Judicial Deference and Reasonableness Review after *Dunsmuir*

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> It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focusing on the who, what, why and wherefor of the litigant's complaint on the merits.
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> -Binnie J., *Dunsmuir v. New Brunswick*[1]

I. Introduction

In *Dunsmuir v. New Brunswick*, the Supreme Court set out "to re-examine the foundations of judicial review and the standards of review applicable in various situations."[2] While the Court's main objective was to simplify the unwieldy mechanics of the pragmatic and functional approach, the decision implicates other issues which extend beyond the standard of review. Even though the full impact of *Dunsmuir* is still unfolding, there is nevertheless enough material available for lawyers and administrative officials to begin considering whether the impact of that case lives up to its promise of establishing a "principled framework that is more coherent and workable."[3]

In order to assess *Dunsmuir*'s legacy, one must first clarify more precisely how that decision changed the practice of judicial review. In my view, the majority opinion in *Dunsmuir* raises two general issues regarding judicial deference and reasonableness review. The first issue concerns what Binnie J. in his concurring opinion calls a "threshold" question regarding the standard of review, and whether judges should review an administrative decision according to a standard of correctness or reasonableness. The second issue concerns a more substantive assessment regarding "the who, what, why and wherefor of the litigant's complaint on the merits."[4]

When one frames *Dunsmuir* in this way, it seems that the majority opinion is full of mixed messages. In one sense it preserves the *status quo* by relabeling, rather than rewriting, the pragmatic and functional approach: it's now called the "standard of review analysis", but the content of that heuristic device is essentially the same. The only minor difference is that, after *Dunsmuir*, one need not embark upon a standard of review analysis in cases where "the

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[1] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, para 154. [*Dunsmuir*]

[2] *Ibid* at para 24.

[3] *Ibid* at para 32. See eg, Gerald Heckman, "Substantive Review in Appellate Courts since *Dunsmuir*" (2009) Osgoode Hall LJ 751.

[4] *Dusmuir*, *supra* n 1.

jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."[5]

However, the decision implements also implements dramatic changes to the doctrine of judicial deference while claiming simultaneously that these alterations are cosmetic rather than foundational. Thus, while the majority opinion explodes the distinction between the patent unreasonableness and reasonableness standards of review, it insists that this move "does not pave the way for a more intrusive review by courts".[6] Similarly, the majority opinion categorizes a bunch of issues which will attract correctness review: constitutional questions, "true" jurisdictional questions, questions of law which are of general importance to the legal system as a whole, and concurrent legal authority.[7] Nevertheless, Bastarache and LeBel JJ. insist that they "neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years" and reiterate Dickson J.'s warning in *CUPE v. New Brunswick Liquor* that judges "must not brand as jurisdictional issues that are doubtfully so."[8]

Mixed messages also haunt the Court's approach to reasonableness review. On the one hand, the majority opinion adopts David Dyzenhaus's idea that judicial deference requires "respectful attention to the reasons offered"[9] by an administrative decision-maker, and builds upon that idea by stating that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."[10] On the other hand, the Court gives relatively short shrift to the merits of the adjudicator's decision, which explained why law entitled him to inquire into the employer's reasons for terminating David Dunsmuir. So while the adjudicator's decision required "justification, transparency and intelligibility" on the part of a public employer, the Supreme Court nevertheless concluded that the adjudicator's decision "was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded."[11] Moreover, the Court concluded that by requiring the employer to hear Dunsmuir before terminating his employment—a proposition that was eminently reasonable given the state of Canadian administrative law at the time[12]—the adjudicator had nevertheless committed a reviewable error of law.[13] In short, the Court's decision to quash the adjudicator's decision in *Dunsmuir* is ironic because the Court's

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[5] *Ibid* at para 62.
[6] *Dunsmuir*, *supra* n 1 at para 48.
[7] *Ibid* at paras 58-61.
[8] *Ibid* at para 59.
[9] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.
[10] *Ibid* at paras 47-48.
[11] *Ibid* at para 76.
[12] *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311; *Kane v University of British Columbia*, [1980] 1 SCR 1105; *Knight v Indian Head School Dvision No. 19*, [1990] 1 SCR 653; David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L&P 117.
[13] *Ibid* at para 117.

substantive assessment of the decision is at odds with the nominal values and purposes it associates with reasonableness review.

While it is tempting to sift through *Dunsmuir*'s tea leaves again, I want to focus on its subsequent impact by examining whether it has changed the way in which judges approach the standard of review and the manner in which they assess the reasonableness of administrative decisions. In Parts II and III, I will briefly situate *Dunsmuir* within the broader historical continuum of Canadian administrative law and examine how it has affected the standard of review applied to a range of administrative decisions. This analysis reveals that, while the concept of jurisdictional error still remains at large it seems that, for the first time since *CUPE*, its days seem to be numbered. The Court's renewed commitment to *CUPE* is apparent in a series of decisions concerning a wide variety of administrative decisions made by privacy commissioners, labour arbitrators, professional disciplinary tribunals, and human rights agencies. These cases suggest that the standard of review has shifted from correctness to reasonableness in topic areas where the Supreme Court has, until very recently, been reluctant to adopt a deferential standard of review. The upshot of all of this is that, since *Dunsmuir*, the Supreme Court has been tacking towards a presumption that judges should scrutinize administrative decisions according to a reasonableness standard. In the long run, this shift has the potential to further simplify how judges and practitioners address the threshold question in Canadian administrative law.

In Part IV, I will shift my attention to consider how the application of the reasonableness standard of review in *Dunsmuir* reveals a persistent problem in Canadian administrative law, *viz.* that while there is no shortage of judicial rhetoric regarding the point or purposes of reasonableness review, the Supreme Court has generally failed to heed those purposes when undertaking reasonableness review. In this respect, *Dunsmuir* is symptomatic of a tendency towards a perfunctory form of merits review which fails to engage meaningfully with the substance of administrative decisions and the pliable nature of reasonableness. Finally, I will conclude by arguing that while the Court's post-*Dunsmuir* approach to reasonableness review is both disappointing and confusing, it can be remedied by articulating a contextual approach, one which is consistent with the methodology employed in *Baker v. Canada*.[14] Such an approach should be premised on upholding the values of "justification, transparency and intelligibility" through judicial review, but should also explain why those values demand different degrees of independent, substantive scrutiny depending upon the interest affected by an administrative decision.

II. Judicial Deference and Reasonableness Review before *Dunsmuir*

In order to assess the prospective significance of *Dunsmuir*, it's useful to consider how the case relates to some of the more general historical themes in Canadian administrative law. Given the parameters of this paper, I cannot undertake a detailed assessment of the voluminous case law

[14] *Baker v Canada*, [1999] 2 SCR 817 [*Baker*].

which preceded *Dunsmuir*. Nevertheless, I will try to explain briefly where that case fits in the broader historical continuum, because one way to understand where we're headed is to recognize where we've been.

For the purposes of this paper, I think it's helpful to carve up the common law history of judicial review into different three different periods of doctrinal development. The first period might be called, following John Willis, the "conceptual" era of judicial review.[15] During this period, the orthodox assumption was that the parameters of judicial review were determined *ab initio* by the legislature. Thus, the practice of judicial review hinged on an abstract characterization regarding legislative intent and the nature of the legal question or powers at stake, instead of the wide-ranging contextual analysis which is more familiar today. If an administrative decision implicated so-called "jurisdictional" issues or "judicial" functions, judges were entitled to intervene on a correctness basis in order to preserve legislative sovereignty, a Diceyan conception of the rule of law (which asserts that superior court judges have a monopoly on interpreting the law), or uphold an interpretation of s. 96 of the *Constitution Act, 1867* which prevented provincial legislatures from shifting legal powers traditionally exercised by the judiciary to newly created administrative institutions.[16] By contrast, if the issues were deemed to be "non-jurisdictional" or "administrative" in nature, the practice of judicial review was more circumspect—sometimes even submissive towards administrative decisions.[17] The result was that during the conceptual period, judges tended towards an all-or-nothing approach to judicial review which jealously scrutinized progressive economic policy (particularly collective bargaining regimes)[18] but turned a blind eye towards executive power exercised during wartime.[19]

The practical shortcomings of the conceptual approach, especially the arbitrary manner in which issues were labelled as jurisdictional or non-jurisdictional, were not lost on academic commentators. DM Gordon condemned the doctrine of jurisdictional error, saying that "[a]nything like a serious examination … of the case law on jurisdiction must convince an open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found."[20] Similarly, Bora Laskin (then a law professor at the University of

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[15] John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 UTLJ 53.
[16] AV Dicey, *Introduction to the Study of the Constitution*, 10th ed (London: MacMillan & Co, 1959); John Willis, "Statute Interpretation in a Nutshell" (1938) 16 Can Bar Rev 1; John Willis, "Administrative Law and the British North America Act" (1939) 53 Harv L Rev 251; John Willis "Section 96 of the British North America Act" (1940) 18 Can Bar Rev 517; Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall LJ 1; Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 51 UTLJ 75.
[17] Dyzenhaus, *supra* n 9 at 286.
[18] See e.g., *John East Iron Works Ltd v United Steel Workers of America, Local 3493*, [1948] 1 DLR 652 (Sask CA); *In re Ontario Labour Relations Board: Toronto Newspaper Guild, Local 87 v Globe Printing Company*, [1953] 2 SCR 18.
[19] *Reference Re: Persons of the Japanese Race*, [1946] SCR 248.
[20] DM Gordon, "The Relation of Facts to Jurisdiction", (1929) 45 LQR 459.

Toronto) referred to the concept of jurisdictional error as a "comforting conceptualism", which enabled judges to interfere with labour board decisions even though judicial interference frequently undermined the policy objective of maintaining peaceful industrial relations.[21] The solution to this predicament, according to Willis, was for judges to eschew conceptual analysis in favour of a "functional" approach to judicial review: one that avoids speculating about legislative intent and instead focuses on factors which indicate that administrative officials are better equipped to interpret and implement legislative policy in the public interest.[22] Laskin took Willis's advice with him to the Bench, where he stated that it was "preferable to avoid generalized observations about jurisdictional defects taken from other cases" and instead focus "on an examination of statutory functions" which had been entrusted to administrative decision-makers.[23]

This critique began filtering into Supreme Court jurisprudence during the second, pragmatic and functional period, beginning with *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*[24] and *CUPE, Local 963 v. New Brunswick Liquor Corporation.*[25] At first glance, these two decisions are an odd couple: *Nicholson* expands the scope of judicial review for procedural fairness, while *CUPE* preaches the virtue of judicial deference on matters of substance.[26] But they are united at a deeper level, in the sense that they both reject the conceptual approach to judicial review in favour of a more pragmatic assessment of the regulatory context, policy objectives, and the impact of an administrative decision on individuals. In *Nicholson* the Supreme Court rejected the traditional assumption that a duty of procedural fairness was contingent upon a "superadded" duty to act judicially,[27] and held that it also applied to "administrative" functions as well.[28] Thus, the conceptual distinction between judicial and administrative functions no longer limited the reach of procedural fairness, so that the duty extended to "every public authority making an administrative decision…which affects the rights, privileges or interests of an individual."[29] And in *CUPE*, Dickson J. famously asserted that "courts…should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[30] Instead, Dickson J. suggested that judges should

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[21] Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses", (1952) Can Bar Rev 986 at 994. See also BL Strayer, "The Concept of "Jurisdiction" in Review of Labour Relations Board Decisions", (1963) 28 Sask Bar Rev 157; Ken Norman, "The Privative Clause: Virile or Futile?", (1969) Sask L Rev 334; J Pink, "Judicial 'Jurisdiction' in the Presence of Privative Clauses", (1965) 23 UT Fac L Rev 5.
[22] Willis, above n 15 at 15.
[23] *R v Ontario Labour Relations Board, ex parte Metropolitan Life Insurance Co*, [1969] 1 OR 412 (CA) at 414.
[24] *Nicholson, supra* n 12.
[25] *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 [*CUPE*].
[26] David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 UTLJ 193 at 197.
[27] *R v Legislative Committee of the Church Assembly*, [1928] 1 KB 411 at 415; *Nakkuda Ali v Jayaratne*, [1951] AC 66 (JCPC).
[28] *Nicholson*¸*supra* n 12 at 324-330.
[29] *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653.
[30] *CUPE, supra* n 25 at 233.

focus on other factors, like expertise and the explicit delegation of authority (implied by a privative clause), which explain why administrative decisions deserve judicial respect. Hence, he concluded that when the meaning of a statutory provision is ambiguous and falls within the statutory mandate of an administrative institution, judges should only intervene when an administrative decision is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".[31]

Despite these important shifts, the transition away from the conceptual approach was anything but straightforward. In particular, the Supreme Court struggled to develop an alternative to the jurisdictional/non-jurisdictional dichotomy, which explains why this terminology continues to crop up to the present day.[32] In the initial years following *CUPE*, there is one set of decisions which simply invokes the label of jurisdictional error with little or no discussion about how *CUPE* had diminished the importance of jurisdictional inquiries;[33] and another set of decisions declares that a standard of "correctness" applies to jurisdictional issues, and reserves the *CUPE* standard of "patent unreasonableness" for non-jurisdictional issues.[34] However, as in the conceptual era, these cases do not adequately distinguish jurisdictional from non-jurisdictional issues, but the Court continued to assume that the distinction was self-evident and uncontroversial.

The real shift away from the conceptual approach occurred only after the Supreme Court began to elaborate the "pragmatic and functional approach" to judicial review as a distinct analytical framework.[35] In the years that followed, the Supreme Court began elaborating how different contextual factors besides legislative intent—especially the significance of administrative expertise—grounded a more general case for judicial deference towards administrative decisions. Thus, even in cases where the enabling legislation provided an express statutory right of appeal,

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[31] *Ibid* at 237.

[32] See e.g. David Mullan, "The Re-emergence of Jurisdictional Error" (1985) 14 Admin LR 326; David Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising *New Brunswick Liquor*" (1987) 1 Can J Admin L&P 71; David Mullan, "A Blast From the Past: A Surreptitious Resurgence of *Metropolitan Life*?" (1992) 5 Admin LR (2d) 117; David Mullan, "Jurisdictional Error Yet Again—The Imprecise Limits of the Jurisdiction-Limiting *Canada (Attorney General) v. P.S.A.C.*" (1993) 11 Admin LR (2d) 117; David Mullan, "Recent Developments in Administrative Law: The Apparent Triumph of Deference!" (1999) 12 Can J Admin L&P 192; David Mullan, "Revisiting the Standard of Review for Municipal Decisions: When is a Pile of Soil and 'Erection'" (2000) 13 Can J Admin L&P 319; David Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can J Admin L&P 59.

[33] *Blanco v Rental Commission*, [1980] 2 SCR 827; *AG v Labrecque*, [1980] 2 SCR 1057; *R. v Skogman*, [1984] 2 SCR 93; *NBC v Retail Clerks' Union,* [1984] 1 SCR 269. But see *Teamsters Union v Massicotte*, [1982] 1 SCR 710. For academic commentary, see David Mullan, "Developments in Administrative Law: The 1980-81 Term" (1982) 3 Sup Ct L Rev 1 at 40-49; David Mullan, "Developments in Administrative Law: The 1981-82 Term" (1983) 5 Sup Ct L Rev 1 at 17-29.

[34] *St. Luc Hospital v Lafrance*, [1982] 1 SCR 974; *Alberta Union of Provincial Employees v Olds College*, [1982] 1 SCR 923; *Canadian Labour Relations Board v Halifax Longshoremen's Association,* [1983] 1 SCR 245; *Bibeault v McCaffrey*, [1984] 1 SCR 176; *Blanchard v Control Data Canada Ltd*, [1984] 2 SCR 476; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 SCR 412.

[35] *Union des employés de service. Local 298 v. Bibeault*, [1988] 2 SCR 1048.

the Court concluded that there were cogent reasons for deferring to administrative decisions.[36] But because the pragmatic and functional analysis did not purge some of the traditional conceptual elements—especially the jurisdictional/non-jurisdictional issues and law/fact distinctions—it became more complex, confusing and conflicted because the factors often pulled in different directions. In order to accommodate this complexity, the Court established an intermediate standard so that judges could assess an administrative decision on a correctness, reasonableness, or patent unreasonableness basis. For a time, it seemed that the pragmatic and functional approach had finally eclipsed the conceptual approach in *Pushpanathan* when Bastarache J. declared that "it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis."[37]

But while the pragmatic and functional analysis grew like topsy during this period, relatively little attention was given to the more substantive question of how one should actually assess the reasonableness of a particular administrative decision on its merits. Instead, the Court resorted to abstract and tautologous definitions. For instance, a patently unreasonable decision was defined as being "clearly irrational"[38] or having an "immediate or obvious" defect, whereas it took "some significant searching or testing" to discover whether a decision was merely unreasonable.[39] The upshot of this was that, in addition to having a complex and conflicted pragmatic and functional approach for determining the standard of review, judges tended to resort to conclusory statements without adequately explaining why a particular decision was (un)reasonable from a more concrete legal perspective that was grounded by examining the regulatory context.

The one notable exception in this respect is *Baker v. Canada*.[40] Besides establishing a duty to give reasons as a matter of fairness, *Baker* also holds that the substance of those reasons must demonstrate that the decision-maker was "alert, alive, and sensitive" to relevant legal principles.[41] In that case, L'Heureux-Dubé J. explained why the reasons given by the immigration officer did not demonstrate adequate regard for the purposes and principles of the enabling legislation, departmental guidelines, and a ratified (but not incorporated) international treaty. But she was also careful to point out that her analysis did not entail "that children's best interests must always outweigh other considerations".[42] It just meant that "where the interests of

[36] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 [*Pezim*]; *Canada (Director of Investigation and Research) v Southam*, [1997] 1 SCR 748 [*Southam*].
[37] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 28 [*Pushpanathan*].
[38] *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 SCR 941 at para 44.
[39] *Southam*, *supra* n 36 at para 57.
[40] *Baker*, *supra* n 14.
[41] *Ibid* at para 75.
[42] *Ibid*

children are minimized, in manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable."[43]

The final bracket of time, which spans roughly from 2002 to *Dunsmuir*, might be called the "dis-functional" period in judicial review. With respect to the threshold standard of review issue, the cases during this period convey weariness and frustration with the complex and conflicted nature of the pragmatic and functional framework. LeBel J.'s concurring opinions in *Chamberlain v. Surrey School District No. 36*[44] and *Toronto (City) v. CUPE, Local 79*[45] provide a general outline of the dis-functional critique. In these opinions, LeBel J. challenges the notion that the pragmatic and functional framework must be routinely applied whenever a court engages in judicial review. Instead, he asserts that express or implied legislative intent about the scope of administrative jurisdiction still serves as an adequate justification for judicial intervention—an approach that, on its face, resurrects the notion of jurisdictional error because it assumes that the parameters of judicial review can be determined by direct reference to legislative intent, instead of a more nuanced analysis of the regulatory context. The following passage from LeBel J.'s concurring opinion in *Chamberlain* is revealing in this respect:[46]

> The ultimate question remains the legislature's intention. Going through the various factors in the "pragmatic and functional method" is not always the best path to that intention. In the context of this appeal, we should look instead to the statutory grant of power to the Board and the conditions attached to it. The courts are responsible for ensuring that the Board acts within the scope of its power. In my opinion, interference with the Board's functions on any other basis would generally be unwarranted.
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> I do not intend to case any doubt on the validity of the pragmatic and functional approach. On the contrary, I suggest that it is more consistent with the philosophy underlying that approach to adapt the framework of judicial review to varying circumstances and different kinds of administrative actors than it is to go through the same checklist of factors in every case, whether or not they are pertinent—a methodology which, I would suggest, is neither pragmatic nor functional.

In the years that followed, the Court provided further fuel for the idea of jurisdictional error by identifying different conceptual categories of issues which would attract review on a correctness standard—constitutional questions,[47] so-called "true" jurisdictional issues,[48] and general questions of law which are of central importance to the Canadian legal system.[49] The suggestion was that there was no need to conduct a pragmatic and functional assessment of the regulatory context where these issues were in play.

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[43] *Ibid*
[44] *Chamberlain v Surrey School District No. 36*, [2002] 4 SCR 710 [*Chamberlain*].
[45] *Toronto (City) v CUPE, Local 79*, [2003] 3 SCR 77.
[46] *Chamberlain*, above n 44 at paras. 194-195. See also *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, [2004] 1 SCR 485 [*United Taxi Drivers'*].
[47] *Nova Scotia (Workers' Compensation Board) v Martin & Laseur*, [2003] 2 SCR 504.
[48] *United Taxi Drivers', supra* n 46; *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, [2006] 1 SCR 140.
[49] *Toronto (City) v CUPE, Local 79*, above n 45; *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc*, [2001] 2 SCR 100.

With respect to the second question regarding reasonableness review, the Supreme Court retreated from the "alert, alive, and sensitive" approach in *Suresh v. Canada (Minister of Citizenship and Immigration)*.[50] That case concerned a decision by the Minister of Citizenship and Immigration to deport a Convention refugee who had been detained on the suspicion that he was a threat to national security. In addressing whether the Minister's decision was reasonable, the Court held that "[i]f the Minister has considered the correct factors, the courts should not reweigh them".[51] In other words, so long as the Minister's decision was not "unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures—it should be upheld."[52] So instead of asking whether the reasons given by the Minister was "alert, alive and sensitive" to relevant legal principles (including *Charter* values), the Court held that reasonableness review is restricted to scanning an administrative decision to ensure that relevant legal factors are mentioned. This decision prompted David Mullan to observe that the Court was "increasing deference in relation to decision-making where there is frequently a strong justification for judicial scrutiny."[53]

In later cases, LeBel J. targeted the woolly definitions associated with the different standards of review and the practical difficulties entailed with implementing those definitions when engaging in a substantive assessment of an administrative decision. The fact that there was still no method for implementing reasonableness review and distinguishing it from the "patent unreasonableness" standard meant that the whole enterprise of judicial review was on shaky ground:[54]

> …the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

But despite these mounting concerns, the issue regarding how to assess substantive reasonableness has not attracted much commentary from the Supreme Court until very recently.

III. Judicial Deference after *Dunsmuir*

In retrospect, *Dunsmuir* is the capstone case for the dis-functional period. As a result, it projects mixed messages about the practice of judicial review. While *Dunsmuir* is openly critical of the complex and conflicted nature of the pragmatic and functional approach, it retains the same framework under a new name—"the standard of review analysis." But the case also posits that this

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[50] *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3 [*Suresh*].
[51] *Ibid* at par. 41.
[52] *Ibid*
[53] David Mullan, "Deference from *Baker* to *Suresh* and Beyond—Interpreting the Conflicting Signals" in David Dyzenhaus (ed) *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 21 at 22.
[54] *Toronto (City) v CUPE, local 79,* above n 45 at para. 66.

analysis can be circumvented altogether when the standard of review is pegged by precedent or the issue at stake involves (1) a constitutional questions (2) "true" questions of *vires*, (3) general questions of law, or (4) concurrent legal authority. The difficulty is that the reasoning in *Dunsmuir* regarding the standard of review straddles two different narratives in Canadian administrative law. The first, conceptual, narrative asserts that judges are entitled to intervene on a correctness basis when the issue under review falls into an abstract class or category; whereas the second, functional, narrative asserts that judges should generally avoid categorizing issues and focus instead on contextual factors which suggest that administrative officials have a legitimate role to play in interpreting the relevant legal principles and values.

This past year, however, the Court issued a series of decisions which reign in the conceptual categories associated with correctness review. The most significant decision in this respect is *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*.[55] In that case, an adjudicator found that the Teachers' Union had breached provincial privacy legislation by publishing members' personal information in a newsletter.[56] The union challenged the decision on the ground that the Privacy Commissioner had failed to complete the inquiry or extend the 90 day deadline for completing the inquiry under s. 50(5) of the Alberta *Personal Information Protection Act*.[57] The union succeeded both at first instance and on appeal. The chambers judge cited *Dunsmuir* as authority for the proposition that "the standard of correctness still applies to matters of jurisdiction."[58] And since the statutory provision stated that an inquiry "must be completed within 90 days" of the complaint unless the Commissioner provided a written extension, the chambers judge concluded that "it cannot be said that the Commissioner should be accorded deference."[59] The Court of Appeal held that, while the breach of the time limitation was not a jurisdictional error *per se*,[60] the fact that the Commissioner failed to justify or explain the defect meant that the decision should nevertheless be quashed.[61]

The Supreme Court's decision in the *Alberta Teachers'* case is interesting, both from the perspective of judicial deference and reasonableness review.[62] With respect to the standard of

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[55] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654 [*Alberta Teachers'*].

[56] *Re Alberta Teachers' Association*, [2008] AIPCD No 28.

[57] *Personal Information Protection Act,* SA 2003, c P-6.5, s. 50(5).

> "An inquiry into a matter that is the subject of a written request…must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner
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> (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and
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> (b) provides an anticipated date for the completion of the review.

This legislative provision has since been amended to impose a limitation period of one year.

[58] *Alberta Teachers' Assn v Alberta,* (2008) 21 Alta LR (5th) 24 at para 10 (QB).

[59] *Ibid* at para 11.

[60] *Alberta Teachers' Assn v Alberta (Information and Privacy Commissioner),* (2010) 21 Alta LR (5th) 30 at para. 19 (CA).

[61] *Ibid* at para 40.

[62] See Laverne Jacobs, "Jurisdictional Quandaries in Administrative Law in the Wake of *Dunsmuir*"

review question, the Court held that despite the wording of s. 50(5), the chambers judge should not have applied the correctness standard. Rothstein J., who wrote the majority opinion, held that the chambers judge had erred in assuming that the statutory provision raised a "true" question of *vires*. In fact, he went so far as to suggest that the concept of jurisdictional error may have outlived its usefulness, noting that "it may be that the time has come to reconsider whether…the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review."[63] But for the time being, Rothstein J. held that "[t]rue questions of jurisdiction are narrow and will be exceptional" so that as long as an administrative tribunal is "interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness."[64]

This Court continues this trend of reigning in the category of "true" jurisdictional issues in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*.[65] That case concerns the legality of a decision by the Nova Scotia Human Rights Commission to refer a matter to a board of inquiry. The complaint alleged that, by implementing an area tax rate to raise supplementary funding for public schools but failing to provide the same level of supplementary funding to French and English language public schools, the regional municipality of Halifax had discriminated against francophone Acadian parents on the prohibited ground of ethnic origin. An investigator appointed by the Human Rights Commission filed three separate reports with respect to this complaint, all of which concluded that a *prima facie* case of discrimination had been made out on the facts. But when the Commission struck a board of inquiry, the city sought prohibition, alleging that the Commission had no jurisdiction to inquire into the matter. At first instance, Boudreau J. quashed the Commission's decision on the ground that the decision to refer the matter to a board of inquiry involved a jurisdictional question; and, citing *Dunsmuir* and *Bell v. Ontario (Human Rights Commission)*[66] as authority, held that the complaint fell outside ambit of the provincial *Human Rights Act* because the scheme of supplementary funding was established by Provincial legislation.[67] However, the Court of Appeal overturned Boudreau J.'s decision, stating that "the judge in these circumstances should have exercised restraint".[68]

The Supreme Court's decision in *Halifax (Regional Municipality)* is interesting, because the Court clearly distances itself from the notion of jurisdictional review with respect to a decision by a human rights commission—a regulatory context in which the Court has historically been

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[63] *Alberta Teachers', supra* n 55 at para 34.
[64] *Ibid* at para 39.
[65] *Halifax (Regional Municipality), supra* n **Error! Bookmark not defined.**.
[66] *Bell v Ontario (Human Rights Commission)* [1971] SCR 756.
[67] *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)* (2009) 273 NSR (2d) 258 at paras 49-53 (NSSC).
[68] *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)* (2009) 273 NSR (2d) 258 at para 34 (CA).

reluctant to extend the notion of judicial deference.[69] Cromwell J., who wrote the unanimous opinion, held that "the Commission's function is one of screening and administration, not of adjudication".[70] Thus, the decision under review was discretionary in nature, which meant that it was subject to judicial review on a reasonableness standard.[71] However, Cromwell J. went further by stating that that the *Bell* decision "should no longer be followed in relation to its approach to preliminary jurisdictional questions"[72], and that "courts should exercise great restraint in intervening at this early stage of the process."[73] This statement, when read alongside the *Alberta Teachers'* case, is noteworthy because instead of simply stating that judges should not be alert to brand an issue as jurisdictional (as Dickson J. stated in *CUPE*), it seems that the Court is undertaking some long overdue house cleaning to root out the lingering vestiges of the pre-*CUPE* conceptual framework.

In addition, it seems that the Court is reigning in other categories which attract correctness review, especially constitutional questions and general questions of law which are of central importance to the legal system as a whole. For instance, in *Doré v. Barreau du Québec*, the Supreme Court trimmed correctness review for constitutional questions.[74] In that case, the Court held that administrative decisions which involve *Charter* values should be reviewed according to a standard of reasonableness, not correctness as the Court had held previously in *Multani v. Commission scolaire Marguerite-Bourgeoys*.[75] The *Doré* case concerned a law society decision to suspend a member's license for sending a personal, inflammatory letter to a superior court justice who had upbraided him in open court. At the disciplinary hearing, Mr. Doré argued that article 2.03 of the professional *Code of Ethics*—which states that "the conduct of an advocate must bear the stamp of objectivity, moderation and dignity"—infringed his freedom of expression under s. 2(b) of the *Charter*. However, the disciplinary committee rejected this argument on the basis that the impugned limitation was "entirely reasonable" because, as a member of an exclusive profession, Doré had voluntarily accepted ethical restraints that were necessary to maintain public confidence in the administration of justice. Having dispensed with the *Charter* objection, the committee suspended Doré's license to practice for 21 days.

On appeal before the provincial Tribunal des Professions Doré argued that, while article 2.03 was constitutionally valid on its face, the disciplinary committee's decision constituted a disproportionate infringement of his s. 2(b) rights. The Tribunal upheld the committee's decision on a correctness standard, but stated that it was not necessary to engage in a full blown *Oakes* analysis in order to reach this conclusion. Instead, it engaged in a more general assessment of

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[69] See e.g., Alison Harvison Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993) 13 Admin LR (2d) 206.
[70] *Halifax, supra* n **Error! Bookmark not defined.** at para 23.
[71] *Ibid* at para 26.
[72] *Ibid* at para 38.
[73] *Ibid.* at para 17.
[74] *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].
[75] *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at para. 20.

whether the decision constituted a proportionate limitation of *Charter* rights, and held that the decision was not unreasonable because it imposed a minimal restriction relative to the gravity of Doré's conduct and lack of remorse. On judicial review, the Superior Court held that the Tribunal's analysis was "unassailable"; but while the Quebec Court of Appeal upheld the Tribunal's decision, it did so only after conducting a full-fledged *Oakes* assessment of the importance of the decision's objective, whether the penalty was rationally connected to that objective, and whether it satisfied the minimal impairment *Oakes* requirement.
While the Supreme Court upheld the Tribunal's decision, it stated that the Court of Appeal should have reviewed that decision according to the administrative law standard of reasonableness. This aspect of the decision is surprising, because it asserts that when *Charter* values are applied to an individual administrative decision that decision is entitled to judicial deference.[76] Moreover, instead of stating that the standard of review was determined by the constitutional nature of the decision, the Court's case for judicial deference relied on functional considerations—that administrative decision-makers are better suited to apply the *Charter* in discrete cases, because they have relevant expertise regarding the implementation of particular legislative policies and the advantage of hearing evidence first hand.[77]In this respect, Abella J. observed that:[78]

> Deference is still justified on the basis of the decision-maker's expertise and proximity to the fact of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case.* But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Hence, these functional considerations apply to individual administrative decisions which apply *Charter* values, because those values "are being applied in relation to a particular set of facts."[79] Nevertheless, the Court reserves correctness review for administrative decisions which assess the constitutionality of enabling legislation, because those functional considerations have diminished significance.[80]

Likewise, in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, the Supreme Court held that the Manitoba Court of Appeal had erred in applying the correctness standard to a labour arbitrator's decision.[81] In that case, the arbitrator upheld a grievance alleging that the employer had been misinterpreting the seniority provisions of the collective agreement for over twenty years. Nevertheless, the arbitrator refused to grant a remedy in the case, saying that "[i]t would be unfair to permit the Union to enforce its interpretation" of

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[76] *Dore*, *supra* n 74 at para 36.
[77] *Ibid* at paras 48 and 54.
[78] *Ibid* at para 54 [emphasis original].
[79] *Ibid* at para 36.
[80] *Ibid*
[81] *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616 [*Nor-Man*].

the collective agreement because "[t]he Employer was entitled to assume that the Union had accepted its practice".[82] While the Court of Queen's Bench initially upheld the arbitrator's decision on a standard of reasonableness, the Manitoba Court of Appeal held that the proper standard to apply was correctness, because (1) the notion of estoppel was a pure question of common law analysis, (2) which was of central importance to the legal system as a whole, and (3) the arbitrator had no relative expertise to interpret or apply that doctrine.[83] Authority for this conclusion[84] was drawn from *Dunsmuir* and *Toronto (City) v. CUPE, Local 79*, the case in which the Supreme Court established the "general question of law" category for correctness review in relation to a labour arbitrator's decision which implicated the common law doctrines of *res judicata* and abuse of process.[85]

Interestingly, the Supreme Court allowed the appeal, saying that the Court of Appeal had erred in applying the correctness standard. While the Court did not repeal the category of "general questions of law", it significantly narrowed its scope. More specifically, the Court held that the labour arbitrator's interpretation of the common law concept of estoppel was warranted a deferential standard of review:[86]

> Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.
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> On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates—and well equipped by their expertise—to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.

In effect, the Court in *Nor-Man* rejects the idea that one can determine the standard of review by simply slotting the issue at stake into an abstract category of questions to which correctness review applies. Instead, it recognizes that relevant functional considerations—especially expertise—means that judicial deference is warranted, even when an arbitrator applies common law doctrines or principles to the facts at hand.

To sum up: while the Supreme Court set up a series of categories for issues which would attract correctness review during the dis-functional period, the case law from the past year indicates that the Court has begun to reign in the scope of those categories and recommit itself to the pragmatic

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[82] *Nor-Man Regional Health Authority v Manitoba Assn. of Health Care Professionals (Plasier Grievance)*, (2008) 95 CLAS 325 at para. 96.
[83] *Manitoba Assn. of Health Care Professionals v Nor-Man Regional Health Authority Inc.* (2010) 255 Man R (2d) 93 at para. 52 (CA).
[84] *Ibid* at paras. 43-53.
[85] *Toronto (City)* above n 45 at para. 15.
[86] *Nor-Man* above n 81 at paras. 44-45.

and functional approach. Many of these cases from the past year—particularly *Alberta Teachers'*, *Halifax*, *Doré*, and *Nor-Man*—involve issues which could easily have been characterized as jurisdictional, constitutional, or a general question of law which is of central importance to the legal system as a whole. But in each case the Court held that judicial deference was warranted, which meant that the decision at stake should be reviewed on a reasonableness standard. However, as we will see shortly, the fact that the Court employs the reasonableness standard does not necessarily mean that the Court is deferring substantively to an administrative decision. A lot depends on how the Court implements the notion of reasonableness review.

IV. Reasonableness Review after *Dunsmuir*

While the decisions from the Supreme Court over the past year suggest that judges should generally adopt the deferential standard when reviewing administrative decisions, the case law regarding the practice of reasonableness review remains muddled. This problem is, to some extent, unavoidable because of the interrelationship between the idea of judicial deference and reasonableness review: while functional considerations counsel judicial respect for the legitimacy of administrative decisions, judges still have a role to play in upholding the rule of law and ensuring that the substance of those administrative decisions are based on relevant legal principles.[87] The result is that judges often struggle to reconcile respect for the administrative state with their constitutional role, which is to hold administrative decision-makers to account legally for their decisions.

Once again, *Dunsmuir* is illustrative of the deep tension between judicial deference and the rule of law which crops up in reasonableness review. One of the most powerful lines in *Dunsmuir* asserts that the purpose of reasonableness review is to ensure "justification, transparency and intelligibility within the decision-making process."[88] In this respect, the Court seems to revive the *Baker* approach to reasonableness review, because it suggests that there is a link between the procedural fairness aspect of reasons—that administrative decisions must be transparent and intelligible—and the idea that judges have a legitimate role to play in scrutinizing the substance of an administrative decision to ensure that they are adequately justified. In this respect, the adjudicator's decision in *Dunsmuir* seemed to have a solid foundation. He held that s. 97(2.1) of the *Public Service Labour Relations Act* entitled him to hold a hearing in order to determine whether Dunsmuir had been terminated for cause.[89] Ultimately, the adjudicator determined that Dunsmuir had not been dismissed for cause, but upheld Dunsmuir's grievance on the basis that the employer had breached its duty of fairness at common law under the principles laid down in *Knight v. Indian Head School Board.*[90]

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[87] *Roncarelli v Duplessis*. [1959] SCR 121.
[88] *Dunsmuir*, above n 1 at para. 47.
[89] Section 97(2.1) stated that "[w]here an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause…the adjudicator may substitute such other penalty for the discharge or discipline as the adjudicator seems just and reasonable in all the circumstances."
[90] *Knight, supra* n 12.

Nevertheless, the Supreme Court held that the adjudicator's decision "was deeply flawed," because it failed to give adequate weight to the employment contract.[91] Interestingly, in a majority opinion that spans 118 paragraphs, the Court's analysis of the adjudicator's decision was relatively terse:[92]

> By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide or even have such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

Thus, with respect to a decision that seemed to be well grounded by both the legislative framework and the common law, the Court concluded that it was nevertheless unreasonable because the adjudicator required the employer to abide by the principles of "justification, transparency, and intelligibility" when the employment contract had rendered those values irrelevant.

The significance of *Dunsmuir* transcends the particular facts of that case because, along with *Baker* and *Suresh*, it reveals how the Court has adopted conflicting approaches to reasonableness review. As I pointed out in Part II, *Baker* established the "alert, alive and sensitive" approach to reasonableness review, which required that the substance of administrative decisions be demonstrably justifiable in light of a broad array of legal resources: legislation, departmental guidelines, international law, and constitutional values. Conversely, *Suresh* establishes a more circumspect approach to reasonableness review, whereby judges are entitled to scan administrative decisions to ensure that relevant legal principles are considered but are not entitled to "reweigh" the merits of the decision.[93] However, as Mullan points out, the regulatory context of *Suresh* raises concerns that the Court is "increasing deference in relation to decision-making where there is frequently a strong justification for judicial scrutiny."[94] Finally, *Dunsmuir* seems to employ an approach which is distinguishable from both *Baker* and *Suresh*. It is distinguishable from *Baker* in the sense that, while the Court deconstructs the reasons given by the adjudicator, it seems to ignore how the adjudicator's decision advanced fundamental legal values, especially the importance of requiring public decision-makers to give public, justifiable decisions. But it is also distinguishable from *Suresh*, in the sense that the Court clearly reweighed factors which were relevant to the decision by holding that the adjudicator should have given priority to the contractual nature of the employment relationship over the common law principle of procedural fairness.

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[91] *Dunsmuir* at para 72.
[92] *Dunsmuir* ata para 74.
[93] See also *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339.
[94] David Mullan, "Deference from *Baker* to *Suresh* and Beyond", *supra* note 53.

While there is an identifiable trend with respect to the Supreme Court's analysis of the standard of review, its approach to reasonableness review over the past year is likely to exacerbate confusion because it continues to project conflicting approaches to reasonableness review. The *Alberta Teachers'* case is a remarkable case in this respect. Recall that the issue in the case concerned the Commissioner's failure to provide a written extension for completing an inquiry within the 90 day statutory period. While this issue was not argued before the adjudicator, it was raised on judicial review. The problem, for the Supreme Court, was to explain how one can assess the reasonableness of a decision which does not address an issue raised on judicial review.

Surprisingly, the Court held that even though the adjudicator did not address the failure to abide by statutory time limits the decision was nevertheless reasonable. The salient passages of Rothstein J.'s decision on this point read as follows:[95]

> In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of the inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.
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> Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.
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> However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.

The decision is striking, because it asserts (1) that the requirement of justification, transparency, and intelligibility is not a universal feature of reasonableness review, and (2) that a reviewing court can repair or fill in gaps which might otherwise raise concerns from a rule of law perspective.[96]

Both of these propositions raise concerns from a broader perspective regarding the constitutional function of judicial review. While there are persuasive functional considerations which counsel a posture of judicial deference towards administrative decisions,[97] judges still have a constitutional duty to ensure that administrative decisions are made in public and are reasonable in light of the relevant law. By stating that judges can repair administrative decisions which are silent on their

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[95] *Alberta Teachers', supra* n 55 at paras 51-53

[96] See also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[97] See parts II and III above.

face or do simply not address statutory requirements, the *Alberta Teachers'* decision evokes reasoning which resonates with other cases which are deeply flawed from a rule of law perspective—especially national security cases where judges assumed that executive decision-makers had acted properly unless the claimant could produce evidence to the contrary.[98] My basic point is that judges should not be enlisted in repairing cracks or gaps in administrative decisions if the reasons provided are insufficient. In essence, this gives government officials an incentive to provide obscure or inadequate reasons, because even if the decision is challenged the court might nevertheless uphold the decision by speculating about possible legal justifications for the outcome. In this respect, it might have been better for the Court to at least remit the matter back to the original decision-maker for further reasons, instead of repairing the decision. At least the adjudicator would then have an opportunity to justify the decision, and the Court could then assess the adequacy of those reasons.

This criticism might strike some people as being overblown. After all, the missed deadline for conducting the inquiry in *Alberta Teachers'* did not undermine the union's ability to make its submissions on the merits at the original hearing or on judicial review. But this suggests that the Court should have rested its decision on other contextual considerations, like the *de minimus* consequences on the fairness of the proceedings, instead of establishing the more general proposition that judges should attempt to repair gaps in administrative reasons before deciding whether to intervene. Binnie J. suggested such a contextual approach to reasonableness review in *Dunsmuir*,[99] but so far the Court has been unwilling to expand on this idea other than to say simply that reasonableness is "a single standard that takes its colour from the context"[100] or "is an essentially contextual inquiry".[101]

While the Supreme Court was willing to adopt an extremely deferential approach in *Alberta Teachers'*, it adopts a very different approach to reasonableness review in *British Columbia (Workers' Compensation Board) v. Figliola* and *Canada (Human Rights Commission) v. Canada (Attorney General)* [*Mowat*].[102] The issue in *Figliola* concerned a decision by the British Columbia Human Rights Tribunal which considered whether a Workers' Compensation Review

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[98] See e.g. *Liversidge v Anderson*, [1942] AC 206 (HL). *Suresh*, *supra* n 50 arguably falls into this category as well.

[99] *Dunsmuir*, *supra* n 1 at para 139, Binnie J:

> "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 represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection [the pragmatic and functional approach] to another [reasonableness review] without any overall saving to motorists in time or expense."

See also Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 UTLJ 581.

[100] *Khosa*, *supra* n 93 at para 59 [*Khosa*].

[101] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2.

[102] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [*Figliola*]; *Canada (Canadian Human Rights Commission v Canada (Attorney General)*, 2011 SCC 53.

Officer had "appropriately dealt with" a human rights complaint. The complaint alleged that the WCB's Chronic Pain Policy, which imposed a fixed compensation award of 2.5% of total disability benefits for persons suffering chronic pain, infringed s. 8 of the British Columbia *Human Rights Code*. This complaint was initially dismissed by the Review Officer on the basis that the fixed award policy did not violate s. 8 or, if it did, there was a *bona fide* justification for the policy. When the complainants appealed this decision to the WCB's Appeal Tribunal, the provincial legislature amended the enabling legislation so as to revoke the Appeal Tribunal's jurisdiction to apply the *Human Rights Code*. Instead of applying for judicial review, the complainants sought to bring the matter before the provincial human rights tribunal. At the hearing, the WCB brought a preliminary motion, alleging that the Tribunal had no jurisdiction because the complaint had already been "appropriately dealt with" by the Review Officer within the meaning of s. 27(1)(f) of the *Code*.[103]

The Human Rights Tribunal rejected the motion for three interrelated reasons.[104] First, the Tribunal member addressed the WCB's argument that the complaint was barred by the common law doctrine of *res judicata*. After examining the Supreme Court of Canada's decision in *Danyluk v Ainsworth Technologies*, the Tribunal concluded that it should exercise its discretionary power under s. 27(1)(f) consistently with relevant common law considerations concerning finality in litigation. Second, the Tribunal held that the Review Officer lacked both real and perceived independence to adjudicate the complaint, because s. 99(2) of the *Workers Compensation Act* imposed an unequivocal statutory duty to apply WCB policy. Finally, the Tribunal note that, even though the WCB did not call any evidence to rebut the complaint at the original hearing, the Review Officer nevertheless found that there was a bona fide justification for the policy. As the Tribunal member put it:[105]

> WCB officers such as the Review Officer have no expertise in interpreting or applying the *Code*. Regarding deficiencies in the process, there was only one party before the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a BFJ [bona fide justification] for the Policy. There was no analysis regarding where the onus lay in establishing a BFJ or what the applicable interpretive principles with respect to human rights legislation are.
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> The rights and interests protected by the *Code* are of a quasi-constitutional nature and of fundamental importance. In my view, given the process before the Review Officer, and the fact that the Review Decisions were not final decisions at the time they were issued, it would work an injustice on the Complainants to lose their right to pursue the Complaints at a hearing before the Tribunal, where they will be able to call evidence and make submissions relevant to their allegations and WCB will be able to call evidence and make submissions to justify the Policy.

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[103] "27(1) A member or panel may, at any time after a complaint if filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

…

(f) the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding."

[104] *Figliola v British Columbia (Workers' Compensation Board)*, [2008] BCHRTD No 374.

[105] *Ibid* at paras 46-47.

Thus, the Tribunal concluded "that the substance of the Complaints was not appropriately dealt with in the review process" and that "the parties to the Complaints should receive the benefit of a full Tribunal hearing."[106]

The Supreme Court quashed the Tribunal's decision on the ground that it failed to demonstrate adequate regard for the unwritten "principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice".[107] Despite the fact that provincial *Administrative Tribunals Act* required the Court to apply the patent unreasonableness standard of review, the Court nevertheless held that the Tribunal had unreasonably exercised its discretionary power under its home statute in an attempt to determine whether the Review Officer's decision complied with the *Human Rights Code*.[108]

> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

Thus, the Court concluded that the Tribunal had "ignored its true mandate under s. 27(1)(f)" because in its view it duplicated proceedings and arguments that had already been considered by the Review Officer.[109]

A similar approach to reasonableness review is implemented in *Mowat*. The issue in that case concerned the legality of a costs award by the Canadian Human Rights Tribunal. At the conclusion of a protracted hearing regarding a sexual harassment complaint which lasted six weeks and produced 4,000 pages of transcript, the Tribunal awarded Donna Mowat $4,000 for pain suffering.[110] At the conclusion of the hearing, Mowat submitted a claim to recoup the cost of retaining legal advice at various points throughout the complaint process. However, in order for her claim to succeed the Tribunal had to be satisfied that legal fees were compensable under s. 53(2)(c) of the *Canadian Human Rights Act*, which states that the Tribunal can order compensation "for any expenses incurred by the victim as the result of the discriminatory practice".[111] When the Tribunal addressed this issue of statutory interpretation, it noted that Federal Court jurisprudence on this issue was conflicted. One line of cases held that the Tribunal was entitled to award legal costs under s. 53(2)(c), because the provisions of the *Act* should be broadly construed so as to advance the policy of combating discrimination in Canadian society

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[106] *Ibid* at para 50.
[107] *Figliola, supra* n 102 at para. 25.
[108] *Ibid* at para 36.
[109] *Ibid* at para 54.
[110] *Mowat v. Canadian Armed Forces*, [2005] CHRD No 14.
[111] *Canadian Human Rights Act*, RSC 1985, C. H-6, s. 53(2)(c).

and compensating victims of discriminatory conduct.[112] However, another line of cases held that s. 53(2)(c) should be construed more narrowly, because if Parliament intended to grant the Tribunal the authority to award legal costs it would have explicitly delegated this remedial authority.[113] Ultimately, the Tribunal concluded that it had the power to award legal costs, because the "[t]he predominance of authority from the Federal Court" favoured a broad interpretation of. 53(2).[114] Moreover, the Tribunal noted that a narrow construction of its statutory remedial powers "would amount to no more than a pyrrhic victory for the complainant" under the circumstances.[115] The Tribunal's award of $47,000 for legal costs (which covered only a portion of Mowat's legal fees) was upheld as reasonable at first instance,[116] but overturned on a correctness standard by the Federal Court of Appeal.[117]

The Supreme Court's decision in *Mowat* seems to reflect the broader trends I have noted above. On the one hand, the Court makes a bold move on the standard of review question by holding that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference."[118] This is a bold statement, because the Court concedes that its past decisions—which held that human rights tribunal decisions regarding questions of law were not entitled to deference—may not have been consistent with the functional values which underpin the deferential approach in other administrative contexts.[119] So when the Court acknowledges in *Mowat* that "[t]he question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute", it seems to be signalling a change of attitude towards judicial review of human rights agencies—at least with respect to the threshold question relating to the standard of review.[120]

However, as in *Figliola*, the Court quickly changes tack and concludes that the Tribunal's decision was unreasonable on its merits. After conducting "a careful examination of the text, context and purpose" of the statutory provisions, LeBel and Cromwell JJ. conclude that the

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[112] *Canada (Attorney General) v Thwaites*, (1994) 3 FC 38 at paras 50-57; *Canada (Attorney General) v Stevenson*, (2003) FCT 341; *Canada (Attorney General) v Brooks*, (2006) FC 500.
[113] *Canada (Attorney General) v Lambie,* [1996] FCJ No 1695 at para 43; *Canada (Attorney General) v Green*, [2008] FCJ No 778.
[114] *Mowat v Canadian Armed Forces* [2006] CHRD No 49 at para 27.
[115] *Ibid* at para 29.
[116] *Canada (Attorney General) v Mowat*, [2008] FCJ No 143 (FC).
[117] *Canada (Attorney General) v Mowat,* [2009] FCJ No 1359 (FCA).
[118] At para. 24.
[119] At para. 21, LeBel and Cromwell JJ.: "At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals."
[120] *Ibid* at para 25.

Tribunal's interpretation was deeply flawed.[121] While they recognized that the wording of s. 53(2)(c) was broad enough to include an award of legal costs, they stated that:[122]

> …when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination.

Lebel and Cromwell JJ. then proceed to carefully deconstruct s. 52—the text, its legislative history, counterpart provisions in provincial human rights legislation, etc.—and, through an application of the *ejusdem generis* canon of statutory interpretation, conclude that Parliament did not intend to confer such a broad remedial power on the Tribunal.

Even at a purely formal level, it's difficult to reconcile the restorative approach to reasonableness review deployed in *Alberta Teachers'* with the more parsimonious approach deployed in *Figliola* and *Mowat*. In *Alberta Teachers'* the Court held that even when an administrative official fails to address a salient legal issue in his or her reasons, the decision may nevertheless pass reasonableness muster if a judge can imagine a reasonable justification for the outcome. By contrast, in *Figliola* and *Mowat* the Court parses an administrative interpretation of its enabling legislation and concludes that the outcome is unreasonable, despite the fact that in both cases the Tribunal member clearly explained how the outcome advanced the policies, purposes, and principles of human rights legislation. This contrast shows that, while the Court has made some modest strides towards simplifying the standard of review, the methodological and substantive issues associated with reasonableness review are in dire need of attention.

V. Conclusion

While the Court in *Dunsmuir* aspired to resolve some of the most perplexing questions in administrative law, the enduring value of the case is that it illustrates two enduring problems. The first problem concerns the allure of jurisdictional categories and correctness review. As long as these categories and the concept of "jurisdictional" issues remains available, judges will be tempted to short-circuit the more difficult task of reasonableness review by stipulating that the nature of the decision demands correctness oversight. However, while *Dunsmuir* represents a historical moment when the Court seemed to have lost its faith in contextual analysis, the cases over the past year suggest that it has renewed its functionalist commitment to *CUPE* and has signalled its intent to reign in the conceptual categories associated with correctness review.

But even if judges settle on a deferential standard of review, they must grapple with the second, more difficult problem of implementing reasonableness review. In this respect the cases from the past year demonstrate that this is, perhaps, the most daunting problem in Canadian administrative law. While there now seems to be general consensus that judicial deference—which eschews correctness review in favour of reasonableness review—is a good thing, little work has been done to explain why the burden of justification is more or less demanding in different

[121] At para. 32.
[122] *Ibid* at para 35.

administrative contexts.[123] In my view, the best way to address this second problem is to begin elaborating Binnie J.'s suggestion in *Dunsmuir* that the practice of reasonableness review needs to be contextualized. In this respect, it might be helpful to rediscover the *Baker* method of reasonableness review, which requires judges to ask whether an administrative decision was "alert, alive and sensitive" to relevant legal values in a manner which is commensurate with the decision's impact on individual interests. By exploring why relevant factors, like the relative impact of the administrative decision, demands a greater or lesser degree of "justification, transparency and intelligibility within the decision-making process", we can work towards realizing *Dunsmuir*'s goal of developing a "principled framework that is more coherent and workable."

[123] See Sossin & Flood, "The Contextual Turn", *supra* n 99.