

***DUNSMUIR AND SUBSTANTIVE REVIEW – IMPLICATIONS AND IMPACT:
A PRELIMINARY ASSESSMENT***

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Dunsmuir and Substantive Review – Implications and Impact:
A Preliminary Assessment

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I. Introduction

Over a year has passed since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick* to “re-examine the Canadian approach to judicial review of administrative decisions” and develop a more “coherent and workable” principled framework.¹ The majority's judgment sought to simplify the framework by merging the patent unreasonableness and reasonableness *simpliciter* standards of review into a single reasonableness standard and by emphasizing the importance of precedent in determining the standard applicable to a specific category of decisions and decision makers. The aim of this paper is three-fold. First, it aims to review how the decision has been received by academics and public lawyers. Second, it seeks to make a preliminary assessment of the impact of *Dunsmuir* on the judicial review of administrative decisions across Canada by focusing on how *Dunsmuir* has so far been applied by Canadian appellate courts.² Thirdly, it attempts to identify general trends that could give us an indication of *Dunsmuir's* future impact on substantive review. Before delving into the academic and judicial commentary on *Dunsmuir*, I present a brief summary of the facts of the decision, the majority judgment and the two concurring minority judgments.

II. *Dunsmuir v. New Brunswick*

A. Facts

David Dunsmuir was a non-unionized lawyer employed by the Department of Justice for the province of New Brunswick under the *Civil Service Act* (CSA),³ and appointed “at pleasure” to the offices of clerk and administrator of the Court of Queen’s Bench. When the Department

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¹ 2008 SCC 9 [*Dunsmuir*] at para. 32 per Bastarache and LeBel JJ.

² Over a hundred appellate decisions explaining or following *Dunsmuir's* treatment of substantive review and decided before April 1, 2009 were examined in preparation of this paper. Decisions which merely cited *Dunsmuir* were not analyzed.

³ S.N.B. 1984, c. C-5.1 [CSA].

became dissatisfied with Dunsmuir's performance, it terminated his employment with payment of four months notice. It did not allege cause. Section 20 of the CSA provided that terminations were governed by the ordinary rules of contract. Dunsmuir grieved the determination under section 100.1 of the *Public Service Labour Relations Act* (PSLRA),⁴ which partially extended to non-unionized employees the grievance process made available to unionized employees by section 97 of the PSLRA. Dunsmuir argued that his employer had not notified him of its performance concerns or given him a reasonable opportunity to respond to these concerns, that he had been terminated without notice, due process or procedural fairness and that the length of the notice period was inadequate.⁵ When the Department dismissed his grievance, Dunsmuir referred it to adjudication under the PSLRA. An adjudicator selected by agreement of the parties determined as a preliminary matter that he was entitled under the PSLRA to determine the "real reasons" for the grievor's termination and, if termination was for cause, to substitute another penalty for the discharge as seemed just and reasonable – a remedy to which unionized employees were entitled under section 97 of the PSLRA. In other words, Dunsmuir was entitled to an adjudication "as to whether discharge purportedly without notice or pay in lieu thereof was in fact for cause."⁶ The adjudicator was ultimately satisfied that the Department had not terminated Dunsmuir for cause. However, he found that it had not afforded Dunsmuir the procedural fairness to which he was entitled.⁷ Accordingly, he ordered Dunsmuir's reinstatement. In the alternative, the adjudicator noted that he would have extended the notice period from 4 to 8 months.

New Brunswick sought judicial review of the adjudicator's award. Applying the pragmatic and functional approach, Justice Rideout of the Court of Queen's Bench characterized the plenary issue as a question of statutory interpretation, reviewable on the standard of correctness. He decided that the adjudicator had incorrectly concluded that the PSLRA authorized him to inquire into the reasons for dismissal. The judge quashed the adjudicator's reinstatement order, finding that it was unreasonable, but upheld the adjudicator's alternative award of eight months notice. The New Brunswick Court of Appeal, Justice Robertson writing, decided that, given the full privative clause in the PSLRA and the relative expertise of labour adjudicators in the

⁴ R.S.N.B. 1973, c. P-25 [PSLRA].

⁵ *Dunsmuir*, *supra* note 1 at para. 9.

⁶ *Ibid.*, at para. 12.

⁷ *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653.

employment context, the appropriate standard of review was reasonableness *simpliciter*. Justice Robertson held that the adjudicator's interpretation of the PSLRA on the preliminary issue was unreasonable and that the employer's election to dismiss Dunsmuir with notice precluded the adjudicator's substitution of a lesser penalty. The Court dismissed the appeal.

The Supreme Court of Canada dismissed Dunsmuir's appeal. While all the judges on the Court agreed that the framework for substantive review needed to be revisited and reformed, and that this should include a merger of the two deferential standards of review into one reasonableness standard, there were significant differences in their reasoning. The majority judgment, penned by Justices LeBel and Bastarache, and the concurring judgments of Justice Binnie and Justice Deschamps are now briefly described and compared.

B. Majority judgment

1. One reasonableness standard

Pre-*Dunsmuir*, the standard of review framework comprised three standards: correctness, where the reviewing court showed no deference to the administrative decision maker, and two "deferential" standards – patent unreasonableness, the most deferential standard, and the intermediate reasonableness *simpliciter* standard. Under the reasonableness *simpliciter* standard, a decision was unreasonable if it "was not supported by any reasons that can stand up to a somewhat probing examination"⁸ or, put another way, if there was no "line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."⁹ A "patently unreasonable" decision was one which suffered from a serious defect ("so flawed that no amount of curial deference can justify letting it stand")¹⁰ that was obvious ("clearly irrational", "not in accordance with reason")¹¹ while the defect rendering a decision unreasonable was "less obvious and might be discovered after significant searching or testing."¹²

⁸ *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 798 at para. 56 [*Southam*].

⁹ *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55 [Ryan] See also *Southam, ibid.*, at para. 56: an unreasonable decision would contain a defect "in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it."

¹⁰ Ryan, *ibid.*, at para. 52.

¹¹ *Ibid.*

¹² *Ibid.*, at para. 53.

The majority noted that while it was necessary to preserve the correctness standard in respect of jurisdictional questions and some other questions of law,¹³ the existence of two deferential standards was problematic, first because there appeared to be no meaningful way to distinguish between an unreasonable and patently unreasonable decision and second, because the very possibility that courts would uphold an unreasonable decision because its irrationality was not clear enough seemed inconsistent with the rule of law.¹⁴ Since one of the Court's justifications for collapsing the deferential standards into a single reasonableness standard is that they were indistinguishable from a definitional point of view, its description of the new reasonableness standard is very significant, and is here reproduced in full:

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a 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.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-Southam formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (Mossop, [1993] 1 S.C.R. 554 at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 (quoted with approval in Baker, [1999] 2 S.C.R. 817 at para. 65, per L'Heureux-Dubé J.; Ryan, [2003] 1 S.C.R. 247 at para. 49).

¹³ *Dunsmuir*, *supra* note 1 at para. 50.

¹⁴ *Ibid.*, at para. 42.

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime”: D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

2. Determining the appropriate standard of review

As well as opting for a two-standard framework in an effort to make the standard of review framework more coherent and workable, the Court sought to simplify the method for selecting the appropriate standard in individual cases. Pre-*Dunsmuir*, the court had held that on all judicial review, including statutory rights of appeal, courts “must always select and employ the proper level of deference” by applying the components of the “pragmatic and functional approach”,¹⁵ first fully described in its modern form in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*.¹⁶ These components or contextual factors were: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question – law, fact, or mixed law and fact. Each factor was succinctly described by the court in the *Dr. Q* decision. The first factor, which focuses on the statutory mechanism of review, suggests a more searching standard of review in the presence of a statutory right of appeal, is neutral where the statute is silent on the question, and in the presence of a privative clause, suggests more deference, proportional to the strength of the privative clause.¹⁷ The second factor recognizes that reviewing courts should recognize legislatures’ choice to “remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues” by affording greater deference, so long as the decision-making body is “more expert than courts and the question under consideration is one that falls within the scope of this greater expertise.”¹⁸ The third factor calls

¹⁵ Ryan, *supra* note 9 at para. 21; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 21.

¹⁶ [1998] 1 SCR 982.

¹⁷ *Dr. Q*, *supra* note 15 at para. 27.

¹⁸ *Ibid.*, at para. 28.

on reviewing courts to “consider the general purpose of the statutory scheme within which the administrative decision is taking place” and, if applicable, of the specific provisions implicated in the review.¹⁹ Increased deference is called for where the statutory regime is polycentric – intended to resolve and balance competing policy objectives or the interests of various constituencies,²⁰ while less deference is required if the statute seeks to resolve disputes or determine rights as between two parties.²¹ The fourth factor, the nature of the problem, counsels in favour of less deference where the administrative decision maker is deciding an issue of pure law, particularly one of general importance and precedential value, and in favour of more deference the more the question is fact-intensive.²²

In *Dunsmuir*, the majority notes that “an exhaustive review is not required in every case to determine the proper standard of review.”²³ A reviewing court must first ascertain whether past cases have already determined “in a satisfactory manner” the degree of deference to be accorded “with respect to a particular category of question.” It is only if this first inquiry proves unfruitful that the court must perform a contextual “standard of review” analysis articulated around “a number of relevant factors”, including the contextual factors defined by the Court in the pragmatic and functional approach.²⁴ Even then, it may not be necessary to consider all of the factors, “as some of them may be determinative in the application of the reasonableness standard in the specific case.”²⁵ The Court, in an apparent effort to explain or summarize the jurisprudence surrounding the selection of an appropriate standard of review, then set out several guidelines (for lack of a better word) indicating where a reasonableness standard would be appropriate:

¹⁹ *Ibid.*, at para. 30.

²⁰ *Ibid.*, at para. 31.

²¹ *Ibid.*, at para. 32. Indicia of a polycentric regime include statutory purposes that require decision makers to select from a broad range of procedural choices or administrative responses or consider specialized, technical or scientific issues, that concern the protection of the public or engage policy issues or that confer broad discretionary power.

²² *Ibid.*, at paras. 33-34.

²³ *Dunsmuir*, *supra* note 1 at paras. 33-34.

²⁴ *Ibid.*, at para. 64. Laverne Jacobs notes that the majority's description of the third contextual factor – the “purpose of the tribunal as determined by interpretation of enabling legislation” differs from that of the pragmatic and functional approach and posits that this new formulation, which de-emphasizes the policy-making role of administrative decision makers, may negatively impact the amount of deference afforded by courts: Laverne Jacobs, “Developments in Administrative Law: The 2007-2008 Term – The Impact of *Dunsmuir*” (2008), 43 S.C.L.R. 1 at 16 [Jacobs].

²⁵ *Dunsmuir*, *supra* note 1 at para. 64.

- Deference will “usually apply automatically” where the question is one of fact, discretion or policy and “must apply” to the review of questions where legal and factual issues are intertwined and cannot be readily separated;
- Deference will “usually result” where a tribunal is interpreting its own statute or statutes closely connected to its function with which it will have particular familiarity;
- Deference “may be warranted” where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.²⁶

The majority then described guidelines indicating the application of the correctness standard:

- Constitutional questions, including division of powers issues, are “necessarily subject” to correctness review;
- Administrative bodies “must be correct” in their determinations of “true questions of jurisdiction”, which arise where a tribunal must “explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.”²⁷
- Courts “must” continue to apply the correctness standard where the question at issue is one of general law “that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.”²⁸
- Questions regarding the jurisdictional lines between two or more competing specialized tribunals “have also been subject to review on a correctness basis.”²⁹

The majority examined all four contextual factors. It noted the presence of a full privative clause, that the adjudicator, appointed by mutual agreement of the parties, could be presumed to hold relative expertise in the interpretation of his enabling statute, that the statute’s overall purpose was to establish a time and cost-effective method to resolve employment disputes and the remedial nature of the relevant provision. Characterizing the issue before the adjudicator as a legal question within his specialized expertise and not of central importance to the legal system, the majority determined that the appropriate standard was reasonableness.

C. Deschamps J.

In her concurring judgment, Justice Deschamps proposes a more extensive overhaul of the standard of review framework. In her view, the four contextual factors need not be considered in

²⁶ Here, the Court specifically cites labour law adjudication as an example: *ibid.*, at para. 54.

²⁷ *Ibid.*, at para. 59. The Court cites, as an example, the question of whether a municipality is authorized under a municipal statute to enact certain by-laws.

²⁸ *Ibid.*, at para 60.

²⁹ *Ibid.*, at para. 61.

every case.³⁰ Rather, the nature of the question will often play the pivotal role in determining the appropriate standard, as it does in regular appellate review:

[T]he analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on “the nature of the question”, to use what has become familiar parlance, it will become apparent that all four factors may not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.³¹

Deference is owed to administrative bodies’ determinations of questions of fact and questions of mixed fact and law, to their interpretation and application of laws in respect of which they have expertise and where these decisions are protected by a privative clause.³² Deference is not owed on the interpretation of laws falling outside administrative bodies’ expertise, including laws of general application like the Constitution, the common law and the Civil Code, ensuring that these laws are interpreted consistently. Finally, in a clear break from the majority’s view and past case law,³³ Justice Deschamps decided that deference is not owed on questions of law for which there exists a statutory right of review or appeal.³⁴ Accordingly, under Justice Deschamps’ approach, correctness would have a broader scope of application than under the majority’s framework.

While her approach appears to be the least sensitive to the varied context of administrative decision-making, Justice Deschamps does concede that exercising deference in particular cases will raise inherent difficulties, despite the merging of the two deferential standards:

The problem with the definitions [of reasonableness] resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black-and-white situation. One cannot change this reality.³⁵

Applying her analysis to the case before her, Justice Deschamps characterized the question under review as whether the common law rules relating to Dunsmuir’s termination had been statutorily displaced. Noting that the starting point of the analysis was the identification of the

³⁰ *Ibid.*, at para. 160.

³¹ *Ibid.*

³² *Ibid.*, at para. 162.

³³ Notably, *Pezim v. British Columbia (Superintendent of Brokers)*, [1997] 1 S.C.R. 798 and *Southam*, *supra* note 8.

³⁴ *Dunsmuir*, *supra* note 1 at para. 163.

³⁵ *Ibid.*, at para. 167. Justice Deschamps describes deference as the attitude adopted towards a decision maker which “defines the contours of reasonableness”, while reasonableness concerns the decision itself.

applicable common law rules, an area in which, in her view, the adjudicator had no specific expertise, Justice Deschamps adopted a correctness standard. She determined that the adjudicator's decision on the preliminary issue was incorrect, as it “did not even consider” the employer’s common law right to dismiss Dunsmuir without cause.

D. Justice Binnie

In a concurring judgment, Justice Binnie expresses concern with two aspects of the majority judgment. First, he notes that while the majority purports to establish a framework that deals with the system of judicial review as a whole, it focuses on administrative tribunals³⁶ rather than taking a holistic approach and extending to “a minister, a board, a public servant, a commission, unelected council or other administrative bodies and statutory decision makers.”³⁷ Secondly, he appears to favour a broader scope for the application of the correctness standard to the review of questions of law. Rather than debating whether such questions are “of central importance to the legal system as a whole”, Justice Binnie would prefer a presumption that questions of law are reviewed on a correctness standard subject to a rule exempting from the standard “the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker.”³⁸

Justice Binnie pays close attention to the role of context in substantive review, particularly in defining the content of the new reasonableness standard. He alone notes that the existence pre-*Dunsmuir* of a highly deferential and an intermediate standard of review attempted to recognize that administrative decision makers making certain decisions should be entitled to more deference than other administrative decision makers making different decisions.³⁹ With the merger of the deferential standards into a single reasonableness standard, the influence of context must be expressed through different means:

The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. “Contextualizing” a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each

³⁶ *Ibid.*, at para. 121.

³⁷ *Ibid.*, at para. 123.

³⁸ *Ibid.*, at para. 128.

³⁹ *Ibid.*, at para. 135. See also Alice Woolley, “The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review” (2008), 21 C.J.A.L.P. 259 at 265 [Woolley].

represents a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.⁴⁰

In other words, the single reasonableness standard will require judges to “apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances,” an approach that the Court had expressly rejected in the context of the three-standard of review framework.⁴¹

How, then, should a court determine whether a decision is “reasonable”? Justice Binnie agrees with the majority's view that reasonableness, while concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, is also concerned with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. But how does context enter this analysis?

[W]hat is required, with respect, is a more easily applied framework into which the judicial review courts and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance ... the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the decision maker under its grant of authority, usually a statute. “[T]here is always a perspective”, observed Rand J., “within which a statute is intended [by the legislature] to operate”, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140. How is that “perspective” to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many “contextual” considerations as the court considers relevant and material.⁴²

Reasonableness in his view, is “a big tent that will have to accommodate a lot of variables that inform and limit courts’ review of the outcome of administrative decision-making.”⁴³

⁴⁰ *Ibid.*, at para. 139.

⁴¹ *Ryan*, *supra* note 9 at para. 43.

⁴² *Ibid.*, at para. 151.

⁴³ *Ibid.*, at para. 144.

In Justice Binnie's conception of reasonableness review, the degree of deference measured by contextual factors, including the four factors from the pragmatic and functional approach, is determinative of the breadth of the “range” of possible, acceptable outcomes defensible in respect of the facts and law:

[T]he Court's adoption in this case of a single reasonableness standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together.⁴⁴

Justice Binnie appears to accept, as do the other judges, that the nature of the question will play an important role in defining the range of reasonable outcomes within which an administrator is authorized to choose.⁴⁵ It seems relatively clear that the range of possible, acceptable outcomes for decision premised on the exercise of a broad, policy-infused discretion would be broader than for a decision that hinged on the interpretation of a relatively static legal standard.

In addition to this more general description of the shape of the new framework for substantive review, Justice Binnie makes a number of very specific suggestions designed to facilitate the analysis through certain presumptions. First, the existence of a privative clause should not be considered by courts as just another factor, but should be taken to foreclose substantive review unless the applicant can “show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.”⁴⁶ Second, given the somewhat discretionary content of most administrative decisions and the fact that there is typically no single “correct” outcome, courts should presume that the applicable standard of review is reasonableness absent a broad statutory right of appeal.⁴⁷ The applicant would have to show that the decision under review rests on an error in the determination of a legal issue not confided to the decision maker to decide, making a correctness standard appropriate. Interestingly enough, though much of Justice Binnie's judgment is concerned with the meaning and application of the reasonableness standard, his application of the standard to the facts of the case is perfunctory:

Once under the flag of reasonableness ... the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of

⁴⁴ *Ibid.*, at para. 153.

⁴⁵ *Ibid.*, at para. 138.

⁴⁶ *Ibid.*, at para. 143.

⁴⁷ *Ibid.*, at para. 146.

discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.⁴⁸

III. Academic, legal and judicial comment

Dunsmuir has attracted much comment from academics and lawyers since it was delivered in March 2008. The Supreme Court itself has had the opportunity to apply and explain its new framework for substantive review in several decisions including the most recent, *Canada (Citizenship and Immigration) v. Khosa*,⁴⁹ decided in March 2009. In this part, I identify common themes and questions arising from legal and academic commentary on *Dunsmuir* and discuss the extent to which these have since been addressed by the Supreme Court and Canadian appellate courts. The following have most frequently been identified in the literature:

- What is the scope of the *Dunsmuir* regime? Does it extend beyond adjudicative tribunals?
- When should precedent govern the appropriate degree of deference and will reliance on precedent in the standard of review analysis actually simplify the task of the reviewing courts?
- Post-*Dunsmuir*, when is deference appropriate on administrative decision makers' decisions on questions of law and, in particular, where there is a statutory right of appeal?
- What are the possible implications of the Supreme Court's formal resurrection, in *Dunsmuir*, of the "true question of jurisdiction" for which the standard of review must always be correctness?
- What does the new reasonableness standard look like? How must it be applied? Does it comprise a spectrum of degrees of deference? What is the relationship between the requirement that a reasonable decision satisfy criteria of justification, transparency and intelligibility and the requirement that it fall within a range of acceptable outcomes?
- Especially given *Dunsmuir's* elimination of the patent unreasonableness standard from the common law approach to substantive review, how should courts approach the interpretation and application of statutory standards of judicial review?

A. *The scope of the Dunsmuir regime*

The majority clearly purported to re-examine the structure and characteristics of "the system of judicial review as a whole", even though the facts of *Dunsmuir* dealt with the review of the

⁴⁸ *Ibid.*, at para. 157.

⁴⁹ 2009 SCC 12 [*Khosa*].

decision of an adjudicative tribunal.⁵⁰ However, Justice Binnie observes that the majority judgment focuses on administrative tribunals⁵¹ and, in his discussion of the impact of the merger of deferential standards into a single standard, essentially assumes that the new framework also applies to the entire range of administrative decision makers.⁵² Justice Deschamps clearly signals in her concurring reasons that her analysis is not directed at discretionary decisions, which are not involved in the facts of *Dunsmuir*.⁵³

1. Academic comment

David Mullan agrees that the majority's analysis is tribunal-focused and warns that this narrow focus constitutes “an important gap” in its articulation of the new framework:

[T]he discussion of how unreasonableness is assessed is located exclusively in precedents involving adjudicative tribunals and testing for unreasonableness in the context of the reasons of adjudicative tribunals that the common law or statute obliges to provide reasons for their decisions. How does all this relate to the world of highly discretionary, policy decision-making by statutory and prerogative authorities that do not act in an adjudicative fashion?⁵⁴

2. Supreme Court developments

The scope of the *Dunsmuir* framework was clarified by the Supreme Court's unanimous judgment in *Lake v. Canada (Minister of Justice)*.⁵⁵ There, the Court applied the *Dunsmuir* framework to review the exercise by the federal Minister of Justice of a very broad discretion to surrender a fugitive accused of cocaine trafficking to US authorities instead of prosecuting him in Canada – a discretion characterized as falling at “the extreme legislative end of the continuum of administrative decision-making” and viewed as “largely political in nature”.⁵⁶ Accordingly, it appears clear that *Dunsmuir* is meant to stand as a comprehensive statement of the standard of review framework. How well adapted this framework is to the review of decisions by non-adjudicative decision makers is another question dealt with later in this paper.

⁵⁰ *Dunsmuir*, *supra* note 1 at para. 33; see also paras. 24 and 26.

⁵¹ *Ibid.*, at para. 121.

⁵² *Ibid.*, at para. 134.

⁵³ *Ibid.*, at para. 165.

⁵⁴ David Mullan, “*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!” (2008), 21 C.J.A.L.P. 117 at 133. Laverne Jacobs also faults the majority judgment’s restatement of the contextual factors as well as Justice Deschamps’ “nature of the question”- focused analysis for de-emphasizing those elements of tribunal decision-making, including polycentricity, that differ from the adjudicative model: Jacobs, *supra* note 24 at 16, 23-4.

⁵⁵ 2008 SCC 23 [*Lake*].

⁵⁶ *Ibid.*, at para. 22.

B. When does precedent govern?

When will it be appropriate for a reviewing court to eschew a full standard of review analysis in favour of following judicial precedent that has “determined in a satisfactory manner” the degree of deference to be accorded to a particular category of question?⁵⁷

1. Academic comment

This question has been raised by many observers and commentators.⁵⁸ Jacobs notes that the concept of “particular category of question” may be limited to the “very narrowly defined issue before the court in that instance” or may be extended to “large, classic labels of ‘question of law’ or ‘mixed question of fact and law’ under a particular statutory regime.”⁵⁹ The latter expansive interpretation would appear to be supported by the majority’s listing of generally-stated guidelines attracting a reasonableness standard (e.g., deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function) or correctness standard (e.g., courts must continue to review on a correctness standard questions of general law of central importance to the legal system as a whole and outside the adjudicator’s specialized expertise).⁶⁰ At least one observer has referred to these guidelines as “presumptive principles and issues conclusively determined and not requiring an exhaustive [standard of review] analysis.”⁶¹ The breadth of meaning afforded to the concept of “particular category of question” is important. As Jacobs notes:

Interpreted too narrowly, there may be no jurisprudence determining the standard of review for the very specific question chosen. By contrast, if defined too broadly, the detrimental risk of sweeping a wide variety of issues into a single standard, without analysis of the expertise of the decision maker and the administrative decision-making context becomes even more pronounced.⁶²

Several considerations favour a narrow construction of the concept. First, the majority characterizes the guidelines as lessons from prior case law to provide “guidance”⁶³ with regard to

⁵⁷ *Dunsmuir*, *supra* note 1 at para. 62.

⁵⁸ Ron Goltz, “‘Patent Unreasonableness is Dead. And We Have Killed It.’ A Critique of the Supreme Court of Canada’s Decision in *Dunsmuir*” (2008) 46 *Alta L. Rev.* 253 at 259; Jacobs, *supra* note 24 at 30-31; David Phillip Jones, “Recent Developments in Administrative Law” (CBA National Administrative Law and Labour & Employment Law CLE Conference, Ottawa, Ontario, 21-22 November 2008) at 26.

⁵⁹ Jacobs, *ibid.*, at 30-31.

⁶⁰ *Dunsmuir*, *supra* note 1 at 54-61.

⁶¹ Goltz, *supra* note 58 at 257.

⁶² Jacobs, *supra* note 24 at 31.

⁶³ *Dunsmuir*, *supra* note 1 at para. 54.

the questions that will be reviewed on a reasonableness standard and states that its guidelines “may be helpful” in identifying questions that “generally fall” to be determined according to a correctness standard.⁶⁴ Accordingly, Mullan’s description of the role of these guidelines in the substantive review framework is likely accurate:

[T]he majority’s approach does constitute valuable signposting that not all factors in the test for establishing a standard of review rank equally and that some may confidently be treated as very commonly, if not invariably leading to unreasonableness review. In those situations, counsel seeking to convince a reviewing court otherwise will have a heavy burden.⁶⁵

Thus, these guidelines serve to focus and define arguments that will have to be addressed by applicants in order to convince the reviewing court that a standard different than the normally applicable standard is warranted.

2. Supreme Court developments

In *Dunsmuir*, the Court did not rely on prior jurisprudence to define the standard, opting instead to conduct a full standard of review analysis involving all four contextual factors. However, it has since illustrated the role of precedent in the *Dunsmuir* framework in two decisions: *Association des Courtiers et Agents Immobiliers du Québec v. Proprio Direct Inc.*⁶⁶ and *Khosa*.⁶⁷ I will describe the facts and judgments for these two decisions and then discuss what lessons they might teach about the role of precedent. *Proprio* dealt with the decision of the Association’s discipline committee to fine a real estate broker for requiring vendors to pay a non-refundable membership fee when they signed an exclusive brokerage contract in addition to having to pay a commission if the property sold. The Committee had found that under the *Real Estate Brokerage Act* (REBA), a sale was a statutory precondition to the receipt of compensation by real estate brokers and that this had been made a mandatory term of Exclusive Brokerage Contracts, the contents of which were prescribed by regulation. Accordingly, the Committee held that Proprio Direct’s non-refundable payment practices were illegal, caused prejudice to the public and thus breached the Association’s rules of professional ethics. The Court of Québec, noting that REBA was consumer-protection legislation, determined that its interpretation by the Committee was reasonable, as was the Committee’s sanction. The Court of Appeal determined

⁶⁴ *Ibid.*, at para. 57.

⁶⁵ Mullan, *supra* note 54 at 126.

⁶⁶ 2008 SCC 32 [*Proprio*].

⁶⁷ *Supra* note 49.

that the Committee had incorrectly interpreted REBA. In its view, laws should be interpreted consistently with free competition and freedom of contract, and the compensation provisions of the Exclusive Brokerage Contracts should not be held to be mandatory without an explicit statutory prohibition on amendments by the parties. Since Proprio Direct's compensation practices were not unlawful, they did not prejudice the public and the Committee's sanction was unreasonable.

Justice Abella, for the majority of the Supreme Court, allowed the appeal. She relied on an analysis of prior case law and on one of the *Dunsmuir* reasonableness guidelines. She observed that the Court of Appeal's prior jurisprudence, based largely on the Discipline Committee's expertise in matters of professional discipline, had consistently applied a reasonableness standard to the Committee's decisions under two previous versions of REBA - one that provided for a right of appeal and another that comprised a form of privative clause.⁶⁸ Justice Abella did not perform a full standard of review analysis, relying instead on one of the *Dunsmuir* guidelines:

What is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute ... The legislature assigned authority to the Association, through the experience and expertise of its discipline committee – to apply – and necessarily interpret – the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for members of the Association. The question whether Proprio Direct breached these standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association's statutory responsibilities.⁶⁹

She then went through an involved explanation of the relevant statutory and regulatory provisions and concluded that in light of this analysis and the overarching consumer protection objective of REBA, the discipline committee was entitled to come to its decision.

Justice Deschamps began her dissenting judgment by painstakingly demonstrating that, correctly interpreted, the REBA does not prescribe mandatory compensation stipulations. She then focused on the appropriate level of deference owed to the discipline committee. She contended that it was not appropriate for the majority to rely on the Québec Court of Appeal's prior case law because one of the cases dealt with a statute that contained a privative clause and the other dealt with the appropriateness of a penalty – a question different from the issue of statutory interpretation involved in *Proprio*. Though Justice Deschamps conceded that the committee was interpreting its enabling statute, she pointed to the existence of a broad statutory

⁶⁸ *Proprio*, *supra* note 66 at paras. 18-19.

⁶⁹ *Ibid.*, at para. 21.

right of appeal, noted that the Committee's expertise is limited to disciplinary matters, and characterized the question broadly:

Can the Association impose a single model of practice on Québec's real estate brokers? Regardless of which perspective is adopted, the issue is an important one ... likely to affect the future of the brokerage profession in Québec.⁷⁰

Seeing "nothing to warrant showing any deference whatsoever" to the Committee's decision, Justice Deschamps applied a correctness standard.

Canada (Citizenship and Immigration) v. Khosa also illustrates the role of precedent in the standard of review analysis. Khosa was a landed immigrant and citizen of India who was convicted for criminal negligence causing death in an automobile street race. Throughout the criminal proceedings, Khosa admitted to speeding and driving dangerously but denied that he was street racing. He received a conditional sentence of two years less a day, with conditions including house arrest, a driving ban and community service conditions with which he fully complied. The sentencing judge recognized that Khosa had no prior criminal record or driving offenses, had expressed remorse for the consequences of his conduct and had favourable prospects for rehabilitation. In view of his conviction, Canada's immigration authorities issued a removal order against Khosa. He appealed the removal order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, which may allow such appeals if "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."⁷¹ The IAD exercised its discretion with regard to several factors:

- (1) the seriousness of the offense leading to the removal order;
- (2) the possibility of rehabilitation;
- (3) the length of time spent, and the degree to which the individual facing removal is established, in Canada;
- (4) the family and community support available to the individual facing removal;
- (5) the family in Canada and the dislocation to the family that removal would cause; and
- (6) the degree of hardship that would be caused to the individual facing removal to his country of nationality.

A two-member majority of the IAD decided that the last four factors were not compelling for or against relief and focused its decision on the first two factors. It considered that the offense

⁷⁰ *Ibid.*, at para. 67.

⁷¹ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 67(1)(c) [IRPA].

was “extremely serious”, expressed concern over Khosa’s refusal to accept without reservation the finding that he had been street racing and observed that this reflected “a lack of insight into his conduct.” It decided that there was insufficient evidence to determine Khosa’s prospects for rehabilitation but that even if these were good, balancing all relevant factors, special relief was not warranted. The dissenting IAD member would have stayed the execution of the removal order pending further review based in part on evidence of Khosa’s remorse and rehabilitation.

Khosa’s application for judicial review was dismissed by Chief Justice Lutfy of the Federal Court, who found that the IAD’s decision was not patently unreasonable. A majority of the Federal Court of Appeal, applying the reasonableness standard, found that the IAD’s decision was unreasonable because it had fixated on the fact that the offense was related to street racing and had not explained why its views on Khosa’s prospects for rehabilitation conflicted with the findings of the British Columbia courts and evidence of Khosa’s good post-conviction behavior.

Writing for a five-judge majority,⁷² Justice Ian Binnie allowed the appeal and restored the IAD’s decision. Applying a reasonableness standard, Justice Binnie determined that the weight to be given to Khosa’s evidence of remorse and his prospects for rehabilitation, and whether these, alone or in combination with other factors, warranted special relief from a valid removal order, were matters to be resolved by the IAD, not the courts. The IAD’s reasons were both transparent and intelligible and the majority’s decision to deny special discretionary relief did not fall outside the range of reasonable outcomes.⁷³ In determining that reasonableness was the appropriate standard, Justice Binnie noted that the existing jurisprudence “points to the adoption of a reasonableness standard” because lower court decisions favoured either a reasonableness or patent unreasonableness standard and no authority suggested a correctness standard for “IAD decisions under section 67(1)(c) of the IRPA.” However, instead of ending the analysis there, Justice Binnie also conducted a full standard of review analysis, looking at each of the four contextual factors.

What do *Proprio* and *Khosa* teach us about the use of precedent in the standard of review framework? Justice Binnie’s judgment in *Khosa* appears to define the concept of “particular category of question” narrowly, focusing on decisions by a specific tribunal under a specific

⁷² McLachlin C.J. and LeBel, Abella, Charron JJ.

⁷³ *Khosa*, *supra* note 49 at paras. 64-67.

provision. In *Proprio*, Justice Abella appears to view the concept more broadly, relying on prior decisions that adopted a reasonableness standard under a slightly different statute and for a question of a different nature. In the absence of precedent “on all fours” with the case at bar, Justice Abella does not conduct a full standard of review analysis but relies on one or more of the *Dunsmuir* guidelines to justify her adoption of a reasonableness standard. While this approach may significantly shorten the standard of review analysis, it is criticized by her colleague, Justice Deschamps, on the basis that the precedents Justice Abella relies on are distinguishable and not controlling and that she has mischaracterized the nature of the question before the discipline committee and thus relied on the wrong *Dunsmuir* guideline. The lesson for prudent administrative lawyers is perhaps that while courts may welcome precedent-based arguments, such arguments are best supported by a full standard of review analysis. As Ron Goltz observes:

[T]his new approach to administrative law is unlikely to simplify matters for practicing lawyers. Given the potential for a court to disagree with counsel’s submission on matters such as whether the issue has been previously decided, the characterization of the relevant issues as one of fact, law or mixed law and fact, and so on, prudent practitioners will avoid the risk and address all issues with the full standard of review analysis, at least in the alternative.⁷⁴

3. Appellate decisions

In close to 40% of the appellate cases reviewed in the preparation of this paper, the court’s selection of the standard of review was based primarily on existing precedent, making precedent the most important determinant of the standard of review for my sample of cases. A full standard of review analysis was conducted in less than half as many cases. In cases where the courts conducted a standard of review analysis or relied on the *Dunsmuir* guidelines to select the appropriate standard, the nature of the question was most frequently afforded the greatest weight in the analysis. The cases revealed a number of interesting trends and issues relating to the use of precedent.

a) Effect of precedents from other jurisdictions

The Alberta Court of Appeal, reviewing a decision of the Alberta Labour Relations Board to allow a law firm to continue to act for union A despite the firm’s previous retainer with union B (which was now adverse in interest) where union B had previously consented to the firm acting for both clients, determined that an Ontario Divisional Court decision setting the standard of

⁷⁴ Goltz, *supra* note 58 at 259.

review for a labour board's determination of conflict of interest⁷⁵ “while of interest and informative” was “not binding in this jurisdiction, and therefore does not set the standard of review in Alberta in the way contemplated by *Dunsmuir*.”⁷⁶ The Court determined that the setting of rules respecting conflicts of interest of lawyers was a question of law that is of central importance to the legal system as a whole and outside a labour board’s specialized expertise and should be reviewed on a correctness standard.⁷⁷

b) Could *Dunsmuir* perpetuate questionable precedents?

The Supreme Court directs courts to rely on precedents where the standard of review has been determined *in a satisfactory manner*. This underlines the possibility that courts may follow precedent without critically reassessing its accuracy in light of more recent jurisprudence. The decision of the Federal Court of Appeal in *Canadian National Railway v. Canadian Transportation Agency*⁷⁸ arguably illustrates this risk. Section 150(3)(b) of the Canadian Transportation Act provides that revenues for demurrage (charges paid by shippers for exceeding time limits for loading or unloading railcars) are not included in the calculation of a company’s “Western Grain Revenues.” The Court noted that in a 2003 decision involving CP Rail, the Federal Court of Appeal determined that the CTA’s interpretation of this provision and the definition of “demurrage” were to be reviewed on a correctness standard and proceeded to outline the Court’s view of the correct interpretation of that section.⁷⁹ The Court also noted that in 2007, a majority of the Supreme Court held that CTA interpretations of its enabling statute should be reviewed on a standard of reasonableness,⁸⁰ a position consistent with the guideline in *Dunsmuir* that reasonableness should apply to decision makers’ interpretations of their home statutes. Finally, the Court noted that at least one recent decision of the Court of Appeal had

⁷⁵ *Universal Workers Union, Labourers’ International Union of North America, Local 183 v. Ontario (Labour Relations Board)*, (2007) 122 O.A.C. 229 (Div. Ct.). The Ontario court also selected a correctness standard.

⁷⁶ *A.U.P.E. v. U.N.A., Local 168*, 2009 ABCA 33.

⁷⁷ See also *Cousins v. Canada (Attorney General)*, 2008 FCA 226, where the Federal Court of Appeal determined that an applications judge had erred in relying on a Supreme Court precedent as determinative of the standard of review for a decision of the Federal Superintendent of Financial Institutions to decline to require the distribution of a surplus in a partially terminated pension plan. The Court of Appeal noted that: the precedent focused not on the Ontario Superintendent of Financial Institutions but on the Financial Services Tribunal, a body with no equivalent in the federal scheme whose adjudicative role differed from the Superintendent’s primarily regulatory function; the decisions of the Tribunal were subject to a different statutory mechanism of review; and the nature of the question at issue was different.

⁷⁸ 2008 FCA 123 [CNR].

⁷⁹ *Canadian Pacific Railway v. Canadian Transportation Agency*, 2003 FCA 271.

⁸⁰ *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15.

applied a reasonableness standard to the CTA's interpretation of the term "utility crossing" in its enabling statute. The Court nevertheless decided that it would apply a correctness standard:

There is no need to revisit the analysis conducted by this Court in *C.P. Rail, supra*, in order to determine the standard of review applicable to the demurrage issue. The only question which arises with respect to demurrage -- as the submissions of the parties and the reasons of the Agency demonstrate -- is whether the Agency properly understood and applied the reasoning set out in that case. In my respectful view, this Court is better positioned than the Agency to construe its own jurisprudence and I therefore propose to apply a standard of correctness in reviewing this aspect of the Agency's decision.⁸¹

With respect, I believe it would have been appropriate for the Court of Appeal to revisit the standard of review. Where the standard of review determined by precedent is arrived at in a manner that conflicts with subsequent decisions by the same court or by the Supreme Court or that contradicts the guidelines set out by the Supreme Court in *Dunsmuir*, the standard of review analysis should be conducted afresh. The outcome of this analysis for such a technical and policy-infused issue as "the definition of demurrage for the purpose of calculating a company's Western Grain Revenues" would likely have been reasonableness. Moreover, the CTA had argued that its decision -- the calculation of the Western Grain Revenues for CN Rail -- was actually consistent with the Federal Court's previous interpretation of the *Canadian Transportation Act*. The question before the Court should arguably have been characterized as a question of mixed fact and law: the application of the legal standard set out in section 150(3) of the *Act* (as interpreted by the Federal Court's 2003 *CP Rail* decision) to a new factual matrix. Such a question would attract a reasonableness standard and the Federal Court should have asked whether the CTA's application of the law to the facts was reasonable.

Similarly, in *Stewart v. New Brunswick (Workplace Health, Safety & Compensation Commission)*,⁸² the New Brunswick Court of Appeal relied on past precedents to determine that the appropriate standard of review for the Commission's interpretation of the word "accident" in the *Federal Government Employees Compensation Act (GECA)*⁸³ was correctness. The precedents had essentially based their selection of a correctness standard on a "general rule" that it is the appropriate standard for a statutory appeal on a question of law. This rule conflicts with the guideline expressed in *Dunsmuir* that deference will usually result where a tribunal is

⁸¹ *CNR, supra* note 78 at para. 23.

⁸² 2008 NBCA 45.

⁸³ R.S.C. 1985, c. G-5.

interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. The Court of Appeal should have revisited the standard of review analysis and considered whether the *GECA*, while not the Commission's enabling statute, was a statute with which the Commission had particular familiarity.

c) “Presumptive force” of the *Dunsmuir* guidelines

The decision of the Federal Court of Appeal in *Idahosa v. Canada (Minister of Public Safety & Emergency Preparedness)*⁸⁴ is noteworthy for its views on the role of the *Dunsmuir* guidelines in establishing the standard of review. *Idahosa* involved a review of the decision of an immigration enforcement officer that a child custody order by an Ontario Court prohibiting the removal of Idahosa's children from Canada did not preclude the enforcement of a removal order against Idahosa herself. Evans J.A., writing for the Court, recognized that this decision involved the interpretation of a provision of the *Immigration and Refugee Protection Act* – the officer's “home statute” and that *Dunsmuir* established a “presumption” that such interpretations were normally reviewable on the standard of reasonableness.⁸⁵ However, he concluded that other circumstances rebutted this presumption and that a correctness standard applied. First, the officer had limited expertise in legal interpretation, especially regarding the issues involving international law and *Charter* rights raised in the application. Second, the statutory provision at issue could be characterized as demarcating which of two specialized tribunals should decide a matter (the Ontario court or the federal enforcement officer). According to another *Dunsmuir* guideline, the interpretation of such provisions is to be reviewed on a correctness standard.

C. Is deference appropriate on administrative decision makers' decisions on questions of law in the presence of a statutory right of appeal?

As noted earlier in this paper, Justice Deschamps clearly states that “deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.”⁸⁶ Even Justice Binnie, in discussing the circumstances in which a

⁸⁴ 2008 FCA 418.

⁸⁵ *Ibid.*, at para. 19.

⁸⁶ *Dunsmuir*, *supra* note 1 at para. 163.

reasonableness standard would apply to the review of administrative decisions, appears to exclude cases where “there is a full statutory right of appeal to the courts.”⁸⁷

1. Academic comment

Given these statements and the majority’s silence on this issue, several observers⁸⁸ wondered whether the court was wavering on the position it had adopted in *Pezim v. British Columbia (Superintendent of Brokers)*⁸⁹ and *Canada (Director of Investigation and Research) v. Southam Inc.*⁹⁰ that, even in the presence of a statutory right of appeal and in the absence of a privative clause, deference to decisions of specialized tribunals on matters which fell squarely within their expertise is warranted on the basis of the concept of specialization of duties. Indeed, these decisions had marked the ascendancy of expertise as the “key determinant of standard of review.”⁹¹ Moreover, it was remarked that expertise was no longer described by the court as the most important contextual factor.⁹²

2. Supreme Court developments

Any doubts about the Court’s commitment to the principle that deference will be owed an expert tribunal’s decision on a question falling within its expertise in the face of a statutory right of appeal were swept away by the majority’s decision in *Khosa*. In a concurring judgment, Justice Rothstein mounted a frontal assault on the principle of deference based on specialization of duties, arguing that it is inconsistent with the stated objective of standard of review analysis – to ground courts’ decisions to intervene in administrative decision-making in legislative intent:

[W]here a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this via a privative clause (...)

In the administrative context, unlike the appellate context, the legislature may decide that the administrative decision maker has superior expertise relative to a reviewing court, including on legal questions. It signals this recognition by enacting a strong privative clause. It is in these cases that the court must undertake a standard of review analysis to determine the appropriate level of deference that is owed to the tribunal. It is not for the

⁸⁷ *Ibid.*, at para. 135.

⁸⁸ Mullan, *supra* note 54 at 130-1; Jones, *supra* note 58 at 25.

⁸⁹ [1994] 2 S.C.R. 557.

⁹⁰ *Supra* note 8.

⁹¹ Audrey Macklin, “Standard of Review: The Pragmatic and Functional Test” in Colleen Flood & Lorne Sossin, eds., *Administrative Law in Context* (Emond Montgomery, Toronto: 2008) 197 at 209.

⁹² Mullan *supra* note 54 at 125; Goltz, *supra* note 58 at 259; Jacobs, *supra* note 24 at 16.

court to impute tribunal expertise on legal questions, absent a privative clause and, in so doing, assume the role of the legislature to determine when deference is or is not owed.⁹³

In his view, the legislatures that create administrative decision makers – not the courts – were best placed to assess the expertise of decision makers:

[They] are better able to consider the relative qualifications, specialization and day-to-day workings of tribunals, boards and other decision makers which they themselves have constituted. Where the legislature believes that an administrative decision maker possesses superior expertise on questions that are normally within the traditional bailiwick of courts (law, jurisdiction, fraud, natural justice, etc.), it can express this by enacting a privative clause.⁹⁴

While Justice Rothstein welcomed the *Dunsmuir* Court's decision to re-emphasize the role of privative clauses in the standard of review analysis and to deemphasize that of expertise, he suggested that the Court must go further by recognizing that "privative clauses and tribunal expertise are two sides of the same coin."⁹⁵

Justice Binnie, for the majority, decried Justice Rothstein's position as an "effort to roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess."⁹⁶ As Justice Binnie points out, the Court's doctrine of deference based on specialization of duties recognizes that there may sometimes be several valid interpretations of a decision maker's enabling statute. The question, then, is not which is the correct interpretation, but which of the many possible interpretations is the most appropriate. On this latter question, deference is owed to administrative decision makers because they can be expected to have a better grasp of the impact of a particular interpretation on the practical implementation of the legislative scheme and on the achievement of the legislative objectives.⁹⁷ Significantly, Justice Deschamps, who agreed with certain parts of Justice Rothstein's judgment (see the section below on judicial review statutes) did not express support for that portion of his judgment urging a return to a standard of review analysis focused on legislative intent as ascertained strictly from the presence or absence of a privative clause.

⁹³ *Khosa*, *supra* note 49 at paras. 90-91.

⁹⁴ *Ibid.*, at para. 95.

⁹⁵ *Ibid.*, at para. 96.

⁹⁶ *Ibid.*, at para. 26.

⁹⁷ *Ibid.*, at para. 25.

D. Implications of the resurrection of the “true jurisdictional question”

The role of the concept of “jurisdiction” in the development of the law of substantive review is well known and will not be described in detail here.⁹⁸ It is sufficient to note that the term “jurisdiction” stands for these ideas: that state officials can only exercise powers that are derived from a constitutionally proper statutory source or within the limits of prerogative power; and that superior courts have the constitutional responsibility to ensure that officials make decisions within the scope of these limits (within jurisdiction) and to intervene when officials exceed the bounds of their jurisdiction. An attractively simple concept, the exact meaning of jurisdiction has always proved elusive. In principle, a statutory authority could overstep the boundaries of its statutory powers and “lose” or “exceed” jurisdiction and attract the intervention of the superior courts if it erroneously determined any question of law or fact. However, Canadian courts did not accept this broad concept of jurisdiction. Instead, they distinguished between two categories of questions confronting statutory authorities. First, there were questions within the authorities’ jurisdiction, over which Parliament intended them to have primary, if not exclusive, authority to decide. Second, there were questions that “affected” or “went to” their authority, over which courts were to have the final word.⁹⁹ How, then, could reviewing courts distinguish between questions that fell within a statutory authority’s jurisdiction and those that affected it? For many years, the answer depended on how the court classified the particular question to be answered by the authority: was it a question that was preliminary to or a prerequisite for the exercise of further powers? This approach led to very intrusive judicial review of the decisions of expert tribunals, particularly labour boards, on questions relating to the interpretation of their enabling statute, arguably infused with policy considerations.¹⁰⁰ In *CUPE v. N.B. Liquor*, the Supreme Court rejected this “classification” approach as unhelpful and warned courts against branding as “jurisdictional, and therefore subject to broader curial review that which may be doubtfully

⁹⁸ For a fuller treatment of this subject, see Gerald P. Heckman, Review of *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan*, Grant Huscroft & Michael Taggart, eds. (2007), 86 Can. Bar Rev. 163 at 164-167.

⁹⁹ This view of substantive review rested on acceptance of certain fundamental constitutional tenets: Parliament may assign or delegate primary responsibility for the exercise of state power on statutory authorities; and the rule of law does not require the courts to have the final word on all questions of law; see David J. Mullan, *Administrative Law* (Irwin Law, Toronto: 2001) at 55.

¹⁰⁰ See *Parkhill Bedding and Furniture Ltd. v. International Molders, Etc. Union* (1961), 26 D.L.R. (2d) 589 (Man. C.A.); *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425.

so.”¹⁰¹ In the years following that seminal decision, the Court abandoned its formalistic approach to determining whether the legislature intended to give a statutory authority primary or exclusive authority to answer the specific question under review. Instead, it adopted an approach whose overall aim remained that of discerning legislative intent “keeping in mind the constitutional role of the courts in maintaining the rule of law,”¹⁰² but that paid “more attention to statutory purposes and structures and the sense they conveyed of the relevant tribunal’s expected areas of competence or expertise.”¹⁰³ This was the pragmatic and functional approach.

From its near-death in *Pushpanathan*, where Justice Bastarache defined a question “going to jurisdiction” as “descriptive of a provision for which the proper standard of review is correctness based upon the outcome of the pragmatic and functional analysis”, the true question of jurisdiction has slowly made a comeback, beginning with the review of the validity of municipal by-laws.¹⁰⁴ The majority in *Dunsmuir* expressly stated that it “neither wish[es] nor intend[s] to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in the area for many years”, reiterated Chief Justice Dickson’s caution in *CUPE* and noted that true questions of jurisdiction “will be narrow.”¹⁰⁵ As Mullan notes, however, the Court’s statement that “true jurisdictional questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter” could accurately describe the preliminary question doctrine followed by interventionist courts in the period preceding *CUPE*.¹⁰⁶ In contrast, other observers have noted that *Dunsmuir’s* clarification of the nature of true jurisdictional questions may have narrowed the application of the correctness standard.¹⁰⁷

1. Appellate decisions

My review of appellate decisions reveals that some appellate courts are heeding the Supreme Court’s warning to view the category of true questions of jurisdiction narrowly. However, it also

¹⁰¹ *CUPE, Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227.

¹⁰² *Dr. Q*, *supra* note 15 at para. 26.

¹⁰³ Mullan, *supra* note 99 at 63.

¹⁰⁴ *United Taxicab Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 SCR 485.

¹⁰⁵ *Dunsmuir*, *supra* note 1 at para. 59.

¹⁰⁶ Mullan, *supra* note 54 at 129-130.

¹⁰⁷ Andrew Wray & Christian Vernon, “Dunsmuir Update” (The Six-Minute Administrative Lawyer, Toronto, Ontario, 24 February 2009) at 19 [on file with author].

reveals that *Dunsmuir's* definition of true jurisdictional questions has not held back appellate courts who take a broader view of this category. The following cases illustrate my observations.¹⁰⁸

In *Hibernia Management & Development Co. v. Canada-Newfoundland Offshore Petroleum Board*,¹⁰⁹ the Newfoundland Court of Appeal considered a challenge by Hibernia and Petro Canada to the Board's issuance of guidelines establishing a Research and Development Fund, requiring the companies to meet specific levels of R&D expenditures and making compliance with these guidelines a condition to continued production authorization. The Board issued the guidelines when it determined that the companies had not been making adequate R&D expenditures. The companies argued that the board did not have the authority to publish guidelines setting R&D requirements that differed from those contemplated in the terms of the initial project approvals. They claimed that this was a true question of jurisdiction requiring a correctness standard, since it related to the scope of the Board's authority. Barry J.A., concurring with Welsh J.A., rejected this argument in extensive reasons. Adverting to the lack of guidance in *Dunsmuir* regarding the indicia of true jurisdictional questions,¹¹⁰ Justice Barry noted that both the *Newfoundland Atlantic Accord Implementation Act* and the underlying Accord itself expressly entrusted the Board with the power to approve companies' R&D expenditures and issue guidelines in this respect.

In characterizing the issue as a challenge to the authority of the Board to issue mandatory guidelines and to require oil companies to spend on research and development allegedly unrelated to their specific projects, the appellants seek to frame the issues in terms of whether authority to decide exists. But in essence they are questioning the result of the Board's exercise of its authority – they object to the content of the Guidelines rather than to the Board's making of them. As decided in *Voice Construction*, the proper approach is to ask: did the legislatures intend the Board or the courts to decide whether particular guidelines might be adopted by the Board? Every issue in every judicial review application could be characterized as an inquiry into whether the legislature authorized the particular result arrived at by the tribunal. To require every tribunal to be correct in answering these issues would be to cease showing deference to tribunal decisions.

¹⁰⁸ See also *Alberta v. A.U.P.E.*, 2008 ABCA 258 at para. 29. A board of arbitration's decision to determine whether a probationary employee was dismissed in bad faith was not a jurisdictional question. The collective agreement gave the board jurisdiction to determine the arbitrability of grievances. In doing so, the board exercised "its core jurisdiction in interpreting its own statute, the collective agreement and labour law cases", suggesting a deferential standard. But see *Smyth v. Perth & Smith Falls District Hospital*, 2008 ONCA 794 at paras. 14-17: the scope of an arbitration agreement is a jurisdictional issue as arbitrators must address the issues and only the issues referred to them in the arbitration agreement.

¹⁰⁹ 2008 NLCA 46 [*Hibernia*].

¹¹⁰ *Ibid.*, at para. 119.

Bastarache and Lebel JJ. made clear in *Dunsmuir* that this was not their intention. Except for the relatively rare cases described by them, the proper approach is to analyze the result of a tribunal's exercise of discretion in terms of whether it “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” (*Dunsmuir*, para. 47.)¹¹¹

He observed that the Board’s power to issue guidelines could be characterized as legislative, and by analogy to the municipal by-law cases, subject to a correctness standard. However, a close inspection of the statute revealed that this was not the legislature’s intent:

... [C]lause 21 of the Accord, dividing decisions on offshore resources between the federal Parliament, government or ministers, the Newfoundland and Labrador legislature, government or ministers and the Board, adds a novel feature to the normal grant of authority to enact subordinate legislation. Clause 21(d) provides for Board policy-making regarding benefits under clause 33(a), subject to joint directions from ministers of both governments. This convinces me that the Accord and legislative scheme contemplates the Board should decide whether adoption of a particular guideline regarding benefits is within the authority granted by the legislation to the Board. Ministers may intervene to jointly direct otherwise, if they conclude the Board has gone too far in the exercise of its authority. This legislative framework indicates courts should show some deference to the policy-making discretion conferred on the Board to make guidelines regarding benefits, including research and development.¹¹²

In *Lienaux v. Barristers Society (Nova Scotia)*,¹¹³ the Nova Scotia Court of Appeal reviewed the decision of the Nova Scotia Barristers Society disciplinary panel to discipline Lienaux, a lawyer engaged as a self-represented litigant in a legal dispute with a former business partner, for accusing four Nova Scotia judges of favouring his opponent because they were all part of Halifax’s “old boy network.” Lienaux argued that under the relevant provision of the *Legal Professions Act*, the Barristers Society could only sanction a member “during or after an investigation” and that by sanctioning him without investigating his allegation of an “old boy network” and allowing him to call evidence establishing his claim, the Society had committed a jurisdictional error. The Court of Appeal declined to view this issue as jurisdictional:

[T]his issue, properly framed, involves neither a legal nor a true jurisdictional question. I say this because nobody would seriously question the Society’s fundamental jurisdiction to discipline its members and, to this end, conduct whatever investigation it deems warranted. Thus issues that may tangentially touch on jurisdiction do not necessarily command a correctness standard ...

The Court then quoted the *Dunsmuir* majority’s caution that “jurisdiction” was a narrow concept, and continued:

¹¹¹ *Ibid.*, at para. 121.

¹¹² *Ibid.*, at para. 123.

¹¹³ 2009 NSCA 11 [*Lienaux*].

In reality, this issue involves the Panel's statutory right to control its own process under the enabling legislation. When deciding the extent of its investigation, the Panel was therefore exercising its discretion and interpreting its enabling statute. This calls for deference. (*Dunsmuir*, para. 53-54; Ryan, para. 42.) Considering the overall guidance offered by Ryan and the true nature of this question, the standard of review arrows point conclusively to reasonableness.¹¹⁴

The Court ultimately dismissed this ground of review:

It appears, by his submission, that Mr. Liénau would have the Nova Scotia Barristers' Society launch a full inquiry into Nova Scotia's justice system simply because, (a) our justice system has been openly criticized in the past, and (b) four Nova Scotia judges have recently ruled against him. Again, aside from baseless assertions, he offers absolutely nothing to connect the four named judges to Mr. Campbell. The fact that he misguidedly believes there is a link is not evidence of a connection. It was more than reasonable for the Panel to proceed as it did.¹¹⁵

A broader view of the concept of jurisdictional question is illustrated in a recent decision of the Federal Court of Appeal.¹¹⁶ In *Canada (Attorney General) v. Watkin*,¹¹⁷ Watkin, the president and CEO of a Canadian-based food/drug manufacturer, claimed that Health Canada had discriminated against him and others associated with his company on the basis of ethnic and national origin by subjecting his company to higher levels of enforcement scrutiny than "Asian businesses" or similar companies managed by persons of First Nations descent. This, he claimed, was a violation of the *Canadian Human Rights Act* (CHRA), which makes it a discriminatory practice to differentiate adversely in relation to any individual on a prohibited ground of discrimination "in the provision of goods, services, facilities or accommodation customarily available to the general public."¹¹⁸ Health Canada challenged the Canadian Human Rights Commission's jurisdiction to consider the complaint. The Commission decided the complainant had standing to bring the complaint and that the matter was within its jurisdiction. Health Canada sought judicial review of this decision.

¹¹⁴ *Ibid.*, at paras 28-29.

¹¹⁵ *Ibid.*, at para. 32.

¹¹⁶ See also *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 199 at para. 31 where the Court characterized the issue whether there was an implicit statutory power in the *Canada Transportation Act* to extend a statutory six-month time limitation for the completion of the negotiations a railway company must undertake before discontinuing the operation of a railway line as a true question of jurisdiction. Without a statutory power to extend, the agency could not dispose of an application filed outside the statutory timelines. But compare to *Maystar General Contractors Inc. v. P.A.T., Local 1819*, 2008 ONCA 265, where the Ontario Court of Appeal disapproved of the Divisional Court's application of a correctness standard to review the decision of the Ontario Labour Relations Board that it had no authority under the *Labour Relations Act* to consider late filed material.

¹¹⁷ 2008 FCA 170 [*Watkin*].

¹¹⁸ R.S.C. 1985, c. H-6, s. 5(b).

Writing for the Court, Noël J.A. characterized the issue before the court as “whether government actions which are not ‘services’ within the commonly accepted meaning can nevertheless be treated as ‘services’ under section 5.”¹¹⁹ Arguably, such a question could be characterized in several different ways. It could be described as a question requiring the decision maker to interpret a term of its enabling statute, which would ordinarily call for a reasonableness standard. The Commission could also be said to possess a considerable degree of expertise in the interpretation of this and other provisions of the CHRA. As well, the proper interpretation of “services” in s. 5 of the CHRA and whether it should extend beyond the commonly accepted meaning of that word could be described as involving policy dimensions and choices which could be informed by the Commission’s experience and expertise in human rights protection. Indeed, the Commission, in argument, relied on Tribunal and court decisions to press for a broad interpretation of the term. The question could also be characterized as one of general law of central importance to the legal system as a whole and outside the Commission’s specialized expertise, thus deserving of review on a correctness standard, a description more in line with the views expressed by the Supreme Court in *Canada (Attorney General) v. Mossop*.¹²⁰ The Court of Appeal opted to categorize the question as jurisdictional:

In my view, Health Canada, when enforcing the *Food and Drugs Act* in the manner complained of is not providing “services, ... customarily available to the general public” within the meaning of section 5. The actions in question are coercive measures intended to ensure compliance. The fact that these measures are undertaken in the public interest does not make them “services.”

I reach this conclusion applying a standard of correctness. As noted, the issue whether the actions complained of are “services” has not been addressed in the present proceedings so that there is no reasoning to which I could defer. In any event, this is a “true question of jurisdiction or *vires*” which must be reviewed on a standard of correctness (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.), para. 59).

The Court’s decision is somewhat reminiscent of the decision of the Supreme Court in *Bell v. Ontario (Human Rights Commission)*¹²¹ to classify as jurisdictional whether a property in respect to which rental discrimination was being alleged was a “self-contained dwelling unit” to which the *Ontario Human Rights Code* applied. The Supreme Court’s stance in *Bell* was much

¹¹⁹ *Watkin*, *supra* note 117 at para. 25.

¹²⁰ [1993] 1 S.C.R. 554.

¹²¹ [1971] S.C.R. 756.

criticized as inappropriately interventionist.¹²² David Mullan, presciently perhaps, noted that the *Dunsmuir* court's definition of true question of jurisdiction could give new life to the thinking and philosophies underlying cases like *Bell*.¹²³ In *Watkin*'s specific context, characterizing the issue as jurisdictional may not really make a difference, since the Court would also arrive at a correctness standard by characterizing it as a question of law of general importance. Assume, however, that the same issue were decided by the Human Rights Tribunal of Ontario and that its interpretation of this section were protected by a privative clause stipulating review on a patent unreasonableness standard.¹²⁴ By characterizing the question as jurisdictional, a reviewing court could sidestep the privative clause and review the tribunal's interpretation on a correctness basis. By contrast, such a result would not in my view automatically follow from the court's characterization of the question simply as a question of law.

E. What does the new reasonableness standard look like?

There are two interrelated sub-questions here. First, does the new reasonableness standard comprise a range or spectrum of degrees of deference? Second, how will courts conduct reasonableness review? In other words, when will a decision be reasonable or unreasonable?

1. Academic comment

Many observers have accepted Justice Binnie's concurring opinion that the "judicial sensitivity to differing levels of respect (or deference) required in different situations which was accommodated in pre-*Dunsmuir* days by the existence of an intermediate and highly deferential standard of review can now only be met by multiple levels of deference within the single remaining reasonableness standard."¹²⁵ Indeed, Mullan argues that this result is dictated by the majority judgment itself.¹²⁶ The majority has directed that past precedent should govern when the *degree of deference* to be accorded has already been satisfactorily determined for a certain category of questions. Accordingly, where courts have previously determined that a patent

¹²² See P. W. Hogg, "The Jurisdictional Fact Doctrine In the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 19 Osgoode Hall L.J. 203.

¹²³ Mullan, *supra* note 54 at 129-130.

¹²⁴ *Ontario Human Rights Code*, R.S.O. 1990, c. H.19, s. 45.8.

¹²⁵ *Dunsmuir*, *supra* note 1 at para. 139. See Mullan, *supra* note 54 at 134 *et seq.*; Woolley, *supra* note 39 at 266-7.

¹²⁶ Mullan, *ibid.*, at 134.

unreasonableness standard was appropriate, the post-*Dunsmuir* reasonableness standard should require the same high degree of deference, a result consistent with the majority's assurance that "the move towards a single reasonableness standard does not pave the way for more intensive review by courts."¹²⁷ It is thus logical to conclude, as Mullan does, that "reasonableness is a standard that admits of varying levels (of) intensity of review depending on the context."¹²⁸ If this is the case, *Dunsmuir* has not really simplified the task of ascertaining the appropriate degree of deference; it has simply left it for a later stage in the analysis:

Reviewing courts should first determine whether the appropriate standard is correctness or unreasonableness. If the latter, the next step is to determine where along the spectrum of deference engaged by the concept of unreasonableness, the court's approach to its task should come to rest.¹²⁹

Thus, courts will still have to "engage in the same or a similar kind of balancing exercise that preoccupied the courts at the initial stage of the former three, discrete standards test" but this time with a more "nuanced and variegated" range of possibilities.¹³⁰

Related to the nature of the reasonableness standard is the second question of how the standard is to be applied. The majority states that "a court conducting review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process articulating the reasons and to outcomes."¹³¹ With regard to the process articulating reasons, the majority states that correctness is concerned mostly "with the existence of justification, transparency and intelligibility within the decision-making process."¹³² With regard to outcomes, the majority explains that reasonableness "is concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."¹³³ In Mullan's view, the majority judgment appears to propose a multi-stage process. First, the reviewing court looks at the tribunal's reasons "to see whether they are coherent in the sense of presenting a reasoned and reasonable articulation of the conclusion reached."¹³⁴ If the tribunal's reasons are lacking in this respect, the reviewing court must "consider any other arguments

¹²⁷ *Dunsmuir*, *supra* note 1 at para. 48.

¹²⁸ Mullan, *supra* note 54 at 134. See also Woolley, *supra* note 39 at 266.

¹²⁹ Mullan, *ibid.*, at 135.

¹³⁰ *Ibid.*

¹³¹ *Dunsmuir*, *supra* note 1 at para. 47.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Mullan, *supra* note 54 at 136.

(either advanced by counsel or, perhaps also, developed by the court) that might justify the decision by reference to a reasonableness standard.”¹³⁵ This latter requirement flows from the majority’s endorsement of Professor David Dyzenhaus’ concept of “deference as respect,” which requires of courts “a respectful attention to the reasons offered or *which could be offered* in support of the decision.”¹³⁶ It is also necessary for the review of “highly discretionary, policy decision-making by statutory and prerogative authorities that do not act in an adjudicative fashion” and for which statute or common law procedural fairness may not require reasons or require only minimal reasons.¹³⁷ In *Khosa*, Justice Binnie comments on the *Dunsmuir* Court’s reference to reasons which could be offered, but only to state that it should not be taken “as diluting the importance of giving proper reasons for an administrative decision.”¹³⁸

Mullan is unsure of whether, having decided that the reasons present a reasoned and reasonable articulation of the decision maker’s conclusion, the reviewing court must nevertheless proceed to “go on and ask the further question whether, in isolation from the reasons provided, the outcome can be justified as reasonable in the sense of coming within what the reviewing court regards as an acceptable range of results by reference to its own assessment of the matter.”¹³⁹ Laverne Jacobs suggests that judicial review of an administrative decision to test its justification, transparency and intelligibility “allows for a much more searching review of an administrator’s decisions than the patent unreasonableness standard” and notes that “in situations such as findings of fact or credibility, the revised standard of reasonableness does not acknowledge or make any room for the advantage that an original administrative decision maker has in seeing testimony given firsthand.”¹⁴⁰ I disagree with this assessment. In *Dr. Q*, the Supreme Court faulted the reviewing judge for reviewing a discipline committee’s findings of fact and credibility on a correctness basis rather than a reasonableness standard. The court made clear that in reviewing findings of fact on a reasonableness standard, a judge’s view of the

¹³⁵ *Ibid.*

¹³⁶ *Dunsmuir*, *supra* note 1 at para. 48.

¹³⁷ Mullan, *supra* note 54 at 133.

¹³⁸ *Khosa*, *supra* note 49 at para. 63.

¹³⁹ Mullan, *supra* note 54 at 136.

¹⁴⁰ Jacobs, *supra* note 24 at 26.

evidence was “beside the point”; her role was to ask if the first instance decision maker’s conclusions had “some basis in the evidence.”¹⁴¹

2. Supreme Court developments

Have subsequent Supreme Court decisions provided further guidance on the nature of the reasonableness standard and how it should be applied? Does reasonableness admit of varying degrees or levels of deference? In *Lake*, the Court was asked to review the exercise by the Minister of Justice of a broad discretion to order a fugitive’s surrender for extradition to the United States. *Lake* argued that the questions of whether surrender was a justified limit on his section 6(1) mobility rights and whether it infringed his section 7 rights should be reviewed on a correctness standard because they dealt with his *Charter* rights. In dismissing this argument, the unanimous Court discussed in significant detail the polycentric and policy-laden nature of the Minister’s decision.¹⁴² It noted that in assessing whether the infringement of section 6(1) was justified, the Minister had to consider the possibility of prosecution in Canada and the interest of the foreign state in prosecuting the fugitive on its own territory:

Accordingly, the Minister’s assessment of whether the infringement of s. 6(1) is justified rests largely on his decision whether Canada should defer to the interests of the requesting state. This is largely a political decision, not a legal one. The legal threshold for finding it unacceptable is evidence that the decision not to prosecute in Canada was made for improper or arbitrary motives. This leaves room for *considerable deference* to the Minister’s conclusion that the infringement of s. 6(1) is justified.¹⁴³

Reflecting on past jurisprudence involving the review of such decisions, the Court observed that:

As is evident from this Court’s jurisprudence, to ensure compliance with the Charter in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister’s discretion will be limited to exceptional cases of “real substance” reflects the breadth of the Minister’s discretion; the decision should not be interfered with unless it is unreasonable ...¹⁴⁴

I would agree with Ron Goltz’s assessment that “the use of such language would seem to imply that varying amounts of deference do in fact exist under the banner of reasonableness.”¹⁴⁵ It is also significant that in respect of *Lake*’s section 7 argument, the Court relies on its decision in *Suresh*, where it found that a minister’s decision whether a refugee faced a substantial risk of

¹⁴¹ *Dr. Q*, *supra* note 15 at para. 41.

¹⁴² See Jacobs, *supra* note 24 at 24.

¹⁴³ *Lake*, *supra* note 55 at para. 37 [emphasis added].

¹⁴⁴ *Ibid.*, at para. 34.

¹⁴⁵ Goltz, *supra* note 58 at 264.

torture upon deportation was a “fact-driven inquiry involving the weighing of various factors and possessing ‘a negligible legal dimension’” and was thus to be reviewed on the patent unreasonableness standard.¹⁴⁶

In *Khosa*, Justice Binnie, for the majority, describes reasonableness using language that could suggest that the standard does *not* comprise a spectrum of degrees of deference:

Reasonableness is a *single standard* that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within “a range of possible, acceptable outcomes which are defensible in respect of the facts and law”... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of the preferable outcome.¹⁴⁷

Indeed, Justice Rothstein, in his concurring judgment, interprets his colleague’s words in this way. Noting the majority’s concern with the perceived rigidity of statutory standards of review in applying to a broad range of different decision makers, he observes that the *Dunsmuir* framework itself is no paradigm of flexibility:

The potential flexibility of the contextual common law analysis is already limited in the post-*Dunsmuir* world of two standards. Regardless of what type of decision makers involved, whether a cabinet minister or an entry-level *fonctionnaire* (para. 28), the *Dunsmuir* analysis can only lead to one of two possible outcomes: reasonableness or correctness. And, as the present majority makes clear, these are single standards, not moving points along a spectrum (para. 59).¹⁴⁸ [Underlining added.]

I do not think this is a fair interpretation of Justice Binnie’s words. Though reasonableness is clearly a “single standard”, Justice Binnie’s observation that its “colour” depends on context seems to indicate that context, including the nature of the question, the presence of a privative clause, the purpose of the decision maker in light of its enabling legislation and the decision maker’s expertise, will have an impact on the application of the reasonableness standard. The most likely vehicle for context to do its work is in the Court’s requirement that a reasonable decision fall within a “range of possible, acceptable outcomes ... defensible in respect of the facts and law.” Indeed, in Justice Binnie’s view, the majority and dissent came to opposing views of the reasonableness of the IAD’s decision to deny Khosa’s humanitarian and compassionate

¹⁴⁶ *Lake, supra* note 55 at para. 39.

¹⁴⁷ *Khosa, supra* note 49 at para. 59.

¹⁴⁸ *Ibid.*, at para. 108.

appeal because Justice Fish, the dissenting judge, took “a different view” than he did of “the range of outcomes reasonably open to the IAD in the circumstances of this case”:

My view is predicated on what I have already said about the role and function of the IAD as well as the fact that Khosa does not contest the validity of the removal order made against him. He seeks exceptional and discretionary relief that is available only if the IAD itself is satisfied that “sufficient humanitarian and compassionate considerations warrant special relief.” The IAD majority was not so satisfied. Whether we agree with particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges.¹⁴⁹

What Justice Binnie had “already said” about the role and function of the IAD referred to his fulsome analysis of the third and fourth contextual factors of the standard of review analysis: the purpose of the IAD as determined by its enabling legislation and the nature of the question before the IAD. There, he considered:

- the exceptional nature of the relief the IAD is empowered to grant;
- the highly discretionary nature of the IAD's determination, allowing the IAD to determine what constitutes humanitarian and compassionate considerations as well as their sufficiency in a particular case;
- the fact-based and policy-driven nature of the IAD's assessment; and
- the fact that the IAD, as first-instance decision maker, had the advantage of conducting the hearings and assessing the evidence presented, including the respondent's testimony.¹⁵⁰

It is therefore clear that Justice Binnie relied on these contextual factors not only to select reasonableness as the appropriate standard, but also in determining whether the decision was reasonable: i.e., in determining the range of reasonable outcomes and whether the IAD's decision fell within this range.

Justice Binnie also reviewed the IAD's majority and dissenting reasons and determined that they met the requirements of justification, transparency and intelligibility because:

- they disclosed with clarity the considerations in support of both points of view;
- they considered the appropriate factors (endorsed in a previous decision of the Supreme Court);
- they reviewed the evidence and attributed significant weight to the respondent's evidence of remorse and prospects for rehabilitation;
- they came to their own conclusions based on their appreciation of the evidence.¹⁵¹

¹⁴⁹ *Ibid.*, at para. 62.

¹⁵⁰ *Ibid.*, at paras 56-58.

¹⁵¹ *Ibid.*, at paras 64-66.

Ultimately, Justice Binnie concluded that “in light of the deference properly owed to the IAD under s. 67(1)(c) of the IRPA, I cannot, with respect, agree with my colleague Fish J. that the decision reached by the majority in this case to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes.”¹⁵² Given the purpose of the tribunal and the nature of the question, the range of reasonable decisions was broad. A reasonable decision would consider appropriate factors and weigh these factors based on the decision maker’s assessment of the evidence before it. Justice Binnie reviewed the reasons to ensure that the IAD’s decision fell within this range and, finding that it did, left it undisturbed.

3. Appellate decisions

Canadian appellate courts have been struggling with the question of how the new single reasonableness standard should be defined and applied to administrative decisions in no small part due to the little guidance offered on this question in *Dunsmuir* and in subsequent Supreme Court decisions applying the new framework. However, the courts are gradually finding their way and several trends have emerged in the case law.

a) Is there a spectrum of levels of deference within the reasonableness standard?

The Ontario Court of Appeal was the first appellate court to reject the proposition that varying degrees of deference apply within the reasonableness standard. In *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*,¹⁵³ the Court reviewed the decision of the WSIAT to dismiss Mills’ requests for a permanent disability assessment on the basis that there was no causal relationship between his current back problems and a work injury he had suffered in 1979. The Ontario Divisional Court had set aside the Tribunal’s decision, finding that there was nothing in the record justifying the Tribunal’s rejection of a medical opinion presented by Mills’ physician. Rouleau J.A., for the Court, dismissed the Tribunal’s claim that the reasonableness standard contained varying degrees of deference:

18 I understand the majority in *Dunsmuir* to be referring now to only two degrees of deference, correctness, where no deference is accorded, and reasonableness, where

¹⁵² *Ibid.*, at para. 67.

¹⁵³ 2008 ONCA 436 [*Mills*].

deference is accorded. It is not necessary or appropriate to then assess the degree of deference within the reasonableness standard.

19 In my view, by collapsing the patently unreasonable standard and the reasonable standard, the majority has not set aside the court's earlier decision in *Ryan v. Law Society (New Brunswick)*, nor has it signalled that courts must now puzzle over the degree of deference to give to a tribunal within the reasonableness standard. The existence of varying degrees of deference within the single reasonableness standard suggests that a decision made by a tribunal will be found to be unreasonable if the court accords the tribunal a low degree of deference but that same decision will be found to be reasonable if the court decides to accord the tribunal a high degree of deference. I do not read the decision of the majority in *Dunsmuir* as encompassing any such approach.

Justice Rouleau cited the *Dunsmuir* Court's view that it was difficult if not impossible to distinguish between a reasonable and patent unreasonable decision and continued:

21 The "revised system" established in *Dunsmuir* was designed in part to make the approach to judicial review of administrative decisions "simpler and more workable" (para. 45). An analysis of the varying degrees of deference to be accorded to the tribunal within the reasonableness standard, as submitted by the appellant, fails to comply with this objective.

22 My conclusion does not signal that factors such as the nature and mandate of the decision maker and the nature of the question being decided are to be ignored. Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

23 My interpretation on this issue is strengthened by the majority description of "reasonableness." The description provided by the majority did not articulate varying degrees of deference, but instead referred simply to a deferential standard that mandates respect for the "decision-making process of adjudicative bodies with regard to both the facts and the law." *Dunsmuir* at para. 48. The concept of reasonableness does not turn on a detailed analysis of whether the tribunal's decision is subject to a high or low degree of deference. In defining the concept of reasonableness, the majority in *Dunsmuir* instead emphasized the following at para. 47:

A court conducting a 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.

24 In the present case, the issues raised on appeal relate to findings of fact made by the Tribunal. These findings fall squarely within the Tribunal's area of experience and

expertise and the basis for the findings is articulated in the Tribunal's reasons. It is in this context that the guiding principles from *Dunsmuir* are to be applied to review the reasonableness of the Tribunal's decision.¹⁵⁴

The Ontario Court of Appeal's view in *Mills*¹⁵⁵ of the nature of the reasonableness standard has now been approved by the Federal Court of Appeal¹⁵⁶ and Alberta Court of Appeal.¹⁵⁷ The judgment of the Federal Court of Appeal in *Telfer v. Canada (Revenue Agency)*, reviewing the Minister of Revenue's discretionary decision not to waive interest on unpaid taxes, provides a good example of how context now factors into the application of the reasonableness standard. Justice Evans underlined the nature of the Minister's discretionary power:

In this case, the refusal to grant relief against accumulated interest did not infringe any right or expectation of Ms Telfer's. On the contrary, she was invoking the Minister's extraordinary statutory discretion to grant her an exemption from a basic principle of the tax system, namely, that taxpayers are liable to pay taxes owing by April of the following year, failing which, they must pay interest, at the prescribed rate, on any amount owing.¹⁵⁸

Noting that the taxpayer had made a different argument in favour of a waiver before the Court than before the Minister, he concluded that “the above considerations, as well as the unstructured

¹⁵⁴ *Ibid.*, at paras. 18-24.

¹⁵⁵ But see *Rodrigues v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 719 at para. 22, decided after *Mills*, which appears to describe various degrees of deference:

It would appear that no court has ever interfered with any of the thousands of decisions of the Tribunal concerning an employee's pre-accident earnings. This is no doubt due to the *substantial degree of deference* accorded to the Tribunal based on the Legislature's decision to create the Board and the Tribunal, to vest in the Board the exclusive authority to calculate a worker's pre-accident earnings, to delegate to the Tribunal the exclusive authority to review matters of workplace safety and insurance, to appoint to the Board and Tribunal members who are experienced in issues of workers' compensation, and to protect the Board and the Tribunal with the toughest privative clause known to Ontario law. The privative clause is most important as it evidences a legislature's intent that an administrative decision maker be given *greater deference* and that interference by reviewing courts be minimized: *Dunsmuir* at paras. 45 and 48. Thus, reviewing courts can interfere only where the Tribunal's decision is *clearly irrational*. [Emphasis added].

¹⁵⁶ See *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at para. 29 [*Telfer*], per Evans J.A.: “While the formulation of the standard of reasonableness as applied to the process for making discretionary decisions is invariable, its application is context-specific: compare *Mills*...”

¹⁵⁷ See *I.A.M. & A.W., Local 99 v. Finning International Inc.*, 2008 ABCA 400 at para. 12:

[T]he respondents submit that there is a spectrum of reasonableness and a review of a decision from a labour board is deserving of the highest level of deference on that spectrum. We reject that proposition. No such spectrum exists. The decision is either reasonable, that is, “whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law”..., or it is not. The “revised system” developed in *Dunsmuir* was intended to simplify the approach to judicial review. The concept of a “spectrum” of reasonableness ignores both the definition and the objective articulated by the Supreme Court of Canada: *Mills*...

¹⁵⁸ *Telfer*, *supra* note 156 at para. 34.

nature of the Minister's statutory power under subsection 220(3.1), militate against a court's subjecting the decision-making process to close scrutiny."¹⁵⁹

Similarly, in *Pharmascience Inc. v. Canada (Attorney General)*,¹⁶⁰ Justice Evans once again injected contextual factors into his application of the reasonableness standard to the decision by the Minister of Health to reject a pharmaceutical company's "Abbreviated New Drug Submission" because it lacked certain information about one of the drug's active ingredients:

Because the question in dispute concerns the application of the law (C.08.002.1(1) of the Regulations) to the facts, and involves no general legal issue, the standard of review is unreasonableness: *Dunsmuir* at para. 53. In applying this standard, a reviewing court must consider the particular context of the dispute: *Mills* ... at paras. 21-22. In the present case, the contextual factors include: the subjective nature of the Minister's statutory power to require the bioavailability characteristics of a new drug ("where the Minister considers it necessary"), the heavily factual nature of the issue in dispute, the technical nature of the facts, the Minister's superior expertise in assessing what information is "necessary" to determine the bioequivalence of the drugs, and the fact that the health of consumers is potentially at stake.¹⁶¹

Based largely on the application judge's reasoning, he concluded that the Minister's decision was well within the range of acceptable and rational solutions.

b) Relationship between the requirement of justification, transparency and intelligibility and the requirement that the outcome fall within the range of acceptable and rational solutions

While the decisions of the Federal Court of Appeal appear to consider the justification/transparency/intelligibility requirement and the outcomes requirement together in applying the reasonableness standard, the Nova Scotia Court of Appeal has, on several occasions, considered these two criteria individually. In *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*,¹⁶² which concerned a labour board's decision to certify as bargaining agent for security employees of a casino the Union which was already bargaining agent for general employees, Fichaud J.A., writing for the Court, explained the process as follows:

29 In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.

¹⁵⁹ *Ibid.*, at para. 40.

¹⁶⁰ 2008 FCA 258.

¹⁶¹ *Ibid.*, at para. 4.

¹⁶² 2009 NSCA 4.

30 Several of the Casino's submissions apparently assume that the “intelligibility” and “justification” attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. “Intelligibility” and “justification” are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, para. 36.

31 Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's “expertise or field sensitivity to the imperatives or nuances of the legislative regime.” This respects the legislators' decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, para. 47-49; *Lake*, para. 41; PANS Pension Plan, para. 63; *Nova Scotia v. Wolfson*, para. 34.¹⁶³

c) What is required for a decision to meet the requirement of justification, transparency and intelligibility?

While it is difficult to identify from the cases broad principles regarding what is sufficient justification, transparency and intelligibility within the decision-making process, the following examples and extracts assist in giving some content to these concepts.

In *Lake v. Canada (Minister of Justice)*,¹⁶⁴ the Supreme Court addressed Lake's claim that the reasons delivered by the Minister of Justice in support of the decision to extradite Lake to face drug trafficking charges in the United States rather than prosecuting him in Canada were inadequate because they did not fully canvass the relevant factors outlined in a leading extradition case - *United States of America v. Cotroni*.¹⁶⁵ The Court determined that this level of detail was not required for the Minister's reasons to meet the reasonableness requirement:

[W]hile I agree that the Minister has a duty to provide reasons for his decision, those reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submissions against extradition and must provide some basis for understanding why those submissions were rejected. Though the

¹⁶³ *Ibid.*, at paras 29-31.

¹⁶⁴ *Supra* note 55.

¹⁶⁵ [1989] 1 S.C.R. 564. These factors include: where was the impact of the offence felt or likely to be felt; which jurisdiction has the greater interest in prosecuting the offence; which police force played the major role in the development of the case; which jurisdiction has laid charges; which jurisdiction is ready to proceed to trial; where is the evidence located; whether the evidence is mobile; the number of accused involved and whether they can be gathered together in one place for trial; in what jurisdiction were most of the acts in furtherance of the crime committed; the nationality and residence of the accused; and the severity of the sentence the accused is likely to receive in each jurisdiction.

Minister's Cotroni analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.¹⁶⁶

The Court noted that the Minister, in his reasons, had stated that he had considered the Cotroni factors and had emphasized that the alleged conduct occurred in the United States, which was entitled to seek to protect its own public and maintain public confidence in its laws and justice system through prosecution. The Court concluded that the decision was reasonable and the reasons sufficient:

Although the locus delicti may not always be determinative, in this case, there is nothing unreasonable about the Minister's conclusion. There is no other factor that would clearly outweigh the fact that the alleged conduct occurred in the United States ... The Minister's deference to the United States owing to the fact that the alleged conduct occurred within its territory provides a sufficient basis for concluding that his decision was reasonable.

In light of this Court's jurisprudence, it is clear that a reviewing court owes deference to a decision by the Minister to order surrender, including the Minister's assessment of the individual's Charter rights. Although the Minister must apply the proper legal principles, his decision should be upheld unless it is unreasonable. In the case at bar, the Minister identified the proper test and provided reasons that were sufficient to indicate the basis for his decision to order the appellant's surrender. In my view, his decision to extradite the appellant rather than pursue prosecution in Canada is not unreasonable.¹⁶⁷

In *Hills v. Nova Scotia (Provincial Dental Board)*,¹⁶⁸ the Nova Scotia Court of Appeal discussed at length the qualities that the reasons of a professional discipline tribunal should exhibit to meet the reasonableness standard:

47 In assessing the sufficiency of reasons issued by the Discipline Committee, this court must look at the decision as a whole to determine whether it contains sufficient information to permit review by an appellate court. To determine if the Committee has committed an error of law, the court must examine the entire record of the tribunal's proceedings. (...)

54 The finding that insufficient care and attention were devoted to a technique-sensitive restoration procedure was a sufficient basis for the Committee's conclusion that Dr. Hills did not meet the requisite standards; the record includes evidence which supports that result as a reasonable and defensible outcome. The Committee is not required to explain in more detail the technical reasons why the procedure performed by Dr. Hills was not successful. (...)

60 Decisions by professional discipline tribunals made up of lay representatives and experts in their field should not be scrutinized with scientific precision or held to a standard of perfection. The record does not disclose any serious and dispositive misstatements of fact or mischaracterization of the evidence that amount to an error of

¹⁶⁶ *Lake, supra* note 55 at para. 46.

¹⁶⁷ *Ibid.*, at paras. 47-49.

¹⁶⁸ 2009 NSCA 13.

law. The reasons provided by the Complaints Committee meet the requirements identified by the Supreme Court in *Lake*: they allow the appellant to understand why the decision was made, and they allow the reviewing court to assess its validity by executing a reasonableness standard of review. There is nothing here which would warrant our intervention.¹⁶⁹

In *I.A.M. & A.W., Local 99 v. Finning International Inc.*, the Alberta Court of Appeal held that where a labour board had offered several reasons in support of a finding that an employer's decision to contract out bargaining unit work was not in good faith and thus prohibited by the relevant statute, it was sufficient to uphold the decision that *one* of the reasons could stand up to a somewhat probing examination, even if an alternative reason was flawed because it used circular reasoning.¹⁷⁰

In *Mills, supra*, the WSIAT had dismissed a claim for benefits based on the absence of medical evidence establishing that Mills' back problems were due to a work injury suffered in 1979. Before the Ontario Court of Appeal, Mills argued that the Tribunal's decision was unreasonable because it had ignored his testimony to the effect that he had asked his physician not to make a note of his back problems in his medical records in order not to jeopardize his truck operator's license. The Court determined that the absence of any reference to Mills' testimony on this point, while regrettable, was not fatal to the Tribunal's decision:

37 This explanation could, if accepted by the Tribunal, explain the silence in the medical records. However, the Tribunal clearly did not accept the respondent's explanation and, having died sometime before the hearing, the respondent's physician could be of no assistance.

38 The Tribunal's reasons do not specifically address the respondent's explanation. However, it is clear from the reasons that the Tribunal did not accept his explanation. In my view, it had a rational basis for doing so. A review of the record discloses that the respondent's explanation as to why there was no notation in his family physician's records was not given at the time his claim for compensation was made and when the claim was first investigated. The explanation came much later in the course of the appeal process. Further, the respondent's explanation conflicts with the information he apparently provided to Dr. Jacqmin [Mills' expert witness] and upon which Dr. Jacqmin relied for his opinion. Dr. Jacqmin's report notes that the respondent had been seeing his family physician for his back problems and did so to obtain medication. If the reason for the respondent's visit to the physician was his back and if medication were being prescribed, the physician would have been required to record any prescription.

¹⁶⁹ *Ibid.*, at paras 47, 54 and 60.

¹⁷⁰ 2009 ABCA 55 at para. 37.

39 Although it would have been preferable had the Tribunal's reasons specifically addressed the respondent's evidence on this point, the failure to do so does not, in my view, make the Tribunal's reliance on the silence of the medical records an error.¹⁷¹

d) How do courts apply the reasonableness standard to decisions supported by reasons that could be challenged as incomplete or insufficiently detailed? Do they consider reasons that *could be offered* in support of the tribunal's decision?

These questions have been addressed in several appellate decisions.

- *Agence nationale d'encadrement du secteur financier (Autorité des marchés financiers) v. Conseillers de placements Tip Ltée*,¹⁷²

The Québec Securities Commission had determined that an investment advisor lacked sufficient integrity and had imposed a five-year suspension of its registrant privileges. The Court of Québec determined that the Commission's penalty was unreasonable and substituted a lifetime ban. Though the Court of Appeal noted that the Commission panel's reasons explaining its choice of sanction were "perhaps not as fulsome as it might have been", it filled in the gaps, finding that a five-year suspension was reasonable based on precedent and on a Commission policy (General Instruction) which required suspended registrants to pass a rigorous re-qualification process:

Counsel for the AMF also conceded that the existence of this General Instruction was not brought to the attention of Pinsonnault J.C.Q., who therefore may have been under the misapprehension that at the expiry of his five-year suspension, Mr. Gagné would automatically recover the rights he lost as a result of the suspension. The Panel, on the other hand, as experts in the administration of its "home statute" and the process Mr. Gagné would have to undergo at the expiry of his term of suspension, are presumed to be aware of this General Instruction and its applicability to Mr. Gagné.¹⁷³

- *Toronto Police Services Board v. Ontario (Information & Privacy Commissioner)*¹⁷⁴

Where the Toronto Police Services Board raised on judicial review a statutory interpretation argument that it had not raised before the Commissioner's adjudicator in order to bolster its position that the Commissioner had erred in ordering production of computer records, the Court of Appeal was understandably forgiving in its assessment of the adjudicator's reasons:

¹⁷¹ *Mills*, *supra* note 153 at paras. 37-39.

¹⁷² 2008 QCCA 1566.

¹⁷³ *Ibid.*, at para. 133 [Emphasis added].

¹⁷⁴ 2009 ONCA 20.

Although the Adjudicator did not specifically address whether the means required to produce the record were means normally used by the institution, his reasons for decision indicate that he was aware the Police would need to develop a new algorithm or software and found that the Police's concerns in this regard were addressed by the fees provisions in the regulation enacted under the Act. In other words, he *must be taken to have found* that where the institution has the technical expertise, using its existing software, to develop a computer program to provide the requested information, that does not take the requested information outside the s. 2(1)(b) definition of "record". The Adjudicator could not fairly be expected to have given a more detailed analysis of this issue when it was not specifically put in issue before him. [Emphasis added].¹⁷⁵

- *Telfer v. Canada (Revenue Agency)*¹⁷⁶

Where, on a judicial review application of the Revenue Minister's decision not to waive interest on Telfer's unpaid taxes, Telfer's counsel presented an argument that differed from that presented to the Minister, the Federal Court of Appeal took this fact into account as part of its contextual application of the reasonableness standard:

When, as in the present case, a consideration is not squarely presented to a decision maker, it will be difficult to establish on judicial review that a failure to deal with it in the reasons for decision so deprives the process of "justification, transparency and intelligibility" as to render it unreasonable.¹⁷⁷

F. How should courts approach the application of statutory standards of judicial review?

This issue was squarely addressed by the Supreme Court in *Khosa*.¹⁷⁸ While Justice Binnie, for the majority, applied a reasonableness standard based on the common law standard of review analysis described in *Dunsmuir*, Justice Rothstein argued that the court should have reviewed the IAD's decision with regard to the statutory standard prescribed for the review of findings of fact in the *Federal Courts Act*.¹⁷⁹ The debate between Justices Binnie and Rothstein regarding the effect of judicial review statutes on the applicable standard of review reveals deep fault lines in the Court on how to ascertain legislative intent in the standard of review analysis and on the interplay between common law and legislated standards of review. This debate may have important ramifications for British Columbia and other Canadian jurisdictions that have opted to statutorily prescribe standards of review or are considering such a reform.

¹⁷⁵ *Ibid.*, at para. 41 [Emphasis added].

¹⁷⁶ *Telfer*, *supra* note 156.

¹⁷⁷ *Ibid.*, at para. 31.

¹⁷⁸ *Supra* note 49.

¹⁷⁹ *Ibid.*, at para. 137.

1. *Khosa*: the judgments

It was common ground that judicial review of the IAD's decision was available under section 18.1 of the *Federal Courts Act*:¹⁸⁰

- 18.1 (3) On an application for judicial review, the Federal Court may
- (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
 - (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
- (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
 - (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - (c) erred in law in making a decision or in order, whether or not the error appears on the face of the record;
 - (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - (e) acted, or failed to act, by reason of fraud or perjured evidence; or
 - (f) acted in any other way that was contrary to law.

However, Justices Rothstein and Binnie disagreed on the legislative intent behind these provisions and therefore on the effect that courts must give them.

Justice Rothstein, who, considering his lengthy tenure as judge of the Federal Court and Federal Court of Appeal, is not unfamiliar with section 18.1 of the *Federal Courts Act*, delivered a judgment that sets out a compelling and straightforward account of the role of this provision in the review of the decisions of federal administrative decision makers. He begins with the premise that, so long as they respect constitutional limits, legislatures have the power to articulate what standard of review should apply to administrative decision makers.¹⁸¹ In the case of section 18.1(4) of the *Federal Courts Act*, where Parliament intended a deferential standard of review, it used clear and unambiguous language: paragraph (d) of that section specifies that the Federal Court may grant relief if it is satisfied that a federal decision maker “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it” – a statutory standard arguably implying a higher level of deference

¹⁸⁰ R.S.C. 1985, c. F-7.

¹⁸¹ *Khosa*, *supra* note 49, at para. 102.

than that provided for by common law *Dunsmuir* reasonableness review.¹⁸² The implication, in Justice Rothstein's view, is that where Parliament did not provide for deferential review, "it intended the reviewing court to apply a correctness standard as it does in the regular appellate context."¹⁸³ Accordingly, the scheme set up by section 18.1(4) essentially reflects Parliament's recognition that while administrative decision makers are better situated than reviewing courts with respect to determinations of fact, the reverse is true for other matters, including questions of law, jurisdiction, natural justice, fraud or perjured evidence.¹⁸⁴ For instance, there is no suggestion in the language of section 18.1(4)(c), which provides for review where a federal decision maker "erred in law in making a decision or an order, whether or not the error appears on the face of the record", that Parliament intended reviewing courts to defer on questions of law.¹⁸⁵ In Justice Rothstein's view, the Federal Courts Act "occupies the area of standard of review and therefore ousts the application of the common law on this question",¹⁸⁶ an assessment with which Justice Deschamps agrees. Justice Rothstein would have held that the IAD's findings of fact underlying its exercise of discretion were neither perverse, capricious or made without regard to the evidence and were thus unassailable.¹⁸⁷

But if Justice Rothstein is correct in stating that, in the absence of express legislative indication that a reviewing court should defer to an administrative decision maker, it should be presumed that the legislature intended the court to apply a correctness standard, what does this mean for the judicial review of decisions that are not protected by a privative clause or for decisions subject to court review via statutory rights of appeal? As discussed earlier in this paper, Justice Rothstein's position is that the Court should abandon its approach of deferring to decisions of expert tribunals on matters that fall within their expertise in the presence of a statutory right of appeal. In other words, courts should get out of the business of assessing tribunal expertise and accept the legislature's view of who is an expert, signaled by the inclusion of a privative clause.¹⁸⁸

¹⁸² *Ibid.*, at paras 117-119.

¹⁸³ *Ibid.*, at para. 117.

¹⁸⁴ *Ibid.*, at para. 120.

¹⁸⁵ *Ibid.*, at para 120-121.

¹⁸⁶ *Ibid.*, at para. 128.

¹⁸⁷ *Ibid.*, at para. 137.

¹⁸⁸ *Ibid.*, at para. 95.

Justice Binnie's starting point is that "most if not all judicial review statutes are drafted against the background of the common law of judicial review."¹⁸⁹ Therefore, statutory provisions like section 58 of British Columbia's *Administrative Tribunals Act* (ATA),¹⁹⁰ which provides that tribunal findings of fact or law or exercises of discretion must not be interfered with unless they are patently unreasonable must be understood in the context of the common law jurisprudence that defines that standard of review:

Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.¹⁹¹

Similarly, for section 18.1 of the *Federal Courts Act* to "retain the flexibility" to deal with the "immense variety of circumstances" associated with review of "the full galaxy of federal decision makers", resort must be had to the contextual *Dunsmuir* standard of review analysis.¹⁹² In Justice Binnie's view, each of the paragraphs in section 18.1(4) sets out a ground of review that permits but does not require a court to grant relief:

Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case."¹⁹³

In other words, while section 18.1(4) sets out grounds on which the court may choose to intervene, it does not set out the "standard of review" that reflects "the court's appreciation" of the respective roles of courts and tribunals and guides the court's decision as to whether it will intervene by granting relief:

... [Section 18.1(4)] should be interpreted so as to preserve to the Federal Court a discretion to grant or withhold relief, a discretion which, of course, must be exercised judicially and in accordance with proper principles. In my view, those principles include those set out in *Dunsmuir*.¹⁹⁴

Pursuant to this approach, Justice Binnie examines each ground of review listed in section 18.1(4), noting for each ground that a standard of review is not expressly specified but rather must be determined by resort to the common law standard of review analysis from *Dunsmuir*.

¹⁸⁹ *Ibid.*, at para. 19.

¹⁹⁰ S.B.C. 2004, c. 45, s. 58(2)(a) [ATA].

¹⁹¹ *Khosa*, *supra* note 49 at para. 19. [emphasis in the original].

¹⁹² *Ibid.*, at para. 33.

¹⁹³ *Ibid.*, at para. 36.

¹⁹⁴ *Ibid.*, at para. 40.

Illustrative of Justice Binnie's analysis is his discussion of section 18.1(4)(c), which authorizes judicial intervention when the decision maker “erred in law in making a decision or an order ...”:

Dunsmuir (at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision maker is reasonable, there is no error of law justifying intervention. Accordingly, para. (c) provides a ground of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or closely related statute. This nuance does not appear on the face of para. (c), but it is the common law principle on which the discretion provided in section 18.1(4) is to be exercised. Once again, the open textured language of the Federal Courts Act is supplemented by the common law.¹⁹⁵

Commenting on section 18.1(4)(d), which authorizes intervention when the decision maker “based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it”, Justice Binnie notes:

... [I]t is clear from s. 18.1(4)(d) that Parliament intended administrative fact-finding to command a high degree of deference. This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the Federal Courts Act.¹⁹⁶

In sum, section 18.1(4) does not oust the common law standard of review analysis:

... [Section 18.1(4)] is not intended to operate as a self-contained code, but is intended by Parliament to be interpreted and applied against the backdrop of the common law, including those elements most recently expounded in *Dunsmuir*.¹⁹⁷

2. Whither judicial review statutes?

The Supreme Court’s decision in *Khosa* sounds a cautionary note to legislators who have enacted or are considering enacting judicial review statutes with the intention of ousting the relatively complex and constantly evolving common law standard of review analysis. The Court has recognized that legislatures have the power to specify standards of review. However, it has given notice that they will have to manifest a clear intention to achieve this end:

[W]here the legislative language permits, the courts (a) will not interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters (as well as other factors such as the applicant’s delay, failure to exhaust adequate alternative remedies, mootness, prematurity, bad faith and so forth).¹⁹⁸

¹⁹⁵ *Ibid.*, at para. 44.

¹⁹⁶ *Ibid.*, at para. 46.

¹⁹⁷ *Ibid.*, at para. 48.

¹⁹⁸ *Ibid.*, at para. 51.

This raises questions as to the effect of the standard of review provisions in British Columbia's ATA. Sections 58 and 59 of the ATA essentially distinguish between tribunals whose decisions are protected by a privative clause and thus reviewable on a patent unreasonableness standard and those without privative clause protection, whose decisions on questions of law are reviewable on a correctness standard. In Justice Binnie's estimation, the B.C. Legislature's failure to expressly articulate the content of the "patent unreasonableness" standard leads to the inference that it left this content and the "precise degree of deference it commands in the diverse circumstances a large provincial administration" to be "supplied by the common law", including the principles set out in *Dunsmuir*.¹⁹⁹

Justice Rothstein pointedly criticizes this aspect of the majority's decision. Referring to the legislative history surrounding the ATA's enactment and to the B.C. Legislature's apparent intent to "shift the focus" of judicial review from scholarly debates about the standard of review to the merits of individual cases, he observes that "it would be troubling to the B.C. Legislature to think that, despite [these efforts], this court would re-impose a duplicative *Dunsmuir*-type analysis in cases arising under the B.C. ATA."²⁰⁰ Given the complex, unpredictable character of the balancing involved in the *Dunsmuir* standard of review analysis, he opines, this approach "does not provide for a panacea of rigorous and objective decision making regarding the intensity with which courts should review tribunal decisions."²⁰¹

Since *Dunsmuir*, British Columbia courts had been struggling with the question of whether the Supreme Court's creation of a merged deferential reasonableness standard should now modify the meaning of "patent unreasonableness" in the ATA or whether that statutory standard should retain the meaning that existed at common law prior to the issuance of the decision in *Dunsmuir*.²⁰² Little over a week before the *Khosa* judgment, the British Columbia Court of Appeal decided, in *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*,²⁰³ that

¹⁹⁹ *Ibid.*, at paras. 19 and 50.

²⁰⁰ *Ibid.*, at para. 116.

²⁰¹ *Ibid.*, at para. 98.

²⁰² The competing views on this question are canvassed by Justice R.H.L. Blair in *Asquini v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62 [*Asquini*] at paras. 50-54.

²⁰³ 2009 BCCA 92 at para. 36. The court also dismissed a constitutional challenge to the ATA. The applicant essentially argued that by imposing standards of review that were different than those prescribed by the common law, the British Columbia legislature had encroached on the inherent judicial review jurisdiction of superior courts. The Court, correctly in my view, responded that the ATA in no way impaired the power of superior courts to review

the effect of *Dunsmuir* was not to change the meaning of patently unreasonable. Writing for the Court, Saunders J.A. adopted the views of Justice Blair in *Asquini*, who stated:

I note that the purpose of *Dunsmuir* was not to pave for the way for more intrusive review of tribunal decisions, and that the single standard of reasonableness is now analyzed on a spectrum of deference. At one end of the spectrum there still lies a degree of deference similar to that mandated under the former standard of patent unreasonableness. It may be, therefore, that the two positions are not irreconcilable, especially in light of Mr. Justice Binnie's [concurring judgment] ...²⁰⁴

In its recent decision in *Carter v. Travelex Canada Ltd.*, the Court of Appeal reiterated that *Dunsmuir* had not “altered the express words of s. 59(3) of the *Administrative Tribunals Act*, which command a high degree of deference.”²⁰⁵ In support of this conclusion, the Court relied on that part of Justice Binnie's judgment in *Khosa* that confirmed that “patent unreasonableness” lived on in British Columbia and that s. 58 of the ATA directed the British Columbia courts to afford administrators a high degree of deference on issues of fact.²⁰⁶ The Court of Appeal did not deal with the more troublesome aspect of Justice Binnie's remarks – that the “content of patent unreasonableness and the precise degree of deference it commands in the diverse circumstances of a large provincial administration” would continue to be calibrated according to the general principles of administrative law. Justice Binnie appears to state that the content of the statutory standard of patent unreasonableness is variable and commands a degree of deference that varies – presumably – depending on contextual factors including the expertise and purpose of the decision maker and the nature of the question. The problem with this view is that the patent unreasonableness that was legislated into the ATA was a standard of the *Ryan* variety – a fixed point on the spectrum – not the sliding scale of deference that Justice Binnie describes in *Khosa*. The Supreme Court will no doubt clarify the exact scope of the common law's influence on the content of patent unreasonableness. At this juncture however, Justice Rothstein's point that the majority's decision runs counter to the British Columbia legislature's intent to simplify rather than complicate standard of review analysis in the province is compelling.

administrative decisions for jurisdictional errors, which *was* entitled to constitutional protection: *Crevier v. Attorney General of Québec*, [1981] 2 S.C.R. 220.

²⁰⁴ *Asquini*, *supra* note 202 at para. 54.

²⁰⁵ 2009 BCCA 180 at para. 27.

²⁰⁶ *Khosa*, *supra* note 49 at para. 19.

It may be that, in practical terms, the majority's judgment will simply require more explicit legislative direction regarding the applicable standard and the intended content of each standard.²⁰⁷ However, Justice Rothstein is alarmed by the assumption that appears to underlie the majority judgment – that legislatures should be presumed not to intend to apply the same unvariegated standard of review across a broad range of decision makers and that a contextual, variable common law standard is more appropriate.²⁰⁸ In his view, the court should be more respectful of legitimate legislative choices to make the nature of the question (fact or law) determinative of the standard of review rather than the nature of the decision maker.²⁰⁹

3. What role may statutory grounds of review actually play?

The majority's interpretation of section 18.1 of the *Federal Courts Act*, and in particular its characterization of the paragraphs set out in s. 18.1(4) as "grounds of review" authorizing court intervention which may be refused at the discretion of the reviewing court based on considerations of deference that flow from the *Dunsmuir* standard of review analysis, is also troubling. Under this approach, section 18.1(4) does not oust the common law standard of review analysis but instead invites its application. I am not convinced that this approach does not effectively read section 18.1(4) out of the *Federal Courts Act*. This appears to be less a case of "the open-textured language" of the Act being "supplemented" by the common law than being supplanted by the *Dunsmuir* analysis. Indeed, there is very little in Justice Binnie's analysis of the statutory provisions that suggests they actually play any real role, other than confirming or reinforcing the common law standards derived by the court in *Dunsmuir*. That said, it is unclear, from a practical perspective, whether there ever was a huge gap in meaning between the statutory standard in section 18.1(4)(d) and the common law standard of review.

²⁰⁷ The B.C. legislature could reinforce its choice of the pre-*Dunsmuir* patent unreasonableness standard with a statutory definition of the content of that standard. However, some observers have opined that ss. 58 and 59 of the ATA should be repealed because the more flexible common law approach to judicial review avoids dangers of "ossification" of this area of the law: see Mark G. Underhill, "*Dunsmuir v. New Brunswick: A Rose by Any Other Name?*" (2008) 21 C.J.A.L.P. 247 at 257-8.

²⁰⁸ *Ibid.*, at para. 102.

²⁰⁹ *Ibid.*, at para. 109. Legislatures may take into account the nature of the decision maker in specific circumstances by including a privative clause in those decision makers' enabling statutes.

4. Are standards of review just another factor guiding courts' remedial discretion?

I am also intrigued, as was Justice Rothstein,²¹⁰ by the majority's view that the standard of review determined through the *Dunsmuir* analysis acts, along with other factors, to guide the exercise of the courts' discretionary power to grant or withhold relief on an application for judicial review. Is it not the case that the standard of review enables reviewing courts to assess the lawfulness of an administrative decision maker's decision and whether intervention is justified, and is not simply another factor to be considered by the court in exercising its overriding discretion to grant or withhold relief, along with the parties conduct, undue delay or the existence of alternate remedies?

IV. Conclusion

It would be foolhardy, if not impossible, to neatly summarize the impact and implications of *Dunsmuir* on substantive review in Canada at this early juncture. Accordingly, I will attempt only to make a few concluding observations based on my preliminary research on this question.

The *Dunsmuir* Court attempted to simplify the framework for substantive review by:

- reducing the number of standards of review to two;
- encouraging reviewing courts to rely on satisfactory precedents; and
- providing guidelines which could serve as presumptive indications of what the appropriate standard should be in a given circumstance, and emphasizing that in many cases, some factors, like the nature of the question, will weigh more heavily than others in the determination of the standard.

My review of appellate cases shows that *Dunsmuir* has served to simplify the standard of review analysis in certain respects. Precedent now appears to be the most significant determinant of the standard of review. Some appellate courts are relying on the *Dunsmuir* guidelines to determine the appropriate standard, viewing these guidelines as presumptions that may be rebutted by the specific circumstances of the case. The cases reveal that although some appellate courts have heeded *Dunsmuir's* caution not to brand as jurisdictional questions that are doubtfully so, others have taken a broader view of the category of true questions of jurisdiction –

²¹⁰ *Ibid.*, at paras. 134-136.

a view that is not constrained by the Court's definition of the term. In most cases where appellate courts have performed a standard of review analysis or considered the *Dunsmuir* guidelines, the nature of the question appears to have had played the most significant role in the outcome. This finding is significant, because of all the contextual factors in the standard of review analysis, the nature of the question is the most amenable to manipulation by the parties and, possibly, by reviewing courts:

[T]he initial task of identifying the question under review is very often a difficult one, because of conflicting and confusing submissions from the parties on opposite sides of the issue (the applicant invariably seeks to characterize the issue as one falling within the expertise of the courts, while the party defending the decision under review [often joined by counsel for the decision maker] will be characterizing the issue as one falling within the expertise of the decision maker). Moreover, as more than one commentator has pointed out, defining the nature of the question in such a way as to lead to a standard of correctness is not unknown for an interventionist court unhappy with the bottom line of a particular administrative decision.²¹¹

My review also shows that it is at the stage of courts' application of the reasonableness standard that substantive review retains much of its complexity. Appellate courts appear to be gradually recognizing that, while it may not be accurate to speak of varying degrees of deference within the reasonableness standard, in the post-*Dunsmuir* regime, the range of reasonable outcomes is now the variable, expanding and contracting under the influence of various contextual factors, including the familiar factors from the old pragmatic and functional approach.

While this new framework brings with it some degree of uncertainty, especially at this early stage in its history, not the least of which is the nature of its interaction with statutory standards of review, appellate courts are slowly developing their own approaches to make it work. Only time will tell whether these are ultimately successful or whether renewed pressure from stakeholders, tribunals, lawyers and judges will push the Supreme Court into another attempt at reform. Of course, as others have noted, uncertainty and complexity are inherent in substantive review. As Alice Woolley notes:

To be fair to the Court, it may be that any radical change in direction in this area is impossible, that the major flaw in *Dunsmuir* is the judgment's illusion that it can fix the problem, not that it does not do so. Why? Because the questions posed by substantive judicial review are impossible to answer. No generic formula can decide when a specific question is better answered by an administrative decision maker and when it is better answered by the court. No test can tell one how to be deferential; since deference is

²¹¹ Underhill, *supra* note 207 at 256.

neither capitulation or substitution of judgment it necessarily requires the drawing of fine lines in particular cases.²¹²

If we must accept that substantive review is inherently complex, then by what criteria should we assess the new *Dunsmuir* framework? David Mullan's assessment of the old pragmatic and functional approach is a good starting point and, in my view, the best way to conclude this paper:

Ultimately, the question comes down to statutory interpretation. There can be little doubt that the court now addresses more directly and usually with more sophistication than ever before the underlying issues and tensions in the exercise of interpretation: for example, the spheres of institutional competence of generalist courts and specialist agencies respectively, regulatory goals and individual rights, and administrative expertise and democratic accountability....

We see no realistic alternative to the course, broadly understood, that the Supreme Court has charted for itself. This is not to say that we are always in sympathy with the way that the court weighs the competing considerations or evaluates its institutional ability to come to grips with the complexities of regulatory schemes and the dynamics of administration. And we still find too much formalism in the court's approach to statutory interpretation and too little concern for attaining the regulatory goals of the particular statutory scheme.

Perhaps the most that can be asked of the law in this area is that it forces judges to address the relevant questions. The law cannot constrain judges who are so disposed from doing "the wrong thing." It should, however, help others to consider thoughtfully what "the right thing" is and not hamper them from doing it.²¹³

²¹² Woolley, *supra* note 39 at 269.

²¹³ David J. Mullan, ed., *Administrative Law — Cases, Text and Materials*, 5th ed. (Emond Montgomery: Toronto, 2003) at 823-24.