Unresolved Issues on Standard of Review – An Update

I. Introduction

In a paper I prepared for last year's Advanced Judicial Seminar on Administrative Law and subsequently revised for publication,[1] I identified fifteen areas of uncertainty in the Canadian law on standard of review for judicial review and appeals to the courts from statutory and prerogative authorities. In the approximately twelve months that have elapsed since the preparation of the final version of that paper, there has been considerable action in the courts on a number of the outstanding issues that I identified. Disappointingly, however, this has not led to definitive resolution (as opposed to refinement) of any of those unresolved dilemmas. This disappointment has been felt most acutely in the judgments of the Supreme Court of Canada. Despite clear opportunities, the Court chose not to confront explicitly some of the persistent questions that lower courts face regularly in their encounters with the administrative process.

In this short paper, I have no objective other than to provide an update on what has happened principally in the Supreme Court and Courts of Appeal on a number of these unresolved issues. Largely, this will be a catalogue reiterating the uncertainties that I identified last year, though with my frustrations manifest in some of the description and analysis. However, there are some areas where there has been resolution, and also, at least at the Court of Appeal level, some sophisticated analysis of the nature of the problems and engagement on how they should be resolved in keeping with the philosophy of *Dunsmuir* [2] and its progeny.

II. The Fate of "True" Questions of Jurisdiction

In the twelve months that have elapsed since last year's paper, the Supreme Court has done little to elaborate on what are the badges of a "true" question of jurisdiction, save to emphasise that it remains a rare species indeed. This was most evident in *McLean v. British Columbia (Securities Commission)*.[3] The issue there was whether proceedings before the Securities Commission based on the rulings of another provincial Commission had been commenced within a statutory limitation period. At one time, the issue may well have been classified as one of true jurisdiction: the Commission had no jurisdiction to entertain proceedings not brought within the statutory time limits. Moldaver J.A. brushed away[4] any suggestion that was still possible. In doing so, he referred to Rothstein J.'s expression of scepticism in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*[5] as to whether true questions of jurisdiction had any role as a "separate category of questions of law." In so doing, he also footnoted[6]

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1 "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *The Advocates' Quarterly* 1.

2 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

3 2013 SCC 67, [2013] 3 S.C.R. 895.

4 *Id.*, at para. 25.

5 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34.

6 *Supra*, note 3, at para. 25, fn3.

City of Arlington, Texas v. Federal Communications Commission[7] in which a majority of the United States Supreme Court jettisoned entirely the concept of jurisdictional error.

Subsequently, in *Martin v. Alberta (Workers' Compensation Board)*,[8] the Supreme Court applied a standard of reasonableness to the determination of an issue that might also have been classified as an issue of "true" jurisdiction in days of yore: Whether, in exercising authority delegated by federal legislation, the Alberta Workers' Compensation Board's determination of claims by injured federal workers was subject in the case of claims for psychological injury to the terms of the federal or Alberta workers' compensation scheme. Indeed, in the very limited standard of review discussion,[9] there is nary a whisper of this possibility. More generally, it now seems as though, absent a genuine situation of duelling jurisdictions, the Supreme Court will only in exceptional cases or perhaps not at all classify an issue as one of true jurisdiction when its resolution depends on the interpretation of the decision-maker's home or closely related statute. This in effect accomplishes what Rothstein J. foreshadowed in *Alberta Teachers'*, the elimination of the concept of jurisdictional error in a practical, if not a theoretical sense.

III. But are Issues of *Vires* Different from or a Subset of Jurisdictional Question?

In last year's paper, I identified the problems arising out of the Supreme Court's merging in *Dunsmuir* of issues of *vires* with those of true questions of jurisdiction.[10] It will be recollected that the example of an issue of *vires* given in *Dunsmuir* was *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,[11] a case involving the authority of the City of Calgary to enact a by-law limiting the number of taxi cab licences. What is problematic about this sense of correctness review of the legal authority to enact subordinate legislation (and perhaps also other kinds of legislative orders) is how to distinguish issues of authority (correctness) from issues that are seen as the exercise of a discretion and generally subject to deferential reasonableness review. That tension is apparent in the judgment of McLachlin C.J. for the Court in the 2012 judgment in *Catalyst Paper Corp. v. North Cowichan (District)*,[12] also involving a municipal by-law. At what point does the issue before a reviewing court cease to be one as to the *vires* of subordinate legislation and become one as to the reasonableness of an exercise of a discretion to

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7 133 S. Ct. 1863 (2013), at pp. 1868 and 1874 (*per* Scalia J.).

8 2014 SCC 25. **[Since this paper was presented but before it was delivered, on May 22, 2014, the Supreme Court of Canada delivered judgment in *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, a newsworthy case involving whether the age discrimination provisions in the British Columbia human rights legislation applied for the benefit of partners in a law firm. While it was not necessary to the determination of the standard of review, since under section 59 of the province's *Administrative Tribunals Act*, S.B.C. 2004, c. 45, a Human Rights Tribunal determination of any pure question of law was subject to a correctness standard of review, Abella J. characterized the issue as one of "jurisdiction": see paras 3-4, 15, and 45. However, there is no discussion, just assumption. That raises the question of whether Abella J. was using the term in a casual or colloquial (as opposed to *Dunsmuir*) sense and/or was simply buying in to the characterization of the issue by the parties and the courts below, without any necessary endorsement of that characterization for precedential purposes.]**

9 *Id.*, at para. 11.

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

11 2004 SCC 19, [2004] 1 S.C.R. 485.

12 2012 SCC 2, [2012] 1 S.C.R. 5.

enact such legislation? Is correctness (and a true question of jurisdiction or *vires*) confined to the meaning of legal terms in the relevant empowering provision, while reasonableness is the test when assessing the substantive qualities of the statutory instrument under attack? And, where do issues such as allegations of acting for a wrongful purpose or contrary to the policy of the empowering Act fit into this scheme?

In 2013, in *Energy Gas New Brunswick Limited Partnership v. New Brunswick (Attorney General)*,[13] Robertson J.A., delivering the judgment of the majority, attempted to come to terms with this dilemma.[14] At stake was the validity of a regulation directing the New Brunswick Utilities Board as to the methodology to be used as part of its rate setting powers. Given that the matter involved the interpretation of a particular term ("methods or techniques") and whether the impugned Regulation in law involved a direction to the Board as to a method or technique, what was at stake was the limits of the Lieutenant Governor in Council's powers under the Act, a matter to be assessed in effect on a correctness basis. In rejecting the first instance judge's deferential approach to the determination of this issue, Robertson J.A. stated that such deference was only warranted where the regulation in question came within the powers conferred on the subordinate legislation maker by the empowering Act. It was confined to situations where the challenge was to the motives or purposes behind the passage of the subordinate legislation under attack. Indeed, in the domain of bad faith, improper purposes and motives, the amount of deference required was at a very high level. A challenge would be successful only "in the most egregious of cases."[15]

Later in 2013, in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*,[16] the Supreme Court also dealt with the issue of how to review the validity of regulations. The regulations in question were the latest shots in an ongoing struggle to put a lid on the increase of the cost of drugs sold by pharmacies. In part, they involved what was in effect a ban on pharmacies controlling manufacturers which sold generic drugs under their own name but did not fabricate them. The major pharmacies challenged these regulations as *ultra vires* in that they were inconsistent with the purpose and mandate of the relevant statutes. Ultimately, Abella J., delivering the judgment of the Supreme Court, held that the Regulations were indeed consistent with the purposes of the relevant legislation in that they were aimed at ensuring drug price transparency and reducing drug costs.[17] That could be discerned from the legislative history and other background material that was before the Court. Thereafter, it was not for the Court to consider the likelihood of the regulations achieving those objectives or whether they were under-inclusive in the effective ban that they created. In short, it was no part of the Court's reviewing powers to inquire into the policy behind or merits of the regulations (whether they were "necessary, wise or objective")[18] or the underlying "political, economic, social or partisan considerations" on which they were based.[19] Only in "egregious" cases[20] such as where the objectives were "irrelevant",

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13 2013 NBCA 34, 404 N.B.R. (2d) 189.

14 *Id.*, at paras. 2-7.

15 *Id.*, at para. 5.

16 2013 SCC 64, [2013] 3 S.C.R. 810.

17 *Id.*, at paras. 36-37.

18 *Id.*, at para. 27.

19 *Id.*, at para. 28.

"extraneous" or "completely unrelated" to the statutory purpose would wrongful purpose review be permissible.

What is also noteworthy is the Court's insinuation of a very specific approach to the assessment of the validity of regulations, an approach that appears to be general in its application rather than confined to challenges based on improper purposes or objectives. There is a presumption of validity with two aspects – the burden is on the challenger to demonstrate invalidity and, in interpreting regulations, courts should, where possible, construe them in a manner that preserves their *vires*.[21]

In fact, the Court provides ample support in the case law and from the text writers for all aspects of this approach. What is problematic, however, is the relationship between this view of the template for the review of the validity of regulations and the world of standard of review of which there is not an explicit mention in the Abella judgment. What does this mean? That standard of review and standard of review analysis are no part of the world of review of subordinate legislation, and that review of subordinate legislation is conducted by reference to its own specific standard or criteria? Or, that the standards set out by Abella J. for scrutinizing regulations is the context-specific test for reasonableness in that setting?

That review of subordinate legislation is *sui generis* and not subject to standard of review analysis seems unlikely given the very recent deployment of standard of review analysis and terminology in *Catalyst Paper*. Rather, what may have been going on here is that, to the extent that the challenge was not based on an allegation of an incorrect interpretation of a constraining provision in the regulation making power (as in *Enbridge Gas New Brunswick Limited Partnership*) but rather a broader attack on the merits of the regulation and the purposes for which it was promulgated, there was no reason to expect any reference to correctness review. In a further attempt to bring the decision within the canopy of *Dunsmuir* and a system-wide approach to standard of review, it is certainly possible to characterize the Court's conception of a very limited scope for intervention on the grounds raised by the challengers and, in particular, the challenge based on improper purposes, as in effect the adoption of a context-sensitive approach to deference in which the margin of appreciation accorded the regulation maker is very wide indeed. In this regard, it is also worth noting that there is nothing necessarily inconsistent between Robertson J.A.'s conception of the appropriate methodology in *Enbridge Gas New Brunswick Limited Partnership* and that of Abella J. in *Katz*. After all, he too acceded to the proposition of limited review capacities when the challenge was to the motives and objectives of the regulation maker, albeit that he felt very uncomfortable conceiving of any of this as a conventional standard of review problem.

Nonetheless, questions still remain. Why was there no mention of standard of review in the Abella judgment, and, in particular, no mention of how the very context specific methodology for the review of subordinate legislation ties into the mainstream of judicial review and standard of review analysis? More particularly, when, in *Dunsmuir*, the Court uses the term *vires* in describing review of the by-law in *United Taxi Drivers' Fellowship of Southern Alberta*, is it using the term in the same way as it was deployed in *Katz* to describe the nature of the challenge in that case? One has to think not given the

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[20] Citing, as did Robertson J.A., *supra*, note 13, at para. 4, the judgment of Dickson J., as he then was, in *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at p. 111.

[21] *Id.*, at para. 25.

very circumscribed scope for judicial review of the kind that was advanced in *Katz* by the applicants and the complete absence of any sense of correctness review by reference to the concept of *vires* as a subset of "true question of jurisdiction."[22] Aside from this important issue of terminology, it is also to be hoped that the Supreme Court has an early opportunity to delineate what if any difference there is between a wrongful purpose or objective challenge based on an incorrect reading of a particular term in the empowering statute, and a wrongful purpose or objective challenge based on a reading of overall legislative objectives as reflected in the history or evolution of a particular legislative scheme.

IV. What are General Questions of Law of Central Importance to the Legal System as a Whole?

Equally elusive for counsel seeking to persuade the Supreme Court of Canada to subject an issue to correctness review is the category of a general question of law which is **both** of central importance to the legal system as a whole and outside the expertise of the decision maker. In *McLean v. British Columbia (Securities Commission)*,[23] Moldaver J. described this category as the wave that came after jurisdictional error in the attempts to persuade courts to engage in correctness review.[24] However, if the fate of such a claim in *McLean* is any indicator, it is a wave that will disappoint the litigator surfers almost as much as that of "true" question of jurisdiction.

In *McLean*,[25] Moldaver J. identifies three reasons for rejecting the argument that the issue of the meaning of the limitation provisions in the securities legislation was a general question of law of central importance to the legal system as a whole beyond the expertise of the decision-maker. First, while the meaning of limitation provisions might sometimes come within this category, this was a situation- or context-specific issue as to the meaning of a limitation clause in a complex regulatory setting and statute; its impact did not extend beyond the boundaries of that regulatory context. Secondly, and more importantly as a general matter, even though a deferential approach opened up the possibility of other provincial securities commissions reaching a different but unreviewable conclusion on the same or similar provisions in their own securities legislation, this was not a reason for treating the question as justifying, in the interests of consistency, correctness review. Not all provincial securities legislation had the same limitation provisions for such matters and the provinces remained free to enact whatever limitation periods that they wanted. In other words, simply because the same question might fall to be resolved by other securities commissions (and presumably reargued before the British Columbia Securities Commission), was not a reason for bringing it within the exceptional category. Finally, and, in some senses, this is the most important of the three points, it was improper to deny expertise to agencies in the interpretation of any aspect of their constitutive statutes, be it a substantive securities law concept or the meaning of adjectival provisions such as limitation periods. The fact that, in doing so, they had to use the normal tools of statutory interpretation so familiar to the regular courts was no

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22 At para. 26, Abella J. does cite *United Taxi Drivers' Fellowship of Southern Alberta, supra*, note 11, but not in relation to its deployment in *Dunsmuir*. There is also no mention of *Catalyst Paper*, this possibly raising the spectre that the Supreme Court might very well see review methodology differing as between municipal by-laws and Lieutenant Governor or Governor in Council regulations.

23 *Supra*, note 3.

24 *Id.*, at para. 26.

25 *Id.*, at paras. 28-33.

reason to withhold recognition of their expertise when those tools were being deployed in the interpretation of their home legislation.

This judgment in effect builds on or gives greater weight to two earlier judgments of the Supreme Court of Canada in which arguments for correctness review on the basis of this exceptional category were dismissed rather more summarily.

The first is *Saskatchewan (Human Rights Commission) v. Whatcott*,[26] which I overlooked in last year's paper and subsequent postscript. There,[27] Rothstein J., delivering the judgment of the Court, applied a reasonableness standard of review to a human rights tribunal determination of an issue involving the interpretation of a substantive provision of the Saskatchewan human rights legislation: the meaning and scope of the section that prohibited publication or displays of any representation

> (b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.[28]

In justifying reasonableness as the standard of review, Rothstein J. stated:

> In this case, the decision was well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it. The decision followed the *Taylor* precedent and otherwise did not involve questions of law that are of central importance to the legal system outside its expertise. The standard of review must be reasonableness.[29]

Implicit in this application of reasonableness review seemed to be acceptance of the proposition that simply because the same or similar substantive issues might arise under other human rights statutes, the *Charter*, or in other adjudicative settings is no reason to treat all such issues as questions of general law of central importance to the legal system as a whole. The home statute presumption and the expertise of the Tribunal trumped any such argument for the application of the exception.

The second is *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*,[30] on which I did comment in the Postscript to last year's paper. There, in the New Brunswick Court of Appeal,[31] Robertson J.A. had justified correctness review of management imposition of a regime of random alcohol testing on the basis that it involved a human rights issue that transcended the particular collective agreement and that was a recurring one in various settings both in New Brunswick and across the country. In the interests of consistency, a "correct" or definitive answer was required and the matter could not be left to the vagaries of deferential reasonableness review in the context of a whole range of decision-makers and employment settings. In the majority judgment, Abella J. did not take up these challenges in Robertson J.A.'s judgment. However, in their joint dissenting judgment,

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26 2013 SCC 11, [2013] 1 S.C.R. 467.

27 *Id.*, at paras. 166-68.

28 *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, section 14(1)(b).

29 *Supra*, note 26, at para. 168.

30 2013 SCC 34, [2013] 2 S.C.R. 458.

31 2011 NBCA 58, 375 N.B.R. (2d) 92.

Rothstein and Moldaver JJ. did join issue at least partially with Robertson J.A..[32] Just because random alcohol testing in the workplace might be a contentious issue in various settings across the country did not mean that it came within the realm of a general question of law of central importance to the legal system as a whole. In other words, general public interest or importance to the public or significant segments of it was not in and of itself a reason for deploying the exception. Rothstein and Moldaver JJ. then went on to describe the issue, notwithstanding its human rights dimensions, as being "part of labour arbitrators' bread and butter."[33] To the extent that there is nothing in the majority judgment that contradicts this aspect of the minority judgment, it may well be appropriate to read the expression of similar sentiments by the Court in *McLean* as acceptance of this view of the scope of the general question of law exception.

If so, what do we now know about the exception? That it is not sufficient that the matter be a recurring one attracting the interest of the public at large or significant segments of the public? That equally it is not sufficient that the same issue might fall to be decided in a whole range of settings across the country? That it is not a surrogate for consistency review where different decision-makers either in the same regulatory or different regulatory settings have been producing seemingly different outcomes on the same question of law? And, if all of those propositions are now part of the detail of the exception's content, what exactly is left?

Late last year,[34] in his blog, *Administrative Law Matters*,[35] Paul Daly noted a Quebec Court of Appeal decision that seemingly provided an example. In *Association des pompiers professionnels de Québec c. Québec (Ville de)*,[36] the Court treated an issue of solicitor/client privilege that arose in proceedings before the Quebec labour board as having the required transcendent characteristics.[37] It is also the case that, notwithstanding *Whatcott* and *Irving Pulp & Paper Ltd.*, some Courts of Appeal are not prepared to resile from the position that certain substantive human rights issues partake of the necessary qualities as to amount to a question of law of central importance to the legal system as a whole and outside the expertise of the decision-maker.

Earlier this month (May 6), in *Telecommunications Workers Union v. Telus Communications Inc.*,[38] the Alberta Court of Appeal, without discussion, applied[39] a standard of correctness to a labour arbitrator's

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32 *Supra*, note 30, at para. 66.

33 *Ibid.*

34 December 31, 2013.

35 http://administrativelawmatters.blogspot.ca/2013/12/professional-privilege-in.html

36 2013 QCCA 2084.

37 *Id.*, at para. 20.

38 2014 ABCA 154.

39 *Id.*, at paras. 25-26. The Court simply referenced *Dunsmuir*, *supra*, note 2, *Walsh v. Mobil Oil Canada*, 2008 ABCA 268, 440 A.R. 199, and *Lethbridge Regional Police Service v. Lethbridge Police Association*, 2013 ABCA 47, 542 A.R. 252, at para. 28. In the former, Ritter J.A., delivering the judgment of the Alberta Court of Appeal, applied *Dunsmuir* standard of review analysis and pre-*Dunsmuir* precedents to reach the conclusion that correctness was the standard of review for human rights tribunals deciding substantive human rights law issues. In the latter, correctness was again held to be the standard of review, this time for a labour arbitrator deciding an issue of substantive human rights law. The Court justified this on the basis that it was a question of general importance, and also that it came within the Rothstein concurrent jurisdiction exception to the presumption of

determination and application of the legal tests for both *prima facie* discrimination and a discriminatory standard as a *bona facie* occupational requirement for the purposes of the *Canadian Human Rights Act*.[40] Almost contemporaneously, on May 2, a panel of the Federal Court of Appeal released two judgments[41] in which it also affirmed the application of correctness review to a Canadian Human Rights Tribunal's determination of substantive questions arising out of the *Canadian Human Rights Act*. While, here too, there was no discussion of the impact of *Whatcott*, Mainville J.A., delivering the judgment of the Court in each of these cases,[42] dealt at length with the standard of review issue.

In *Johnstone*, the legal components of the application for judicial review were whether under the Act, childcare obligations came within the potential reach of discrimination on the basis of "family status" and, as in *Telus Communications Inc.*, whether, in a family status discrimination complaint, the Tribunal had committed reviewable error in the test that it applied to the determination whether there had been a *prima facie* case of discrimination. Mainville J.A. held that the standard of review for each of these determinations was that of correctness. *Seeley* raised the same two legal issues plus two additional questions.[43] In *Seeley*, Mainville J.A. provided a summary of his reasoning in *Johnstone* for concluding that the standard of review for the two overlapping questions of law was that of correctness. Let me take the liberty of reciting that summary in full:

> (a) [T]he Supreme Court of Canada has consistently held that fundamental rights set out in human rights legislation are quasi-constitutional rights, and the principle that constitutional issues are subject to correctness review extends as well to quasi-constitutional issues involving the fundamental rights set out in the *Canadian Human Rights Act*;
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> (b) [A] multiplicity of courts and tribunals are called upon to interpret and apply the rights set out in human rights legislation, including the *Canadian Human Rights Act*, and it would be inconsistent to review the legal questions at issue here on judicial review of a decision of a tribunal on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court of first instance on the same legal question[44];
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> (c) [S]ince most provinces have adopted human rights legislation that prohibit discrimination on the basis of family status, for the sake of consistency between [*sic*] those statutes, the

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reasonableness review for questions of law arising out of home or closely related statutes recognized in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 (discussed *infra*).

40 RSC 1985, c.H-6.

41 *Canada (Attorney General) v. Johnstone*, 2014 FCA 110, and *Canadian National Railway Co. v. Seeley*, 2014 FCA 111. (The other two members of the panel were Pelletier and Scott JJ.A.)

42 *Id.*, at paras. 38-52 (*Johnstone*) and paras. 35-37 *(Seeley*).

43 In *Seeley*, however, CN did not dispute that the reach of "family status" included childcare obligations. As for the other two issues, there was no discussion of the appropriate standard of review, though, in conducting review, Mainville J.A. appeared to treat them as involving law/fact application with no segregable pure question of law, reviewable on a reasonableness basis: see *id.*, at paras. 55-68.

44 I return to this particular justification, in Section VI below.

meaning and scope of family status and the legal test to find discrimination on that prohibited ground are **issues of central importance to the legal system** [emphasis added];

(d) [T]he Supreme Court of Canada has determined in the past that a correctness standard applies to the meaning and scope of family status under the *Canadian Human Rights Act*, and it should be left to the Supreme Court of Canada itself to determine if this approach has been implicitly overruled by its more recent rulings dealing with the standard of review.

What is interesting about this analysis is that it makes the case for correctness review by reference to number of the bases for such a finding identified by the Supreme Court of Canada in *Dunsmuir*: the existence of a Supreme Court precedent on the standard of review the satisfactory nature of which Mainville J.A. was not about to assess;[45] the constitutional or *quasi*-constitutional character of the questions of law at play; and the centrality of those questions to the legal system as a whole. In addition, in terms of the post-*Dunsmuir* case law, he concluded in *Johnstone* that all of these considerations plus the overlapping jurisdiction between courts and tribunals with respect to such issues justified a holding that the Rothstein presumption of deference to tribunals interpreting their home statutes had been rebutted.[46]

It would, however, be folly to believe that Mainville J.A.'s apparently sound and logical reasoning is the final word on the subject of substantive human rights legal issues as reviewable universally on a correctness basis. More particularly, there is the problem of how correctness review for all such issues can be reconciled with the stance of the Supreme Court in *McLean* and *Whatcott*, not to mention the joint judgment of Rothstein and Moldaver JJ. in *Irving Pulp and Paper Ltd*., judgments which in aggregate call into question not only the lumping of substantive human rights issues into the exceptional category of issues of central importance to the legal system as a whole, but also the other three bases that Mainville J.A. advanced for moving to correctness review.

V. To Which Decision-Makers Does the Presumption of Reasonableness in the Interpretation of Home and Closely Related Statutes Apply?

In *Agraira v. Canada (Public Safety and Emergency Preparedness)*,[47] LeBel J. applied a standard of reasonableness to a determination by the Minister of Public Safety and Emergency Preparedness that it was not "in the national interest" to allow an individual to remain in Canada who had had sustained contact with known terrorist and terrorist-associated groups. To the extent that this was a decision that depended on an assessment of facts and the application of policy, this was not all that surprising. However, LeBel J. went on to state that

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45 By reference to the criticism levelled by the Supreme Court against a Federal Court of Appeal judgment that held that an earlier Supreme Court of Canada judgment had been overtaken implicitly by subsequent Supreme Court of Canada jurisprudence: see *Johnstone*, *supra*, note 41, at para. 52, with reference to *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 21.

46 *Id.* (*Johnstone*), at para. 44.

47 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 49-50. For a fuller assessment, see my Postscript to "Unresolved Issues", *supra*, note 1, at pp. 84-85.

> …because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54). This factor, too, confirms that the applicable standard is reasonableness.[48]

Did this amount to acceptance of the application of the presumption of reasonableness review in the interpretation of home or closely related statutory provisions to decision-makers other than tribunals or adjudicative bodies? There is no clear answer to this question especially as LeBel J. did not refer specifically to the presumption or to the Federal Court of Appeal judgments in which there were differences of opinion on the extension of the presumption to ministerial determinations of questions of law.[49] It is also difficult to read the judgment as standing for the proposition that the presumption applies across the whole range of statutory and prerogative decision-making. First, this was apparently a decision that was taken personally by the Minister. Secondly, it involved the interpretation not of a narrow or tightly constrained legal term but a very open-textured legislative provision ("national interest") on which one might normally expect deference to be accorded to ministerial judgments. Clearly, definitive resolution of the scope of the presumption awaited a more detailed and definitive evaluation by the Court.

In the meantime, however, matters have not stood still in the lower courts. Of particular interest are *Qin v. Canada (Minister of Citizenship and Immigration)*[50] and *Kandola v. Canada (Minister of Citizenship and Immigration)*,[51] both post-*Agraira* judgments of the Federal Court of Appeal.

In the former, Evans J.A., in what is technically *obiter dicta*, in reviewing an immigration officer's rejection of an application for permanent residence, made the more general point that reasonableness was never an appropriate standard of review when a statutory provision was unambiguous and there was only one possibly correct interpretation to that provision.[52] I will return to that proposition later. However, in what is more pertinent to the current discussion, Evans J.A. went on to question whether the presumption of reasonableness could ever extend to decision-makers who lacked the express or implied authority to decide any question of law or fact necessary to dispose of the matter before them.[53] Obviously, this raises a serious question as to the universality of the presumption. If a decision-maker lacks that authority, how is it possible to justify deference to whatever tentative, non-authoritative positions that that statutory delegate takes on a particular question of law?

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48 *Id.*, at para. 50.

49 Mainville J.A. in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40, [2013] 4 F.C.R. 155 (rejecting the application of the presumption and in effect erecting a presumption to the opposite effect) and Stratas J.A. (in dissent on this point) in *Takeda Canada Inc. v. Canada (Minister of Health)*, 2013 FCA 13, 440 N.R. 346 (determining that the presumption did apply to all manner of statutory and prerogative decision-making, though holding that it was rebutted in the particular circumstances).

50 2013 FCA 263, 451 N.R. 336.

51 2014 FCA 85.

52 *Supra*, note 50

53 *Id.*, at paras. 34-38.

In contrast, Noël J.A., in delivering the majority judgment in *Kandola*, was impressed by the fact that in *Agraira*, in the extract cited above, LeBel J. used the term "decision maker", not "tribunal."[54] He also noted[55] that, subsequently, and this time dealing specifically with the presumption, Moldaver J., delivering the judgment of the majority of the Court in *McLean v. British Columbia (Securities Commission)*,[56] had also used the term "administrative decision maker's", not "tribunal's". He therefore concluded that the presumption was indeed one that applied to a citizenship officer's rejection of an application for a certificate of Canadian citizenship. In other words, he appears to have held that the presumption applies across the whole range of statutory and prerogative decision-makers. (Notably, there is no reference to the position that Evans J.A. took earlier in *Qin*.)

However, Noël J.A. did not stop there. By reference[57] to the judgment of Stratas J.A. in *Takeda*,[58] he went on to hold that, in cases such as this, the presumption of reasonableness review can be "quickly rebutted."

> Specifically, there is no privative clause and the citizenship officer was saddled with a pure question of statutory construction embodying no discretionary element. The question that he was called upon to decide is challenging and the citizenship officer cannot claim to have any expertise over and above that of a Court of Appeal whose sole reason for being is resolving such questions.[59]

If that indeed is the way to approach the rebutting of the presumption in the case of powers being exercised by public servants or officials, under either explicit statutory warrant or as delegates of the Minister, then, of course, it amounts to a very weak presumption. Putting it another way, there will be few occasions on which deference is required for the determination of pure questions of law by such officials. Indeed, even in terms of Stratas J.A.'s more general identification[60] of the task as one of determining whether the presumption is rebutted by reference to the four standard of review criteria set out in *Dunsmuir*, there would appear to be a marginal, if no practical difference between simply determining whether deference is required by immediate reference to the four *Dunsmuir* factors, and starting with a presumption to which the four *Dunsmuir* factors are set up in response.

In this analysis, I should not be read as being critical of any of the approaches that have been advanced on the question of the application of the presumption of deference to home statute interpretation by decision-makers other than tribunals. However, as Paul Daly has said in his blog entry, "Who Decides

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54 *Supra*, note 51, at paras. 40-41.

55 *Id.*, at para. 41.

56 *Supra*, note 3, at para. 21.

57 And also *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, *supra*, note 39, at para. 16: *supra*, note 51, at paras. 42-43. (Mainville J.A., who delivered the judgment in *David Suzuki*, reluctantly accepted that his position in that case had been implicitly rejected in *Agraira*: at paras. 80-87.)

58 *Supra*, note 49, at paras. 28-29.

59 *Id.*, at para. 43.

60 *Supra*, note 49, at para. 28.

Here? Deference on Ministerial Interpretations of Law (Again)", in reference to both *Kandola* and another Federal Court of Appeal judgment:[61]

> Ultimately, the Supreme Court of Canada is going to have to treat this question more rigorously and, in doing so, pay close attention to the concerns of federal court judges.[62]

It may well be, however, that that opportunity has already presented itself. At present, the Supreme Court has under reserve an appeal from the judgment of the Federal Court of Appeal in *Canada v. Canadian National Railway Co.*.[63] Among the issues in that case is the standard of review applicable to the Governor in Council in determining appeals from the decisions of regulatory bodies *i.e.* Cabinet Appeals.

VI. What is the Scope of the Rothstein Exception to the Presumption of Reasonableness?

One domain where the Supreme Court has been proactive in clarifying the principles governing the selection of the appropriate standard of review is in relation to the Rothstein exception to the application of the reasonableness standard to tribunal determinations of pure questions of law recognized in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*.[64] There, delivering the judgment of the majority of the Court, Rothstein J. held that the presumption did not apply or was rebutted in the exceptional circumstances where both a court and an administrative tribunal (the Copyright Board) had jurisdiction over the same question. In such a case, it made no sense that, on appeal, the court's decision on an issue of statutory interpretation would be subject to correctness review but, on a judicial review application, the tribunal's decision on the same question would be subject to deferential reasonableness review.

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61 *Canada (Citoyenneté et Immigration) c. Dufour*, 2014 CAF 81.

62 http://administrativelawmatters.blogspot.ca/2014/04/who-decides-here-deference-on.html

63 [2012] S.C.C.A. No. 557 (Q.L.), on appeal from 2012 FCA 278, 440 NR. 217. **[Since this paper was submitted but before it was presented, the Supreme Court of Canada, on May 23, 2014, delivered judgment in this case: see *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40. For present purposes, the essential ingredients of the judgment of the Court, delivered by Rothstein J., are (1) that, in dealing with an application to vary an order of the Canadian Transportation Agency filed under section 40 of the *Canadian Transportation Act*, S.C. 1996, c. 10, the Governor in Council has authority (jurisdiction?) to determine questions of law that arise in the context of such an application (see paras. 34-49); (2) that the *Dunsmuir* framework for determining the standard of review applies to the Governor in Council in the exercise of this authority, as opposed to situations where the challenge is to the Governor in Council performing legislative functions (such as promulgating subordinate legislation) where the principles of *vires* govern (see paras. 51-54); and (3) that the *Dunsmuir* framework includes the presumption of reasonableness review applicable to authorities interpreting their home or closely connected statutes, a presumption that had not been rebutted in this context – there was no constitutional question, no issue as to competing jurisdictions, no true question of jurisdiction or *vires*, and no question that was of central importance to the legal system as a whole (see paras. 55-62). In terms of the particular issue raised in this portion of my paper, it is now clear that, at least where any decision-maker has authority to determine questions of law and is not acting in a legislative capacity, the presumption of reasonableness review will apply; the presumption's zone of operation is not confined to adjudicative tribunals. This judgment also has implications for other sections of this paper as well: especially Part II and the badges of "true" questions of jurisdiction; and Part III and what constitutes an issue of *vires* for the purposes of justifying correctness review.]**

64 *Supra*, note 39.

What has now become clear is that this exception does not apply simply because the same statutory interpretation question might possibly arise before both a court and an administrative tribunal. Thus, as seen already, in *McLean v. Securities Commission (British Columbia)*,[65] Moldaver J., delivering the judgment of the Court, rejected this argument more generally as well as an attempt to invoke the Rothstein exception in a situation where a court might on appeal or in some other setting have to deal with the issue of the meaning of the relevant provision:

> Here the legal question is the interpretation of [provisions in the Commission's home statute] – and it is *solely* the Commission that is tasked with considering the matter in the first instance. Accordingly, there is no possibility of conflicting interpretations with respect to the question actually at issue.[66]

While this does not necessarily resolve all questions surrounding the scope of the exception, Evans J.A. went somewhat further in *Re: Sound v. Fitness Industry Council of Canada*,[67] where an argument had been made for the application of the Rothstein exception to another aspect of the Copyright Board's authority. As opposed to the situation in *Rogers Communications*, this was not a case where the Board and the Federal Court were each specifically assigned original jurisdiction over the issue of the interpretation of the relevant provisions. It was not a situation of truly shared jurisdiction over the matter. Thus, even though it might be possible to envisage circumstances in which a court might at first instance have to deal with the particular question of statutory interpretation, the exception did not apply by reason of that fact alone. First, the possibility of this occurring was a "theoretical and somewhat remote possibility."[68] Secondly, that possibility did not derogate from the fact that the legislature had conferred primary responsibility for such matters on the Copyright Board.[69]

These two judgments narrow considerably the circumstances under which the Rothstein exception can be invoked. Thus, for example, even though the Supreme Court of Canada denied leave to appeal,[70] it seems highly unlikely that the Alberta Court of Appeal's application of the Rothstein exception in *Lethbridge Regional Police Service v. Lethbridge Police Association*[71] has survived. There, the Court of Appeal had referred to the fact that a whole range of adjudicative regimes determine issues of human rights (whether under the same or similar statute or by reference to the provisions of the *Charter*), and thus had concurrent jurisdiction for the purposes of the application of the Rothstein exception, this providing the justification for correctness review.[72] In fact, the concurrency of jurisdiction in *Rogers Communications* between the Federal Court and the Copyright Board was one that existed by virtue of explicit recognition in the relevant home statute of both regimes, court and tribunal.

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65 *Supra*, note 3.

66 *Id.*, at para. 24.

67 2014 FCA 48, at paras. 45-49.

68 *Id.*, at para. 49.

69 *Ibid.*

70 [2013] S.C.C.A. No. 159 (Q.L.).

71 *Supra*, note 39.

72 More generally, as noted earlier, the argument that correctness review applies automatically to the determination of a pure question of law raising substantive human rights issues may well have been nixed by the combination of *Whatcott*, *supra*, note 26, and *Irving Pulp and Paper*, *supra*, note 30.

Indeed, as already discussed at some length, [73] it also seems likely that, indirectly at least, the Supreme Court has rejected more generally the argument for correctness review of the determination of human rights questions of law by human rights tribunals on the basis that they arise in other contexts as well, including at first instance before courts. This was in a case neglected in last year's paper and presentation, *Saskatchewan (Human Rights Commission) v. Whatcott*.[74] There, Rothstein J., delivering the judgment of the Court, reversed the Saskatchewan Court of Appeal's application of the correctness standard to a human rights tribunal interpretation of a substantive provision in the provincial human rights legislation.[75] The substantive provisions of human rights codes constituted the home statute of human rights commissions and tribunals and, as such, generated an entitlement to deference.[76]

Nonetheless, as also seen, at least two Courts of Appeal, Alberta and the Federal Court of Appeal, have continued to apply correctness review to decisions of tribunals involving the interpretation of substantive discrimination provisions in human rights legislation. Indeed, among the grounds for so doing identified by Mainville J.A. of the Federal Court of Appeal in *Johnstone* was that the situation came within the Rothstein exception to the presumption of reasonableness review; that, in the case of such adjudications, the presumption is rebutted by virtue of overlapping first instance jurisdiction among tribunals and section 96 courts. Once again, the Supreme Court will have to sort out this frequently recurring standard of review issue. Indeed, it is also apparently the case that opinions differ in the Federal Court of Appeal itself, as reflected by the judgment of Stratas J.A. in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*,[77] applying the presumption of reasonableness review to the determination of a substantive human rights issue of law. Mainville J.A. does not cite, let alone deal with this case in either *Johnstone* or *Seeley*.

VII. Deference and Procedural Fairness

As noted in last year's paper,[78] in *Syndicat des travailleuses et travailleurs de ADF-CSN c. Syndicat des employés de Au Dragon Forgé Inc.*,[79] Bich J.A., delivering a judgment of a panel of the Quebec Court of Appeal, called into question the conventional wisdom that issues of procedural fairness either did not require a standard of review analysis or were universally subject to correctness. At least, in situations where an issue of procedural entitlement arose out of the interpretation or application of a statutory provision, why did the normal presumption of deferential review not apply?

Subsequently, the Bich approach has garnered support from Stratas J.A. of the Federal Court of Appeal. In *Maritime Broadcasting System Ltd. v. Canadian Media Guild*,[80] a company sought judicial review of

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73 In Section IV, *infra*

74 *Supra*, note 26.

75 2010 SKCA 26, 346 Sask. R. 210, applying the precedent of *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41, 267 D.L.R. (4th) 733.

76 *Supra*, note 26, at paras. 166-68.

77 2013 FCA 75, 444 N.R. 120. (Pelletier J.A. was also on this panel as well as that in *Johnstone*, *supra*, note 41, and *Seeley*, *supra*, note 41.

78 "Unresolved Issues", s*upra*, note 1, at 63-64.

79 2013 QCCA 793, at para. 47.

80 2014 FCA 59.

the Canadian Industrial Relations Board's certification of a bargaining unit on various grounds both substantive and procedural. Included among the procedural grounds was an allegation that the Board had violated the rules of procedural fairness by, *inter alia*, refusing to hold an oral hearing, rulings that had been sustained by the Board on reconsideration. After an extensive review of the relevant case law and principles,[81] Stratas J.A. concluded that not only did the case law read fully not preclude the application of a reasonableness standard of review to procedural rulings but that also not to be deferential, where appropriate, would go against the spirit of *Dunsmuir*.

However, Stratas J.A.'s analysis of the relevant law did not attract the support of the other two members of the panel. Webb J.A., with whom Near J.A. concurred, rejected the contention that issues of procedural fairness could be dealt with on other than a correctness basis. In so doing, he relied on an earlier judgment of another panel of the Federal Court of Appeal and a different reading of the purport of the Supreme Court of Canada's case law. In *Re: Sound v. Fitness Industry Council of Canada*,[82] Evans J.A., delivering the judgment of the Federal Court of Appeal, had stated by reference to Supreme Court of Canada authority:

> The black-letter rule is that courts review allegations of procedural unfairness by administrative decision-makers on a standard of correctness.

However, he then went on to explain that, as opposed to the determination of whether the initial common law threshold to procedural fairness had been crossed, an issue always resolved on a straight correctness basis,[83] "the content of the duty in a particular context, and whether it has been breached is more nuanced".[84] Where decision-makers enjoy discretion in the crafting of their procedures, it was not for the courts to "second-guess an administrative agency's every procedural choice, whether embodied in its general rules or in an individual determination."[85] However, he then concluded:

> That said, administrative discretion ends where procedural unfairness begins…. A reviewing court must determine for itself on the correctness standard whether that line has been crossed. There is a degree of tension implicit in the ideas that the fairness of an agency's procedure is for the courts to determine on a standard of correctness, and that decision-makers have discretion over their procedure.[86]

After reviewing Supreme Court of Canada authority supporting the concept that respect for procedural choices made by agencies was a factor in determining the content of procedural fairness obligations,[87] he concluded:

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81 *Id.*, at paras. 46-66.

82 *Supra*, note 67, at para. 34.

83 *Id.*, at para. 35.

84 *Id.*, at para. 36.

85 *Id.*, at para. 38

86 *Id.*, at para. 39

87 *Id.*, at paras. 40-41 (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 27, and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paras. 230-31).

> In short, whether an agency's procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which the courts are most familiar.[88]

In *Maritime Broadcasting*, Stratas J.A. confronted the Evans judgment[89] and, with particular reference to this paragraph,[90] asserted that Evans J.A. was in effect accepting the reality of deference and reasonableness review in the context of procedural rules and rulings. More particularly, he refused to accept that Evans J.A. was creating another category or standard of review for procedural rules and rulings: "respectful correctness" or "correctness with a degree of deference."[91]

Nonetheless, the reality seems to be that not only the Federal Court of Appeal and other courts across the country but also the Supreme Court of Canada in a more recent judgment are content for the time being at least to live with this awkward compromise. Clearly, the majority of the Federal Court of Appeal in *Maritime Broadcasting* found the compromise acceptable.[92] Similarly, in *Wilson v. University of Calgary*,[93] Horner J. of the Alberta Court of Queen's Bench initially accepts[94] the Alberta Court of Appeal precedent in *Nortel Networks Inc. v. Calgary (City)*[95] to the effect that correctness is the standard of review for issues of procedural fairness, but then goes on to state:

> I agree with the University that the above-mentioned factors support its argument that the procedures chosen in the context of disciplinary hearings ought to be afforded significant weight in determining the context of the duty of fairness owed to the CPL students. I note also that the Policy was developed in consultation with faculty, staff and student representatives: s.4.3.[96]

Indeed, four days before the release of the judgment in *Wilson*, the Supreme Court of Canada, without facing the conflict of views directly, continued to follow the same path. In *Mission Institution v. Khela*,[97] LeBel J., delivering the judgment of the Court, initially reiterated the standard line that correctness is the standard of review for determining whether a decision-maker complied with the duty of procedural

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88 *Id.*, at para. 42.
89 *Supra*, note 80, at paras. 59-62.
90 *Id.*, at para. 59.
91 *Id.*, at para. 60.
92 *Id.*, at paras. 75-79.
93 2014 AQQB 190.
94 *Id.*, at para. 47.
95 2008 ABCA 370, 440 A.R. 325, at para. 32.
96 *Supra*, note 93, at para. 52.
97 2014 SCC 24.

fairness.[98] However, when it came to actually measuring whether that duty had been fulfilled, LeBel J. emphasised the need for deference to the decision-maker's judgment as to whether a statutorily authorized withholding of information in the context of offender transfer proceedings was justified having regard to the "security of the person, the safety of any person or the conduct of an investigation."[99]

Once again, this led Paul Daly in his blog to bemoan the fact that the whole issue of deference to procedural fairness rules and rulings "will continue to hang over Canadian administrative law until it is argued and authoritatively resolved by the Supreme Court."[100]

VIII. Reasonableness Review in the Face of an Absence of Reasons

One of the biggest challenges in the conduct of deferential reasonableness review arises in situations where the decision-maker has not provided reasons for decision or not addressed in its reasons the specific issue on which judicial review is sought. Three legal propositions set the scene for consideration of this dilemma. First, there is not a general requirement on all decision-makers to provide reasons for their decisions.[101] Secondly, a failure to provide adequate reasons is not a free-standing ground of judicial review.[102] Thirdly, *Dunsmuir*, in its articulation of reasonableness review, spoke of

> …respectful attention to the reasons offered or **which could be offered** in support of a decision.[103]

One of the consequences of a coalescence of these three principles is that, on occasion, judicial review courts will feel obliged to reconstruct for apparently deferential review purposes the reasoning process of a decision-maker who has not provided reasons for a decision or the aspect of the decision that is under judicial review. I have discussed the implications of this in last year's paper. However, it is noteworthy that, in the past twelve months, the Supreme Court has engaged in this kind of reconstruction exercise in two more cases, both discussed earlier in other sections of this paper: *Agraira v. Canada (Public Safety and Emergency Preparedness)*[104] and *McLean v. British Columbia (Securities Commission)*.[105] What stands out in both these judgments, and I suggest that it should not be surprising, is that it is very difficult to imbue the whole process of reconstruction (or construction[106]) and review with any realistic sense of deference or true reasonableness review. When the reviewing court steps into the shoes of the decision-maker for these purposes, it is obvious that any consideration of the question of law at issue will take on the quality of a first instance assessment of the issue.

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98 *Id.*, at para. 79.

99 *Id.*, at para. 89.

100 "Move along, Nothing to See Here: Orthodoxy and Procedural Fairness", http://administrativelawmatters.blogspot.ca/2014/03/move-along-nothing-to-see-here.html

101 *Baker v. Canada (Minister of Citizenship and Immigration)*, *supra*, note 87, at para. 43.

102 *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at paras. 15-16.

103 *Supra*, note 2, at para. 48.

104 *Supra*, note 47.

105 *Supra*, note 3.

106 What the decision-maker might have said on this issue had he or she even thought about it.

Interestingly, Moldaver J.,[107] in *McLean*, took the challenge seriously and, after constructing an interpretation of the legislation (a limitation provision) that supported the result reached by the decision-maker, then posited an analysis that might have supported on a reasonableness standard the other possible interpretive outcome. For this, however, he attracted the ire of Karakatsanis J. (in a judgment concurring in the result).[108] There was only one reasonable outcome to this interpretive issue! One might also say that in (re)construction exercises such as this, what is happening is that the Court is in reality deferring to its own assessment of the pure question of law in issue.

That said, there remains a serious issue as to the circumstances in which the review court should actually engage in such reconstruction exercises, as opposed to remitting the matter back for the development of reasons. Recently,[109] Stratas J.A. of the Federal Court of Appeal, and delivering the judgment of the Court, faced up to this issue. After noting that there are limits on the legitimacy and ability of the Court to engage in such an enterprise,[110] he went on to hold that, in the absence of any evidence that the decision-maker had in any way "grappled"[111] with the issue, there was simply no basis on which the reviewing court could or should even speculate as to how the decision-maker would have justified a decision on that issue.[112]

However, that was not the end of the matter. While normally this would have produced a remission back for the provision of reasons on the particular issue, there were compelling reasons not to do so in this case, and, in particular, the prejudice to an already prolonged process by such a remission bringing with it the possibility of another appeal or application for judicial review. Therefore, as a matter of remedial discretion, the Court rejected the option of a remission back and, on the basis of its own first instance assessment of the issue, made an order in the nature of *mandamus* compelling the agency to provide the benefit the applicant was seeking.[113] This represents a triumph of pragmatism over blind adherence to general principles. It may also at least on occasion represent a more realistic approach to the problem of conducting review when there are no reasons than pretending to be getting inside the mind of the actual decision-maker.

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107 *Supra*, note 3, at paras. 39-41.

108 *Id.*, at paras. 75-80.

109 In *D'Errico v. Canada (Attorney General)*, 2014 FCA 95.

110 *Id.*, at para. 10, citing Rothstein J. in *Alberta Teachers' Association*, *supra*, note 5, at para. 54.

111 *Id.*, at para. 11.

112 *Id.*, at paras. 11-13.

113 *Id.*, at paras. 15-27. However, contrast this with the even more recent judgment of Stratas J.A. in *Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114, at para. 27. Here, he refused the Minister's invitation to find that there was sufficient support in the record for a decision, not legally and reasonably supported by the reasons given by the relevant Immigration Officer. The appropriate disposition on the facts was a remand:

> This is a situation where the Officer informed by these reasons of her error and of the proper standard to be applied might well reach a different result. There is evidence in the record that could support a decision either way. I cannot say that the record leans so heavily against relief that sending the matter back to the Officer would serve no useful purpose.

IX. The Variable Qualities of Reasonableness Review

It is now well-accepted that, while there are not gradations within reasonableness, the assessment of what constitutes a reasonable decision or one within an appropriate margin of appreciation is a context-sensitive inquiry.[114] For the present, let me assume that that is a logical or defensible differentiation, and that context sensitivity is an appropriate recognition of the vastly differing situations in which courts may have to be deferential to statutory and prerogative decision-makers. However, even so, that provides very little guidance as to when context matters and the extent to which it matters for the methodology of deferential assessment of a decision.

In this survey of recent jurisprudence, I want to focus on what seems to me to be the most troublesome and important aspect in the evolution of a context-sensitive approach to the conduct of judicial review, and especially the application of the reasonableness standard. That aspect is the conduct of reasonableness review of pure questions of law.

Here, the principal protagonists, as in the case of deference to procedural rules and rulings, have been to this point Evans J.A. and Stratas J.A. of the Federal Court of Appeal, and the zone of disagreement between them concerns what have often been characterized as narrowly circumscribed (as opposed to open-textured) questions of law or statutory interpretation.

For Evans J.A., in one of his final judgments, *Qin v. Canada (Minister of Citizenship and Immigration)*,[115] the issue became whether the statutory provision in issue was ambiguous or admitted of only one possible answer.[116] If it was that kind of provision, the issue of deference did not even enter the picture; the role of the reviewing Court was simply to apply the single correct answer and set aside the decision if it had produced the incorrect answer. In other words, on unambiguous issues of statutory interpretation, there was no reason to go down the standard of review path. Leaving aside for the moment whether such an approach fits at all within the principles enunciated in *Dunsmuir*, what does seem clear is that this comes very close to an acceptance of the position espoused by the United States Supreme Court since *Chevron*;[117] the first inquiry is whether Congress intended that there was a single correct answer to the statutory interpretation issue before the reviewing court. Only if Congress did not so intend, should a reviewing court move to the second stage and determine on a deferential basis whether the ruling should be set aside.

In contrast, Stratas J.A. has taken a different approach, though whether it makes any practical difference is another question. For Stratas J.A., the more narrow or closely circumscribed the relevant statutory provision,[118] the less room there is for manoeuvre or the making of choices on the part of the designated decision-maker, a position characterized at its most extreme by a statutory interpretation issue for which there are only two possible answers – yes or no! In those circumstances, while deference

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114 See *e.g. Alberta Teachers' Association*, *supra*, note 5, at para. 47.

115 *Supra*, note 50.

116 *Id*, at paras. 32-34.

117 *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

118 See *e.g. First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, *supra*, note 77, at paras. 13-17.

is still theoretically required (as, for example, on the basis of the presumption of reasonableness review for questions involving the interpretation of the decision-maker's home or constitutive statute), nonetheless, in terms of the analysis, the reviewing court should apply normal principles of statutory interpretation in testing the ruling of the agency. This exercise by its very nature brings reasonableness review and correctness review into close proximity, if not identity with one other.

In my view, Stratas J.A. probably has had the better of the methodological debate. First, the ongoing struggles over *Chevron* and its meaning and application in United States case law as well as academic commentary clearly suggest that this kind of approach is rife with problems and difficult to apply in practice. More particularly, the search for congressional intention that there be a single correct answer or, in an Evans sense, that a statutory provision is unambiguous and admits of only one correct answer invites debate and controversy in many instances. Secondly, the Stratas approach is much more in the nature of a refinement of *Dunsmuir* and its elaboration of an appropriate standard of review methodology. The Evans J.A. approach involves a significant modification or qualification of the approach laid out in *Dunsmuir.*

As for the Supreme Court of Canada, it may well be that, even though he does not directly address the debate, Moldaver J., delivering the judgment of the Supreme Court of Canada in *McLean*,[119] does speak in terms that show an awareness of it. At one point, he accepts that there are interpretive issues arising out of statutory provisions for which there will be only one correct answer:

> In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation **do not always guarantee a single clear answer**, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations [emphasis added].[120]

He reiterates this notion subsequently, though in somewhat more nuanced terms:

> It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance: … In those cases, the "range of reasonable outcomes" … will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it.[121]

Read in isolation, the first extract suggests support for the Evans J.A. or *Chevron* approach – the reviewing court should first consider the relevant statutory provision and ask whether, in accordance with the normal principles of statutory interpretation, there is only one possible answer to the statutory interpretation question. If so, that is the end of the matter and a standard of review analysis is not needed. However, the second articulation seems to call for the reviewing court to first conduct a standard of review analysis to determine whether the standard is correctness or reasonableness

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119 *Supra*, note 3.

120 *Id.*, at para. 32.

121 *Id.*, at para. 38.

(presumably without regard to clarity or otherwise of the statutory provision in issue). Thereafter, if the standard is reasonableness, the court asks whether, once normal principles of statutory interpretation are applied, there is only one reasonable answer to the statutory interpretation issue. In that case, any answer other than that one will be unreasonable.

Of course, in reality, when the reviewing court is asking whether, by reference to normal principles of statutory interpretation, there is only a single correct answer, the process of interpretation will be the same whether the standard of review is that of reasonableness or correctness, with one possible qualification. That possible qualification is that where the court is pursuing this inquiry through the lens of reasonableness rather than correctness review, there is and indeed should be a greater willingness to find ambiguity and rationality or reasonableness in other interpretations than is the case when the lens is that of correctness review. Indeed, this was the reality in *McLean*; Moldaver J. in a situation arguably involving only two possible answers was willing to see both as being reasonable. Therefore, under an overall reasonableness standard, the Court had to sustain the interpretation adopted by the Securities Commission. This provides some support for the argument that the Stratas approach and the second articulation of the relevant proposition in *McLean* might be easier to reconcile with the *Dunsmuir* approach and more in accord with the general philosophy of deference to decision maker determinations of questions of law.

Undoubtedly, however, *McLean* is not the end of the dialogue on this issue, an issue which may also, as exemplified by another Stratas judgment,[122] require further elaboration of a test for determining how broad the range of possibly reasonable interpretations is in any particular interpretive exercise. Is it just a case of testing the limits by reference to the ordinary principles of statutory interpretation or are there, as Stratas J.A. has suggested, a range of administrative law factors that must be factored in to that statutory interpretation exercise in order to properly elucidate the extent of the range of possible answers?

X. Does Disguised Correctness Review Call Into Question the Whole Enterprise of Deference to Determinations of Pure Questions of Law?

I noted above the difficulties of engaging in anything other than correctness review when a reviewing court is put in the position of having to ostensibly conduct reasonableness review on the basis of its (re)construction of the probable reasoning process of an actual decision-maker who has not given reasons for a decision or ruling that is under challenge. Moreover, the previous section also suggests that the reality is that there will be very little, if any difference between correctness and reasonableness review in the case of statutory provisions that are seen to admit of only one correct answer. While these two aspects of the emerging standard of review law are both excusable and understandable, what is much more difficult to accept is disguised correctness review in the case of decisions that are supported by reasons and where there is no apparent consensus that the elucidation of the relevant question of law admits of only one correct answer. Indeed, there is a sense in which such disguised correctness review undercuts the whole standard of review exercise and the ostensible commitment to deferential

[122] *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, at paras. 88-92.

reasonableness as the default position for the determination of most pure questions of law or statutory interpretation.[123]

A particularly egregious example of this is *Martin v. Alberta (Workers' Compensation Board)*.[124] Here, Karakatsanis J. quickly classified the decision under review as one of mixed fact and law and subject to deferential reasonableness review. However, when it came to applying the standard of review to the Board's decision, she segmented an apparently pure question of law, the application of provincial law and standards to compensation claims by federal sector employees. She then subjected the Board's determination of that question to a correctness examination conducted on the basis of normal principles of statutory interpretation and without any mention of the standard of reasonableness or reference to the actual reasoning of the Board.

In defence of *Martin*, it might, I suppose, be argued that where, as in *Martin* itself, the Court sustains the original decision-maker's ruling on the disputed issue, it matters little that the Court has reached that conclusion on the basis that the ruling was correct. The best way of confirming that a decision is reasonable is to demonstrate that it was correct! However, that smacks too much of the methodology that once had some currency: In conducting deferential review, the court should first ask whether the decision under review is correct, and, only if it is incorrect, to further inquire whether it was unreasonably so. Such an approach fails to see the whole point of the requirement of deference.

The practice of identifying reasonableness as the standard of review but then assessing the relevant issue of law on a correctness basis becomes even more problematic when the Court holds that the original decision-maker's decision was unreasonable after such a correctness analysis. In such instances the recital of reasonableness as the standard of review reduces deferential review to the formal recital of a false mantra. *Dionne v. Commission scolaire des Patriotes*,[125] which followed closely on the heels of *Martin*, is a prime example. Here, Abella J., delivering the judgment of the Court, after reciting that reasonableness was the standard of review,[126] then proceeded to analyse on a correctness basis the issue of whether a supply teacher was entitled to the benefit of a statutory right to withdraw her services on the basis that the school was a dangerous work environment.[127] The Commission had determined that, as a matter of law, Dionne was not entitled to the benefit of the relevant regime. In the Supreme Court of Canada, with only minimal reference to the reasons of the Commission, Abella J. conducted a *de novo* analysis of that ruling and reached the conclusion that the Commission had been wrong and therefore unreasonable.

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123 This is not meant to question the enterprise where what is in issue is factual findings, inextricably intertwined questions of mixed law and fact, policy decisions, and perhaps even some more opened-ended questions of law: *Agraira*, *supra*, note 47, and *Khela*, *supra*, note 97. The latter is also very interesting on the issue of deference in *habeas corpus* proceedings where the onus is on the Crown to establish the lawfulness of the detention, a proposition that the Court accepted in *Khela* but nonetheless then went on to integrate a reasonableness standard of review into the assessment of the Crown's justification of transfer of the offender/applicant.

124 *Supra*, note 8.

125 2014 SCC 33.

126 *Id.*, at paras. 15 and 45.

127 *Id.*, at paras. 17-45.

Indeed, it is sometimes difficult to resist the conclusion that the Court has engaged in disguised correctness review even when there are references to the actual reasons for the decision under attack. For example, in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[128] addition of the word "reasonably" in the concluding paragraph of the various segments of a statutory interpretation exercise does little to disguise the fact that what went before was straight correctness statutory interpretation, perhaps informed by the reasons of the Commissioner but scarcely deferential to them in any meaningful sense.[129]

In short, the increasing phenomenon of "disguised correctness" review represents a clear and present danger to the integrity of the deference project. It also represents a challenge both to judicial review applicants drafting facta and making oral argument as well as lower courts in crafting their reasons. How seriously should they take the proposition that, on questions of law, decision-makers are normally entitled to genuine deference?

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128 2014 SCC 31. See also *Bernard v. Canada (Attorney General)*, 2014 SCC 13, at paras. 21-33.

129 See also the subsequent judgment in *John Doe v. Ontario (Finance)*, 2014 SCC 36.