

¹⁰⁷ The difference in the rate of overturn when a deferential standard was applied before and after *Dunsmuir* was statistically significant ($p < 0.001$) at a confidence level of 0.95.

when either the correctness standard or no standard was applied held fairly steady between the two periods. That is, when the correctness standard was applied before *Dunsmuir*, the rate of overturn was 47 per cent. After *Dunsmuir*, this rate was 46 per cent. Similarly, the rate of overturn when no standard was applied was 40 per cent before *Dunsmuir* and 41 per cent thereafter.

D THE COURT DID NOT CHANNEL ITS INTERVENTIONIST IMPULSES INTO PROCEDURAL FAIRNESS

As mentioned above, the data set included those instances in which administrative decisions were reviewed by members of the Supreme Court on both procedural and substantive grounds. This was to test for the possibility of a ‘substitution effect’ in which judges wishing to circumvent a deferential standard of review focused on procedural fairness, which did not necessarily require a court to show deference. The data, however, do not provide support for the existence of such a substitution effect. Before *Dunsmuir*, in those cases that involved a review on both procedural and substantive grounds, there were fifty-three votes cast by members of the Court with respect to procedural fairness. Of these, eleven (or 21 per cent) were votes to overturn due to a lack of procedural fairness. These votes only commanded a majority of the Court in a single pre-*Dunsmuir* case (namely, *Baker*).¹⁰⁸ If the substitution effect was present, one would expect the rate of overturn on procedural grounds to increase after *Dunsmuir*. The data, however, do not bear this out.¹⁰⁹

Of the thirty-two votes on procedural fairness cast by members of the Supreme Court in the post-*Dunsmuir* data set, only two (or 6 per cent) were votes to overturn on procedural grounds. The two votes in question were cast in dissent by Justices Rothstein and Moldaver in a single case.¹¹⁰ In other words, not one of the eighty-nine cases in the post-*Dunsmuir* data set involved a situation where at least a majority of the Court voted to overturn an administrative decision on procedural grounds. In fact, the Court unanimously found that the duty of procedural fairness applied but was not violated in four cases in the post-*Dunsmuir* period.¹¹¹ While further

¹⁰⁸ While there was an apparent drop in the rate of overturn on the basis of procedural fairness, this drop was not statistically significant at confidence level 0.95 and above.

¹⁰⁹ The decrease in the rate of overturn was statistically significant ($p < 0.03$) at a confidence level of 0.95.

¹¹⁰ See *Bernard*, supra note 84 at para 71.

¹¹¹ See *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559; *Sriskandarajah v United States of America*, 2012 SCC 70, [2012] 3 SCR 609; *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.

research on this phenomenon at the lower court level would be valuable, the voting patterns observed in this study do not provide any apparent support for the hypothesis that judges constrained to review on the reasonableness standard tend to direct their interventionist impulses at attacking administrative decisions on procedural grounds.

E LABOUR ADJUDICATORS, CABINET OFFICIALS, AND HUMAN RIGHTS TRIBUNALS: THE SAME PATTERN

The same quantitative patterns observed in respect of the Supreme Court's overall treatment of administrative decision makers can be observed if one separately examines the way in which the Court treated the review of each of the three most commonly reviewed categories of decision maker: labour adjudicators, Cabinet/departmental officials, and human rights tribunals.¹¹² The Court's treatment of each of these administrative decision makers after *Dunsmuir* reveals an increase in the rate at which a deferential standard of review was chosen and a decrease in the rate at which decisions were overturned.

Looking first to the decisions of labour adjudicators, of the seventeen cases decided by the Court before *Dunsmuir*, individual members of the Court voted to select a deferential standard of review 76 per cent of the time that a standard was identified (see [Figure 3](#)). While this rate is high, in the twenty-one cases involving a review of labour adjudicators after *Dunsmuir*, the members of the Court voted to apply the reasonableness standard even more frequently – that is, 88 per cent of the time. Whereas individual members of the Court voted to overturn the decisions of labour adjudicators 46 per cent of the time (whichever standard was selected) before *Dunsmuir*, this rate decreased to 25 per cent after *Dunsmuir*. Similarly, the Court as a whole overturned seven of the eighteen decisions by labour adjudicators that it reviewed before *Dunsmuir* (for an overturn rate of 39 per cent), whereas the Court overturned only four of the twenty-two decisions that it reviewed during the post-*Dunsmuir* period (for an overturn rate of just 18 per cent).

Similarly, as is shown in [Figure 4](#), in the fourteen cases involving the review of decisions by Cabinet and departmental officials before *Dunsmuir*, the individual members of the Court voted to select a deferential standard of review 54 per cent of the time that a standard was identified. In the twenty cases decided after *Dunsmuir*, this rate rose to 80 per cent. Individual members of the Court voted to overturn the decisions of Cabinet and departmental officials 56 per cent of the time before *Dunsmuir*,

¹¹² The precise proportions of each of these categories of decision makers is set out below in the fifth Part of this article.

Figure 3: The Supreme Court’s review of decisions by labour adjudicators

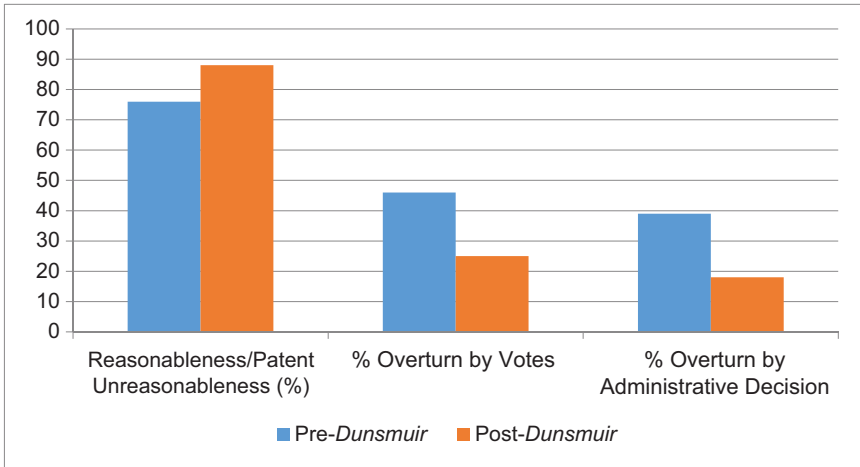
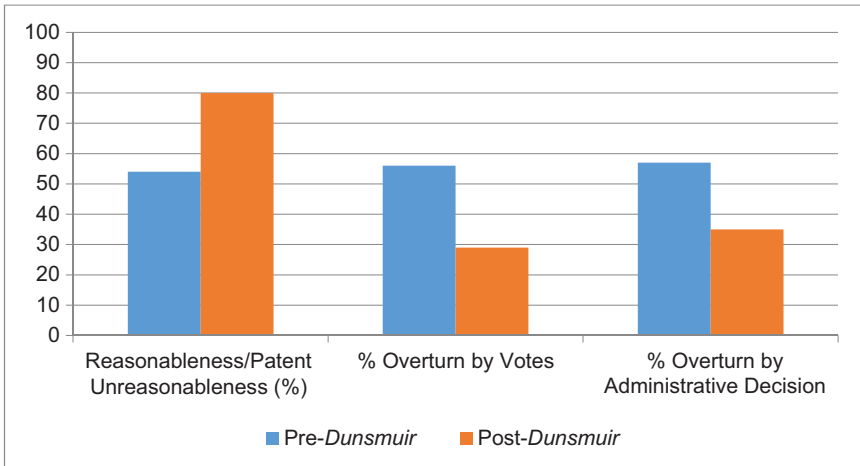
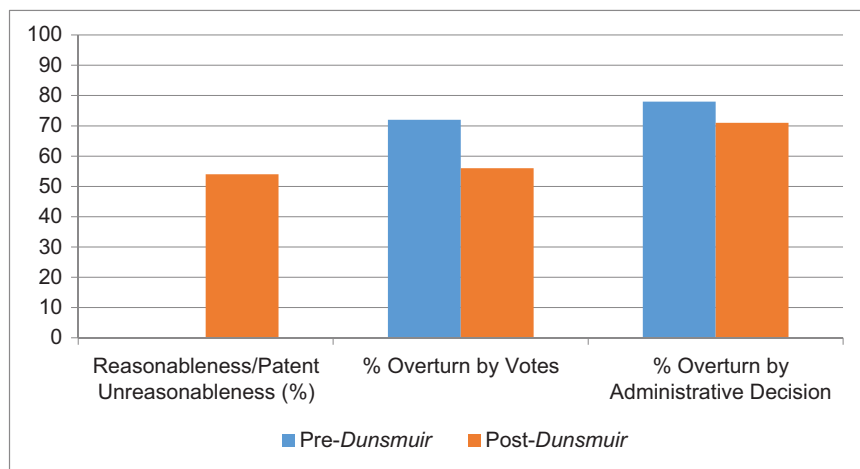


Figure 4: The Supreme Court’s review of decisions by Cabinet and departmental officials



whereas they only voted to overturn such decisions 29 per cent of the time after *Dunsmuir*. Similarly, the Court as a whole overturned eight of the fourteen decisions by Cabinet and departmental officials before *Dunsmuir* (for an overturn rate of 57 per cent), whereas after *Dunsmuir* it overturned eight of twenty-three such decisions (for an overturn rate of 35 per cent).

Figure 5: The Supreme Court's review of decisions by human rights tribunals

Finally, as is shown in Figure 5, when one examines the Supreme Court's treatment of decisions by human rights tribunals before and after *Dunsmuir*, the same patterns can be observed. More specifically, not a single vote was cast by judges of the Court to review a human rights tribunal decision on a deferential standard in any of the eight relevant cases that were decided before *Dunsmuir*. By contrast, in the seven cases involving a review of human rights tribunal decisions that the Court decided after *Dunsmuir*, members of the Court voted to apply the reasonableness standard 54 per cent of the time. Members of the Court voted to overturn the decisions of human rights tribunals some 72 per cent of the time before *Dunsmuir*. This rate dropped to 56 per cent after *Dunsmuir*. Similarly, the Court as a whole overturned eight of the nine decisions by human rights tribunals that it reviewed before *Dunsmuir* (for a rate of overturn of 78 per cent). After *Dunsmuir*, this rate dropped slightly, as the Court overturned five of the seven decisions it reviewed (for a rate of overturn of 71 per cent).

V Validity of the data

On their face, the data appear to contradict the suggestion, made by critics such as Daly, Mullan, and Heckman, that the *Dunsmuir* framework would lead to less deference being shown by the courts than under the pragmatic and functional approach. The first question that flows from this is whether the data accurately reflect the effect of the *Dunsmuir* framework on the level of deference shown by the Supreme Court (as

opposed to some other factor or set of factors). There are two main reasons to believe that the quantitative changes observed in this study may be the result of doctrinal changes to the standard of review analysis rather than some other factor.

First, while I have not conducted a regression analysis to control for potentially confounding factors, at least two of the most obvious sets of such factors do not seem to have had a significant impact on the data. These two sets of factors are changes in the composition of the Court in terms of the political party of appointing prime ministers and changes in the mix of administrative decision makers whose decisions were reviewed in the two periods under scrutiny. Second, a closer look at some fairly similar cases that the Court decided before and after *Dunsmuir* suggests that there may indeed have been a real trend towards showing greater deference than was the case under the pragmatic and functional approach.

A THE CHANGING COMPOSITION OF THE SUPREME COURT DID NOT LIKELY SKEW THE RESULTS

Perhaps the most obvious potentially confounding factor that might have affected the level of deference shown by the Supreme Court is the fact that its composition (and, in particular, the relative extent to which its members were appointed by prime ministers of different political parties) changed significantly during the period under scrutiny (that is, 1998–2016). When *Pushpanathan* was decided in 1998, six of the nine members of the Court had been appointed by Prime Minister Brian Mulroney (Progressive Conservative), while just three had been appointed by Prime Minister Pierre Trudeau (Liberal).¹¹³ The balance then shifted significantly between 1998 and 2004 when Prime Ministers Jean Chrétien (Liberal) and Paul Martin (Liberal) appointed Justices Arbour, Lebel, Deschamps, Fish, Abella, and Charron to the Court (and elevated McLachlin J to the post of Chief Justice). Between 2006 and 2016, the balance shifted again as Prime Minister Stephen Harper (Conservative) appointed Justices Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown to the Court. By the time that *Commission scolaire de Laval* was decided in 2016, the Court had only two remaining members that had been appointed by a prime minister that belonged to the Liberal party (that is, McLachlin CJ and Abella J).¹¹⁴

¹¹³ Those six judges were Lamer CJ, and L'Heureux-Dubé, Gonthier, Cory, McLachlin, and Major JJ.

¹¹⁴ It should be noted that as McLachlin J was initially appointed to the Supreme Court by Prime Minister Mulroney (Progressive Conservative) in 1989 and elevated to the position of Chief Justice by Prime Minister Chrétien (Liberal) in 2000, in the data that

If the Conservative appointees were – for whatever reason (including having adopted the ideology of their appointing prime minister) – acting more deferentially overall than their Liberal counterparts, this might explain the changes observed in the data set, at least in part.¹¹⁵ The data, however, do not seem to support this theory. First, as shown in Table 4, while the Liberal appointees do seem to have voted to overturn slightly more often than the Conservative or Progressive Conservative appointees, this difference is too small to account for the increase in deference shown by the Court since *Dunsmuir*. During the pre-*Dunsmuir* period, for example, the Liberal appointees voted to overturn 40 per cent of the time (or 38 per cent when a standard of review was identified). By comparison, the Progressive Conservative appointees voted to overturn 38 per cent of the time (whether or not a standard was identified). Similarly, in the post-*Dunsmuir* period, the Liberal appointees voted to overturn 31 per cent of the time (or 25 per cent when a standard was identified), whereas the Conservative appointees voted to overturn 28 per cent of the time (or 24 per cent when a standard was identified).

The notion that the changing composition of the Supreme Court might have been responsible for the increase in post-*Dunsmuir* deference is also inconsistent with the fact that McLachlin CJ, who is the only judge to have sat on the Court throughout the entire period under scrutiny, voted in a manner that is similar to the Court as a whole. For

is summarized in Table 4, all of McLachlin J's votes were counted under the Progressive Conservative appointee category, whereas the votes of McLachlin CJ were counted under the Liberal appointee category.

- 115 Some empirical literature from the United States suggests that while more 'conservative' judges (usually appointed by Republican presidents) may vote to overturn administrative agency interpretations of statutes at higher rates than more 'liberal' justices (who are usually appointed by Democratic presidents), this obscures the fact that judges are far more likely to defer to decisions that match their political ideology (or involve decisions made by the administrations led by a president of the same political party that appointed them). See Thomas J Miles & Cass R Sunstein, 'Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron,' (2006) 73 U Cm L Rev 82 (examining published appeals court decisions from 1990–2004 in which federal judges reviewed interpretations of law by the Environmental Protection Agency and National Labour Relations Board); Thomas J Miles & Cass R Sunstein, 'Depoliticizing Administrative Law' (2009) 58 Duke LJ 2194 (discussing studies that found 'highly politicized' voting patterns in judicial review of agency action). For a discussion of the relationship between the ideology of appointing prime ministers and judges' voting patterns in areas other than administrative law, see e.g. James Stribopoulos & Moin A Yahya, 'Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario' (2007) 45:2 Osgoode Hall LJ 315; Benjamin Alarie & Andrew Green, 'Policy Preference Change and Appointments to the Supreme Court of Canada' (2009) 47:1 Osgoode Hall LJ 1.

example, the Chief Justice's overall pre-*Dunsmuir* overturn rate was 36 per cent, whereas that of the Court as a whole was 39 per cent. Her pre-*Dunsmuir* overturn rate when a standard of review was applied was 35 per cent, whereas that of the Court as a whole was 38 per cent. In the post-*Dunsmuir* period, McLachlin CJ's overall overturn rate was 30 per cent, whereas that of the Court as a whole was 29 per cent. Her post-*Dunsmuir* overturn rate when a standard was applied was 25 per cent, whereas that of the Court as a whole was 23 per cent.

The notion that the changing composition of the Supreme Court had little to do with the changing rate of deference shown to administrative decision makers may also find some support from the fact that, as is the case with the Court's jurisprudence overall,¹¹⁶ there was a high degree of unanimity among the members of the Court in the cases examined in this study. This was true both with respect to the selection of standards of review and their application to particular administrative decisions. The Court was unanimous in both respects in 67 per cent of all of the votes tallied in this study (67 per cent before *Dunsmuir* and 68 per cent thereafter).¹¹⁷ Thus, the fact that there was significant turnover on the Court, combined with the significant flux in the proportion of judges appointed by prime ministers of different political parties did not appear to result in any obvious division in the Court over time. Instead, the Court's high rate of unanimity was maintained throughout the period under scrutiny.¹¹⁸

116 According to one study, the Supreme Court was unanimous in over 63 per cent of cases between 1975 and 2004. Peter McCormick, 'Blocs, Swarms, and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada' (2004) 42 *Osgoode Hall LJ* 107. See also Emmett Macfarlane, 'Consensus and Unanimity at the Supreme Court of Canada' (2010) 52 *SCLR* (2d) 379; Donald R Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008) at 213. This is not to say that unanimity precludes the presence of ideological differences among judges from being reflected in the jurisprudence in subtle ways. See, generally, Lee Epstein, William M Landes, & Richard A Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Cambridge, MA: Harvard University Press, 2013).

117 Of the Supreme Court's 886 pre-*Dunsmuir* votes on the merits of administrative decisions in this study (that is, excluding procedural fairness votes), 590 were delivered unanimously (67%). Of the 888 post-*Dunsmuir* votes on the merits in the study, 602 were delivered unanimously (68%). That means that 1 192 of the 1 774 votes on the merits (or 67%) during the entire period under review were unanimous.

118 These findings are consistent with the empirical work that has been done examining the relationship between the party of appointing prime ministers and the policy preferences of Supreme Court judges (as expressed in their voting patterns). See e.g. Benjamin Alarie & Andrew Green, 'Policy Preference Change and Appointments to the Supreme Court of Canada' (2009) 47 *Osgoode Hall LJ* 1 at 1, 28; Benjamin Alarie & Andrew Green, 'What's Behind the Screen? Docket Control at the Supreme Court

B DIFFERENCES IN THE MIX OF CASES THAT CAME BEFORE THE COURT
PROBABLY DID NOT SKEW THE RESULTS

Another potentially confounding factor that might have accounted for the increased show of deference by the Court in the post-*Dunsmuir* period is a change in the kinds of administrative decision makers whose decisions came before the Court as well as the mix of areas of law that were at issue. If the members of the Court generally showed more or less deference to particular kinds of decision makers (for example, labour tribunals, ministers of the Crown, and so on) or in particular areas of the law (for example, constitutional, human rights, labour, professional discipline, and so on), then changes in the mix of cases that came before the Court in these respects might very well have skewed the overall results of the study one way or the other. However, the data suggest that this was probably not the case in this study (at least to any notable degree).

As is set out in [Table 5](#), the Supreme Court's jurisprudence during both periods of time was diverse in terms of the variety of the decision makers whose decisions were reviewed. Nevertheless, there is a fair degree of similarity in the relative proportions of those decision makers during the two periods. At the highest level of generality, there were similar proportions of cases before and after *Dunsmuir* in which the Court reviewed decisions of adjudicative (in the broadest possible sense)¹¹⁹ and non-adjudicative decision makers. In particular, sixty-one of the pre-*Dunsmuir* cases in the data set concerned the review of decisions by adjudicative decision makers, compared with sixty-two such cases in the post-*Dunsmuir* period. By comparison, there were twenty-seven cases involving the review of non-adjudicative decision makers both before and after *Dunsmuir*.

The same parallels were present with regard to more specific categories of decision makers. For example, as discussed above, the decisions of labour adjudicators were reviewed in seventeen of the cases in the pre-*Dunsmuir* data set and twenty-one of the post-*Dunsmuir* cases. The

of Canada,' under review at Osgoode Hall LJ, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2469326&download=yes> (accessed 28 August 2015).

119 The distinction between adjudicative (or quasi-judicial) and other administrative decisions, which is notoriously difficult to make, used to carry tremendous significance in administrative law as it could determine whether a given decision was reviewable on the merits or subject to the rules of natural justice. See e.g. *Minister of National Revenue v Coopers and Lybrand*, [1979] 1 SCR 495, 92 DLR (3d) 1 (SCC). For present purposes, I considered a decision maker to be acting in an adjudicative capacity in a particular case if the decision involved the resolution of some kind of a *lis inter partes*, as opposed to e.g. a broad policy decision, the granting of a license, or the passage of a by-law by a municipality.

decisions of Cabinet and departmental officials were reviewed in fourteen of the pre-*Dunsmuir* cases and twenty of the post-*Dunsmuir* cases. Decisions by human rights tribunals were reviewed in eight pre-*Dunsmuir* cases and in seven post-*Dunsmuir* cases. Added together, these cases represent 45 per cent of the pre-*Dunsmuir* cases and 54 per cent of the post-*Dunsmuir* cases in the data set. Rough parallels between the two periods of time can also be seen with respect to the review of decisions by the Immigration and Refugee Board, municipalities, specialized economic tribunals (for example, the Canadian International Trade Tribunal, securities commissions, and so forth), intellectual property boards (for example, the Copyright Board, the Commissioner of Patents, and so on), and workers' compensation and occupational health and safety tribunals.

Given the parallels in the relative proportions of administrative decision makers whose decisions were reviewed during the two periods of time under scrutiny, there was also a fair degree of similarity between the legal areas that were at issue in the two sets of cases. For example, as is set out in [Table 6](#), there were twenty-two cases before *Dunsmuir* and twenty-three cases thereafter that dealt with labour law issues; fourteen cases before *Dunsmuir* and nine cases thereafter that dealt with human rights law issues; and ten cases before *Dunsmuir* and thirteen cases thereafter that dealt with constitutional law issues. Similar parallels were present in terms of the proportion of cases that dealt with immigration/refugee issues, access to information and privacy, intellectual property, education, Aboriginal law, and workplace compensation/occupational health and safety. As such, it seems unlikely that the explanation for the fairly dramatic changes in the rate of deference shown by the Court to administrative decision makers after *Dunsmuir* can be attributed solely to any obvious changes in the mix of decision makers whose decisions were reviewed or the broad areas of law that were at issue during the two periods under scrutiny.

C QUALITATIVE SIGNS OF INCREASED DEFERENCE

Looking beyond the merely quantitative indicia of deference, one can also observe a pattern of deference in the approach taken by the Court in particular cases decided after *Dunsmuir* that represent a clear departure from the prior case law. As a general proposition, this pattern has involved a post-*Dunsmuir* approach that is focused on maintaining a robust presumption that the reasonableness standard will apply to a wide array of questions and on limiting the scope of the exceptions to this presumption. This pattern can be illustrated by examining two sets of cases that involved similar issues and decision makers but were treated with much greater deference after *Dunsmuir*.

The first example involves a comparison between *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)* (ATCO 2006),¹²⁰ which was decided two years before *Dunsmuir* and the similarly named *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)* (ATCO 2015),¹²¹ which was decided almost ten years later. Both cases involved decisions made by a specialized administrative decision maker who was interpreting and applying its home statute. Yet the approach taken in the two cases was very different.

In *ATCO 2006*, the Alberta Energy and Utilities Board approved the disposition of the proceeds from the sale of buildings by a public utility. In so doing, the board applied a formula under which profits that exceeded the original cost could be shared between customers and shareholders and allocated a portion of the net gain on the sale to the customers. The Supreme Court in *ATCO 2006* segmented the decision under review into two parts, each of which was reviewed on a different standard.¹²² The first question was whether the Board had the authority under the Gas Utilities Act¹²³ and the Alberta Energy and Utilities Board Act¹²⁴ to allocate proceeds from a sale of utility assets. This question, the Court held, should be reviewed on a standard of correctness as it involved (a) statutory interpretation of general statutory terms such as ‘public interest’ and ‘conditions’ with respect to which the board had no greater expertise than the Court and (b) a jurisdictional question as to the board’s statutory authority to act.¹²⁵ The Court held that the second question under review, which pertained to the board’s choice of method for the allocation of proceeds in this case, called for a deferential standard of review in light of the board’s expertise, its broad mandate, the technical nature of the question, and the general purposes of the legislation.¹²⁶

In applying these standards of review to the decision of the board in *ATCO 2006*, the majority of the Supreme Court held that the board had erred in concluding that it had jurisdiction to do what it did.¹²⁷ In the view of the majority, the correct interpretation of the applicable legislation could only lead to the conclusion that the board did not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. The majority also held that even if the board had the jurisdiction to make such a determination, its method of allocation in

¹²⁰ 2006 SCC 4, [2006] 1 SCR 140 [*ATCO 2006*].

¹²¹ 2015 SCC 45, [2015] 3 SCR 219 [*ATCO 2015*].

¹²² *ATCO 2006*, supra note 120 at paras 22–33.

¹²³ RSA 2000, c G-5.

¹²⁴ RSA 2000, c A-17.

¹²⁵ *ATCO 2006*, supra note 120 at paras 31–2.

¹²⁶ *Ibid* at para 33.

¹²⁷ *Ibid* at para 34.

this case was unreasonable since, among other reasons, it was based on the incorrect assumption that ratepayers had acquired a proprietary interest in the utility's assets.¹²⁸

The fairly intrusive analysis employed by the Court in *ATCO 2006* can be readily contrasted with its more deferential approach in *ATCO 2015*. In the latter case, the Alberta Utilities Commission denied a request by a utility company to recover, in approved rates, certain pension costs. In so doing, the board was required to interpret and apply provisions in the Electric Utilities Act¹²⁹ and in the Gas Utilities Act that allowed for the recovery of 'prudent' costs.

With respect to the standard of review, the public utility in *ATCO 2015* quite reasonably relied upon *ATCO 2006* in arguing that the applicable standard should be correctness. Rothstein J, writing for the Court in *ATCO 2015*, rejected this argument. In so doing, he demonstrated some of the key ways in which the Court's post-*Dunsmuir* approach has represented a real departure from the past. To begin with, Rothstein J noted that while the decision under review in *ATCO 2015* involved a question of statutory interpretation, the Court's post-*Dunsmuir* jurisprudence has repeatedly maintained that the standard of reasonableness will presumptively apply where – as in *ATCO 2015* – the provision at issue was one with which the decision maker has some familiarity.¹³⁰

This approach involved an express repudiation of the notion (articulated in *ATCO 2006* and many other pre-*Dunsmuir* cases) that questions of statutory interpretation can be divided into those that implicate a decision maker's specialized expertise and those that do not. For example, in *McLean v British Columbia (Securities Commission)*, Moldaver J held that '[w]hile such a view may have carried some weight in the past, that is no longer the case.' He went on to explain that,

as this Court has repeatedly indicated since *Dunsmuir* . . . the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* – not the courts – to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's 'expertise.'¹³¹

Against this jurisprudential backdrop, Rothstein J perfunctorily noted in *ATCO 2015* that '[t]o the extent that an appeal also turns on the

¹²⁸ *Ibid* at paras 82–5.

¹²⁹ SA 2003, c E-5.1.

¹³⁰ *ATCO 2015*, supra note 121 at para 28.

¹³¹ [2013] 3 SCR 895 at paras 31, 33 [*McLean*] [emphasis in original].

Commission's interpretation of its home statutes, a standard of reasonableness also presumptively applies. The presumption is not rebutted in this case.¹³²

In concluding that the presumption of reasonableness was not rebutted in *ATCO* 2015, Rothstein J declined to characterize the decision under review as jurisdictional, which would have rebutted the presumption under the *Dunsmuir* framework. In so doing, he noted that while the Court in *ATCO* 2006 had characterized the question at issue as such (and, thus, subject to review on the correctness standard), the Supreme Court's post-*Dunsmuir* jurisprudence has emphasized that 'true questions of jurisdiction, if they exist as a category at all . . . are rare and exceptional.'¹³³ Indeed, aside from *ATCO* 2015, the Court has rejected arguments that particular questions under review were true questions of jurisdiction on at least six separate occasions since *Dunsmuir* was decided.¹³⁴ In applying the standard of reasonableness to the impugned decision in *ATCO* 2015, the Supreme Court concluded that the commission's decision was not unreasonable since, among other reasons, the use of the word 'prudent' in the applicable legislation did not require the commission to use the specific methodology advocated by the public utility.¹³⁵

A second example that illustrates the change in the Supreme Court's approach after *Dunsmuir* is a comparison between *Toronto (City) v CUPE, Local 79*¹³⁶ and *Ontario v OPSEU*,¹³⁷ two companion cases that were

¹³² *ATCO* 2015, supra note 121 at para 28.

¹³³ *Ibid* at para 27.

¹³⁴ See *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 61, [2014] 2 SCR 135 (finding that a determination by the Governor in Council as to whether a party to a confidential contract can bring a complaint under the *Canadian Transportation Act*, SC 1996, c 10 is not a true question of jurisdiction); *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 33–6 (finding that the question as to whether the Information and Privacy Commissioner lost jurisdiction to deal with a complaint under the *Personal Information Protection Act*, SA 2003, c P-6.5 when it failed to complete an inquiry within ninety days as per s 50(5) of the Act was not jurisdictional); *Celgene Corp v Canada (Attorney General)*, 2011 SCC 1 at paras 33–4, [2011] 1 SCR 3 (finding that the question as to whether the Patented Medicine Prices Review Board had the authority under the *Patent Act*, RSC 1985, c P-4, to order a patent holder to provide price information about sales from the United States was not jurisdictional). See also *Nolan v Kerry (Canada) Inc*, 2009 SCC 39 at paras 31–6, [2009] 2 SCR 678; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 [*Alliance Pipeline*] (finding in all three cases that the question as to whether a tribunal has the authority to award costs under its statute is not a true question of jurisdiction).

¹³⁵ *ATCO* 2015, supra note 121, para 64.

¹³⁶ 2003 SCC 63, [2003] 3 SCR 77 [*Toronto*].

¹³⁷ 2003 SCC 64, [2003] 3 SCR 149 [*OPSEU*].

decided some five years before *Dunsmuir*, with *Nor-Man Regional Health Authority Incorporated v Manitoba Association of Health Care Professionals*,¹³⁸ which was decided three years after *Dunsmuir*.

In *Toronto* and *OPSEU*, the Supreme Court was faced with decisions by labour adjudicators that reversed the dismissal of employees that had been convicted of sexual assault directly related to their employment duties.¹³⁹ Both decision makers held that the common law doctrines of issue estoppel and abuse of process did not preclude the dismissed employees (or their unions) from arguing that the assaults of which they were convicted did not happen. Instead, the adjudicators allowed the matters to be re-litigated and concluded that, despite the criminal convictions to the contrary, the assaults did not in fact happen. This led to findings in both cases that the ensuing dismissals were unjust.

With regard to the standard of review, the Supreme Court held in *Toronto* that while the case law established that patent unreasonableness is the general standard of review to be used in reviewing an arbitrator's decision as to whether just cause has been established in the discharge of an employee, such decisions may be segmented, with the review of interpretations of the common law undertaken on the correctness standard.¹⁴⁰ This practice was applied in *Toronto* such that the question as to whether the employee (or his representative union) was entitled to re-litigate the issue decided against him in the criminal proceedings was reviewable on the correctness standard.

In arriving at this conclusion, Arbour J wrote that the application of complex common law doctrines such as issue estoppel, abuse of process, and *res judicata* were both outside the sphere of expertise of a labour arbitrator and 'at the heart of the administration of justice.'¹⁴¹ In his concurring reasons, Lebel J agreed and, in a holding later adopted by the majority in *Dunsmuir*, held that 'where the question at issue is so clearly a question of law that is both of *central importance to the legal system*

¹³⁸ 2011 SCC 59, [2011] 3 SCR 616 [*Nor-Man*].

¹³⁹ The employee in *Toronto* worked as a recreation instructor. He was convicted of sexually assaulting a boy under his supervision. *Toronto*, supra note 136 at para 3. In *OPSEU*, one employee (Mr White) worked as a residential counsellor in a facility for adults with developmental disabilities. He was convicted of sexually assaulting a severely disabled resident under his care who could not speak. *OPSEU*, supra note 137 at para 3. The other employee (Mr Samaroo) was employed as a correctional officer. He was found guilty of two counts of sexual assault and one count of assault in respect of female inmates in the jail at which he worked (at para 5).

¹⁴⁰ See *Toronto*, supra note 136 at para 14, citing *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487 at para 39: 'The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard.'

¹⁴¹ *Toronto*, supra note 136 at para 15.

as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed . . . analysis in order to reach a standard of review of correctness.¹⁴²

The Supreme Court went on to conclude in both *Toronto* and *OPSEU* that the adjudicator had erred in permitting re-litigation of the criminal convictions. And, as a result of that error, the Court held that the adjudicators had reached patently unreasonable conclusions on whether the employees in question had been dismissed for just cause.¹⁴³

The lack of deference shown by the Court to the adjudicators' decisions in *Toronto* and *OPSEU* can be contrasted with the approach of the Court in the post-*Dunsmuir* decision of *Nor-Man*, which also concerned the application of the equitable remedy of estoppel by a labour adjudicator. In *Nor-Man*, a union claimed that an employee was entitled under the collective agreement to a bonus week of vacation upon reaching twenty years of employment. The employer disagreed on the basis that some of those years had been spent as a casual employee, which did not, in its view, count insofar as the entitlement to vacation benefits under the collective agreement was concerned. While the adjudicator rejected the employer's interpretation of the collective agreement, he held that the union was estopped from challenging it due to its long-standing failure to grieve the employer's consistent application of that interpretation.¹⁴⁴

With regard to the standard of review, the Manitoba Court of Appeal in *Nor-Man* concluded that, as in *Toronto* and *OPSEU*, the application of the common law doctrine of estoppel was reviewable on the correctness standard since it was a question of central importance to the legal system as a whole that was outside the adjudicator's expertise. Writing for the Supreme Court in *Nor-Man*, Fish J disagreed. In so doing, he explained that while common law and equitable doctrines may emanate from the courts, arbitrators are authorized by their broad statutory and contractual mandates to adapt these doctrines as they see fit in order to promote the peaceful continuity of the relationship between employers and unions.¹⁴⁵ As such, the reasonableness standard applied.

Applying the reasonableness standard in *Nor-Man*, the Supreme Court went on to conclude that the decision was reasonable. This was so even though the Court agreed with the union that the arbitrator had failed to make a key factual finding required by the test for promissory estoppel

¹⁴² Ibid at para 62 [emphasis added].

¹⁴³ Ibid at para 58. The reasoning of the Court in *Toronto* was followed by the Court in *OPSEU*, supra note 137 at para 1.

¹⁴⁴ *Nor-Man*, supra note 138 at paras 1–21.

¹⁴⁵ Ibid at paras 35–53.

laid down by the Supreme Court itself in *Maracle v Travellers Indemnity Company of Canada*.¹⁴⁶ In so concluding, Fish J held that the question is not whether the labour arbitrator failed to apply the applicable case law 'to the letter' but, rather, whether he had reasonably adapted and applied the equitable doctrine of estoppel in a manner that was consistent with the objectives and purposes of the applicable legislation, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the employee's grievance. The Court was satisfied that the arbitrator had done so.¹⁴⁷

It is important to note that *Nor-Man* was not the only post-*Dunsmuir* case in which the Supreme Court rejected the argument that the correctness standard applied because the decision under review was said to be of central importance to the legal system as a whole and outside the expertise of the decision maker. In fact, since *Dunsmuir*, the Court has done so on at least five other occasions. These cases involved the interpretation of a statutory limitation period by a securities regulator,¹⁴⁸ the interpretation of a management rights clause in a collective agreement by a grievance board,¹⁴⁹ a human rights tribunal's determination regarding its statutory authority to award costs,¹⁵⁰ an energy board's determination regarding its statutory authority to award costs,¹⁵¹ and a grievance arbitrator's interpretation of the principle of deliberative secrecy.¹⁵²

Based on the foregoing examples, there are good reasons to believe that both the increase in the rate at which a deferential standard was applied and the decrease in the rate that underlying administrative decisions were overturned after *Dunsmuir* were in fact connected to the doctrinal changes to the standard of review analysis made by the Court in *Dunsmuir*.

VI Possible explanations

The data in this study show that the Supreme Court's apparent increase in deference to administrative decision makers after *Dunsmuir* has two main facets: an increase in the rate at which a deferential standard was applied and a decrease in the rate of overturn when a deferential

146 [1991] 2 SCR 50 at 57 [*Maracle*].

147 *Nor-Man*, supra note 138 at paras 59–61.

148 *McLean*, supra note 131 at paras 26–33.

149 *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para 66, [2013] 2 SCR 458.

150 *Mowat*, supra note 134.

151 *Alliance Pipeline*, supra note 134.

152 *Commission scolaire de Laval*, supra note 22 at paras 30–9.

standard was applied. What might account for these changes? First, it is possible that, contrary to Daly's assertion, the pragmatic and functional approach may actually have been more manipulable and thus amenable to intrusive review than the *Dunsmuir* framework. Second, the increase in post-*Dunsmuir* deference when a deferential standard was applied may also have been the result of a complex mix of factors, including responses to the changes made in *Dunsmuir* by administrative decision makers and prospective litigants.

A THE PRAGMATIC AND FUNCTIONAL APPROACH MAY NOT HAVE BEEN VERY DEFERENTIAL

One of the reasons why deference may have gone up since *Dunsmuir* is that the pragmatic and functional approach may not have actually been the 'bulwark against interventionist judges' that Daly and others have asserted.¹⁵³ While it is true that a reviewing court bent on applying a standard of review of correctness had to 'jump through all the hoops'¹⁵⁴ of the pragmatic and functional approach before doing so, these hoops involved the weighing of four factors, each of which contained its own measure of subjectivity and none of which was dispositive.¹⁵⁵ In practice, this meant that the test was both flexible and manipulable.

A good illustration of the subjective and flexible nature of the pragmatic and functional approach is *Trinity Western University v British Columbia College of Teachers*.¹⁵⁶ *Trinity Western* concerned a decision by the British Columbia College of Teachers (BCCT) not to approve an application from a private university to assume full responsibility for its teacher education program. BCCT found that granting the application would have been contrary to the public interest under the applicable statute since the university followed certain practices that the BCCT considered to be discriminatory.¹⁵⁷ The BCCT was concerned that exposure to these practices would negatively affect the suitability and preparedness of graduates to teach in the public school system. The majority and

¹⁵³ Daly, *supra* note 14 at 322.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Pushpanathan*, *supra* note 6 at para 27. The criticism of the pragmatic and functional approach as being so malleable that it could not prevent intervention from determined judges was well summarized by David Mullan as follows: '[T]he regime is a fraud. If a judge finds fault with a decision under review, that judge will manipulate the malleable pragmatic and functional factors and/or the application of the chosen standard of review to reach the conclusion that he or she wants. It is also time-consuming and expensive in the sense that it adds another dimension to the ambit of judicial review applications.' See Mullan, 'Deference,' *supra* note 3 at 52.

¹⁵⁶ 2001 SCC 31, [2001] 1 SCR 772 [*Trinity Western*].

¹⁵⁷ *Ibid* at paras 1–6.

the dissent in *Trinity Western* disagreed on each of the four contextual factors as well as on the resulting standard, which the majority held to be correctness and the dissent considered to be patent unreasonableness.

With respect to the expertise factor, for example, in reasons written by Justices Iacobucci and Bastarache, the majority in *Trinity Western* held that the BCCT's expertise did not include interpreting the scope of human rights or reconciling competing rights under the Canadian Charter of Rights and Freedoms.¹⁵⁸ As a result, the majority concluded that this factor called for less deference.¹⁵⁹ In dissent, Justice L'Heureux-Dubé held that the expertise factor militated in favour of more deference since the BCCT had relative expertise compared to the courts in the area of setting standards for admission into the teaching profession.¹⁶⁰ With regard to the nature of the question, Iacobucci and Bastarache JJ held, on behalf of the majority, that the existence of discriminatory practices is a question of law concerned with human rights.¹⁶¹ As a result, they concluded that this factor called for less deference to the BCCT. L'Heureux-Dubé J, by contrast, held that this factor militated in favour of more deference since determining how an educational program will affect the preparedness of graduates to teach in the public schools is a factual inquiry that requires the specialized expertise of the BCCT's members.¹⁶²

In addition to the fact that the four factors that comprised the pragmatic and functional approach were each fairly subjective in nature, an added measure of uncertainty (and, thus, an added opportunity for manipulation by reviewing judges) arose from the fact that, as Justice Robertson of the New Brunswick Court of Appeal has observed, 'any time a decision-maker is asked to weigh a number of factors before choosing among one of at least three possible standards, there remains the problem of what weight is to be given to any one factor.'¹⁶³ As a result, similar factors were often weighed very differently in different cases.¹⁶⁴

¹⁵⁸ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁵⁹ *Trinity Western*, supra note 156 at para 17.

¹⁶⁰ *Ibid* at para 52.

¹⁶¹ *Ibid* at para 18.

¹⁶² *Ibid* at para 55.

¹⁶³ Honorary Joseph R Robertson, 'The Deference Doctrine and the Standards of Review: A Historical and Pragmatic Assessment' (Draft paper prepared for the Appellate Courts Seminar, National Judicial Institute, Ottawa, 12 April 2000) at 71, cited by Honorary Frank Iacobucci, 'Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis' (2002) 27 *Queen's LJ* 859 at 871–3.

¹⁶⁴ See e.g. Philip Bryden, 'Understanding the Standard of Review in Administrative Law' (2005) 54 *UNBLJ* 75 at 79–80.

When one combines the subjectivity of the individual factors in the pragmatic and functional approach with the added layer of subjectivity associated with the weighing of those factors, manipulation by at least some reviewing judges was all but inevitable. This high level of manipulability may be one reason why deference may have increased when the Court replaced the pragmatic and functional approach with the *Dunsmuir* framework.

B ANOTHER POSSIBLE EXPLANATION: INSTITUTIONAL RESPONSES TO THE *DUNSMUIR* FRAMEWORK

It is important to recall that the complex relationship between the courts, the executive and legislative branches of government, and litigants seeking judicial review is not static. It is in constant flux, with each group responding to moves made by the other players.¹⁶⁵ Thus, for example, the courts might react to the passage of privative clauses or rights of appeal by legislatures by affording more or less deference. Particular decision makers that are granted greater deference from the courts may be emboldened to make decisions that diverge from the presumed policy preferences of the judiciary. Parties contemplating judicial review may become more likely to do so if they know that the correctness standard will be applied (and less so if the reasonableness standard will apply). As such, to understand the trends in deference shown by the Supreme Court both before and after *Dunsmuir*, one must also consider the effect that the Court's doctrinal changes may have had on administrative decision makers and prospective litigants.

While this dynamic is complex, Andrew Green has plotted out some of the likely institutional reactions to the Supreme Court's move from the pragmatic and functional approach to the *Dunsmuir* framework.¹⁶⁶ He asserts that in light of the presumption that the reasonableness standard will apply to many more situations, administrative decision makers should be willing to take more 'aggressive' interpretations of statutes. Moreover, as the correctness standard becomes less prevalent, potential litigants whose positions line up with the courts' perceived policy preferences should be less likely to bring judicial reviews.¹⁶⁷

Based on these institutional dynamics, Green predicts (accurately, insofar as the data in this study are concerned) that there may be an initial decrease in the overall rate at which the courts overturn administrative

¹⁶⁵ See Andrew Green, 'Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law' (2014) 47 UBC L Rev 443 [Green].

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.* at para 104.

decisions. He also suggests that this rate may then increase again as decision makers and prospective litigants adjust to the new standard of review framework.¹⁶⁸ In terms of a decrease in deference shown by the Court, as is discussed in the next Part of the article, there are several early signs that the Court may indeed be heading in that direction.

VII *The future of deference in administrative law*

While the overall data collected in this study suggest that the Supreme Court has shown increased deference to administrative decision makers since *Dunsmuir*, it remains an open question whether this trend will continue. This is so for at least two reasons. First, the overall post-*Dunsmuir* trend exhibited by the Supreme Court of vigilantly protecting the presumption of reasonableness has not been entirely uniform. Over the repeated objections of Abella J, the Court has begun to recognize a new basis for rebutting this presumption in cases where the enabling legislation provides courts with concurrent jurisdiction to review particular questions or – more vaguely – otherwise suggests an absence of deference. Second, as these cases demonstrate, the *Dunsmuir* framework itself is neither static nor inherently deferential. As such, the future direction that the Court's jurisprudence will take is uncertain.

A EARLY SIGNS OF DECREASED DEFERENCE?

The first post-*Dunsmuir* case in which the Supreme Court recognized a new exception to the presumption of reasonableness that applies when administrative decision makers interpret their home statutes was *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*.¹⁶⁹ In *Rogers*, a majority of the Court held that the presumption was rebutted with respect to a decision in which the Copyright Board had interpreted provisions in the Copyright Act. The reason for this was that the board and the courts had concurrent jurisdiction at first instance under the statute over questions of law.

Writing for the majority of the Supreme Court, Rothstein J reasoned in *Rogers* that it would be incongruous if the Court were to apply a

¹⁶⁸ *Ibid.* In making this prediction, Green notes that there is some evidence of this very trend in the United States after the Supreme Court's decision in *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984). *Ibid* at n 111. The evidence that he cites for this is discussed in M Stephenson, 'Statutory Interpretation by Agencies' in D Farber & A O'Connell, eds, *Research Handbook on Public Choice and Public Law* (Cheltenham, UK: Edward Elgar, 2010) 285 at 309.

¹⁶⁹ 2012 SCC 35, [2012] 2 SCR 283.

reasonableness standard on judicial review of a decision by the board when that same legal question would be decided *de novo* if it arose in a court at first instance.¹⁷⁰ Similarly, it would be inconsistent to apply the reasonableness standard to a determination of a legal question by the board on an appeal from a judicial review but the correctness standard on an appeal from a decision of a court on the very same question.¹⁷¹

Abella J wrote separate concurring reasons in *Rogers* criticizing the majority's approach. She noted that '[s]ince *Dunsmuir*, this Court has unwaveringly held that institutionally expert and specialized tribunals are entitled to a presumption of deference when interpreting their mandate.'¹⁷² She considered that the practice of applying the correctness standard because a court could also interpret the same statute 'effectively drains expert tribunals of the institutional deference they are owed.'¹⁷³ Abella J condemned the majority's recognition of a new exception to the presumption of reasonableness when questions of home statute interpretation are concerned.

Similarly, as discussed above, a majority of the Supreme Court in *Saguenay* relied (in part) upon the fact that a human rights tribunal's statutory jurisdiction was exercised concurrently with the courts in concluding that the correctness standard applied to the review of one part of an impugned decision. The question that was reviewed on the correctness standard by the majority concerned the scope of the state's duty of religious neutrality under the Quebec Charter. The majority of the Court also justified the application of the correctness standard for this question on the basis that it was a question of central importance to the legal system as a whole that was outside of the expertise of the tribunal.¹⁷⁴ Once again, Abella J disagreed. Abella J noted that while the question at issue may have been of central importance, it was not outside the adjudicator's specialized area of expertise. In fact, she argued that questions concerning the scope of rights under the Quebec Charter were part of 'the Tribunal's daily fare.'¹⁷⁵

A similar dynamic unfolded in *Tervita Corp v Canada (Commissioner of Competition)* in which the majority of the Supreme Court held that a question of law arising under the home statute of the Competition Tribunal was subject to the correctness standard since the enabling statute provided that 'an appeal lies to the Federal Court of Appeal from any

¹⁷⁰ Ibid at para 14.

¹⁷¹ Ibid.

¹⁷² Ibid at para 40.

¹⁷³ Ibid.

¹⁷⁴ *Saguenay*, supra note 54 at paras 47–9.

¹⁷⁵ Ibid at para 168.

decision or order . . . of the Tribunal as if it were a judgment of the Federal Court.’¹⁷⁶ The majority concluded that, as in *Rogers*, this language ‘evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness.’¹⁷⁷

Once again, Abella J disagreed. She noted that as a result of the Supreme Court’s post-*Dunsmuir* jurisprudence,

judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause – that is notwithstanding legislative wording – when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away – again – at this precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.¹⁷⁸

As a result, Abella J was of the view that, as in *Rogers* and *Saguenay*, the presumption that the reasonableness standard applied had not been rebutted.

The same dynamic unfolded more recently in *Canadian Broadcasting Corp v SODRAC 2003 Inc.*,¹⁷⁹ which concerned the validity of certain broadcast licenses granted by the Copyright Board. On the question of standard of review, as in *Saguenay*, the majority of the Supreme Court segmented the impugned decision into several questions, each of which was reviewed on its own standard. Following *Rogers*, the majority applied the correctness standard to the interpretation of the Copyright Act.¹⁸⁰ The majority of the Court applied the reasonableness standard to four other aspects of the impugned decision by the board.

Abella J once again dissented from the approach of the majority. In so doing, she focused on the Court’s willingness to segment the impugned decision into multiple parts that are each reviewed on their own standard. This, she wrote, ‘takes judicial review Through the Looking Glass.’ Confusion will certainly arise, Abella J argued, as ‘[r]eviewing courts will be left to wonder just how many unreasonable or incorrect components of a decision it takes to warrant judicial intervention.’ She also noted that segmenting decisions ‘increases the risk that a reviewing court will

¹⁷⁶ 2015 SCC 3 at para 38, [2015] 1 SCR 161.

¹⁷⁷ *Ibid* at para 39.

¹⁷⁸ *Ibid* at para 170.

¹⁷⁹ 2015 SCC 57, [2015] 3 SCR 615 [CBC].

¹⁸⁰ *Ibid* at para 35. *Copyright Act*, RSC 1985, c C-42.

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.' Abella J suggested that this approach could presage a return to the long since abandoned 'preliminary question doctrine,' whereby courts adopted such a broad understanding of 'jurisdictional error' in order to substitute their own opinion for that of a tribunal on virtually any aspect of an impugned decision.¹⁸¹

It is not clear whether, perhaps in response to the institutional dynamics identified by Andrew Green, the exceptions to the presumption of reasonableness that were found to exist by majorities of the Supreme Court in *Saguenay*, *Rogers*, *Tervita*, and *CBC* represent the beginnings of a new trend in which the Court will more routinely segment impugned decisions and apply the correctness standard at a higher rate than before *Dunsmuir*.¹⁸²

B THE *DUNSMUIR* FRAMEWORK MAY YET LEAD TO LESS DEFERENCE BEING SHOWN

The central aim of this study was to determine whether the prediction that the *Dunsmuir* framework would lead to less deference being shown to administrative decision makers was borne out by the data. The answer, insofar as the jurisprudence of the Supreme Court is concerned, seems to be a cautious 'no.' This does not mean, however, that the *Dunsmuir* framework is inherently more deferential than the pragmatic and functional approach. While, on their face, the data suggest that the *Dunsmuir* framework has given rise to increased deference, this is not because Daly, Mullan, and Heckman were wrong about the malleability of the framework itself. Mullan and Heckman are certainly correct that the category of jurisdictional questions is notoriously vague and amenable to judicial manipulation. It just so happens that since *Dunsmuir* the Court has aggressively narrowed its scope to the point it has almost been eliminated from the analysis altogether.

Daly is certainly correct that there is an inherent degree of overlap between the broad categories of questions that now give rise to the presumption of reasonableness and the categories of questions that can rebut that presumption. He is also correct that the *Dunsmuir* framework itself provides no real guidance on how to characterize questions under review in cases of overlap. It just so happens that since *Dunsmuir* the Court has been fairly determined to protect the presumption of

¹⁸¹ *CBC*, supra note 179 at paras 187, 191.

¹⁸² Green, supra note 165.

reasonableness and limit the scope of its exceptions. Nevertheless, one cannot discount the possibility that the overall trend exhibited by the Court since *Dunsmuir* might change at any time. At least some members of the Court may decide to erode the strength of the presumption of reasonableness and/or enlarge the scope of the exceptions that would rebut that presumption. Indeed, as discussed above, we may already be seeing the emergence of such a trend in cases such as *Rogers*, *Saguenay*, *Tervitai*, and *CBC*.

C CONCLUSION: MORE STUDY IS NEEDED

In a recent extra-judicial speech, McLachlin CJ canvassed the administrative law jurisprudence of the Supreme Court over the last fifty years. She divided the case law into four periods: ‘a period of confrontation; a period of contextual deference; a period of search for standards of review; and finally, a period of consolidation – to use the vernacular, “settling down.”’¹⁸³ According to the Chief Justice, this latter period of ‘settling down’ began with *Dunsmuir* and continues to the present day. This is a ‘period of relative calm in administrative review,’ marked by a ‘general acceptance on the part of legislatures and tribunals . . . of the importance of judicial review by the courts’ as well as by an acceptance by the courts of the ‘specialized expertise and policy perspectives that administrative decision-makers bring to their special tasks of judging and the consequent need for deference.’

While the data in this study may support McLachlin CJ’s optimistic assessment of the current state of administrative law, cases such as *Rogers*, *Saguenay*, *Tervita*, and *CBC* suggest that, insofar as the standard of review wars between the courts, legislatures, and administrative decision makers are concerned, there is neither an armistice nor a peace treaty in sight. Until there is, there will be a continuing need for empirical studies that carefully examine the current state of the law, both at the quantitative and qualitative level.

¹⁸³ McLachlin, ‘Administrative Tribunals,’ *supra* note 1.