Canadian Institute for the Administration of Justice

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Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen![1]

1. Introduction

In *Dunsmuir v. New Brunswick*,[2] Bastarache and Le Bel JJ. characterized the Court's objectives in reconfiguring the law relating to the standard of review of statutory and prerogative decision-makers as follows:

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[1] This paper is a revised and more complete version of that presented at the May 23, 2013 seminar. As such, it owes much to the other presenters at the seminar, Justice David Stratas and Michael Gottheil, and the discussions of our presentations, as well as earlier interactions with both David Stratas and John Evans of the Federal Court of Appeal, though as will be clear from the content of the paper, neither would sign on without considerable qualifications to the views expressed. Many parts of the paper also draw upon a generic recent developments paper, "Developments in Judicial Review of Administrative Action – 2011-12", last revised for presentation at the Continuing Legal Education Society of British Columbia Administrative Law Conference 2012, held in Vancouver on October 26, 2012. (Text available on request.) There are also extracts drawn from other papers and, where that occurs, there is footnote acknowledgment. For recent writing on the standard of review issue, see The Hon. Justice John M. Evans, "Standards of Review in Administrative Law" (2013), 26 Canadian Journal of Administrative Law & Practice 67; Audrey Macklin, "Standard of Review: Back to the Future?" in Flood and Sossin (eds.), *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2nd ed., 2012), Chapter 9, at p.279; Sheila Wildeman, "*Pas de Deux*: Deference and Non-Deference in Action", *id.*, Chapter 10, at p.323; Gerald Heckman, "Substantive Review in Appellate Courts Since *Dunsmuir*" (2009), 47 Osgoode Hall L.J. 715; Robert E. Hawkins, "Whither Judicial Review?" (2010), 88 Canadian Bar Review 603; Paul Daly, "Deference on Questions of Law" (2011), 74 Mod. L. Review 694, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 49 Osgoode Hall L.J. (forthcoming), and "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012), 58 McGill L.J. (forthcoming); Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's L.J. 59; Simon Ruel, "Case Law Update: The Top Administrative Law Cases of 2011 and Why They Matter" (2012), 25 Canadian Journal of Administrative Law & Practice 25; The Hon. Thomas A. Cromwell, "From *The New Despotism* to *Dunsmuir*: A Funny Thing Happened on the Way to the Apocalypse" (2011), Canadian Journal of Administrative Law & Practice 285; and David Phillip Jones, "Recent Developments in Administrative Law", a paper delivered in Ottawa on November 23-24, 2012, at the Canadian Bar Association, 2012 National Administrative Law, Labour and Employment Conference, *At the Crossroads*. Of these papers, that written by Lewans most closely corresponds to my own position.

[2] 2008 SCC 9; [2008] 1 S.C.R. 190

> The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.[3]
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> What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.[4]

In this paper, I attempt to assess the degree to which this objective has been achieved and also to provide some sense of the continuing uncertainties in what we all hoped after *Dunsmuir* would a clearer, less contested standard of review jurisprudence.

Focussing as the paper does on aspects of the standard of review analysis and application that are still subject to uncertainties, there is the distinct possibility that it will convey an exaggerated sense of the frailties and ambiguities of the *Dunsmuir* enterprise. Indeed, the very length of the list of problem areas – fifteen – undoubtedly increases the likelihood that I will be perceived as totally disenchanted with the judgment in *Dunsmuir*. There is also a sense in which my analysis and some of the post-*Dunsmuir* case law mask the overall contributions of that seminal judgment by isolating and treating elements of the discussion as though they were provisions in a statute rather than a judicial attempt to provide general guidance and suggest bases for further elaboration and refinement. It is therefore important not only to draw these matters to your attention but also and more importantly to set out, albeit in summary form, the positive accomplishments of that seminal judgment.

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[3] *Id.*, at para. 32.

[4] *Id.*, at para. 33.

First, the instruction that there is no need to conduct a standard of review analysis if there is already a satisfactory precedent,[5] while not cementing the authority of all former standard of review judgments, does provide a basis for a cursory standard of review statement in many cases. Secondly, the Court's insistence that reasonableness is the almost invariable standard for questions of fact, mixed fact and law where there is no readily extricable pure question of law, and for exercises of discretionary power has resolved the problem for a vast swath of what statutory and prerogative authorities do in their day to day work.[6] Thirdly, stemming from *Dunsmuir*[7] and spelt out more explicitly in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*,[8] there is great merit in the recognition of the principle that

> … unless the situation is exceptional, … the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have a particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

More generally, the clear movement in the direction of reasonableness as the default standard of review is an appropriate recognition of the balance that Bastarache and Le Bel JJ. identified as the constitutional underpinnings to the task of defining the scope of judicial review:

> … an underlying tension between the rule of law and the foundational democratic principle which finds expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of

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5 *Id.*, at paras. 57 and 62.

6 *Id.*, at paras. 51 and 53.

7 *Id.*, at para. 54.

8 2011 SCC 61; [2011] 3 S.C.R. 654, at para. 34

> judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interferences with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.[9]

Notwithstanding all of this, however, what has become clear in the five years since *Dunsmuir* is that some of the principles and guidelines proposed in that judgment have been far from self-applying or free from ambiguity. Moreover, as a consequence of the reconfiguration, new problems or new ways of conceiving of old problems have become apparent. Indeed, while many rejoiced in the elimination of patent unresasonableness as a common law standard of review, there is a very real question as to whether the new world of contextual reasonableness review is creating just as intransigent problems as existed in the pre-*Dunsmuir* world of trying to give content and definition to a standard of patent unreasonableness in such a way as would enable ready delineation of the differences between it and the more intrusive but still deferential standard of reasonableness or reasonableness *simpliciter*. It has also been the case that the Supreme Court of Canada has itself been the source of some of the current state of uncertainty by failing to take a consistent approach on certain key aspects of standard of review and either failing to address ripe issues when the occasions have presented themselves or stopping short of a comprehensive evaluation of outstanding issues.

In the paper, my objective is to outline what appear to me to be the current areas of uncertainty and to try to suggest tools for dealing with at least some of them pending authoritative resolution by the Supreme Court.

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[9] *Supra*, note 2, at para. 27.

2. When is a Precedent on Standard of Review "Satisfactory"?

As mentioned in the Introduction, in *Dunsmuir*, Bastarache and LeBel JJ. provided welcome relief to lower court judges to the extent that they excused them from a full standard of review analysis where "existing jurisprudence"[10]

> … has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.[11]

Nonetheless, the triggering of this free pass on conducting a standard of review analysis is not without controversy. How directly relevant must the precedent be? Must it involve the same statutory provision or subset thereof, and also be predicated on the same substantive basis for judicial review as is being pleaded in the present case? More significant, however, is the issue of whether courts need to pay heed to arguments that pre-*Dunsmuir* standards of review can no longer be relied on safely because they are now inconsistent with the changes in approach and methodology wrought by *Dunsmuir*. This can pose particularly tricky problems for lower court judges when the precedent in question is a judgment of the Supreme Court of Canada.

Certainly, to the extent that a relevant precedent established the now discredited patent unreasonableness standard of review, in the vast majority of cases, one would expect that to now default to the sole remaining deferential standard of reasonableness. Given the extent to which the Supreme Court in *Dunsmuir* and subsequently has reduced the number of situations were correctness is the standard of review, it would be an unusual case in which it could now be posited that a

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[10] *Id.*, at para. 57.

[11] *Id.*, at para. 62.

standard of review that was previously patent unreasonableness should, in the wake of *Dunsmuir*, become correctness.

It is also clear that the Supreme Court itself has been prepared to state that it is no longer safe to rely on some of its own previous authorities on the review of human rights commissions and tribunals. In *Canada (Human Rights Commission) v. Canada (Attorney General)*,[12] LeBel and Cromwell JJ., delivering the judgment of the Court, and referring[13] to previous authorities such as *Canada (Attorney General) v. Mossop*,[14] *University of British Columbia v. Berg*,[15] and *Gould v. Yukon Order of Pioneers*,[16] stated:

> But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and other bodies should be swept under the standard of correctness.[17]
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> There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of those questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness, But, not all questions of general law entrusted to the Tribunal rise to the level of issues of general importance to the legal system or fall outside the adjudicator's

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12 2011 SCC 53; [2011] 3 S.C.R. 471 (also known as "*Mowat*").

1313 *Id.*, at para. 20.

14 [1993] 1 S.C.R. 554.

15 [1993] 2 S.C.R. 353.

16 [1996] 1 S.C.R. 571.

17 *Supra*, note 12, at para. 21.

> specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.[18]

That issue was whether the Tribunal could include costs as a component of "compensation" for violations of the relevant Act and the Court went on to hold that that was a question of law that attracted reasonableness review.[19] It now remains to be seen whether this "reversal" of earlier authority extends to the interpretation of the substantive discrimination provisions of Human Rights Codes, an issue to which I return later in this paper.

Subsequently, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*,[20] Cromwell J., delivering the judgment of the Court, expressly repudiated the broad conception of jurisdictional error (leading to correctness review) that, in 1971, the Court had espoused in *Bell v. Ontario (Human Rights Commission)*.[21]

Indeed, the Supreme Court itself seems to have acknowledged that it went too far in treating a pre-*Dunsmuir* precedent as binding on standard of review. This was in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*.[22] Here, Rothstein J., delivering the judgment of the majority, stated:

> Although this Court held in *Northrup Grumman Overseas Services Corp. v. Canada (Attorney General)* [[23]] that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to

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18 *Id.*, at para. 23.
19 *Id.*, at para. 27.
20 2012 SCC 10; [2012] 1 S.C.R. 363, at paras. 17 and 34.
21 [1971] S.C.R. 756.
22 *Supra*, note 8.
23 2009 SCC 50; [2009] 3 S.C.R. 309.

> this type of question, not on the Court finding a true question of jurisdiction (para.10).[24]

However, making the judgment that *Dunsmuir* has implicitly overruled a directly relevant Supreme Court of Canada precedent is not a matter to be undertaken lightly as illustrated by *Canada v. Craig*,[25] where, in a taxation case, Rothstein J. took the Federal Court of Appeal to task for holding that a directly relevant Supreme Court of Canada judgment from 1978 had been overtaken by more recent Supreme Court judgments on the approach to be taken to the interpretation of the *Income Tax Act.*

However, perhaps the strongest justification for ignoring previous Supreme Court precedent exists where the Court has relied on more general principles clearly rejected in *Dunsmuir*, such as statements justifying correctness review on the basis that courts are better at identifying and applying the principles of statutory interpretation than tribunals. I consider this in greater detail later in the paper.

3. The Marginalization of Expertise

In terms of pre-*Dunsmuir* approaches to establishing the standard of review, expertise remains one of the four standard of review criteria. However, what was once, according to Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*,[26] the most important among those constituting the former "pragmatic and functional"

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[24] *Supra*, note 22, at para. 33.

[25] 2012 SCC 43; [2012] 2 S.C.R. 489, at paras. 18-23.

[26] [1997] 1 S.C.R. 748, at para. 50, relying upon Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 759 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335:

> … the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause.

factors in determining the appropriate standard of review has now itself in effect become in effect a presumption: that where the legislature has created a special regime for the determination of rights, privileges and interests of all kinds, the adjudicator or dispenser of those rights, privileges and interests is to be treated as an institution with expertise. Moreover, this assumption of expertise applies just as much to the determination of questions of law as it does to findings of fact and mixed law and fact as well as the application of policies.

This is developed most fully in the case of labour arbitrators in the judgment of Fish J. in *Nor-Man Regional Health Authority Inc. v. Association of Manitoba Health Care Professionals*.[27] There, he speaks of labour arbitrators as "benefit[ting] from *institutional expertise*…, even if they lack *personal expertise*."[28] Rothstein J. expresses it somewhat differently and succinctly in his judgment in *Alberta Teachers' Association*:

> Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision-makers who are assumed to have specialized expertise with the assigned subject matter.[29]

In each of these instances, the issue on review was a pure question of law.

In effect, at least as far as tribunal and regulatory agencies are concerned, expertise will generally, if not always be assumed on an institutional basis in the standard of review analysis. As Michael Gottheil[30] has suggested,[31] this comes close to rendering expertise a

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27 2011 SCC 59; [2011] 3 S.C.R. 616, at paras. 45-55.

28 *Id.*, at para. 53.

29 *Supra*, note 8, at para. 1.

30 Executive Chair, Social Justice Tribunals Ontario.

tautology in the standard of review analysis: the legislative conferral of power also amounts to a conferral or recognition of expertise. However, at least where the legislation spells out in some detail the qualifications required or expected of members of tribunals, as was the case with the Competition Tribunal under review in *Southam*, those qualifications may be relevant as reinforcing the assumption of expertise. The presence of statutory qualifications may also assist in marginal cases in determining whether there is a match between the expertise of tribunal members and, what is now the most important of the standard of review factors, the nature of the question which is the basis of the judicial review application.

What is also clear is that some post-*Dunsmuir* courts have in effect adopted a presumption of an absence of expertise, at least on questions of law, in the case of decision-makers other than adjudicative tribunals. This has been particularly so in the case of decision-making by Ministers. Thus, for example, in a judgment that I discuss in greater detail later, Mainville J.A., for the Federal Court of Appeal, stated in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*:

> [T]hough the Minister – acting on advice of the officials of the Department of Fisheries and Oceans – can certainly claim expertise in the management of the fisheries and fish habitat, this does not confer on the Minister expertise in the interpretation of statutes. Expertise in fisheries does not necessarily confer special expertise to interpret the statutory provisions of the [relevant legislation].[32]

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[31] In commentary on an earlier version of this paper at the May 23, 2013 Advanced Judicial Seminar in Administrative Law, held in Toronto. For a fuller and still useful critique of the place of expertise in standard of review analysis, see Robert E. Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998), 21 Dalhousie Law Journal 5, at pp. 9-26.

[32] 2012 FCA 40; 427 N.R. 110, at para. 104.

This was in a context in which Mainville J.A. rejected the application to Ministers of the Rothstein presumption of reasonableness review in the case of a decision-maker engaged in the interpretation of a home or constitutive statute. That presumption was confined to adjudicative tribunals. This approach was also applied by a majority of the Federal Court of Appeal in *Takeda Canada Inc. v. Canada (Minister of Health)*.[33] However, even Stratas J.A. (dissenting), and who would have applied the presumption, provided as one justification for holding that the presumption of reasonableness review was rebutted:

> The Minister has no expertise in legal interpretation.[34]

What remains puzzling in all of this is why, even absent any statutory requirements for legal qualifications, a presumption of expertise exists in the instance of adjudicative tribunals and their members but not in the case of Ministers, albeit that Ministers have the benefit of their legally qualified staff and the advice they provide routinely. It certainly cannot be based on empirical data nor do I suspect on informed intuition. Rather, it tends to be an add-on or make-weight reason deployed in support of other and more substantial justifications for differentiating between adjudicative tribunals and Ministers, one of which may be a perception of a greater degree of independent or non-self-serving decision-making on the part of adjudicative tribunals.[35]

On the whole subject of empirical support for regarding statutory decision-makers as expert, the conduct of applications for judicial

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[33] 2013 FCA 13, at paras. 111-16.

[34] *Id.*, at para. 29.

[35] However, see Ron Ellis, *Unjust by Design – Canada's Administrative Justice System* (Vancouver: UBC Press, 2013) for a sceptical view of the extent to which Canada's adjudicative tribunals function with true independence, this perhaps suggesting the argument that those which are not sufficiently independent both legislatively and operationally should not benefit from a presumption of expertise.

review does not lend itself easily to the assessment of actual expertise. Thus, there has generally been resistance to the filing of affidavit and other forms of evidence to either prove or disprove the expertise of particular members or panels of administrative tribunals.[36] Moreover, when courts speculate about or take judicial notice of the expertise or lack thereof of administrative tribunals, there is reason for scepticism. Thus, as Michael Gottheil has pointed out,[37] referring to *Nor-Man Regional Health Authority*,[38] it is almost certainly the case that, despite the urgings of counsel and the premises of the argument rejected by Fish J., labour arbitrators across Canada encounter issues involving the principles of equitable estoppel far more frequently than the section 96 generalist courts.

Because of this and other reasons, I have considerable sympathy with the marginalization of expertise project. It is also to be hoped that the presumption will prevail at least in the instance of adjudicative tribunals, and that, as a further consequence, the courts will cease to be seduced by arguments based on comparative expertise[39] considerations such as those that appeal to the notion that generalist courts are better at statutory interpretation than tribunals or that, through their regular encounters with the *Charter*, they know as much, if not more about human rights issues than human rights tribunals. The

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[36] Though see *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (Q.L.); 12 Admin. L.R. (2d) 45 (S.C.), at para. 32, where Bauman J., apparently without objection, accepted an affidavit in support of the expertise of the members of the Appeals Commission. *Quaere* the admissibility of affidavits to establish **lack** of actual expertise.

[37] *Supra*, note 31.

[38] *Supra*, note 27.

[39] The notion that the assessment of expertise was a comparative exercise involving an assessment of the tribunal's expertise on the issue under review in relation to that of the reviewing court's emerged originally in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 32. Subsequently, McLachlin C.J. strongly endorsed this conception of the assessment of expertise in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19; [2003] 1 S.C.R. 226, at paras. 28-29.

perpetuation of this mode of analysis has the potential to undermine seriously the whole movement in the direction of reasonableness as the predominant standard of review. This is a subject to which I will return when I deal more specifically with the presumption of deference when tribunals are interpreting their home or other frequently encountered statutes.

4. The Disappearance of Jurisdictional Error?

Ever since the 1981 judgment of Laskin C.J.C. in *Crevier v. Quebec (Attorney General)*,[40] it has been accepted that there is a constitutional guarantee of judicial review "on questions of jurisdiction." However, two years prior to that in 1979, Dickson J. (as he then was), in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*,[41] was issuing a strong warning against the overuse of the concept of jurisdiction:

> The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.[42]

This was a refrain cited and reiterated in *Dunsmuir*.[43] There, Bastarache and LeBel JJ., went on to assert:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of jurisdiction or *vires* to distance ourselves from the extended definitions offered before *CUPE.* It is important to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary

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40 [1981] 2 S.C.R. 220, at p. 236. This was in the context of a provincial statutory body. However, this guarantee was extended to federally-created bodies in *MacMillan Bloedel Ltd. v. Simpson*, [1999] 4 S.C.R. 725.

41 [1979] 2 S.C.R. 227.

42 *Id.*, at p. 233.

43 *Supra*, note 2, at para. 35

> question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it authority to decide a particular matter. The tribunal must interpret the statutory grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.[44]

While there is considerable room for discussion as to just what this version of jurisdictional question involves, what is clear is that Bastarache and Le Bel JJ. shared with Dickson J. a strong sense that the category of jurisdictional question should be strictly circumscribed.

More recently, a majority of the Court has gone even further. In delivering the majority judgment in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*,[45] Rothstein J. wondered:

> Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review.[46]

However, as this point had not been argued, he decided not to go that far though noting that the Court since *Dunsmuir* had never encountered a true question of jurisdiction.[47] Cromwell J., citing the principle of legality and constitutional principle, refused to sign on to Rothstein J.'s scepticism and clearly wanted jurisdictional error

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44 *Id.*, at para. 59.
45 *Supra*, note 8.
46 *Id.*, at para. 34.
47 *Ibid.*

preserved as a category of judicial review subject to a correctness standard.[48] However, his concerns were solitary, and so it must for the moment be assumed that, at the very least, it is going to take a convincing case for the Supreme Court to accept that for standard of review purposes a question is one of true jurisdiction.[49]

Indeed, this is confirmed by the Supreme Court's refusal in the post-*Dunsmuir* era to classify issues as ones of true jurisdiction. Thus, in *Alberta Teachers' Association*, Rothstein J. rejected the argument that the interpretation of a time limit provision for the completion of an investigation was jurisdictional in nature.[50] Just a little earlier, LeBel and Cromwell JJ., delivering the judgment of the Court in *Canadian (Human*

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[48] *Id.*, at paras. 92-93.

[49] It is interesting to note that Scalia J., writing for the majority of a deeply divided (though not in this case along the usual ideological lines) United States Supreme Court in *City of Arlington, Texas v. Federal Communications Commission*, Slip Opinion, May 20, 2013, 569 U.S. ___ (2013), rejected the contention that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), did not require deference to agency determinations of the scope and meaning of ambiguous statutory provisions that were jurisdictional in nature and that it applied only to *intra*-jurisdictional issues. In so doing, Scalia J. can be seen (at p. 5 of Slip Opinion) as either rejecting a meaningful concept of jurisdiction or collapsing all issues involving the meaning of ambiguous statutory provisions into the jurisdictional category:

> That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.

It must, however, be kept in mind that *Chevron* deference is triggered only where the statutory provision in question is unclear or unambiguous. As a consequence, the first question under *Chevron* is

> … whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court as well as the agency must give effect to the unambiguously expressed intent of Congress": *Chevron*, *id.*, at pp. 842-43.

As might be suspected, the discernment of whether Congress has spoken unambiguously has itself become an art form!

[50] *Supra*, note 8, at para. 31. Rothstein J. also held that the decision on time limits was not a question of general law of central importance to the legal system as a whole and outside the expertise of the tribunal (at para. 32), another basis on which correctness review might have been justified. In contrast, in a judgment subject to an appeal currently on reserve in the Supreme Court of Canada, the British Columbia Court of Appeal applied a correctness standard of review to a Securities Commission's interpretation of a limitation period in its home statute: *McLean v. British Columbia (Securities Commission)*, 2011 B.C.C.A. 455; 312 B.C.A.C. 288; leave to appeal granted: [2012] S.C.C.A. No. 9 (Q.L.).

Rights Commission) v. Canada (Attorney General),[51] repulsed the argument that the question of whether a human rights tribunal could include costs as part of an award of "compensation" was one of true jurisdiction.[52] Even Cromwell J., the staunch defender of jurisdiction as an operative category in *Alberta Teachers' Association*, took pains in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*,[53] to explain why it was no longer safe to regard *Bell v. Ontario (Human Rights Commission)*[54] as authority for the proposition that Commission determinations of discrete questions of law in deciding whether to refer a matter for hearing by a tribunal were true questions of jurisdiction. It should also be kept in mind that Rothstein J., in *Alberta Teachers' Association*, also explained away his earlier judgment in *Northrup Grumman Overseas Services Corporation v. Canada (Attorney General)*.[55] There, he had categorized, relying on earlier authority, the issue of whether a non-Canadian supplier had standing to bring a complaint to the Canadian International Trade Tribunal as a true question of jurisdiction subject to correctness review.[56] In *Alberta Teachers' Association*, he described this holding as

> … based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction.[57]

What then is left within the concept of a true jurisdictional question? *Dunsmuir* itself provides some clues. There, Bastarache and LeBel JJ. appear to provide two examples of true jurisdictional questions subject

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51 *Supra*, note 12.
52 *Id.*, at para. 27.
53 *Supra*, note 20, at para. 34.
54 [1971] S.C.R. 756.
55 *Supra*, note 23.
56 *Id.*, at para. 10.
57 *Supra*, note 8, at para. 33.

to correctness review. There are "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals."[58] The second example is provided by reference to a 2004 judgment, *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,[59] where the question was whether

> ... the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. … That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*.[60]

Neither of these examples is without problems. As the Supreme Court's jurisprudence makes clear, discerning when an issue of competing authority involves mutually exclusive jurisdiction is itself a problematic exercise. More common are issues of overlapping jurisdiction and decisions about how the overlaps are dealt with, decisions on which are generally dealt with on a reasonableness basis.[61]

Even more problematic is the second example. Is it meant to suggest that true questions of jurisdiction or *vires* are more likely to be located in the decision-making of bodies other than tribunals or adjudicative bodies? And, if that is indeed the case, where is the line to be drawn between a municipality's jurisdiction to enact a by-law and a municipality's discretion with respect to the enactment of by-laws for which the standard of review will almost invariably be that of reasonableness?[62]

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58 *Supra*, note 2, at para. 61.

59 2004 SCC 19; [2004] 1 S.C.R. 485.

60 *Supra*, note 2, at para. 59

61 See *e.g. British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52; [2011] 3 S.C.R. 422, and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

62 See *e.g. Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2; [2012] 1 S.C.R. 5.

It is also the case that some provincial Courts of Appeal have been perfectly happy to take up Rothstein J.'s challenge in *Alberta Teachers' Association* to show him an example of a true jurisdictional question.

In *Lysohirka v. British Columbia (Workers' Compensation Board)*,[63] a panel of the British Columbia Court of Appeal was confronted by a Workers' Compensation Board reconsideration decision in which the Reconsideration Officer had, in addition to assessing whether there was a statutory basis for reconsideration, gone on to consider whether there were any common law grounds for review. According to Garson J.A., delivering the judgment of the Court, whether the Reconsideration Officer had any such common law authority was a true question of jurisdiction and subject to correctness review.[64] In so holding, the Court relied[65] on both *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*,[66] and the judgment of Cromwell J. in *Alberta Teachers' Association*.[67] Despite Rothstein J.'s judgment in *Alberta Teachers' Association*, the sense of a tribunal exceeding "its statutory powers by entering into an area of inquiry outside of what the legislation intended" still persisted. Whether and to what extent the Reconsideration Officer could superimpose common law grounds of review on the explicit statutory grounds was one such question.

Of course, the most obvious question that this analysis begs is: Why did the Court simply not see the Reconsideration Officer as engaged in an interpretation of her or his home statute, and, as a consequence, presumptively entitled to deference? What distinguished this exercise

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63 2012 BCCA 457; 39 B.C.L.R. (5th) 15, application for leave to appeal denied: [2013] S.C.C.A. No. 23.

64 *Id.*, at para. 41.

65 *Id.*, at paras. 39-43.

66 2010 ONCA 284; 99 O.R. (3d) 481, at para. 24.

67 *Supra*, note 8.

in statutory interpretation from others? Was the situation analogous to those cases[68] in which the Supreme Court had determined on a correctness basis whether a tribunal or agency has jurisdiction or authority to consider constitutional questions or award *Charter* remedies?

The Newfoundland Court of Appeal provides the second example: *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*.[69] At stake here was a preliminary decision of the Board to the effect that, save in exceptional circumstances, it did not have jurisdiction to pass on to consumers savings generated by a rate stabilization plan. This ruling was made in the context of a general rate application and was characterized by the Board itself as a question of jurisdiction. In adopting that classification and subjecting the ruling to correctness review, the Court agreed with counsel for the regulated utility:

> The issue that the Board stated for itself was a true question of jurisdiction or *vires*. It engaged the question of what the Board had the legal power and authority to do, not what the Board should do as a matter of regulatory judgment and decision-making. The issue was engaged on a preliminary hearing before the Board proceeded to a hearing on the merits.[70]

In justification of this conclusion,[71] the Court stated that nothing said in *Alberta Teachers' Association* had detracted from the authority of *Dunsmuir* and the characterization by Bastarache and LeBel JJ., already set out, that true questions of jurisdiction involve issues as to the

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[68] See *e.g. Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; [2003] 2 S.C.R. 504, and *R. v. Conway*, 2010 SCC 22; [2010] 1 S.C.R. 765.

[69] 2012 NLCA 38; 323 Nfld. & P.E.I.R. 127.

[70] *Id.*, at para. 94.

[71] *Id.*, at para. 89.

"authority to make an inquiry"; situations where the "tribunal must determine whether its statutory grant of power gives it the authority to decide a particular matter."[72]

As in the case of *Lysohirka*, this analysis once again gives rise to the question of why this amounts to an exceptional case taking the relevant issue outside the domain of a tribunal interpreting its home statute and entitled presumptively to deferential review. Moreover, even more starkly than *Lysohirka*, in relying on the ambiguous statement from *Dunsmuir* in justification of its conclusion, is the Court once again resurrecting the spectre of a potentially extensive category of "preliminary" or outset or threshold jurisdictional questions? If so, the Rothstein challenge will prove to have been easily met, and jurisdictional error will again be alive and well as a point of departure for counsel seeking to attract the perceived benefits of correctness review.

5. Competing Jurisdictions – The One Clear Example of "True" Jurisdiction?

In *Dunsmuir*,[73] Bastarache and LeBel JJ. identified two examples of situations where the Supreme Court confronted "the jurisdictional lines between two or more competing specialized tribunals", a situation where correctness review is automatic. In the first, *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*,[74] the issue was whether a grievance arbitration under a collective agreement was precluded by a statutory regime governing the discipline and dismissal of police officers. In the second, *Quebec (Commission des droits de la*

[72] *Supra*, note 2, at para. 59.
[73] *Supra*, note 2, at para. 61.
[74] 2000 SCC 14; [2000] 1 S.C.R. 360

personne et des droits de la jeunesse) v. Quebec (Attorney General),[75] the issue was whether a complaint under the Quebec human rights regime arising out of an employment relationship was precluded by the existence of the possibility of a grievance arbitration. In the first instance, the Court held that the specific statutory regime precluded recourse under the collective agreement's arbitration provisions. In the second, the Court determined that the right to launch a human rights complaint was not precluded by the right to grieve under the collective agreement; unlike *Regina Police Assn*., jurisdiction was shared. What these cases demonstrate is that on each of two questions in situations such as this, the standard of review will be that of correctness: Are the regimes mutually exclusive, and, if so, which one prevails?

Of course, in some instances, the answer to the second question may be so obvious as not to even arise in any practical sense. This is particularly so in the constitutional domain such as where the issue is whether a matter comes within federal or provincial regulatory jurisdiction. In such cases, the normal (though not invariable) assumption will be that only one of the competing agencies can have authority; there is simply no question of shared jurisdiction.[76] Similarly, when the issue is whether a tribunal has jurisdiction to consider *Charter* and other constitutional issues and grant *Charter* and other constitutional remedies, the sole question will be whether there is shared jurisdiction. Unless it is shared, the only authority will be that of the regular courts.[77]

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[75] 2004 SCC 39; [2004] 2 S.C.R. 185

[76] As in *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, also referenced in *Dunsmuir supra*, note 2, at para. 58, though in the context of correctness review of constitutional questions.

[77] As in *Nova Scotia (Workers Compensation Board) v. Martin*, *supra*, note 68, also referenced in *Dunsmuir*, *ibid.*

It is also clear from other pre-*Dunsmuir* Supreme Court judgments, such as *Vaughan v. Canada*,[78] that a jurisdictional saw-off issue can arise in a non-constitutional setting as between a specialized tribunal and the regular courts, and not just as between two specialized adjudicative tribunals. There too, the standard of review will be that of correctness. Yet another variation on the same theme, this time involving competing specialized tribunals, will be a situation where, on some matters, jurisdiction is shared and, on other matters, the jurisdiction is mutually exclusive. In such a case, the task for the reviewing court will be, first, to decide whether there is partially shared jurisdiction, and, secondly, to determine on a correctness basis whether the particular matter comes within the domain of shared or mutually exclusive jurisdiction. Here, the leading pre-*Dunsmuir* example is *Canada (House of Commons) v. Vaid*,[79] where the Supreme Court determined on a correctness basis that, while jurisdiction to deal with work-related grievances by employees of the House of Commons was sometimes shared between the Canadian Human Rights Tribunal and the special regime established under the *Parliamentary Employees and Staff Relations Act*,[80] the particular complaint came within the exclusive jurisdiction established by the latter Act.

Given the number of examples in the pre-*Dunsmuir* case law of issues respecting potentially competing and mutually exclusive jurisdiction, one could be forgiven for seeing this as a regular preoccupation of the courts and one where the concept of a true jurisdictional question has considerable life, Rothstein J. in *Alberta Teachers' Association* notwithstanding. However, the reality is that in the post-*Dunsmuir*

[78] 2005 SCC 11; [2005] 1 S.C.R. 146.
[79] 2005 SCC 30; [2005] 1 S.C.R. 667.
[80] R.S.C. 1985, c. 33 (2nd Supp.), s. 2.

world, as far as I am aware, there have been only two further cases that could be categorized as coming within any of the examples given of this category: *R. v. Conway*,[81] involving the capacity of an administrative tribunal to grant *Charter* remedies, and *Syndicat de la function publique du Québec v. Quebec (Attorney General)*,[82] was whether a labour arbitrator shared jurisdiction with the Quebec Commission des relations du travail, or whether, in the absence of specific incorporation of certain substantive rights into a collective agreement, the jurisdiction of the Commission over complaints about such matters was exclusive. It may be, therefore, that this is an issue that has pretty much run its course and will not recur all that often.

However, that is not to say that there are no outstanding questions. In particular, there may be an issue as to what happens in a mutually exclusive competing jurisdiction situation, when initial responsibility for determining whether there is mutually exclusive jurisdiction and which of the competing adjudicators has jurisdiction is explicitly reposed in one of the two competitors. In such a situation, should a reviewing court, *Dunsmuir* notwithstanding, accord deference to the decision on jurisdiction by the designated tribunal? Certainly, in the pre-*Dunsmuir* Workers' Compensation case law, the Court has applied a deferential standard of review to a tribunal decision on whether the workers' compensation regime operates to the exclusion of a common law cause of action in the regular courts.[83] It is hard to see the current Supreme Court, aside from the deployment of the patent unreasonableness standard of review, seeing this as other than a satisfactory precedent on the standard of review. Nonetheless, it does stand out as a clear

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81 *Supra*, note 62.

82 2010 SCC 28; [2010] 2 S.C.R. 61.

83 *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

exception to correctness review where there is a question of whether there is shared or mutually exclusive jurisdiction.

What has, however, arisen in the post-*Dunsmuir* case law in the Supreme Court has been the issue of overlapping or shared jurisdiction, and the standards by which the courts should review the determination of one of the sharing tribunals to assume or not to assume jurisdiction. In particular, there have been issues as to whether the doctrines of *res judicata*, issue estoppel, or principles akin to those doctrines should operate to preclude a tribunal considering a matter (or dealing with a particular aspect of a matter) that has already in some form been before the other tribunal with which it shares jurisdiction.

In *British Columbia (Workers' Compensation Board) v. Figliola*,[84] the issue involved a decision of the Human Rights Tribunal to entertain a complaint despite the fact that the matter had already been through the Workers' Compensation regime where the discrimination allegations had been canvassed. In the face of an explicit provision in the constitutive legislation of the Tribunal conferring a discretion to decline a complaint that had been "appropriately dealt with elsewhere", the Court determined that the standard of review should be that of patent unreasonableness (as legislatively preserved in some contexts in British Columbia) notwithstanding the relevance, though not direct application to the exercise of that discretion of common law principles of *res judicata* and issue estoppel. The issue of overlapping jurisdiction did not raise a true question of jurisdiction, and did not therefore fall to be determined on a correctness basis.[85]

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[84] *Supra*, note 61.

[85] *Id.*, at para. 21 (*per* Abella J.).

What, however, this leaves open is the question of whether correctness review would be engaged in the absence of a statutory discretion to decline to accept a complaint. Would the absence of an explicit discretion preclude the Tribunal from declining to accept a complaint, or would the Tribunal have implicit authority to reject the complaint by reference to the same finality principles as are in play where there is an explicit discretion? And, more significantly for present purposes, would the question of whether there is such an implicit discretion be a jurisdictional question subject to correctness review, or would this also be treated as involving the interpretation of the Tribunal's constitutive statute thereby presumptively attracting deferential review under the *Dunsmuir* standards or principles?[86]

In short, the various permutations and combinations implicating overlapping and mutually exclusive jurisdiction are many. This renders uncertain the extent of the application of correctness review on the *Dunsmuir* basis that what is at stake is the resolution of an issue of competing or mutually exclusive jurisdiction between or among specialized tribunals.

6. With the Demise or Marginalization of "Jurisdiction", has it Been Replaced by Another Bedrock Constitutional Guarantee?

[86] Interestingly, where the question involves whether a court in a civil action should allow a plaintiff to pursue allegations already dealt with by an administrative tribunal, the standard of review on appeal from the first instance court's decision on that question will probably be that of correctness at least as far as the identification of the legal contours of any applicable finality doctrine is concerned, as opposed to deferential review of the exercise of the discretionary power to apply or not apply the relevant doctrine once those legal contours have been identified correctly. See *e.g. Penner v. Niagara (Regional Police Services Board)*, *supra*, note 61, at para. 27. In contrast, it may be that, in a tribunal setting, the tribunal's identification of the relevant legal contours may be subject to reasonableness rather than correctness or error in principle review. Whether that is of any practical moment may, however, depend on whether reasonableness review of such exercises of discretion amounts in effect to disguised correctness review, a characterization that some have attributed to the actual application of the reasonableness standard in *Figliola*. For further discussion, see Section 16, "The Malleability of Reasonableness Review."

What the previous two sections have revealed is that judicial review for jurisdictional error is under threat. In *Alberta Teachers' Association*, Rothstein J. indicated a strong predisposition to eliminate it entirely from the rubric of Canadian judicial review. In any event, as that case indicates, there are unlikely to be many situations, at least where the decision of tribunal is in issue, where the Supreme Court will engage in correctness review on the basis of a true question of jurisdiction. Moreover, the one category of true jurisdictional question recognized by the Supreme Court in *Dunsmuir*, the drawing of jurisdictional lines between two competing specialized tribunals is becoming a rare species even in the domain of competition between a federal and a provincial tribunal arising out of sections 91 and 92 of the *Constitution Act, 1867*.

Nonetheless, as Cromwell J. points out in *Alberta Teachers' Association*,[87] the Supreme Court in *Dunsmuir* reaffirmed the constitutional guarantee for review for jurisdictional error, a ground of review that could not be removed by a privative clause. According to Bastarache and LeBel JJ. in *Dunsmuir*:

> [J]udicial review is constitutionally guaranteed in Canada, **particularly** with regard to the definition and enforcement of jurisdictional limits [emphasis added].[88]

Clearly then, the Supreme Court did not see itself in *Dunsmuir* as overruling *Crevier*. However, if, indeed, jurisdictional error is practically on the verge of extinction, does this represent in any way a threat to the constitutional integrity of judicial review?

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87 *Supra*, note 8, at para. 102.

88 *Supra*, note 2, at para. 31.

Certainly, there is room for argument that when the Court in *Dunsmuir* located its rationalization of two standards of review, correctness and reasonableness, on the balancing of maintenance of the rule of law and respect for legislative choice,[89] it was in effect creating a new constitutional guarantee of a minimum of reasonableness review for the exercise of any justiciable statutory or prerogative power. Indeed, this argument is reinforced by the Court's insistence that the presence of a privative clause is no more than an indicator, not of more limited or no judicial review but of reasonableness and not correctness review.

Nonetheless, the Court was certainly not explicit as to the constitutional place of reasonableness review. Moreover, what any such guarantee would call into question would be the constitutional validity of any statutory provision, such as found in sections 58-59 of the British Columbia *Administrative Tribunals Act*,[90] restricting judicial review to the now repudiated common law standard of patent unreasonableness. Or, would striking or reading down such a provision go too far in setting the balance between maintenance of the rule of law and respect for legislative intention? Indeed to this point, though the matter was not argued, the Supreme Court has not had any problem with these provisions in the *Administrative Tribunals Act*. Thus, in *British Columbia (Workers' Compensation Board) v. Figliola*,[91] Abella J., delivering the majority judgment, recognized and applied the patent unreasonableness standard of review called for by section 59(3) of that

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89 *Supra*, note , and accompanying text.

90 S.B.C. 2004, c. 45. Though note the in-effect reading down of such a provision in the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 (as amended), section 45.8 in *Toronto (City) Police Service v. Phipps*, 2010 ONSC 3884; 271 O.A.C. 305, aff'd 2012 ONCA 155; 289 O.A.C. 163: Given the legislative history, patent unreasonableness meant reasonableness.

91 *Supra*, note 61, at para. 20

Act.[92] Indeed, in his partially dissenting judgment, Cromwell J. also applied the patent unreasonableness standard of review without question.

Does this therefore mean that, just like jurisdictional error, the additional constitutional guarantees implicit in *Dunsmuir* are a chimera; that access to judicial review of administrative action, save on *Charter* and other substantive constitutional grounds, will generally yield to legislative restrictions or prohibitions? I have heard one current Supreme Court of Canada judge express the view that the guarantee finds its baseline in judicial review of all arbitrary and irrational decisions or conduct by public authorities. Until such time as the Supreme Court directly confronts the issue, perhaps that is the best that we can hope for, though it does contain within it the potential for the emergence of a new take on the distinction between unreasonable and patently unreasonable decisions. While unreasonableness review can be removed statutorily, review for arbitrariness and irrationality cannot!

7. The Characteristics of a Question of Law of Central Importance to the Legal System **and** Outside Expertise of the Decision-Maker

Among the other categories of question "always" attracting correctness review under the *Dunsmuir* principles is one

> … of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise".[93]

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[92] Though some might argue that in reality Abella J. conducted correctness review or deployed the very same methodology as is normally associated with reasonableness review.

[93] *Supra*, note 2, at para. 60, citing *Toronto (City) v. C.U.P.E.*, 2003 SCC 63; [2003] 3 S.C.R. 77, at para. 62.

The reach of this classification is by no means self-evident and requires unpackaging. First, there is the problem of what the term "general law" embraces.

In the pre-*Dunsmuir* jurisprudence, the Supreme Court in *Canada (Deputy Minister of National Revenue – M.N.R.) v. Mattel Canada Inc.*,[94] adopted what was a generous conception of what constituted general questions of law either outside the expertise of the decision maker or where the decision maker and the courts were at parity in terms of competence. In that case, the Court determined that correctness review was appropriate for "pure questions of law that require the principles of statutory interpretation and other concepts which are intrinsic to commercial law."[95] According to Major J., delivering the judgment of the Supreme Court:

> Such matters are traditionally the province of the Courts and there is nothing to suggest that the CITT has any particular expertise in respect of these matters. If, as in this case, the CITT's relative expertise does not speak to the nature of the questions in issue in an appeal, the appropriate standard of review for questions of law is correctness.[96]

In my view, it is now clear that this kind of analysis has not survived *Dunsmuir* and cannot provide a springboard for entry into the world of general questions of law, let alone ones that are of central importance to the legal system as a whole.

First, characterizing the identification and application of the principles of statutory interpretation as tasks at which the superior courts are more expert and as therefore being questions of general law, if applied

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94 [2001] 2 S.C.R. 100; 2001 SCC 36.

95 *Id.*, at para. 33.

96 *Ibid.*

literally, would undercut the entire deference exercise and, in particular, the presumption that decision-makers are entitled to deference in the interpretation of their home and related statutes. This is generally accepted in the post-*Dunsmuir* jurisprudence.

Margaree Environmental Assn. v. Nova Scotia (Minister of Environment)[97] provides a good example. There,[98] MacAdam J. confronted a pre-*Dunsmuir* precedent that had bluntly asserted:

> The nature of the problem before the Minister is one of statutory interpretation. The interpretation of these terms is a question of law and the appropriate standard is that of correctness.[99]

In rejecting the argument that this continued to govern, MacAdam J. made it abundantly clear that characterization of an issue as one of statutory interpretation did not lead to the conclusion that this was a general question of law of fundamental importance to the legal system as a whole.[100] Citing other post-*Dunsmuir* precedent,[101] MacAdam J. accepted that questions of statutory interpretation "do not automatically attract a standard of correctness."[102]

What is also clear in the post-*Dunsmuir* case law is that the other half of the *Mattel* formula does not provide a basis for correctness review. Simply because a decision-maker may have to have regard to general principles of law that exist beyond or outside that decision-maker's

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97 2012 NSSC 296; 319 N.S.R. (2d) 294 (S.C.).

98 *Id.*, at para. 31.

99 *Acheson v. Nova Scotia (Minister of Environment and Labour)*, 2006 NSSC 211, at para. 21. (Other authorities to the same effect were also cited.)

100 *Supra*, note 97, at paras 32-35 and 40-42.

101 *Id.*, at para. 40.

102 *Specter v. Nova Scotia (Minister of Fisheries and Agriculture)*, 2012 NSSC 40; 312 N.S.R. (2d) 346, at para. 40 (*per* Wood J.).

statutory regime is not a sufficient basis for categorization of a question as one of "general law" subject to correctness review.

In asserting that correctness was the standard when the Canadian International Trade Tribunal was interpreting a statutory provision that brought into play general principles of commercial law and, in particular, sale of goods, Major J. was implicitly drawing upon one of the foundational standard of review authorities: *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board.*[103] There, Beetz J. deployed as a justification for correctness review an argument to the effect that the reviewable decision depended on the meaning of a statutory term, "alienation", known to the Civil Law of Quebec.

However, what we now know in the post-*Dunsmuir* world is that this kind of analysis is too simplistic. The mere use or relevance of concepts or terms that also have counterparts in common or general law is not in and of itself a sufficient basis for classifying the task of the decision-maker as involving one of general law or as leading to correctness review. The starkest example of this is the judgment of Fish J., for the Supreme Court, in *Nor-Man Regional Health Authority Inc.*[104] At issue here was a labour arbitrator's reliance on estoppel to prevent the union asserting that the employer's interpretation of the collective agreement was incorrect. At first instance, the court held that this was a reasonable decision on the part of the arbitrator. However, on appeal, the Manitoba Court of Appeal held that the standard of review was that of correctness and that the arbitrator had erred in the appreciation and application of the principles of estoppel:

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[103] [1984] 2 S.C.R. 412.

[104] *Supra*, note 27.

> The question of whether imputed or constructive knowledge is sufficient to found an estoppel, and the related question about intent, are questions that, in my opinion, are not confined to any particular field of law. The questions and their answers transcend individual areas of law, such as property, contracts, and labour law, and are of central importance to the legal system as a whole. It may be that labour arbitrators have opined on those questions, but they do not fall within their specialized area of expertise.[105]

In contrast, Fish J., after accepting that the principles applied by the arbitrator were closer to those of promissory estoppel than any other species of estoppel recognized by common law and equity,[106] stated:

> Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.[107]

In comparing these two statements, it is important to recognize where the essential difference lies. Fish J. does not necessarily disagree with the sentiment that where a decision-maker is required to identify and apply general law or common law or equitable principles, the general law threshold is crossed. However, what he sees as misguided in Freedman J.A.'s judgment is the latter's acceptance of the proposition that when estoppel is relevant in a labour relations or collective agreement setting, it carries with it the same principles and content that it does when deployed, for example, in a general contractual setting. Despite description or categorization of the principles applied by the labour arbitrator in this case as those of estoppel, a term with a

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105 2010 MBCA 55; 255 Man. R. (2d) 93, at para. 46 (*per* Freedman J.A.).

106 *Supra*, note 27, at para. 28.

107 *Id.*, at para. 44.

general, a common law, or an equitable currency, it does not necessarily follow that they will have the same content or apply in the same way as they do under general law when relevant in a collective bargaining context. The determination of whether they do, and, if not, the identification of any contextual differences is primarily the task of the assigned arbitrator subject to review on a deferential, unreasonableness basis.

This means that a question is only one of general law when the principles and content of the relevant legal concept actually do transcend the particular context and fall to be decided by reference to the same principles and content as applies, if not universally, then across a range of situations beyond the particular context. In short, the Manitoba Court of Appeal's error was to categorize estoppel as coming into that category. And, as a consequence, what Fish J. is in effect doing is caution lower court judges against too ready a classification of a question coming before a statutory authority as depending on the same principles and content as applies in general law, or common law or equity. However, that by no means provides conclusive direction as to when a question of law does attract the "general law" characterization.

This dilemma is most graphically illustrated by judicial review of decisions interpreting human rights statutes. In the pre-*Dunsmuir* world, the Supreme Court did not afford human rights tribunals any measure of deference in the interpretation of their home statute? The judgment of La Forest J. in *Canada (Attorney General) v. Mossop*[108] makes the Court's position abundantly clear. After noting that human

[108] *Supra*, note 14. Lamer C.J. (Sopinka and Iacobucci JJ. concurring), delivering the principal majority judgment, endorsed this aspect of La Forest J.'s judgment, at para. 26. So too, though dissenting on the merits, did Cory J. (at para. 151) and McLachlin J. (as she then was) (at para. 161). However, in her dissent, L'Heureux-Dubé J. applied the standard of patent unreasonableness to the determination (at paras. 61-93).

rights tribunals make decisions that have "a direct influence on society at large in relation to basic social values",[109] he continued:

> The superior expertise of a human rights tribunal relates to fact-finding and adjudication in a human rights context. It does not extend to general questions of law such as the one in issue in this case [Whether "family status" in the federal human rights statute included same-sex couples]. These are ultimately matters within the province of the judiciary, and involve concepts of statutory interpretation and general legal reasoning which the courts must be supposed competent to perform.[110]

That approach apparently has not totally survived *Dunsmuir*. Thus, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*,[111] LeBel and Cromwell JJ. stated:

> The nature of the "home statute" administered by human rights tribunals makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the remedial authority of human rights tribunals or commissions.
>
> There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions

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109 *Id.*, at para. 45.

110 *Ibid.*

111 *Supra*, note 12.

> ought to be drawn, especially in respect of the issue that remains before our Court.[112]

In this case, the issue to be decided was whether, in terms of the Tribunal's constitutive Act, the power to award "compensation" included the power to award costs. According to LeBel and Cromwell JJ., this was an issue of law on which the tribunal was entitled to deference. What, however, may be critical is that the relevant determination did not involve the interpretation of any of the Act's anti-discrimination provisions. Rather it came within the category of question encompassed by the judgment's reference to questions of proof, procedure and remedial authority. Do "proper distinctions" still require issues of substantive anti-discrimination law to be assessed on a non-deferential basis? And, if correctness is the appropriate standard for human rights tribunals determining such questions, does it also hold for other decision-makers (such as labour arbitrators) when required to decide issues on the basis of substantive human rights and anti-discrimination principles?

Certainly, this was the way in which Robertson J.A. of the New Brunswick Court of Appeal, in a case now under reserve in the Supreme Court of Canada, saw it. In *Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union of Canada Local 30*,[113] on judicial review of an arbitration which raised human rights issues arising out of an employer's random alcohol testing policy, Robertson J.A. referred to the fact that the Supreme Court had yet to accord deference to a tribunal's determination of questions of law "umbilically tied to human

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112 *Id.*, at paras. 22-23.

113 2011 NBCA 58; 375 N.B.R. (2d) 92 (leave to appeal granted: [2011] S.C.C.A. No. 440 (Q.L.)).

rights issues."[114] In refusing to take that step, Robertson J.A. referred to the extent to which court precedents had been deployed by arbitrators dealing with this very issue. This was seen as reflective of the general legal importance of such issues, a factor that also pointed in the direction of consistent decision-making on this issue by arbitrators, something that he found lacking in the existing arbitral jurisprudence.[115]

While this judgment predated *Canadian Human Rights Commission* by a few months, it has been referred to and applied earlier this year by the Alberta Court of Appeal in *Lethbridge Regional Police Service v. Lethbridge Police Assn.*[116] The setting was once again a labour arbitration, the issue being an allegation of discrimination on the basis of disability in the firing at the end of probation of a police constable. The Court reasoned as follows:

> Human rights issues are unusual in that they may be decided by a number of tribunals: human rights commissions, labour arbitrators, professional disciplinary bodies, and the ordinary courts … . Where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be for correctness … . Likewise, the nature of human rights issues are that they are questions of law of general importance to the legal system. In the circumstances, the appropriate standard of review is correctness (even when such issues are decided by human rights panels) … . However, the underlying factual findings of the arbitrator are still entitled to deference [citations omitted].[117]

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114 *Id.*, at para. 23.

115 *Ibid.*

116 2013 ABCA 47; 542 A.R. 252, at para. 28 (application for leave to appeal filed: [2013] S.C.C.A. No. 159(Q.L.)).

117 *Ibid.*

Somewhat strangely, there is no reference to the *Canadian Human Rights Commission* judgment. Nonetheless, it is certainly possible to read this case and *Irving Oil* as reconcilable with that judgment.[118] When the issue coming before a tribunal is a substantive human rights or anti-discrimination matter, as opposed to an adjectival or remedial issue arising out of the constitutive statute, "proper distinctions" may still point in the direction of correctness review.

Nonetheless, in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*,[119] Stratas J.A., delivering the judgment of the Federal Court of Appeal, deployed *Canadian Human Rights Commission* in justification of applying a reasonableness standard to a Canadian Human Rights Tribunal interpretation of substantive provisions in the federal Human Rights legislation.[120] Albeit that, in the context, the scope of the reasonableness review was quite intrusive,[121] it still represents a judgment in which the Court applied the presumption of reasonableness review to a tribunal's interpretation of its home statute, despite the substantive human rights dimension of the relevant issues.

Now, we must await the judgment in *Irving Oil* to know which approach reflects more accurately the position of the Supreme Court of Canada.

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[118] Interestingly, in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35; [2012] 2 S.C.R. 283, at para. 16, Rothstein J. justified correctness review of a Copyright Board interpretation of a provision that also fell to be decided in civil proceedings by the Federal Court not on "the central importance" criterion but on the basis that this was an exceptional other case in which the presumption of reasonableness review of a tribunal interpreting its home statute was rebutted. (Abella J. dissented holding that reasonableness was the standard. In so doing, she referred, at para. 72, to *Canadian Human Rights Commission*.)

[119] 2013 FCA 75. For another example of the use of *Canadian Human Rights Commission* to justify deferential reasonableness review of a human rights tribunal interpretation of a substantive anti-discrimination provision, see *Canadian National Railway v. Seeley*, 2013 FC 117. Indeed, the particular statutory term was "family status", the very one that in *Mossop* attracted correctness review.

[120] *Id.*, at para. 10.

[121] *Id.*, at paras 13-15. The Court's conception of reasonableness review is returned to in Section 8 of this paper.

That judgment might also provide some guidance on the extent to which a failure on the part of a tribunal to be consistent in its interpretation of core substantive provisions in its empowering statute or general mandate provides either an independent or supplementary reason for correctness review. To this point, the Supreme Court has rejected arguments presenting inconsistency in tribunal decision-making as a justification for correctness review.[122] (I return to this subject in Section 12.)

More generally, what requires resolution by the Court is whether it is sufficient to trigger this *Dunsmuir* principle if the question of law is one that transcends the specific context and falls to be determined by the same criteria and in the same way whenever it falls to be decided in whatever setting. Will that in itself be sufficient to make it of central importance to the legal system as a whole, or is more required? Also, what is to be made of the second part of the principle: "and outside the expertise of the particular decision-maker"?[123] Can, for example, it be asserted that it is no longer a question of comparative expertise as between the tribunal and the reviewing court, and, if so, is there a claim, for example, that human rights tribunals do have expertise in resolving questions of human rights and anti-discrimination law and that they should have deference even where the particular issue might arise in other settings and stand to be analysed and applied in the same way irrespective of setting?

Let me conclude this section by positing the following question: Would the reasoning that led the Court in 1998 to correctness review in

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[122] The still leading authority is *Domtar Inc. v. Québec (Commission d'appel en matière des lésions professionnelles)*, [1993] 2 S.C.R. 756.

[123] In *Alberta Teachers' Association*, *supra*, note 8, Rothstein J. continued to emphasise this as a component of the test: see paras. 30 and 32.

Pushpanathan v. Canada (Minister of Citizenship and Immigration) [124] still prevail today. There, Bastarache J., delivering the judgment of the majority of the Court, was confronted by a provision that disqualified from convention refugee status those claimants who had engaged in acts "contrary to the principles and purposes of the United Nations". According to the Court, the meaning of this provision was one that depended on the application of principles of general law on which the Immigration and Refugee Board possessed no particular or relative expertise. It was also a legal question that would have significant precedential value.[125] Under the *Dunsmuir* principle discussed in this section, would those considerations still be relevant and lead to correctness review?

Recently, in *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*,[126] Zinn J. of the Federal Court, by reference to subsequent Supreme Court of Canada authority,[127] was clearly of the view that this feature of *Pushpanathan* survived. Where immigration authorities were engaged in "the interpretation of criminal or international law",[128] there was no place for deference; the presumption that such authorities were normally entitled to deference in the interpretation of their home statutes was overcome. He then went on to add:

> In addition, although it is not necessary for the conclusion that I have reached, I am also of the view that the question of who is or is not admissible to Canada is a question "**of central importance to the legal**

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124 [1998] 1 S.C.R. 982.

125 *Id.*, at paras. 43-50 particularly.

126 2012 FC 1417.

127 Notably *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12; [2009] 1 S.C.R. 339 (*id.*, at para. 19) and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40; [2005] 2 S.C.R. 100 (*id*, at para. 20).

128 *Id.*, at para. 21.

> **system**." A finding on admissibility dictates the right of a non-citizen to enter into and remain in Canada, either as an immigrant or a protected person. The right of a non-citizen to remain in Canada and the protection, if any, he or she is entitled to receive prior to removal, are fundamental to the Canadian legal system.[129]

It remains to be seen whether this kind of analysis provides the way forward under this category.

8. The Presumption of Reasonableness Review for Interpretation of Home Statutes – Does it extend to All Manner of Public Authorities?

As outlined already, in *Alberta Teachers' Association*,[130] Rothstein J., building particularly on *Dunsmuir v. New Brunswick*[131] and *Smith v. Alliance Pipeline Ltd.*,[132] stated:

> [T]he interpretation by the **tribunal** of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review [emphasis added].[133]

One of the questions arising out of this pronouncement is whether the presumption of reasonableness review applies not just to tribunals but also to other decision-makers exercising prerogative and statutory powers. *Dunsmuir*, *Alliance Pipeline*, and *Alberta Teachers' Association* all involved judicial review of the decisions of tribunals in the usual sense of that word. Nonetheless, the critical paragraphs in *Dunsmuir* occur in a part of the judgment where Bastarache and LeBel JJ. had made it clear that they were addressing not just adjudicators or

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129 *Id.*, at para. 30.

130 *Supra*, note 8.

131 *Supra*, note 2.

132 2011 SCC 7, [2011] 1 S.C.R. 160.

133 *Supra*, note 8, at para. 34, quoting the judgment of Bastarache and LeBel JJ. in *Dunsmuir*, *supra*, note 2, at para. 54.

tribunals but the "structure and characteristics of the system of judicial review as a whole."[134] Did this mean that when, in paragraph 54, they were addressing the issue of a "tribunal" interpreting its own statute, they were to be taken literally, or that "tribunal" was a synonym for all statutory and prerogative decision makers? Interestingly, when they elaborate in the following paragraph, the term used is "administrative decision-maker",[135] rather than tribunal, this lending some support for the argument that they were addressing all manner of statutory and prerogative decision-makers. However, the judgments of Fish J. in *Alliance Pipeline* and Rothstein J. in *Alberta Teachers' Association* are difficult to read as addressing the issue; they are each firmly rooted in a tribunal setting.

This question has surfaced most frequently in the Federal Court and the Federal Court of Appeal in the context of decision-making by Ministers of the Crown. The primary authority is the judgment of Mainville J.A. of the Federal Court of Appeal in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*.[136] There, Mainville J.A. (for a three judge Court) examined the reviewability of Ministerial decisions in some detail, even going so far as to assert that according deference to Ministerial decisions on pure questions of law would "establish a new constitutional paradigm."[137] He then moved to a standard of review analysis, and, by reference to the four *Dunsmuir* criteria, concluded that Parliament did not intend to protect from correctness review the Minister's decision interpreting a provision in the constitutive statute. There was no protective privative clause, the relevant provision

134 *Supra*, note 2, at para. 33.
135 *Id.*, at para. 55.
136 *Supra*, note 32.
137 *Id.*, at para. 98.

conferred a closely circumscribed power on the Minister, the Minister was acting in an administrative, not an adjudicative capacity, and the question involved the interpretation of a statute, an exercise to which the Minister "brought no special expertise." Correctness was therefore the standard of review.[138]

Subsequent courts have not necessarily accepted that part of Mainville J.A.'s judgment in which he asserts that anything other than correctness review of Ministerial decision-making would run counter to the *Bill of Rights* of 1689 unless expressly provided for by Parliament. Nonetheless, they have generally accepted that the *Alberta Teachers' Association* presumption does not reach the determination of questions of law by Ministers of the Crown at least when they are acting in an administrative, as opposed to an adjudicative capacity. Indeed, not only is there no such presumption but also, as with Mainville J.A. in *Georgia Strait*, a full standard of review analysis has not led to reasonableness as the standard.

Thus, in *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*,[139] an appeal to the Federal Court of Appeal from a Ministerial decision designating the foundation as a private, rather than a public one for income tax purposes, Dawson J.A. engages in a standard of review analysis that in its reasoning parallels that in *Georgia Strait*. For her, the bottom line, citing *Georgia Strait*, appears to be

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138 *Id.*, at paras. 101-105.

139 2012 FCA 136, 432 N.R. 338. See also in the Federal Court, *Attawapiskat First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development Canada)*, 2012 FC 948 (Phelan J.), at paras. 63-68, and *UHA Research Society v. Canada (Attorney General)*, 2013 FC 169 (Snider J.), at paras. 6-12.

> …that the reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise.[140]

More recently, in *Takeda Canada Inc. v. Canada (Minister of Health),*[141] Dawson J.A. (Pelletier J.A. concurring) reiterates her endorsement of *Georgia Strait*, noting that to go against it and commence any analysis of a Ministerial interpretation of the constitutive statute with a presumption of reasonableness review, would "create[ ] unacceptable uncertainty."[142] She then proceeds to identify a number of pre-*Dunsmuir* decisions of the Supreme Court of Canada applying correctness as the standard for the review of determinations of questions of law by Ministers or their delegates.[143] In terms of *Dunsmuir*, the standard of review for such matters has already been determined satisfactorily and no further analysis is required.

In contrast, Stratas J.A., although also holding that correctness was the standard of review of a Ministerial decision refusing to accord "innovative drug" status,[144] nonetheless was of the view that *Alberta Teachers' Association* was binding authority,[145] and that a fair reading of Rothstein J.'s majority judgment in that case was to the effect that the presumption applied across the spectrum of statutory and prerogative decision-making. It operated on all "legislative interpretations of administrative decision-makers."[146] In other words, Stratas J.A. read the word "tribunal" in the critical paragraph of the

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140 *Id.*, at para. 23 (followed in *Canada (Minister of Health) v. Celgene Inc.*, 2013 FCA 43) .
141 *Supra*, note 33, at paras. 111-16.
142 *Id.*, at para. 114.
143 *Id.*, at paras. 115-16.
144 *Id.,* at para. 26.
145 *Id.*, at para. 32.
146 *Id.*, at para. 27.

Rothstein judgment to be a generic term for all statutory and prerogative decision-makers. Nonetheless, Stratas J.A. went on to emphasise that the presumption was rebuttable, and, for those purposes, a standard of review analysis that pointed clearly in the direction of correctness review would suffice. In this instance, Stratas J.A., on the same basis as Mainville J.A. in *Georgia Strait*, assessed all four standard of review factors as supporting a correctness analysis.[147]

This did, however, provoke a reaction from Dawson J.A.: In *Georgia Strait*, Mainville J.A., had faced up to and rejected the argument that the presumption of reasonableness applied to the determination of questions of law by Ministers. He had read Rothstein J.'s endorsement of a presumption of reasonableness in *Alberta Teachers' Association* as restricted to adjudicative tribunals.[148]

And, obviously, for the moment, it is that view that prevails in both the Federal Court and the Federal Court of Appeal. However, it may well be that the Supreme Court of Canada will have an opportunity to itself address this issue. In *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*,[149] a pre-*Alberta Teachers' Association* and pre-*Georgia Strait* judgment of the Federal Court of Appeal and presently under reserve in the Supreme Court, Pelletier J.A. had applied a correctness standard to a Ministerial interpretation of a term in the *Immigration and Refugee Protection Act*, "national interest."

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147 *Id.*, at paras. 28-29.

148 *Id.*, at paras. 111-14.

149 2011 FCA 103; 415 N.R. 121 (Appeal heard: October 18, 2012: [2011] S.C.C.A. No. 233 (Q.L.)). See also *Canada (Attorney General) v. Canadian National Railway*, 2012 FCA 278; 440 N.R. 217, leave to appeal granted on April 11, 2013: [2012] S.C.C.A. No. 57, in which the standard of review of Governor in Council decisions on "Cabinet appeals" is in issue.

> This is a question of law that does not involve a review of the Minister's decision-making and so should be assessed on the standard of correctness. The Minister has no relative expertise in the interpretation of these provisions of the *IRPA* so there is no reason for the court to defer to him on these questions.[150]

In the absence of anything definitive from the Supreme Court of Canada,[151] there are two questions worth pursuing: one of principle and one as to reach of the Federal Court of Appeal's current position.

The issue of principle revolves around the appropriateness of restricting the presumption of reasonableness review to tribunals' interpretations of their home or frequently encountered statutes. In the case law, there are references to a lack of Ministerial expertise on pure questions of law, at least in comparison to that of the courts.[152] In contrast, it is interesting to note that, as far as tribunals are concerned, the Supreme Court appears to have largely moved away from the assessment of expertise as a comparative exercise involving an assessment of the tribunal's expertise in comparison to that of the court. Indeed, as already noted, tribunal expertise over the interpretation of their constitutive statutes is now assumed by the Supreme Court on the basis of legislative choice of a tribunal as the decision-maker. For

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150 *Id.*, at para. 32.

151 However, some clue as to the likely outcome of this issue in the Supreme Court may be found, for example, in the judgment of Cromwell J. in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29; [2012] 1 S.C.R. 364, discussed at greater length in Section 8, where he appeared to review the legal component of a Ministerial discretion on a correctness basis. See also to the same effect the judgment of Le Bel J. (relied on by Cromwell J.), in *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14; [2010] 1 S.C.R. 427, at paras. 32-38.

152 See *e.g. Agraira*, *supra*, note 149, at para. 32 ("no relative expertise"); *Sheldon Inwentash*, *supra*, note 139, at para. 22 (no "greater expertise than the Court"); *Attawapiskat First Nation*, *supra*, note 139, at para. 67 ("does not have expertise"). Even Stratas J.A. in *Takeda*, *supra*, note 33, at para. 29, in determining whether the presumption has been rebutted by reference to the four standard of review factors, states: "The Minister has no legal expertise in legal interpretation."

example, Rothstein J. commences his judgment in *Alberta Teachers' Association* with the following statement:

> Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter.[153]

In a slightly different vein, Fish J., in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*,[154] speaks of labour arbitrators "benefit[ting] from *institutional expertise* … even if they lack *personal expertise* in matters of law."

Does this explain the difference between Ministerial and tribunal decision-making? When the legislature selects a tribunal to perform a function, it is opting for expertise, neutrality, and decision-making autonomy; when it leaves the matter in the hands of a Minister, it is leaving the function to a person who is not expert in law (either presumptively or in reality) and who often will lack neutrality or the perception of it in the carrying out of her or his functions.

In my view, the first justification should not carry the day. There is no particular reason to deny a presumption of expertise to Ministers when interpreting statutes from which they derive their power. Ministers will seldom be exercising their powers personally, and their subordinates who do exercise the powers will either be thoroughly immersed in the details of the relevant statutory regime or have access to competent legal advice from counsel who possess that expertise. Indeed, a presumption of legal or interpretive expertise may be much more

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153 *Supra*, note 8, at para. 1.

154 *Supra*, note 27, at para. 53.

justified empirically in the instance of departmental decision-making in the name of the Minister than it is in the instance of many tribunals.

In contrast, the second justification may have more force. The argument for a presumption of reasonableness review in the interpretation of home statutes does not carry the same weight in departmental settings at least where there may be tensions between the advancement of various policy objectives in the face of individual rights-based claims. Where the legislature has not chosen a neutral arbiter in the form of a tribunal to deal with such matters, there is a case to be made, absent other indicators of deference such as a privative clause, for more intrusive court scrutiny of determination of questions of law even where they involve the decision-maker's home or constitutive statute.

Nonetheless, as Stratas J.A. has suggested in his dissenting judgment in *Takeda Canada Inc.*,[155] this argument does not necessarily mean that the presumption of reasonableness review should be withdrawn completely from the interpretation of home statutes by Ministers of the Crown. Rather, any such concerns can be accommodated in the assessment of the various contextual factors that will form part of an argument that, in the circumstances, the presumption has been rebutted.

> I am reluctant to carve out administrative decisions from the *Alberta Teachers' Association* approach merely because the administrative decision-maker is a Minister, as is the case here. For one thing, the *Alberta Teachers' Association* approach aptly handles the breadth of Ministerial decision-making, which comes in all shapes and sizes, and arises in different

[155] *Supra*, note 3.

> contexts for different purposes. In addition, Ministerial decision-making power is commonly delegated, as happened here. It would be arbitrary to apply the *Alberta Teachers' Association* approach to decisions of administrative board members appointed by a Minister (or, practically speaking, a group of Ministers in the form of the Governor in Council) but apply the *Georgia Strait* approach to decisions of delegates chosen by a Minister.[156]

The second question left dangling by the Federal Court and Federal Court of Appeal jurisprudence is the extent of the reach of the exclusion of the *Alberta Teachers' Association* presumption, and, more generally, whether decision-makers other than tribunals should ever be accorded deference in their determinations of pure questions of law.

What about decision-making by the Governor in Council or Cabinet? In a pre-*Alberta Teachers' Association* case, *Public Mobile Inc. v. Canada (Attorney General)*,[157] Sexton J.A., delivering the judgment of the Federal Court of Appeal, in the context of an appeal to Cabinet from a decision of the CRTC, explicitly left for another day the question of whether there was any room for deference to Governor in Council determinations of the meaning of terms in a constitutive statute.[158]

What about decision-making within a departmental setting where the statutory power is conferred explicitly on a departmental official other than the Minister, particularly where the decision is adjudicative in nature or attracts the protections of procedural fairness? Very recently, Gleason J. of the Federal Court grappled with this question in *Qin v. Canada (Minister of Citizenship and Immigration)*.[159] In so doing, she

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156 *Id.*, at para. 33.

157 2011 FCA 194, [2011] 3 F.C.R. 344.

158 *Id.*, at para. 35.

159 2013 FC 147.

engaged in the same kind of struggle as Stratas J.A. had in *Takeda Canada Inc.*: Was the issue of standard of review to be resolved by reference to Federal Court and Federal Court of Appeal authority to the effect that no deference was owed to visa officers interpreting their home statute, or by reference to *Alberta Teachers' Association* and the presumption of reasonableness review in such matters? In the end, as the choice of standard of review was irrelevant to the outcome of the matter, Gleason J. did not rule on the issue and it was left dangling.[160]

In *Friends of Davie Bay v. British Columbia*,[161] the British Columbia Court of Appeal did grasp the nettle in the instance of the determination of the Director of the Environmental Office that a project was not reviewable. The Director operated in a departmental setting with the Minister being an alternate decision-maker under the relevant legislation. The appellant, relying in part on *Georgia Strait*, argued that the standard of review for the Director's interpretation of her or his home statute should be that of correctness.[162] However, the Court rejected *Georgia Strait* as irrelevant and applied *Alberta Teachers' Association*, though without explicit reference to the presumption, to reach the conclusion that the issue of law was not one of true jurisdiction and was therefore subject to correctness review.[163]

Indeed, in both this case and the judgment of MacAdam J. in *Margaree Environmental Association*,[164] the reviewing Court determined the standard of review on the basis of a full *Dunsmuir* analysis rather than explicitly starting with the presumption. To this extent, they can both

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160 *Id.*, at paras. 9-16.

161 2012 BCCA 293; 32 B.C.L.R. (5th) 278.

162 The standard of review provisions of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, did not apply to the decision under appeal; it was not the decision of a tribunal subject to that Act: *Id.*, at para. 16.

163 *Id.*, at paras. 18-30

164 *Supra*, note 97, at paras. 27-52.

be seen as consistent with *Georgia Strait* and different in approach from Stratas J.A. in *Takeda Canada Inc.* where the *Dunsmuir* criteria are deployed as a basis for assessing whether the presumption has been rebutted. As Stratas J.A. himself acknowledged, the occasions on which this difference in approach may be decisive may not be all that many[165].

Nonetheless, what is interesting about *Friends of Davie Bay* and *Margaree Environmental Assn.* is the willingness of both courts to reach the conclusion that, even in the absence of a privative clause, the determination of pure questions of law by the Director (in one instance) and the Minister acting on the advice of a delegate (in the other) were entitled to deference. In *Friends of Davie Bay*, albeit that the Director was operating under a departmental umbrella, the Court, accepting the position of the parties, was prepared to attribute expertise to this official,[166] and this, coupled with the fact that the Director was interpreting the home statute on a non–jurisdictional issue, was sufficient to lead to deference. In *Margaree Environmental Association*¸ the Court went even further and was prepared to explicitly attribute expertise to the Minister acting in an adjudicative capacity.[167] Both these stand in stark contrast to not only *Georgia Strait* but also some of the other Federal Court of Appeal authorities in which there was no willingness to attribute any measure of expertise on questions of law to Ministers even where acting through delegates who might be expected to be well-versed in the intricacies of the home statute.

Indeed, Mainville J.A. made it clear that he would be very reluctant to apply a correctness standard to Ministerial determinations of pure

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165 *Supra*, note 33, at para. 34.

166 *Supra*, note 161, at para. 22 ("None of the parties disputes the expertise of" the Director.)

167 *Supra*, note 97, at paras. 51-52.

questions of law absent a privative clause in the empowering legislation.[168] As already noted, there were no privative clauses in the relevant legislation in both *Friends of Davie Bay* and *Margaree Environmental Association.* However, in the latter, the Court classified the function in question as adjudicative rather than administrative.[169] In *Georgia Strait*[170] and *Sheldon Inwentash*,[171] the Federal Court of Appeal, as well as being unwilling to attribute any expertise to the Minister with respect to pure questions of law, had also characterized the decisions under scrutiny as administrative, as opposed to adjudicative.

However, an argument to the effect that Ministers (acting through delegates) or their officials are expert on pure questions of law when acting in an adjudicative capacity but not when acting in an administrative capacity scarcely withstands scrutiny. Moreover, if this is indeed the decisive factor in close cases, it has the potential to re-insinuate into Canadian judicial review law the long-abandoned search for a test to distinguish administrative from adjudicative (judicial or *quasi*-judicial) functions.

In short this important area of standard of review law is rife with uncertainty, and, given the frequency with which decision-making by statutory or prerogative authorities other than independent tribunals comes before the courts, in need of urgent attention by the Supreme Court of Canada.

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168 *Supra*, note 32, at paras. 5-6.
169 *Supra*, note 97, at para. 51.
170 *Supra*, note 32, at para. 103.
171 *Supra*, note 139, at para. 22.

9. The Scope of the Rothstein Exception to the Presumption of Reasonableness Review

In *Alberta Teachers' Association*,[172] Rothstein J. listed the various situations in which *Dunsmuir* and its progeny would require a correctness standard of review. Where one of these categories was engaged and the challenge was to the tribunal's determination of a pure question of law, the presumption of deference to a tribunal's interpretation of its home or constitutive statute was rebutted. The question that this left dangling was whether there were other "exceptional"[173] categories not on the standard list:

> … constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside of the adjudicator's expertise, … jurisdictional lines between two or more competing specialized tribunals, [and] true questions of jurisdiction or *vires*.[174]

The answer was to come in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*.[175] There, the Court was faced with a challenge to a decision of the Copyright Board which involved the interpretation and application of its home statute, and, more specifically, and as a prelude to setting a tariff, whether a particular mode of transmitting copyrighted music constituted a communication "to the public."

In a pre-*Dunsmuir* judgment, *Society of Composers*, *Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*,[176] Binnie J.

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172 *Supra*, note 8.

173 *Id.*, at paras. 39-40.

174 *Id.*, at paras. 30, citing the judgment of LeBel and Cromwell JJ. in *Canadian Human Rights Commission*, *supra*, note 12, at paras 58 and 60-61.

175 *Supra*, note 118.

176 2004 SCC 45; [2004] 2 S.C.R. 427.

for the Court had held that the standard of review of the Board's determination of questions of law was that of correctness. While Rothstein J., for the majority, recognized that that precedent had to be re-evaluated in light of the *Dunsmuir* principles, he took note[177] that, as part of his justification of correctness review, Binnie J. had pointed out that the regular courts, rather than the Copyright Board generally dealt with the *Copyright Act*,[178] as, for example, in the context of infringement actions.

This provided Rothstein J.[179] with the springboard to a holding that the standard of review of the Board's determination of the meaning of "to the public" was that of correctness. Under the copyright regime, both courts and the Board determined the same issues at first instance. In instances where there is an appeal from the holding of a trial judge, the standard of scrutiny for questions of law would be that of correctness.[180] For the Federal Court of Appeal to apply the deferential standard of reasonableness to the same questions of law on an application for judicial review would be incongruous.

Rothstein J. went on to reconcile the application of a correctness standard to the Board's determination of pure questions of law by reference to *Dunsmuir*.[181] This was not an instance where the legislature had reposed trust in the Copyright Board for the resolution of copyright issues as a "discrete and special administrative regime."[182] By reason of this sharing of adjudicative authority with the regular

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177 *Supra*, note 118, at para. 10.

178 *Supra*, note 176, at para. 49.

179 *Supra*, note 118, at paras. 10-20

180 As specified for appeals in all civil actions in *Housen v. Nikolaisen*, 2002 SCC 32; [2002] 2 S.C.R. 235, at para. 8.

181 *Supra*, note 118, at para. 15.

182 *Supra*, note 2, at para. 55.

courts, this was not a situation where the legislature was to be taken as having established the Copyright Board as a "discrete" regime with superior expertise. As a consequence, Binnie J.'s pre-*Dunsmuir* judgment was still to be regarded as a satisfactory precedent on standard of review.

Rothstein J. did however go on, in responding to Abella J.'s dissent on standard of review, to make it clear that this was an unusual situation:

> I wish to be clear that the statutory scheme under which both a tribunal and a court may decide the same legal question at first instance is quite unlike the scheme under which the vast majority of judicial reviews arise. Concurrent jurisdiction at first instance seems to appear only under intellectual property statutes where Parliament has preserved dual jurisdiction between the tribunals and the courts.[183]

Nonetheless, there are some signs that it may be difficult to constrain the operation of the Rothstein exception. Thus, in *Lethbridge Regional Police Service v. Lethbridge Police Assn.*,[184] the Alberta Court of Appeal, after referring to the fact that "human rights commissions, labour arbitrators, professional disciplinary bodies, and the ordinary courts" all decide human rights issues, then deployed the Rothstein judgment as part of its justification of correctness review of a labour arbitrator's ruling on the meaning of a substantive discrimination provision in a human rights statute:

> Where a number of tribunals have concurrent jurisdiction over an issue, consistency requires that review be for correctness.[185]

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183 *Supra*, note 118, at para. 19.

184 *Supra*, note 116.

185 *Ibid.*

If indeed the exception applies that broadly, it will surely have much more of an impact on the presumption than Rothstein J. contemplated. It will therefore be interesting to see whether the Supreme Court grants leave to appeal.

In the meantime, however, I believe that the Alberta Court of Appeal has misread what Rothstein J. was saying in *Rogers Communications*. Aside from his insistence that this was a limited and rare situation (an assertion questioned by Abella J. in dissent[186]), there are two aspects of that situation that have to be kept in mind. First, the sharing of jurisdiction between the courts and the Copyright Board is provided for specifically in the *Copyright Act*;[187] it does not come about as a result of the courts' general common law jurisdiction happening to involve from time to time issues confronted by a "discrete" administrative tribunal. Secondly, there is nothing in the decision to suggest that the exception has purchase when the sharing of jurisdiction is between or among administrative tribunals as opposed to a sharing between the courts and an administrative tribunal. In short, this is not the path back to general correctness review whenever a tribunal deals with an issue that might also arise before either a court or another administrative tribunal. Indeed, read broadly, the Alberta Court of Appeal deployment of *Rogers Communications* could arguably apply to justify correctness review of tribunal determination of questions of law on the basis that a court might subsequently have to deal with those same questions in

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[186] *Supra*, note 118, at para. 70, referencing the *Trademarks Act*, R.S.C. 1985, c.T-13, which establishes shared jurisdiction between the Trade-marks Opposition Board and the Federal Court. In so doing, Abella J. goes on to note that Rothstein J.A. (as he then was), in *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145 (C.A.), at para. 51, had applied a reasonableness standard to review of the Board's decision on a question of law. Rothstein J. responded to the effect that the standard of review under other intellectual property regimes should be left to be decided "in a case in which it arises": at para. 19.

[187] R.S.C. 1985, c. C-42.

the context of an action for damages or collateral attack.[188] That obviously goes too far.

10. Reconciling the Nominate Grounds of Judicial Review with Reasonableness Review

One of the perennial issues in Canadian judicial review law is how to reconcile deferential, reasonableness review with claims based on various nominate grounds of judicial review, most of which are traditionally associated with review for abuse of discretion. How do challenges based on acting for an improper purpose, failing to take account of relevant factors, taking account of irrelevant factors, improper delegation, acting under dictation, wrongful fettering, and bad faith fit within the scheme of standard of review and the place of reasonableness as the default standard of review especially in the case of discretionary powers?

The existence of this dilemma can in fact be traced back to the foundational judgment of the Supreme Court on deference, *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation*.[189] There, Dickson J. prescribed restraint in the judicial review of decisions confided to administrative tribunals, restraint that would lead to judicial review on questions of law only where the decision under attack was patently unreasonable.[190] At the same time, citing *Service Employees' International Union v. Nipawin District Union*

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188 Take, for example, *Magder v. Ford*, 2013 ONSC 263; 113 O.R. (3d) 241 (Div. Ct.), where the Divisional Court in the context of a defence to enforcement proceedings allowed the appellant to raise the validity of a previously unchallenged decision by Toronto City Council, an example of collateral attack. It would be surprising if the possibility that an issue might also be raised in a regular court by way of collateral attack meant that the standard of review of Council's decision, if had been challenged directly, would automatically be that of correctness. That would still fall to be considered.

189 *Supra*, note 93.

190 *Id.*, at p. 237.

Hospital,[191] he recognized[192] the existence of categories of error that would take a tribunal both beyond the protection of a privative clause and outside its jurisdiction:

> … acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act as to embark on an inquiry or answer a question that was not remitted to it.

To the extent that a number of these grounds of review involved interpretation of the tribunal's home or constitutive statute, how was the task of review to be accomplished? The nominate grounds were framed in correctness language, yet the predominant principle was henceforth to be deference to tribunal evaluation of such questions.

Some hints as to how the two concepts might be brought together can be found in the admittedly cryptic sentences in *New Brunswick Liquor* that follow the quotation from *Nipawin*. Dickson J. continues:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question that was not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?[193]

If extended to some of the other grounds of review listed in the citation from *Nipawin*, what this can be read as saying that, if indicated by a standard of review analysis, there will be occasions on which the tribunal's discerning of relevant and irrelevant factors will be subject to

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191 [1975] 1 S.C.R. 382, at p. 389.

192 *Supra*, note 93, at p. 237.

193 *Ibid.*

deferential treatment. For example, the appropriate question will be: "Was it reasonable for the tribunal to treat this factor as relevant?"

This interpretation seemed to have gained acceptance in 1999 in *Baker v. Canada (Minister of Citizenship and Immigration)*.[194] There, L'Heureux-Dubé J., delivering the judgment of the majority of the Court, insisted that standard of review analysis applied just as much to review for abuse of discretion as it did for errors of law. She then went on to say:

> Incorporating judicial review of decisions that involve considerable discretion into the [then] pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give considerable leeway to the discretionary decision-maker in determining the "proper purposes" or "relevant considerations" involved in making a given determination.[195]

Further endorsement of this blending of the grounds with the standard of review analysis is to be found in the judgment of McLachlin C.J.C. in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*.[196]

> To determine standard of review on the [then] pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant matter. … The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the

194 [1999] 2 S.C.R. 817.
195 *Id.*, at para. 56.
196 2003 SCC 19; [2003] 1 S.C.R. 226.

> journey. … For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker.[197]

What could be clearer? A standard of review analysis must be applied in order to establish the basis (now correctness or unreasonableness) on which the reviewing court should approach an application for judicial review based on any of the nominate grounds. Deference is therefore just as much a possibility in relation to review on some or perhaps most of those grounds as it is with respect to other species of error.

The approach is, however, not without its problems. Certainly, as far as an application for review based on one or more of the nominate grounds depends on a decision-maker's interpretation of its home or constitutive statute, there is no problem in applying a reasonableness standard, if otherwise indicated (and it generally will be). However, I wonder whether it is quite this straightforward when the nominate ground is either fact-based or depends on more general principles of common law judicial review. Does a standard of review analysis and reasonableness review really have any purchase when the ground of review is bad faith, largely a fact-based inquiry based on a distinct legal test? And, what about assertions that decision-makers have acted under dictation, have unduly fettered their discretion, or wrongfully delegated their powers? These too are nominate grounds that rest upon a consideration of the facts and accepted legal principles. Importing standard of review analysis and, beyond this, conceiving of review on these grounds being conducted by reference to a reasonableness standard is a stretch.

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[197] *Id.*, at paras. 22 and 24-25.

However, Stratas J.A., in *Stemijon Investments Ltd. v. Canada (Attorney General)*,[198] saw the matter differently in a case in which it was alleged that the decision under review was the result of undue fettering. He first established that the overall standard of review for the decision in question was the deferential standard of reasonableness, and then, within that context, dealt with the assertion of undue fettering:

> Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of the law, cannot fall within the range of a what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.[199]

It is, of course, impossible to quarrel with the basic sentiment. However, simply by dealing with a fettering argument under the general umbrella of reasonableness standard of review in no way alters the nature of the inquiry: As a matter of fact and by reference to the legal tests for fettering, was the decision-maker unduly fettered in the exercise of his discretion? The inquiry and the tests to be applied are in no way different from what would have occurred previously when fettering was treated as a nominate ground of review not subject to standard of review analysis. Putting the same argument in another way, the nature of the inquiry and the tests to be applied would not have differed in this case had the umbrella standard of review been that of correctness. Cases of fettering, acting under dictation, bad faith, and generally[200] unlawful delegation will depend on the same criteria

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198 2011 FCA 299; 425 N.R. 341.

199 *Id.*, at para. 24.

200 I say "generally" because there clearly will be instances where the power to delegate will be determined by reference to a specific provision relating to delegation in either the decision-maker's home statute or other more general statutory interpretation legislation than by reference to the common law principle of *delegatus non*

whether they are dealt with under an overall umbrella of unreasonableness or correctness review. Indeed, Stratas J.A. himself seems to acknowledge this when he says in *Stemijon* that the outcome is not affected by the debate about the continued separate existence of the nominate grounds of review.[201]

Of somewhat greater moment, however, is an earlier difference of opinion between Stratas J.A. and Evans J.A.: *Kane v. Canada (Attorney General)*.[202] At stake here was the methodology for reviewing an appeal to a tribunal from the Public Service Commission's exercise of a discretion to "use an advertised or non-advertised appointment process"[203] to fill a public service position. Under the Act, success on the appeal to the Public Service Staffing Tribunal depended on whether the Commission had engaged in "an abuse of authority" in deciding to use an advertised appointment process,[204] with the Tribunal's decision protected by a strong privative clause.[205] In the particular instance, the Tribunal had denied the appeal, treating the position as new rather than the reclassification of an existing position that the candidate had filled on an interim basis.

The Court of Appeal, on appeal from a decision of the Federal Court denying the judicial review application,[206] split 2-1 in favour of allowing the appeal. Both the majority judgment, delivered by Evans J.A., and the dissenting judgment, delivered by Stratas J.A., accept that the

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potest delegare. In such cases, standard of review analysis and the application of a reasonableness standard are not only feasible but appropriate.

201 *Supra*, note 201, at para. 23.

202 2011 FCA 19; 413 N.R. 351, leave to appeal granted, December 1, 2011 ([2011] S.C.C.A. No. 109 (Q.L.)).

203 *Public Service Employment Act*, S.C. 2003, c. 22, s. 33.

204 Section 77(1)(b).

205 Section 102.

206 2009 FC 740; 256 F.T.R. 127.

appropriate standard of review is that of unreasonableness.[207] Where they part company is on how reasonableness review is to be conducted in the particular circumstances of this case and the statutory regime under which it arose. That choice was determined on the basis of a complex set of considerations that are not directly relevant to the point that I wish to make here.[208]

For Evans J.A.,[209] the Tribunal's decision was subject to be set aside and remitted back because it assumed what was a potentially material and relevant fact, that the position was a new, not a reclassified one. By failing to sufficiently inquire into that fact, it may have made a decision on the basis of an incorrect fact, and this failure of inquiry amounted to an abuse of authority. In terms of the traditional rubric, it had potentially failed to take into account a fact that it might (but not necessarily must) have determined was relevant to the abuse of authority question. As a consequence, its decision on abuse of authority was unreasonable and subject to remission back for reconsideration.

In his dissent,[210] Stratas J.A. saw the Court's role with respect to the Tribunal's assessment of the Commission's decision in a broader context, one that did not focus on the potential or possible relevance to the abuse of authority determination of whether the position was new or reclassified. Rather, the Court's task was to assess whether the outcome was one that, having regard to all of the material that was

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[207] *Supra*, note 202, at paras. 36-40 (*per* Evans J.A.) and 92 (*per* Stratas J.A.).

[208] My deployment of the judgments pays no attention to what may have been the critical issue of guidelines and policies, and the extent to which they were relevant to the assessment of the Commission's decision. For the differing views taken as to the nature and relevance of the guidelines and policy relied upon by the applicant in this case as well as the Tribunal's treatment of them, see paras. 44-56 (Evans J.A.), and paras. 120 and 130-32 (Stratas J.A.).

[209] As summarized, *id.*, at para. 6 and developed at paras. 68-81 particularly.

[210] *Id.*, principally at paras. 99-109.

before the Tribunal and that informed its reasons, came within a range of possible results that "were defensible on the facts and the law."[211] In exercising that function, the Court ought not to be preoccupied with the Tribunal's assessment of or assumptions about a possibly relevant factor, as long as its conclusions could otherwise withstand the scrutiny of reasonableness review.

In some respects, the difference between the two judgments is reminiscent of the famous "debate" between Wilson J. and Gonthier J. in *National Corn Growers Assn v. Canada (Import Tribunal)*[212] as to the extent to which reviewing courts should probe the full administrative record, including the evidence, and parse all the findings or steps taken along the way by the tribunal in reviewing for what was then "patent unreasonableness." Subsequently, Rothstein J.'s disquiet with Abella J.'s judgment in *Alberta (Education) v. Canadian Copyright Licensing Agency*[213] also echoes some of the concerns animating Stratas J.A. in his criticism of the Evans J.A. approach. More importantly, what is potentially at stake here, particularly if one treats as accurate one of Stratas' J.A.'s descriptions of the difference between his approach and that of Evans J.A., is the way in which reviewing Courts should integrate the previous nominate grounds of review for abuse of discretion within reasonableness review. Stratas J.A. accuses Evans J.A. of seizing on the issue of newness of the position and treating the Tribunal's failure to deal more amply with it as a failure to take account of a relevant factor. According to Stratas J.A., this represents a failure to adhere to the edict

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211 *Id.*, at para. 107, citing *Dunsmuir*, *supra*, note 2, at para. 47.

212 [1990] 2 S.C.R. 1324. Incidentally, Wilson J., in favouring a more restrained approach, cited then Professor Evans at some length in justification of her position: see paras. 10-23. Earlier, Justice Stratas had been one of her law clerks.

213 2012 SCC 37; [2012] 2 S.C.R. 345, at paras. 59-60.

quoted earlier of McLachlin C.J. in *Dr. Q v. College of Physicians and Surgeons of British Columbia*[214]:

> No longer is it "sufficient merely to identify a categorical or nominate error" or to "slot a particular issue into a pigeon hole of judicial review" such as the failure to take into account a relevant consideration… . Instead, "[r]eview of the conclusions of an administrative decision-maker must begin by applying [the reasonableness standard of review]… .[215]

Continuing,[216] Stratas J.A. stated that, under this approach, it was not for the reviewing court to determine which considerations are relevant. Rather, that determination was initially for the tribunal, and it was a determination for which it was entitled to "substantial leeway."

Leaving aside the critical question of whether this characterization is being totally fair to Evans J.A.,[217] one thing is obvious: If reviewing

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214 *Supra*, note 196.

215 *Supra*, note 202, at para. 101., citing from paras. 22 and 25 of *Dr. Q*. See also his judgment in the subsequent case of *Stemijon*, *supra*, note 198, at paras, 21-24, discussing the attempt to characterize the decision under review as involving an unlawful fettering of discretion.

216 *Id.*, at para. 102, this time citing from para. 56 of *Baker*, *supra*, note 194.

217 What is clear is that characterization or description of what constitutes unreasonableness is becoming an increasingly important aspect of the conduct of unreasonableness review. (For another interesting recent example of disagreement among the members of a Federal Court of Appeal panel on appropriate characterization, see *White Bear First Nations Chief and Council v. Canada (Minister of Indian Affairs and Northern Development)*, 2012 FCA 224.) Thus, another way of pleading unreasonableness in *Kane* could have been a claim that the Tribunal based its decision against Kane on an unreasonably restrictive definition or conception of what could constitute an "abuse of authority" by the Commission. It is also instructive to note the way in which Evans J.A. described why the Tribunal's decision was unreasonable in the Introduction to his judgment, *id.*, at para. 6:

> In my view, for the employer to base an exercise of discretion on an incorrect fact is *prima facie* unreasonable and can thus constitute an abuse of authority, if the fact is material and relevant. Thus, in assessing whether the employer's decision in this case was an abuse of authority, **the Tribunal cannot ignore Mr. Kane's complaint** that the employer based its decision to advertise on an erroneous finding that the position was new, a matter which section 33 permits, but does not require, the employer to consider [emphasis added].

At a point at which, in Canadian jurisprudence, review for adequacy of reasons has become subsumed within reasonableness review, what this characterization can be read as asserting is that the Tribunal was unreasonable in failing to address a significant issue raised by the employee. As stated by the majority of the Newfoundland Court

courts take the position that it is unreasonable for a tribunal to take into account a factor that the court sees as irrelevant on a proper interpretation or to fail to take into account a factor that the court sees as relevant, reasonableness review in this respect is indistinguishable from correctness review at least as far as the relevance or irrelevance of factors is concerned. One can also make the same argument with respect to the discernment of what are proper and what are improper legislative purposes. To move in this direction would therefore seriously undermine the expressed policy of deference to tribunals interpreting their home or related statutes.

It does, of course, appear to be the case that the Supreme Court (and the Federal Court of Appeal) have embraced this position in relation to the review of the exercise of discretionary powers by authorities other than tribunals, albeit that deference is still generally due once the purposes of the relevant statute and the limits of the discretion have been observed or adhered to.[218] It remains to be seen whether the Supreme Court will go down this same road with tribunals,

Similar dilemmas emerge from *Big Loop Capital Co. Ltd. v. Alberta (Energy Resources Conservation Board).*[219] There, the Alberta Court of Appeal applied a reasonableness standard of review to a Board determination that a First Nations Reserve did not constitute an "urban

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of Appeal in *Newfoundland and Labrador (Treasury Branch) v. Newfoundland and Labrador Nurses' Union*, 2010 NLCA 13; 294 Nfld. & P.E.I.R. 161, at para. 11, relying on *Lake v. Canada (Minister of Justice)*, 2008 SCC 23; [2008] 1 S.C.R. 761, and *R. v. R.E.M.*, 2008 SCC 51; [2008] 3 S.C.R. 3, the decision "must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter." Arbitrary assumption of facts which are central to a live issue in the matter does not meet that standard, especially when, under current law, an actual finding on a material fact is potentially also exposed to unreasonableness review, as illustrated by *Alberta (Education)*, *supra*, note 202. See also *Spidel v. Canada (Attorney General)*, 2012 FC 958, for a recent example of unreasonableness review of a decision based on a failure to come to grips with the issues raised, in this instance, by an federal offender's grievance provided for by way of Commissioner's Directive.

[218] As discussed in Section 8 of this paper.

[219] 2012 ABCA 64; 522 A.R. 325.

centre" and was therefore not entitled to a setback for two sour gas pipelines approved by the Board. The term "urban centre" was provided for in a Directive issued by the Board, and the Court held quite summarily that this was an instance of a Board interpreting and applying its own Directives in a matter that was not of central importance to the legal system as a whole and therefore subject to review on a reasonableness basis.[220] However, the Court went on to hold that the Board had made an unreasonable decision in engaging exclusively in a density analysis, and in failing to have regard to the provisions of the *Municipal Government Act*[221] in determining whether the Reserve was a "similar development" to a list of species of communities spelled out in the Directive and borrowed from that Act. According to the Court, this focussing on extraneous considerations and failing to have regard to relevant considerations meant that the Board's decision was one that

> … falls outside of the range of acceptable and rational outcomes that are defensible in respect of the facts and law (*Dunsmuir* at para. 47).[222]

This too looks a lot like correctness review in terms of the Board's determination of what constitute relevant and what constitute irrelevant factors in the exercise of the Board's discretionary powers, and raises starkly and again the continuing status of these as free-standing or independent grounds of judicial review.

Unfortunately, any expectations that the Supreme Court might resolve some of these tensions on the appeal in *Kane* were dashed. In a

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220 *Id.*, at para. 10.

221 R.S.A. 2000, c. M-26, sections 59 and 80.

222 *Supra*, note 217, at para. 11.

disappointingly short judgment,[223] the Court allowed the appeal primarily on the basis of a disagreement with Evans J.A. and his assessment of the facts and the reasons under review. That the Court was not about to resolve the conflict between the majority and minority on the issues of principle is apparent in the following statement:

> Even accepting (without deciding) that the majority was correct to think that a discretionary decision based on an irrational finding of material fact would constitute an abuse of authority, there is no realistic possibility on this record that the Tribunal could find any such irrational finding of material fact in this case.[224]

As a consequence, the tying up of the many loose ends in the relationship between reasonableness review and the historical nominate grounds of common law judicial must await another day.

11. The Place of Deference when Constitutional (including *Charter*) Issues are in Play

Dunsmuir reaffirmed the generally accepted position that, on constitutional questions, the standard of review was always correctness.[225] One specific example was provided – questions "regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*"[226] However, Bastarache and LeBel JJ. also referred to "other constitutional issues"[227] citing *Nova Scotia (Workers Compensation Board) v. Martin*[228] and my

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223 2012 SCC 64.
224 *Id.*, at para. 10.
225 *Supra*, note 2, at para. 58.
226 *Ibid.*
227 *Ibid.*
228 *Supra*, note 68.

Administrative Law Text.[229] These references make it clear that the Court had an apparently comprehensive view of what constituted "constitutional questions" for the purposes of correctness review. *Martin* raised the issue of whether a tribunal had the legal capacity to deal with constitutional questions. As a consequence, it must be taken that the Supreme Court intended to extend the reach of correctness review to all such adjectival questions such as those involving authority to award *Charter* remedies.[230] As for the citation of my text, the only other species of constitutional question besides sections 91 and 92 issues to which I refer are those implicating the *Charter* and the *Canadian Bill of Rights*, so they too must be seen as subject to correctness review.[231]

Nonetheless, it was also clear that this view of the standard to be applied when judicial review of administrative action encountered constitutional questions was not quite so simple or straightforward. Undoubtedly, where a pure question of constitutional law is concerned, correctness always has been the mandatory standard of review. However, even in the pre-*Dunsmuir* era, the Supreme Court was asserting the need for deference to tribunal assessment of constitutional questions when that assessment involved questions of fact[232] or even mixed law and fact when there was no readily extricable pure question of law.[233] The same held true for review of discretionary exercises of power that implicated *Charter* rights and freedoms.[234]

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229 David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 60.

230 Now see *R. v. Conway*, *supra*, note 68.

231 Subsequently, see *e.g. Multani v. Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6; [2006] 1 S.C.R. 256, at para. 20.

232 See *e.g. Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21; [2004] 1 S.C.R. 528.

233 See *e.g. Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; [2002] 1 S.C.R. 3.

234 See *e.g. Lake v. Canada (Minister of Justice)*, *supra*, note 217.

In 2006, the majority judgment of Charron J. in *Multani v. Commission scolaire Marguerite-Bourgeoys*[235] appeared to reject the notion that deference or the reasonableness standard of review had a role to play in judicial review based on allegations of *Charter* violations. In a case involving a section 2(a) *Charter* freedom of religion challenge to a school board decision denying a Sikh pupil permission to wear a ceremonial dagger to school, Charron J. stated:

> The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in apply the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard.[236]

Thereafter, Charron J. proceeded to review the School Board`s decision using the same methodology as specified in *R. v. Oakes*[237] for the assessment of legislation for *Charter* compliance. In that analysis, there is little room for deference. Certainly, at the second stage of the *Oakes* test for whether or not a *prima facie* violation can be justified by reference to section 1 of the *Charter*, the proportionality assessment, the Court concedes some room for a form of deference. As part of that analysis, in assessing whether the legislation (or decision) has impaired minimally the asserted right or freedom or freedom, the reviewing Court should not be looking for perfection. As acknowledged by Charron J.,[238] citing *RJR-MacDonald Inc. v. Canada (Attorney General)*:

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235 *Supra*, note 231.

236 *Id.*, at para. 20.

237 [1986] 1 S.C.R. 103.

238 *Supra*, note 231, at para. 50.

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.[239]

However, even when translated to the world of judicial review of administrative action, that limited concession to a margin of appreciation in the context of a justification of a *prima facie* violation of a protected right or freedom seems far removed from the respect for agency choice found in the application of an unreasonableness standard of review. It is also clear from *Multani* that the majority in effect engaged in a *de novo* assessment of the factual underpinnings of the extent to which the wearing of a kirpan to school represented a threat to the safety of other students, teachers and staff, as well as the other considerations involved in the section 1 balancing exercise.

In contrast to the position taken by Charron J. and a majority of the Court, Deschamps and Abella JJ. argued for and applied an administrative law reasonableness assessment to the School Board's exercise of authority.[240] Just over six years later, in *Doré v. Barreau du Quebec*,[241] the Charron approach was abandoned. In a judgment of a unanimous Court, delivered by Abella J., and including three judges[242] who had sided with Charron J. in *Multani*, it was accepted, in the context of review of a professional disciplinary decision which engaged freedom of expression as protected by section 2(b) of the *Charter*, that

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239 [1995] 3 S.C.R. 199, at para. 160.

240 *Supra*, note 238, at paras. 84*ff.* Nonetheless, Deschamps and Abella JJ. found the decision unreasonable.

241 2012 SCC 12; [2012] 1 S.C.R. 395.

242 McLachlin C.J., Binnie and Fish JJ.

the *Charter* issue should be subsumed within the administrative law principles and methodology of judicial review.

At least in the context of "an adjudicated administrative decision",[243] the Court, after an analysis of conflicting prior authority,[244] determined that review for adherence to *Charter* guarantees and "values" should take place under the rubric of common law judicial review of administrative action. In appropriate instances, what this meant was review not on the basis of correctness, but with reference to a standard of reasonableness. Moreover, in this context, the assessment of reasonableness was a much more elastic or holistic exercise than is used when legislation is challenged for non-compliance with the *Charter*. More particularly, the decision should not be first tested for *Charter* compliance with violations then subjected to the *Oakes* test for justification. Rather, the relevant considerations from *Oakes* (principally balance and proportionality) should be part of an overall assessment for reasonableness (or, where appropriate, correctness).

It would, however, be folly to pretend that *Doré* has resolved all questions that arise out of the dilemma of fitting *Charter* review within the *Dunsmuir* standard of review exercise. Among the questions are the significance of Abella J.'s talking in terms of both *Charter* guarantees

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243 *Supra.*, note 241, at para. 4.

244 *Id.*, at paras. 23-58. In fact, the possibility that *Multani* was under threat had surfaced earlier in the 2011 judgment of the Court: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44; [2011] 3 S.C.R. 134, a judgment not mentioned in the Abella survey in *Doré*. Among the issues at stake there was the exercise of ministerial discretion to grant exemptions from Canada's drug laws to safe injection sites. The Court assessed that exercise of discretion (engaging section 7 of the *Charter* and the right not to be deprived of the right to life, liberty and security of the person except in accordance with the principles of fundamental justice) on the basis of whether the refusal of an exemption was "arbitrary and grossly disproportionate" (para. 127). Presumably, the question now is whether that test represents that of reasonableness in a setting where *Charter* guarantees and values are at stake, a matter to which I return later in this paper.

and *Charter "*values".[245] What differentiates a *Charter* guarantee from a *Charter* value? Are there situations where *Charter* guarantees are not in play but *Charter* values are, and, if so, what difference does that make to the standard of review analysis and the application of a reasonableness standard?

Even after *Doré*, pure legal questions concerning the reach of the various provisions of the *Charter* will presumably continue to be reviewed on a correctness basis, but will there also be other situations (involving mixed questions of law and fact, fact, and discretion) where correctness is the appropriate standard (justified possibly by the first instance decision-maker's lack of expertise or clear statutory indicators)? More pertinently for the earlier discussion, how far exactly does *Doré* reach, if at all beyond "adjudicated administrative decisions" to, for example, the exercise of ministerial and other forms of executive discretion, including the making of subordinate or delegated legislation? As seen already, this issue as to the range of affected decision-makers is also one that remains outstanding in terms of the

[245] In *Baker v. Canada*, *supra*, note 194, at para. 56, L'Heureux-Dube J. spoke of discretion having to be exercised " in accordance with … the fundamental values of Canadian society, and the principles of the *Charter*." That raises the possibility that Abella J. has collapsed these two concepts into one. However, that does not resolve the problem. Does the *Charter*, aside from its guarantee of specific rights and freedoms, also have a penumbra that informs the exercise of discretionary power even though a specific right or freedom is not in play? Or, is the constant reference to the term "values" in *Dubé* meant to indicate that courts should always think in terms of the values of the *Charter* rather than actual rights and freedoms when administrative decision-making has an impact on *Charter* rights and freedoms? Either way, the whole idea and use of the term "values" requires further elaboration or unpackaging. The idea of *Charter* values informing the exercise of discretion seems to find its origins in the dissenting judgment of Gonthier and Bastarache JJ. in *Chamberlain v. Surrey School District, No 36*, 2002 SCC 86; [2012] 4 S.C.R. 710, where the majority of the Court, in a case that raised a clash between freedom of expression and freedom of religion, and the right to equality, as guaranteed by sections 2(a) and (b), and section 15 of the *Charter* respectively, set aside a School District's decision on instructional materials as unreasonable without recourse to the *Charter*. In dissent, Gonthier and Bastarache JJ. held that the exercise of discretion passed the reasonableness test in part because the School District had been attuned to the "values" of the *Charter* in reaching its decision. However, it is not at all clear that this was in any sense directly addressing an allegation to the effect that this exercise of discretionary power actually violated the *Charter*, section 15 right to equality. In any event, it is equally unhelpful on what precisely is the purport of an appeal to *Charter* values as opposed to rights and freedoms in an application for judicial review of the exercise of a discretionary power.

application of the presumption of reasonableness review for a decision-maker's interpretation of its home statute or one that it encounters regularly in the exercise of its authority.

In terms of the uncertainties arising out of *Doré* and its subsuming of review of exercises of discretion implicating *Charter* rights, freedoms, and values within common law judicial review of administrative action, guidance may actually be found in another branch of constitutional law: the duty to consult and, where appropriate, accommodate aboriginal peoples and their rights, interests, and as yet unresolved claims. From the time of *Haida Nation v. British Columbia (Minister of Forests)*,[246] the Supreme Court has made it clear that, in any judicial assessment of the various issues raised by this constitutional duty, those involved in the process are entitled to a measure of deference.

In *Haida Nation*, the decisions under review were Ministerial replacement and transfer of tree farm licences. When it came to deal with the question of the standard of review to be applied to these decisions, McLachlin C.J. stated that, given the failure of the government to set up any consultative process, it was not possible to definitively rule on the appropriate standard of review.[247] However, she then proceeded to indicate by reference to "[g]eneral principles of administrative law", not **constitutional law**, what those standards of review were likely to be.[248] On questions of law, including questions of law that could be readily extricated from questions of mixed law and fact, the standard of review would generally be that of correctness. However, on questions of fact and mixed fact and law, the standard

246 2004 SCC 73; [2004] 3 S.C.R. 511.

247 *Id.*, at para. 60.

248 *Ibid.*

would generally be that of reasonableness. For these purposes, she described the existence or extent of the duty to consult as a question of law, though insofar as this kind of determination involved an assessment of facts, there was scope for deference to the decision-maker's findings, at least where the relevant factual matters "were within the expertise of the tribunal."[249] Where the tribunal or decision-maker was in a "better position to evaluate the issue than the reviewing court",[250] in the absence of error on legal issues, the standard of review would generally therefore be that of reasonableness.

Given the Court's general position that issues of procedural fairness in administrative law are adjudicated on a correctness basis,[251] it is interesting that McLachlin C.J. goes on to assert that review of the process itself (the details of consultation and, where appropriate, accommodation) should be evaluated on a reasonableness basis.[252] At least as far as accommodation is concerned, the test is not whether the scheme or the government action achieved perfection but rather whether, in all the circumstances, it was reasonable. Similarly, while the Crown was required to be correct in its evaluation of the seriousness of a claim or the impact of an infringement, these being legal questions, where the Crown had made the correct legal determination, the process of consultation and accommodation would only be set aside where the outcome was unreasonable.[253]

Subsequently, the Court applied these principles in both *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,[254] and *Beckman v. Little*

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249 *Id.*, at para. 61.

250 *Ibid.*

251 As discussed in Section 13 of this paper.

252 *Supra*, note 246, at para. 62.

253 *Id.*, at para. 63.

254 2010 SCC 43; [2010] 2 S.C.R. 650.

Salmon/Carmacks First Nation.[255] While both these decisions give rise to questions of detail in the choice and application of what can shifting standards of review in a duty to consult and accommodate context,[256] what seems clear is that, when read in combination with the standard of review analysis, they provide a more developed and nuanced sense of the way to engage in judicial review when constitutional issues are in play than has so far emerged in the context of judicial review of decisions implicating *Charter* rights, freedoms and values. It is to be hoped that in future these two categories of judicial review of decisions raising constitutional issue not continue to exist in separate silos but that the lessons of the duty to consult litigation are deployed to advantage in any future consideration of choice of standard of review in *Charter* litigation.

Beyond the issue of choice of standard of review, however, *Doré* also raises issues of what reasonableness review actually involves when that is the appropriate standard of review for judicial review of administrative action implicating *Charter* rights, freedoms and values. In that context, what is the methodology for assessing the exercise of discretion or the law/fact application process? That is a question to which I return in the final section of this paper on the malleability of reasonableness review.[257]

12. Inconsistency as a Species of Unreasonableness[258]

[255] 2010 SCC 53; [2010] 3 S.C.R. 103.

[256] I explore this aspect of these two decisions in greater detail in "The Supreme Court of Canada and the Duty to Consult: A Lifting of the Fog" (2011), 24 Canadian Journal of Administrative Law and Practice 233. Some of the material in this section is directly lifted from that paper.

[257] Incidentally, it is also an issue in the context of the duty to consult and, where appropriate accommodate aboriginal peoples and their rights, interests and as yet undetermined claims. See "Lifting the Fog", *ibid*.

[258] For a more detailed exploration of this subject, see my earlier paper, "Consistent Decision-Making – A Core Value for High Volume Jurisdiction Tribunals and Agencies?", delivered in 2010 at the Ontario Workplace

There is an argument to be made that the courts would be justified in engaging in more intrusive review where a statutory or prerogative decision-maker makes unexplained or inexplicable truly inconsistent decisions. This kind of conduct could be seen either as of necessity unreasonable and justifying a setting aside by reason of that alone or as justifying correctness review of the particular decision.

However, twenty years ago in a judgment that the Supreme Court has never repudiated, L'Heureux-Dubé J., in *Domtar Inc. v. Québec (Commission d'appel en matière des lésions professionnelles)*,[259] held that inconsistency was not a free-standing ground of judicial review, and that, in the case before the Court, setting aside was appropriate only if the decision was patently unreasonable on its own terms.

For the most part, the judgment of L'Heureux-Dubé in *Domtar* has continued to garner judicial acceptance. Thus, McPherson J.A. of the Court of Appeal for Ontario strongly endorsed the thrust of the judgment in 2006 in a labour arbitration context in *National Steel Car Ltd. v. United Steelworkers of America, Local 7135*.[260]

However, there is some more recent post-*Dunsmuir* evidence of judicial concern about the problem of judicial sanctioning of the co-existence of inconsistent tribunal decisions, and, in particular, allowing a pattern of inconsistent decisions on the same issue of law to develop and remain impervious to judicial review. Indeed, in *Dunsmuir* itself, in her concurring judgment, Deschamps J., stated that "[c]onsistency in the law is of prime societal importance."[261] Thereafter, in at least two

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Safety and Insurance Appeals Tribunal 25th Anniversary Symposium. Some of the text of that paper is incorporated into this section.

259 *Supra*, note 122.

260 (2006), 278 D.L.R. (4th) 545 (Ont. C.A.), at para. 31.

261 *Supra*, note 2, at para. 165.

instances, Court of Appeal for Ontario judges have raised the issue of inconsistency in the context of exploring the parameters of the now only deferential standard of review, that of unreasonableness: Juriansz J.A. in *Abdoulrab v. Ontario (Labour Relations Board)*[262] and Feldman J.A. (who had concurred with McPherson J.A. in *National Steel Car*) in *Taub v. Investment Dealers Association of Canada*.[263] While this issue was not critical to the decision in either case, Layden-Stevenson J.A. of the Federal Court of Appeal picked up on both of them in *Canada (Attorney General) v. Mowat*,[264] involving inconsistent decisions by the Canadian Human Rights Tribunal on its capacity to include a costs component in a monetary award for a human rights violation.

In *Abdoulrab*, Juriansz J.A., in an extract quoted approvingly by Feldman J.A.,[265] worried aloud about the issue of inconsistency in a post-*Dunsmuir* unreasonableness world:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.[266]

Layden-Stevenson J.A. in *Mowat* expressed similar sentiments:

> There is much to be said for the argument that where there are two conflicting lines of authority interpreting the same statutory provision, even

262 2009 ONCA 491.
263 2009 ONCA 628.
264 2009 FCA 309, at para. 45.
265 *Supra*, note 263, at para 65.
266 *Supra*, note 262, at para 48.

> if each on its own could be found to be reasonable, it would not be reasonable for the court to uphold both.[267]

However, thereafter, Layden-Stevenson J.A. finessed the issue of whether a court should be able to break the logjam caused by the existence of two possibly reasonable lines of tribunal jurisprudence by classifying the issue of costs as involving an issue of "jurisdiction." On appeal to the Supreme Court of Canada,[268] the inconsistency argument was not addressed as such. However, while LeBel and Cromwell JJ. both rejected the classification of the "costs" issue as jurisdictional in nature, it is one of the Supreme Court judgments that has attracted the criticism that its particular form of reasonableness review was in effect disguised correctness.

The same can also be said of two other post-*Dunsmuir* judgments of the Supreme Court of Canada in which the Court was confronted by conflicting jurisprudence on an issue coming before an administrative tribunal. In *Canada (Attorney General) v. Northrop Gruman Overseas Service Corporation*,[269] the Court very quickly moved to a correctness standard of review of a Canadian International Trade Tribunal decision on the basis that the relevant question was one of jurisdiction. Subsequently, in *Plourde v. Wal-Mart Canada Corporation*,[270] the Court, while nominally adhering to a reasonableness standard of review in a Quebec labour law setting, in fact conducted review in such a way as to indicate that it was in reality resolving the jurisprudential logjam and not leaving any room for the persistence of the other possibly reasonable interpretation.

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267 *Supra*, note 264, at para. 45.

268 *Supra*, note 1.

269 *Supra*, note 23.

270 [2009] 3 S.C.R. 465; 2009 SCC 54.

What has also occurred in some Court of Appeal decisions has been the deployment of the importance of consistency in justification, along with other factors, for treating a question as one of central importance to the legal system as a whole and outside the expertise of the decision-maker. Thus, as already discussed, the Alberta Court of Appeal, in *Lethbridge Regional Police Service v. Lethbridge Police Assn.*, in reference to a substantive human rights or anti-discrimination provision in the province's human rights legislation referred to the need for consistency as one of the reasons for correctness review.[271] However, the context here was a situation in which the same question could arise in a variety of contexts or settings. It was not a situation where the Court was primarily concerned that there be consistency of decision-making within a particular tribunal but rather among a range of adjudicative settings. However, in *Irving Pulp & Paper Ltd. v. Communications Energy and Paperworkers Union of Canada, Local 30*,[272] Robertson J.A. was more expansive in his evaluation of consistency. Here too the issue was a human rights, anti-discrimination provision that could arise in a number of adjudicative settings including the regular courts and labour arbitrations. Robertson J.A., in justifying correctness review, commenced by referring to that overlapping jurisdiction but then went further:

> Indeed, if one looks to the arbitral jurisprudence, one is struck by the reliance on judicial opinions touching on the matter. The overlap reflects the general importance of the issues in the law and the need to promote consistency and, hence, certainty, in the jurisprudence. Finally, I am struck by the fact that there comes a point where administrative decision-makers are unable to reach a consensus on a particular point of law, but the parties

[271] *Supra*, note 116, at para. 28.

[272] *Supra*, note 113.

> seek a solution that promotes certainty in the law, freed from the tenets of the deference doctrine. In the present case, it is evident that the arbitral jurisprudence is not consistent when it comes to providing an answer to the central question raised in this appeal. Hence, it falls on this Court to provide a definitive answer as far as New Brunswick is concerned.[273]

There is much to be said for this argument, an argument that allows for the courts to abandon a normal reasonableness standard of review where a tribunal has parallel and conflicting lines of jurisprudence on the same legal issue and either lacks the capacity or the inclination to break the deadlock internally. To use the language of Beetz J., in an earlier leading authority on the standard of review, allowing the inconsistent lines of authority to persist on the basis that both are reasonable is to perpetuate a "fraud on the law."[274]

However, it is hard to see that approach as reconcilable with either *Domtar* or *National Steel Car*, both determined in an arbitral context. It is also an approach that the Federal Court has rejected decisively despite the failure of Citizenship judges over many years to adopt a consistent meaning to the term "resident" in the *Citizenship Act*.[275] As far back as 1998, in *Re Harry*,[276] Muldoon J. had described this as a "scandalous incertitude in the law." Nonetheless, the Federal Court continues to maintain that it is not its role to resolve that uncertainty. This is reflected in the penultimate paragraph of one of the more recent judgments in this continuing saga, that of Mosley J. in *Hao v. Canada (Minister of Citizenship and Immigration)*:

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273 *Id.*, at para. 23.

274 In *Syndicat des employés de production du Québec et de l'Acadie v. Canada Labour Relations Board*, *supra*, note 103, at pp.420-421, repeated in *Union des employés de service, local 298 v. Bibeault* [1988] 2 S.C.R. 1048, at para. 115.

275 R.S.C. 1985, c. C-29, section 5(1)(c).

276 (1998), 144 F.T.R. 141, at para. 22.

> While the inconsistent application of the law is unfortunate, it can not be said that every example of that inconsistency in this context is unreasonable. If the situation is "scandalous" …, it remains for Parliament to correct the problem.[277]

It is also interesting to note that this statement follows an evaluation of the positions expressed in *Taub*, *Abdoulrab*, and *Mowat*.[278]

It now remains to be seen whether, on the appeal on *Irving Pulp & Paper Ltd.*, the Supreme Court upholds the position that, so long as each of the inconsistent interpretations meets the reasonableness standard, the inconsistency must be allowed to remain, subject to only internal tribunal or external legislative resolution. In my view, it would be far better if the Court, rather than leaving the situation to be dealt with by manipulation and resurrection of old categories of jurisdictional error or by correctness review disguised as reasonableness, accepts as legitimate the more direct approach, that of correcting a fraud on the law that the tribunal itself has not be able to resolve and that the legislature has proved unwilling to address.

13. Reasonableness Review and Procedural Rulings

Among the nominate grounds of judicial review is a failure to afford procedural fairness to those whose rights, privileges or interests are affected by administrative decision-making. In general, the Supreme Court of Canada has accepted that standard of review analysis has no relevance in the domain of allegations of procedural fairness. Thus, in *C.U.P.E. v. Ontario (Minister of Labour)*,[279] Binnie J. differentiated between procedural fairness (the manner of making a decision) and

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277 2011 F.C. 46; 383 F.T.R. 46, at para. 50.

278 *Id.*, at paras. 30-37.

279 *Supra*, note 93, at paras. 100-03,

standard of review (relevant to the outcome or end-product of decision-making). Earlier, Arbour J., in *Moreau-Bérubé v. New Brunswick Judicial Council*,[280] had also described standard of review as irrelevant to the consideration of a claim of procedural unfairness – it was a question of whether, in all of the circumstances, the decision had involved a reviewable denial of fairness. Subsequently, however, in *Canada (Citizenship and Immigration) v. Khosa*,[281] Binnie J. (referencing *Dunsmuir*) stated that correctness was the standard of review for procedural fairness issues.

Irrespective of whether a standard of review is irrelevant to procedural fairness review or the standard of review is correctness, what seems clear is that there is no room for deference to a decision-maker on issues of procedural fairness. In the context of challenges to procedural rules and the making of specific procedural rulings, the courts should apply their own independent judgment by reference to the facts and appropriate tests.

However, it just as clearly is not as simple or straightforward as that if one has regard to a range of other authorities. Here, there are two strands. The first emerges from the leading Canadian judgment on the principles of procedural fairness, *Baker v. Canada (Minister of Citizenship & Immigration)*.[282] *Baker* outlines five factors that determine the extent of the procedural fairness obligations of a statutory decision-maker.

> Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made

[280] 2002 SCC 11; [2002] 1 S.C.R. 249, at para. 74.
[281] *Supra*, note 127, at para. 43.
[282] *Supra*, note 194.

> by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has expertise in determining what procedures are appropriate in the circumstances.[283]

While not going so far as to suggest that this should lead to an overall deferential posture to qualifying tribunals on questions of procedure, it at least prescribes respect for procedural choices as one of the factors that has to be taken into account in an overall assessment of the content of procedural fairness. Deference intrudes albeit in a supporting or subsidiary role.[284]

The second strand concerns situations where a tribunal is given explicit discretion with respect to a particular procedural right. An early example is provided by *Bibeault v. McCaffrey*.[285] In this instance, the Court held that, in exercising an explicit discretionary power with respect to participatory rights at a hearing, the Quebec Labour Court was subject to judicial review only where that discretion was exercised in a patently unreasonable manner.

Very recently, though without reference to *Bibeault*, the Quebec Court of Appeal appears to have expanded the canvas on which the *Bibeault* principles can operate. This was in *Syndicat des travailleuses et travailleurs de ADF – CSN c. Syndicat des employés de Au Dragon Forgé Inc.*[286] At issue was an inter-union contest for the right to represent a group of employees in which the union losing its accreditation claimed that it had been denied the right to a fair hearing when the labour

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283 *Id.*, at para. 27.

284 For an example, see *Ontario (Ministry of Community, Family and Children Services) v. Crown Employees Grievance Settlement Board* (2006), 81 O.R. (3d) 419 (C.A.), at para. 22.

285 [1984] 1 S.C.R. 176.

286 2013 QCCA 793 (This judgment came to my attention by way of Professor Paul Daly's blog, *Administrative Law Matters* and an entry dated May 9, 2013 ("Deference on Questions of Procedural Fairness").)

board had refused to provide it with the names of employees that the board determined were not members of that union. Whether there was any entitlement to the names as a component of the right to full answer and defence depended on the interpretation of various provisions in the Quebec *Labour Code*. In sustaining the board's decision, Bich J.C.A. stated that the interpretive exercise was one on which the board was entitled to deference and the reasonableness standard of review. After citing[287] *Alberta Teachers' Association*[288] and *Rogers Communications Inc.*,[289] Bich C.J.A. continued:

> Considérant tout cela, j'estime, par analogie, que la norme de la décision raissonable doit aussi s'appliquer lorsque la question de la justice naturelle se pose dans le context de l'interprétation par le tribunal administratif de sa loi constitutive et accessoirement aux dispositions qu'elle doit ainsi interpreter et appliquer, comme c'est ici le cas.[290]

In short, the Quebec Court of Appeal seems to be accepting as a general principle that when an issue of procedural fairness hinges on the interpretation of the decision-maker's home or closely-related statute, there will be a presumption of reasonableness review. It now remains to be seen whether and to what extent other courts sign on to this conception of the role of deference in the realm of procedural fairness.

More generally, there is a strong case for according deference to tribunals' assessment of the content of their procedural obligations. In the instance of procedural rule-making, this claim is at its strongest when the tribunal's rules have been forged in the context of broad

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287 *Id.*, at para. 46.
288 *Supra*, note 8.
289 *Supra*, note 118
290 *Supra*, note 286, at para. 47.

stakeholder involvement but also where the tribunal has, as in the Ontario Labour Relations Board's reconsideration decision in the seminal *Consolidated-Bathurst* litigation,[291] provided reasoned elaboration of the procedural practice or rule under attack. The same also holds for a tribunal's formal justification of procedural rulings in individual cases on questions such as the admissibility of evidence, right to counsel, requests for an adjournment, and disclosure, especially where, as in *Dragon Forgé*, the procedural ruling depends on the interpretation of a provision in that tribunal's constitutive statute or where there is an express statutory discretion as to the relevant procedural component of the decision. Moreover, ultimately, it may not make much practical difference whether this deference comes about through the extension of the principles of *Dunsmuir* or in the context of the fifth of the *Baker* procedural fairness intensity factors.

14. When to Segment

A methodological issue that sometimes arises in setting the standard of review is that of the extent to which the challenged decision should be segmented into various components and a standard of review analysis applied to each. As seen already, that was an aspect of the disagreement between Evans J.A. and Stratas J.A. in *Kane v. Canada (Attorney General)*,[292] discussed in the Nominate Grounds section of this paper. The greatest potential for the decision whether to segment to have an impact arises in situations where a decision-maker is applying the law to the facts; where questions of law and the principles

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[291] *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.* (1984), 5 CLRBR (NS) 79 (OLRB), culminating in the Supreme Court's sustaining ([1990] 1 S.C.R. 282) of the procedural fairness of the Board's practice of holding "full board" meetings to discuss particularly significant issues before individual panels of the Board.

[292] *Supra*, note 202.

governing the exercise of discretionary powers interface with the facts of the particular matter before the decision-maker.

Bastarache and LeBel JJ. signal this in *Dunsmuir*:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically. … We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and **cannot be readily separated** [emphasis added].[293]

Of course, even if segmentation or separation of the legal issues is readily achieved does not itself mean that those legal issues will be reviewed on a standard of correctness; the usual test for the standard of review for pure questions of law still has to be applied. However, where segmentation is feasible, it does leave the possibility of correctness review on the table.

As noted in the section on the Nominate Grounds of Review, the debate about segmenting in the Supreme Court of Canada dates back to at least 1990 and the duelling judgments of Wilson[294] and Gonthier JJ.[295] in *National Corn Growers Assn. v. Canada (Import Tribunal)*.[296] There, Wilson J. was opposed generally to the breaking down of a decision-making process into each of its component parts or various conclusions, and reviewing each separately. To do so only increased the risk that a court would detect reviewable error in one of the tribunal's conclusions as opposed to its interpretation of the relevant statutory provisions, which she saw as the appropriate focus of restrained judicial review. A theory of deference was far more likely to be translated into

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293 *Supra*, note 2, at para. 53.

294 Dickson C.J. and Lamer C.J. concurring.

295 La Forest, L'Heureux-Dubé, and McLachlin JJ. concurring.

296 *Supra*, note 212.

practice when reviewing courts applied the relevant standard of review to a tribunal's interpretation of the relevant statutory provisions and not to each of its conclusions.[297] Similarly, she decried examination of the evidential record to see whether the various conclusions as well as the decision as a whole had sufficient factual support.[298] Gonthier J. disagreed; it was sometimes important, as in this case, that a reviewing judge probe the various stages of a decision-making process and conclusions reached so as to ensure that the conduct of judicial review was sufficiently informed and protective of the applicant's right to appropriate judicial scrutiny of the decision under review.[299]

Even prior to *Dunsmuir*, it had become apparent that Wilson J. had lost at least some aspects of this methodological debate. Two developments in particular are testimony to that. Very shortly after *National Corn Growers*, in *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen, etc. of the Plumbing and Pipefitting Industry, Local 740*,[300] the Supreme Court accepted that a tribunal's findings of fact could be assessed in appropriate cases under the then standard of patent unreasonableness. Then, in both *Dr. Q* [301] and *Baker*,[302] the Court accepted that standard of review analysis applied across the universe of statutory decision-making, including the review of exercises of discretionary exercises of power. In appropriate cases, this obviously required courts to have regard to the evidence supporting the outcome reached by the decision-maker under review. Also, when the concern on an application for judicial review was the

297 *Id.*, at para. 28.
298 *Id.*, at para. 31.
299 *Id.*, at paras. 72 and 101.
300 [1990] 3 S.C.R. 644.
301 *Supra*, note 196.
302 *Supra*, note 194.

application of law or the principles underlying the exercise of statutory discretion, in most cases, this required resort to both the evidentiary record and also the decision-maker's reasoning or conclusions along the way. While it might conceivably be possible to conduct deferential judicial review of pure questions of law without regard to the decision-maker's various conclusions along the way or the evidential record, that would seldom, if ever be feasible in the case of review based on lack of evidential support for factual findings or on allegations of deficiencies in the law/fact integration process or the exercise of discretion. Indeed, in *Dunsmuir*, this sense of the methodology of judicial review was cemented in the following much-quoted statement:

> A court conducting review for reasonableness inquires into the qualities that make a decision reasonable, referring **both to the process of articulating the reasons and to outcomes**. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law.[303]

Nonetheless, as is clear from both pre- and post-*Dunsmuir* jurisprudence, the apparent triumph of Gonthier J. over Wilson J. has not put an end to the segmentation or disaggregation debate in the Supreme Court of Canada. There, the principal proponent of limited segregation or disaggregation has been Abella J. Prior to *Dunsmuir*, she articulated her position in two judgments delivered a day apart: *Lévis (City) v. Fraternité des policiers de Lévis Inc.*,[304] and *Council of Canadians*

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303 *Supra*, note 2, at para. 47.

304 2007 SCC 14; [2007] 1 S.C.R. 591

with Disabilities v. VIA Rail Canada.[305] To the consternation of standard of review Supreme Court watchers,[306] her position that segregation was an exceptional step prevailed in the latter but not the former. Why that was so is never explained satisfactorily. More significantly, in the post-*Dunsmuir* era, this debate has resurfaced in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*,[307] with Abella J. again one of the principal protagonists.

There, she was critical of the majority position that it was appropriate to extricate from an overall question of mixed law and fact the meaning of a term in the *Copyright Act*,[308] and, for reasons discussed earlier, to subject the interpretation of that term to correctness review. Following a survey of the Supreme Court's jurisprudence on segmenting especially where the decision under attack is essentially one of mixed fact and law,[309] Abella J. concluded:

> Segmenting the definition of each word and phrase in a statutory provision into discrete questions of law is a reintroduction by another name – correctness – of the unduly interventionist approach championed by the jurisdictional and preliminary question jurisprudence … .[310]
>
> The Copyright Board's conclusion that a music download is a "communicat[ion] … to the public" was a decision entirely within its mandate and specialized expertise, involving a complex tapestry of technology, fact, and broadcast law and policy. Pulling a single thread from this textured piece and declaring it to be the determinative strand for

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305 2007 SCC 15; [2007] 1 S.C.R. 650

306 For a discussion, see Gus Van Harten, Gerald Heckman, and David J. Mullan, *Administrative Law – Cases, Text and Materials* (Toronto: Emond Montgomery Publications, 6th ed. , 2010) at pp. 787-95

307 *Supra*, note 118.

308 R.S.C. 1985, c. C-42, s. 3(1)(f) ("communicate to the public by telecommunication")

309 *Supra*, note 118, at paras. 74-86.

310 *Id*., at para. 87.

> deciding how the whole piece is to be assessed strikes me, with great respect, as an anomalous relapse.[311]

The response on this point of Rothstein J. for the majority was limited. The application for judicial review had been argued on all sides on the basis that what was at stake was a pure question of law: whether a point to point transmission can ever amount to a communication to the public in terms of the relevant provision in the Act. This was not a question of mixed law and fact and it was clearly extricable from the rest of the Board's tasks.[312]

Obviously, there are a number of factors in play in this debate. First, how should a reviewing court approach an argument that there is a readily extricable question of law at stake in an application for judicial review? The position of Abella J., relying principally on a series of pre-*Dunsmuir* authorities, is that the segregation of a pure question of law from a question of mixed fact and law, should be a rare or exceptional event. However, it is not clear from the opening quotation from Bastarache and LeBel JJ. in *Dunsmuir*[313] that "readily separated" indicates rarity, as opposed to an instruction to be cautious when the invitation is extended by a party seeking judicial review. Secondly, and

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311 *Id.*, at para. 88.

312 *Id.*, at para. 19. To add to the confusion in this whole area, it is interesting to note the apparent role reversal between Rothstein and Abella JJ. in another in the series of copyright cases that the Supreme Court rendered on July 12, 2012: *Alberta (Education) v. Canadian Copyright Agency (Access Copyright)*, *supra*, note 213. There, in what recalls the Wilson v. Gonthier debate in *National Corn Growers* (*supra*, note 212), Rothstein J., at para. 59, in solitary dissent and rejecting the argument that certain of the Board's findings of fact and mixed law and fact, commented on the majority judgment penned by Abella J.:

> However, I do not think it is open on a deferential review, where a tribunal's decision is multifactored and complex, to seize upon a few arguable statements or intermediate findings to conclude that overall decision is unreasonable.

Only where the impact on the final or overall decision of an unreasonable finding along the way would the standard of unreasonableness have been met (at paras. 57-58),

313 *Supra*, note 293 , and accompanying text.

more importantly, what is the most difficult part of this exercise is the identification of the badges of what constitutes a readily extricable legal question. However, it is a task that finds parallels in the conduct of appeals from first instance decisions in civil cases at least since the judgment of the Supreme Court of Canada in *Housen v. Nikolaisen*,[314] though Abella J. takes the position that, for competence reasons, courts in the context of judicial review should be far more hesitant to segment than appellate courts should be on civil appeals.[315] Thirdly, and to reiterate a point made above and emphasised by Rothstein J.,[316] segregation for review purposes of a readily extricable pure question of law does not lead automatically, presumptively or even tentatively in the direction of correctness review of the tribunal's determination of that question. That will be rare, and, as long as the legal question in issue involves the tribunal's constitutive or another frequently encountered statute, there will be a strong presumption of reasonableness review.

15. The Links between Reasonableness Review and Reasons

Given the movement towards unreasonableness review as the predominant norm, it is important to consider the link between reasons and reasonableness review. In *Dunsmuir*, as seen already, reasonableness was defined principally in terms of ``the existence of justification, transparency and intelligibility within the decision-making process.``[317] These are considerations that speak obviously to the reasons provided by a decision-maker for its decision. However, the Court went on to state that reasonableness was

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314 *Supra*, note 180.

315 *Supra*, note 118, at para. 75.

316 *Id.*, at para. 19.

317 *Supra*, note 2, at para. 47.

> …also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.[318]

This at the very least hinted at a reviewing court assessing a decision by reference to considerations other than the reasons, if any provided by the decision-maker. This was reinforced by the Court`s citation of David Dyzenhaus[319] and his conception of ``deference as respect`` as involving

> …respectful attention to the reasons offered or **which could be offered** in support of a decision [emphasis added].[320]

Indeed, this attention to review by reference to justifications other than those, if any provided by the decision-maker was necessary if the Court was to provide a template for reasonableness (or, for that matter, correctness) review that spanned the entire spectrum of statutory and prerogative decision-making. In *Baker v. Canada (Minister of Citizenship and Immigration)*,[321] L`Heureux-Dubé J. had made it clear that, even in the instance of individualised decision-making, the common law obligation to provide reasons developed in that case did not apply universally. Tests for discerning and applying the appropriate standard of review had therefore to accommodate those decisions for which reasons were not required. What remained to be teased out, however, was how exactly review would take place in those situations.

Three recent Supreme Court of Canada judgments in particular stand out for their treatment of this dilemma. The first chronologically was

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318 *Ibid*.

319 *Id*., at para. 48.

320 "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997), 279 at p. 286.

321 *Supra*, note 194, at para. 43 ("in certain circumstances").

Alberta Teachers` Association.[322] At stake there was an application for judicial review based on a matter that was not raised before the Commissioner: Whether he had acted in a timely manner to extend the time during which he had to complete an inquiry. For reasons that are not relevant to the present discussion, Rothstein J. sustained the Alberta Court of Appeal`s judgment that it was appropriate as a matter of discretion to entertain the application for judicial review despite the applicant`s failure to raise the matter before the Commissioner. However, he then went on to hold that, in appropriate circumstances, even absent reasons, the Court should not interfere "[i]f there exists a reasonable basis upon which the decision maker could have decided as it did."[323] In this instance, the Court was able to discern the basis for the Commissioner's implied decision from the past decisions of the Commissioner to the same effect, decisions which themselves provided a reasonable basis for the decision under review.[324] Rothstein J. also made it clear that, where it was not possible to discern the basis for a decision not supported by reasons, the appropriate disposition would normally be a remission back to the decision-maker for the provision of reasons, not a quashing of the decision as unreasonable.[325]

Subsequently, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*,[326] the Court confronted a Commission reference of a discrimination complaint to a board of inquiry, a decision taken without reasons. For the purposes of conducting reasonableness review

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322 *Supra*, note 8.

323 *Id.*, at para. 53.

324 *Id.*, at para. 56. This and the other two cases discussed in this section raise of necessity questions about the scope of the judicial review record and the admissibility of affidavit evidence to enable the reviewing court to perform its judicial review function where the decision-maker has not provided reasons for its decision. See, more generally, on the admissibility of affidavit evidence to supplement the record: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22.

325 *Id.*, at para. 55.

326 *Supra*, note 20.

of that exercise of discretion, Cromwell J. took account of the investigator's reports to the Commission and the "surrounding circumstances."[327]

This same issue also arises in the context of decision-makers performing not adjudicative or individualised decision-making but engaged in legislative or policy-making exercises. This was the context of the third case: *Catalyst Paper Corp. v. North Cowichan (District)*.[328] At stake here was the validity of a municipal by-law. Here, according to McLachlin C.J., delivering the judgment of the Court:

> To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and statements of policy that give rise to them.[329]

In this context also, whether a by-law was reasonable had to take into account the entitlement of Councils to "consider broader social, economic and political factors that are relevant to the electorate." [330]

In contrast to the case of the Privacy Commissioner, where a remission back for the provision of reasons would have been an appropriate remedial response if the Court had not been able to discern from other sources the reasons for the decision, that is not a feasible outcome in the case of representative bodies exercising legislative powers. In this context, the Court may well be endorsing the inclusion of *ex post facto* justifications as part of the record, pleadings, and argumentation on

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327 *Id.*, at para. 58.
328 *Supra*, note 62.
329 *Id.*, at para. 29.
330 *Id.*, at para. 30.

judicial review. Moreover, in assessing those justifications and, indeed, as in *Catalyst Paper* itself, justifications arising out of the legislative record, a reviewing court should generally give considerable leeway to the municipality's evaluation of the legitimacy of the purposes put forward and the methods adopted for achieving those purposes.

More generally, in a case where reasons had been given, in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,[331] Abella J., for the Court, explained the way in which she conceived of the linkage for review purposes between evaluation of the reasons that had been provided and evaluation of the actual outcome or result:

> Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses… . It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible outcomes. … [C]ourts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.[332]

Indeed, Abella J. went on to express agreement with the way in which the respondent had described the link between reasons and outcome in their factum:

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331 2011 SCC 62; [2011] 3 S.C.R. 708.

332 *Id.*, at paras. 15-16. For an early application of resort to the record as part of unreasonableness review in a situation where the reasons were inadequate, see *Pridgen v. University of* Calgary, 2012 ABCA 139; 524 A.R. 251, at paras. 53-55. At paras. 20-22, Abella J.A. also made it clear that inadequacy of reasons did not give rise to a separate ground of procedural unfairness. However, in so holding, she took care to distinguish this from a case where a tribunal obliged to provide reasons had failed to give any; that presumably can still be characterized as a breach of the principles of procedural fairness.

> Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process.[333]

Here too, in allowing reviewing courts the opportunity to move beyond what might at first blush seem to be inadequate or unreasonable readings to a larger palate, the Court is yet again expanding the opportunities for a decision to be found reasonable. However, as in *Alberta Teachers` Association*,[334] I assume that the rejection of the proposition that inadequacy of reasons is not a free-standing ground of review does not preclude a remission back for the provision of better reasons in situations where a judgment about the reasonableness of a conclusion is not feasible from the reasons provided even when read in the broader context.[335]

That this remedial option should not be foreclosed is readily apparent from *Kane*[336] and *Big Loop Capital*,[337] discussed earlier in the Section on the nominate grounds of judicial review. In each instance, the Court's ultimate disposition was to grant the application for judicial review or allow the appeal, and to remit the matter for consideration by the designated decision-maker in accordance with proper

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333 *Id.*, at para. 18.

334 *Supra*, note 8.

335 See *e.g. Canadian Sugar Institute v. Canada (Attorney General)*, 2012 FCA 163. There Sharlow J.A., delivering the oral judgment of a unanimous Court, simply stated (at para. 4):

> Having considered the written and oral submissions of the Institute, we are unable to discern from the Tribunal's reasons and the evidence to which we were referred how the Tribunal reached the conclusions that it did… . For that reason, this application for judicial review will be set aside… and the matter will be returned to the Tribunal for reconsideration.

Subsequently, on reconsideration, the Canadian International Trade Tribunal reversed its earlier decision: "Sugar makers taste victory after tribunal restores trade barriers", *The Globe and Mail*, October 1, 2012.

336 *Supra*, note 202.

337 *Supra*, note 217.

principles.[338] In other words, the Courts accepted that, on the material before it, it was inappropriate for them to determine that the original decision was necessarily inappropriate by reason of the particular unreasonable findings. The decision-maker might still be able to justify that conclusion on other grounds or with appropriate consideration of what were the relevant facts or factors.[339] This is important in view of Abella J.'s judgment in *Newfoundland and Labrador Nurses' Union*[340] that the consideration of adequacy of reasons should not normally be divorced from a consideration of the reasonableness of the outcome. More specifically, both *Kane* and *Big Loop Capital* illustrate the point that it may still be sometimes appropriate for a court to hold that a decision that is not "justifiable, transparent or intelligible" may nonetheless produce a reasonable outcome.[341] In situations where the Court cannot confidently make a judgment either way, the appropriate disposition is remission to the designated decision-maker.

Even accepting the existence of that necessary remedial flexibility, this is an area rife with problems that will need to be addressed. What are the limits on courts constructing or reconstructing reasons when a decision-maker has either not provided reasons for the decision or aspect of the decision under challenge, or given inadequate reasons? How relevant is it to this determination that the decision-maker was not obliged at common law or by statute to provide reasons for the challenged decision? What materials should be admissible in support of such attempts at justification by the decision-maker or, more likely,

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338 *Id.*, at paras. 18-20. I should also note that the legislation did not permit reversal but only confirmation, variation or vacation with a remission for reconsideration.

339 Though the Court doubted it: para. 17.

340 *Supra*, note 331.

341 For an example, see *Stemijon*, *supra*, note 198 . There Stratas J.A., despite holding that there had been unlawful fettering, went on to sustain the Minister's decision "because he reached the only reasonable outcome on these facts": para. 61

affected party trying to save the decision? What impact do a jurisdiction's rules on the record filed on an application for judicial review or statutory appeal have on any such reconstructive efforts? Should courts ever be willing to entertain counsel arguments attempting to explain an outcome as reasonable absent any supporting material in the record itself or other admissible evidence, or will this always constitute an illegitimate form of *ex post facto* justification?

16. The Malleability of Reasonableness Review

In his concurring judgment in *Dunsmuir*,[342] Binnie J. characterized the replacement of two deferential standards of review with a single reasonableness standard as bringing about

> …a debate *within* a single standard of reasonableness to determine the appropriate level of deference.

This notion of a spectrum of deference within the reasonableness standard did not take hold in the Supreme Court. Indeed, by the time of *Khosa* a year later, Binnie J. appeared to have accepted the mainstream of the Court's thinking on the nature of the reasonableness standard:

> Reasonableness is a single standard that takes its colour from the context.[343]

Nonetheless, Binnie J. returned to this question in his concurring judgment in *Alberta Teachers' Association*.[344] Here, he stated:

> "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense.[345]

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342 *Supra*, note 2, at para. 139.

343 S*upra*, note 127, at para. 59.

344 *Supra*, note 8.

This led to Rothstein J. accusing Binnie J. of trying to insinuate the concept of variable intensity reasonableness review from his judgment in *Dunsmuir*.[346] He then continued:

> Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of a discretion. Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not.[347]

Irrespective of the merits of this standoff between Binnie and Rothstein JJ., one thing is clear from the recent case law. With the application of standard of review analysis to the entire universe of statutory and prerogative decision-making and the preponderance of situations in which reasonableness rather than correctness has become the standard, reasonableness review is conducted by reference to rather different standards depending on the context. Certainly, in terms of *Dunsmuir*,[348] it can be claimed that all that this amounts to is that the Court is simply recognizing the reality that, for example, where there is a broad discretion, the "range of possible acceptable outcomes which are defensible in terms of the facts and law" are likely to be far more numerous than in the case of a narrow question of law. (I return to this characterization of the dilemma later.) However, when the test for reasonableness is described in different ways or has different components depending on the nature and context of the challenge, it is

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345 *Id.*, at para. 87.

346 *Id.*, at para. 47.

347 *Ibid.*

348 *Supra*, note 2, at para. 47.

hard to see reasonableness review simply in terms of the *Dunsmuir* test.

Catalyst Paper Corp. v. North Cowichan (District) provides an excellent example. There, McLachlin C.J., endorsing the sense of reasonableness review taking its colour from the context, resorted to the language of pre-*Dunsmuir* case law on judicial review of municipal by-law making.[349] This case law deployed concepts such as "aberrant", "overwhelming" and "manifestly unjust." Ultimately, the test, according to McLachlin C.J., was:

> [O]nly if the bylaw is one that no reasonable body informed by [a wide variety of] factors could have taken will the bylaw be set aside.[350]

These characterizations of the badges of an unreasonable by-law beg the question: How much difference is there between the degree of deference that they mandate and that which existed by reference to the former patent unreasonableness standard? Indeed, broadening that inquiry, are these not just other ways of expressing the traditional English *Wednesbury* unreasonableness test for decisions taken by municipalities: a decision that is so unreasonable that no reasonable tribunal could ever have taken it?[351] Significantly, McLachlin C.J. cites *Wednesbury* in her judgment,[352] and, at first instance, Voith J. quoted

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[349] *Supra*, note 62, at paras. 18-25.

[350] *Id.*, at para. 24. In terms of the debate between Binnie and Rothstein JJ., McLachlin C.J. went on (*ibid.)* to say:

> The fact that **wide** deference is owed to municipal councils does not mean that they have *carte blanche* [emphasis added].

[351] *Associated Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K.B. 223, at 229 (*per* Lord Greene M.R.): a decision "so absurd that no sensible person could ever dream that it lay within the powers of the authority".

[352] *Supra*, note 62, at para. 20.

with seeming approval the famous or infamous statement by Lord Greene M.R.[353]

It is also useful to contrast the descriptions of unreasonableness in *Catalyst Paper* with the way in which Abella J. characterized the methodology of reasonableness review of a discretionary power in which the guarantees and values of the *Charter* were implicated. In *Doré v. v. Barreau du Québec*, she stated:

> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.[354]

If we locate this statement in the context of a by-law making exercise, as in *Catalyst Paper*, what this means is that the language and methodology of judicial scrutiny changes once the *Charter* enters the picture, and, quite frankly, the task of justifying the by-law becomes that much more onerous, albeit still within a framework of reasonableness review.

There is nothing unwarranted about this and I should not (despite Rothstein J.) be read as being critical of varying kinds of methodologies, even intensity of reasonableness review depending on context. However, where the matter does become much murkier is in the context of judicial review of questions of law. In justification of his stand on varying levels of intensity within reasonableness review, Binnie J., in *Alberta Teachers' Association*, references[355] (among other

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353 2009 BCSC 1420, 98 B.C.L.R. (4th) 355, at paras. 46-47.

354 *Supra*, note 241, at para. 57.

355 *Supra*, note 8, at para. 85.

judgments including those of both Rothstein and Cromwell JJ. in that very case[356]) *Canada (Canadian Human Rights Commission)*[357] as an example of where the conduct of reasonableness review was very close to that of full correctness review.[358] Indeed, were one to excise the portions of the LeBel and Cromwell JJ. judgment discussing standard of review, what in effect is left is a review of the question of the capacity of the Tribunal to include legal costs in an award of compensation that, in virtually every respect, is a correctness review of the Tribunal's ruling. As one of my correspondents has described it, this is a startling example of "disguised correctness" review.

Perhaps, such thorough-going examinations of the merits of a decision are inevitable in situations where the Court is going to quash the decision under review. Indeed, in this respect, there is a stark contrast between the approach of Fish J. in sustaining the use of estoppel by a labour arbitrator in *Nor-Man Regional Health Authority Inc.*,[359] and the judgment in *Canada (Human Rights Commission).* This tendency to engage more with the merits of a decision that is about to be quashed is also exemplified by the judgments of Abella J. in *British Columbia (Workers' Compensation Board) v. Figliola*[360] and *Alberta (Education) v. Canadian Copyright Licensing Agency*,[361] and that of Cromwell J. in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services).*[362]

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356 *Id.*, at para. 88.

357 *Supra*, note 12.

358 Indeed, a close reading of the judgment of Bastarache and LeBel JJ. in *Dunsmuir* itself might suggest that when they came to apply the reasonableness standard to the adjudicator's decision (*supra*, note 2, at paras. 72-76), they too engaged in disguised correctness review!

359 *Supra*, note 27.

360 *Supra*, note 61.

361 *Supra*, note 213.

362 *Supra*, note 151.

In the first, Abella J.'s review of the Human Rights Tribunal's exercise of discretion to allow the complaint to proceed to a human rights hearing despite the earlier ruling on the matter by the Workers' Compensation Board, reads very much as a correctness review of that decision based on the Court's own assessment of the legal scope of the statutory discretion and, even beyond that, of the Tribunal's evaluation of the competing considerations that went into the exercise of that discretion. The same is also true of Cromwell J.'s judgment in *Halifax Regional Municipality*, where correctness review intrudes even more explicitly. Relying principally on another post-*Dunsmuir* decision, *Montréal (City) v. Montreal Port Authority*,[363] Cromwell J. expressed the task of the Court reviewing an exercise of Ministerial discretion for unreasonableness in the following terms:

> **Provided that the Minister applies the correct legal test**, his or her exercise of discretion is judicially reviewed for reasonableness… . The exercise of discretion must be consistent with the principles governing the application of the Act and the Act's purposes… .[364]

Subsequently, in justification of the quashing of this particular exercise of ministerial discretion, he describes

> …the Minister's exercise of discretion [as] contrary to both the purposes and the policy of the Act.[365]

Aside from the fact that the approach in and tone of this judgment is in many respects different from that of McLachlin C.J. in sustaining the municipal by-law in *Catalyst Paper*,[366] what is also clear is that the Court

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363 *Supra*, note 151, at paras. 32-38.

364 *Supra*, note 151, at para. 43. Indeed, this same assessment also holds for Cromwell J.'s concurring judgment in *Figliola*, *supra*, note 61.

365 *Id.*, at para. 56.

366 *Supra*, note 62.

in this case sees certain aspects of the exercise of ministerial discretion as not entitled to any measure of deference: the discerning of the "correct legal test" and the "purposes and policy of the Act." As was the case in *Figliola*, it too calls into question the Court's commitment to the generality of the proposition that statutory decision-makers interpreting their constitutive statutes are presumptively entitled to deference. In both instances, for certain subsets of the judicial review exercise, the Court, albeit operating under a general standard of reasonableness, assumed responsibility for discerning the "correct" legal ambit of the relevant statutory regimes. Indeed, even in *Catalyst Paper*, in describing the courts' role in the review of municipal by-laws, McLachlin C.J. emphasised that municipalities must not act "for improper purposes" or "purposes not covered by legislation" without any indication that a municipality's discernment of the purposes of the legislation is entitled to any degree of deference.[367] Moreover, this comes after a discussion of the limits imposed on the municipality's powers by the "rationale of the statutory regime" and the "purview of the legislative scheme."[368]

As suggested already, there may also be other justifications for more intensive reasonableness review stemming from the nature of the question that is before the court for judicial review, as opposed to a felt need to provide extensive justification for quashing a decision as unreasonable. Recently, in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*,[369] Stratas J.A., delivering the judgment of the Federal Court of Appeal, justified[370] apparently

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367 *Id.*, at para. 28.

368 *Id.*, at para. 25.

369 *Supra*, note 119.

370 *Id.*, at paras. 14-15.

intrusive reasonableness review and, at the same time, the stance of the Supreme Court of Canada in *Canadian Human Rights Commission*. In a case involving interpretation of substantive provisions of the *Canadian Human Rights Act*, he posited that the range of decisions or decision-making parameters[371] that, in terms of *Dunsmuir*, were acceptable and defensible on the facts and the law was "relatively narrow."[372] The same was true in *Canadian Human Rights Commission*, and it was therefore not appropriate to describe the judgment in that case as an example of "disguised correctness."[373]

Certainly, there is an argument for accepting more anxious or close scrutiny in situations where, for example, there are only two possible answers to a question of statutory interpretation. However, that should not detract from recognition that each of those answers might be sufficiently plausible to pass the deferential reasonableness standard. And to be fair, Stratas J.A. says nothing to suggest otherwise.

Nonetheless, even if his conception of a "range" is intended to convey a sense of appropriate parameters or factors rather than the number of possible outcomes, Stratas J.A.'s justification of more intrusive reasonableness review does sound alarm bells to the extent that elements of it hearken back to some of the same justifications that previously led to correctness review of not only tribunal

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371 He does not say which.

372 *Supra*, note 119, at para. 14. For an earlier valuable elaboration of the contours of reasonableness review by Stratas J.A., see *Canada (Attorney General) v. Abraham*, 2012 FCA 266; 440 N.R. 201, at paras. 37-50. However, the other members of the Federal Court of Appeal (Pelletier and Dawson JJ.A.), while concurring in the outcome, indicated that they were expressing no opinion on this portion of the Stratas J.A. judgment. In *Abraham* at paras, 42-45. Stratas J.A. appears to be developing the sense of a varying range in the context of "outcomes" and "solutions", and not considerations or factors. However, in providing an example in para. 46 and applying his theory to a statutory discretion, there are elements in the discussion that seem to focus on the range of factors and considerations.

373 *Id.*, at para. 15.

interpretations of human rights statutes but also a range of other home legislation, as discussed in Section 3:

> In this case, the range is relatively narrow. **The Tribunal's decision primarily involves statutory interpretation. – a matter constrained by the text, context and purpose of the statute. It also involves equality law – a matter constrained by judicial pronouncements.** In this case, the Tribunal had less room for manoeuvre than in a case turning upon one or more of factual appreciation, fact-based discretions, administrative policies, or specialized experience and expertise not shared by the reviewing court on the particular point in issue [emphasis added].[374]

In the pre-*Dunsmuir* world, these were the justifications for applying correctness review to tribunal determinations of questions of law, including those involving the interpretation of their home statutes. Dare one ask whether there is all that much difference between that and the reality of more intrusive reasonableness review based on the same considerations? It also suggests the legitimacy, albeit under another name, of conducting review by reference to some conception of whether there is are many or few relevant considerations that are legitimately taken into account, something that Stratas J.A. called his colleague, Evans J.A. on in *Kane*.[375]

While I would not go so far as Professor Paul Daly,[376] who has suggested that the Stratas position is coming close to American *Chevron* review[377] (There are certain questions on which the legislature has signalled the need for agencies to reach the correct interpretation

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374 *Id.*, at para. 14. For a similar analysis, see the extra-judicial pronouncement of Evans J.A. in "Standards of Review in Administrative Law", *supra*, note 1, at p. 77, though, as opposed to Stratas J.A., Justice Evans is clear that he is talking about the range of possible decisions, not factors or considerations. He also identifies the seriousness of the impact of the decision on individual rights as relevant to the intensity of reasonableness review: *ibid.*

375 *Supra*, note 202.

376 See Paul Daly's blog, *Administrative Law Matters*, for March 24, 2013: "Deference and Reasonableness".

377 *Chevron U.S.A. Ltd. v. Natural Resources Defence Council Inc.*, *supra*, note 49.

of a question of statutory interpretation), there is a real danger that a principle of close reasonableness review based on these factors will lead some courts to overreach in their assessment of a tribunal's interpretation of its home statute, thereby undercutting the essential philosophy of *Dunsmuir* as reinforced by *Alberta Teachers' Association*.

The judgment of Abella J. in *Alberta (Education)*,[378] exemplifies a different dimension of disguised correctness review in that the critical issue, the concept of "fair dealing" under the *Copyright Act*,[379] was a question of fact and "a matter of impression."[380] In determining whether the Copyright Board's decision was reasonable on this question of fact and matter of impression, Abella J. again engaged in what looks very much like full appellate review of the evidence supporting various elements leading to the ultimate conclusion. This drew the ire of Rothstein J. in dissent. As already set out in the Section on Segmentation, he stated:

> Tribunal decisions can certainly be found to be unreasonable… . However, I do not think it is open on deferential review, where a tribunal's decision is multifactored and complex, to seize on a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.[381]

As indicated already, while this retreat from a full commitment to reasonableness review may be understandable in a case where the Court is of a mind to quash the decision under review, it does not, of course, help counsel arguing such a case and recognizing that

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[378] *Supra*, note 213.

[379] R.S.C. 1985, c. C-42, s. 29.

[380] *Supra*, note 213, at para. 37, following *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13; [2004] 1 S.C.R. 339, at para. 52.

[381] *Id.*, at para. 59.

correctness of at least aspects of the decision may be the real focus of the Court's attention. More generally, however, it poses problems for any attempt to describe or categorize decisions that are prone to attract "disguised correctness" or partial correctness review. These cases also raise the perennial question, discussed earlier, of whether there still are free-standing grounds of judicial review divorced from the standard of review analysis involving, for example, acting for a purpose not contemplated by the Act or incorrectly discerning the policy foundation of the relevant Act. More importantly, they call into question whether the Rothstein presumption of reasonableness review or deference to decision-makers in the interpretation of the home or related statutes applies to all decision-makers or is confined to tribunals or similar agencies, an issue also discussed earlier. In particular, does it have any purchase in the case of Ministers of the Crown, public servants, and municipalities?

At the level of high theory, the Court has gone well down the road to a regime where the standard of review is generally that of reasonableness. However, at the level of practical application of reasonableness review to particular situations, there remains considerable confusion. In particular, the tasks ahead are, first, to provide greater clarity as to what constitutes "unreasonableness" across the various grounds of judicial review, and, secondly, to identify more precisely the kinds of situation which will attract "disguised correctness" review, or, less rhetorically, will involve the resolution of certain subsets of a decision-making process by reference to a standard of correctness or a surrogate for that in the form of more intense reasonableness scrutiny.

As Binnie J. stated in *Alberta Teachers Association*:

> Predictability is important to litigants and those who try to advise them on whether or not to initiate proceedings. It remains to be seen in future cases how the discretion of reviewing judges [in choosing from a variety of levels of scrutiny] will be supervised at the appellate level to achieve such predictability.[382]

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[382] *Supra*, note 8, at para. 87.