CHAPTER TWELVE

Making Sense of Reasonableness

Sheila Wildeman*
Schulich School of Law, Dalhousie University

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I. INTRODUCTION

When the Supreme Court of Canada released its judgment in *Dunsmuir v New Brunswick*[1] in 2008, there was general (if cautious) agreement that this development was likely to simplify substantive review. That is, *Dunsmuir*'s downsizing of the standards from three to two (cutting out patent unreasonableness and leaving only reasonableness and correctness), together with its streamlining of the work of selecting the standard (by way of a set of categorical presumptions), was regarded, not least by the judges issuing the decision, as a win for efficiency and judicial economy.[2] What the implications of *Dunsmuir* would be for judicial deference was another question. Some raised the obvious worry that loss of the most deferential standard would mean more (unjustified) judicial intervention.[3] But it was difficult to argue with the reasons for cutting patent unreasonableness loose. The *Dunsmuir* majority had affirmed a strong line of criticism on the conceptual incoherence and pragmatic unworkability of the distinction between the two deferential standards.[4] This, plus the majority's rule-of-law-based rejection of the idea that *some* unreasonableness was good enough for administrative law (so long as it was not "patent") pulled the common law rug out from patent unreasonableness as a respectable legal standard.

Yet, in this, the *Dunsmuir* majority hinted at a further prospect, beyond the attractive prospect of simplifying the standard of review analysis: that of freeing up judicial energies to engage more directly and seriously with the meaning of reasonableness, and deference, and how these should interact in administrative law.[5] The newly consolidated reasonableness standard called out for this kind of attention, uniting as it did the imperative of judicial deference to administrative decisions and the expectation that administrative decisions be justified. Now that deference no longer required judges to conduct review according to fictional distinctions about the permissible "depth of probing" or "magnitude of error"—asking "how much deference?" or "how much error?" in an effort to distinguish patent unreasonableness from reasonableness review[6]—one anticipated that further guidance would be forthcoming on how the imperatives of deference and justification should work together. But would the courts follow through and invest more intellectual resources into clarifying the purposes, structure, and implications of reasonableness review, and how exactly it differs from correctness review? That was, and is, no idle question; rather, it goes to a project central to repairing the legitimacy crisis (the growing sense that the standards of review are a waste of time) that provoked *Dunsmuir*'s refashioned standards in the first place.

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

2 See Chapter 11 by Audrey Macklin.

3 See David Mullan, "Dunsmuir v New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117 at 133, 137-40 ["Let's Try Again!"]; 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 LR 253 at paras 1, 31. Both authors suggest that the worry is eased because the newly unified reasonableness standard is likely to incorporate a spectrum of deference, shading into something like patent unreasonableness review at one extreme.

4 See *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77 at paras 60-135, LeBel J and *Dunsmuir*, *supra* note 1 at paras 40-42.

5 This shift in emphasis is brought out most clearly in the concurring opinion of Binnie J in *Dunsmuir*, *supra* note 1 at para 145. See also, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2001] 3 SCR 654 at para 38, Rothstein J for the majority [*ATA*].

6 *Dunsmuir*, *supra* note 1 at paras 40-42.

Nearly ten years on from *Dunsmuir*, there is general agreement that the work of selecting the standard to be applied in judicial review of substantive administrative decisions has been nicely economized.[7] Moreover, it is quite clear that *Dunsmuir*'s categorical approach to selecting the standard has shifted substantive review away from correctness as the default on questions of law (including questions involving the limits of discretion) toward reasonableness as the presumptive standard on all categories of question—with rare exceptions.[8] That is, *Dunsmuir*'s "standard of review analysis" and the principles it identifies as scaffolding have precipitated a fundamental shift toward selecting a deferential standard of review in matters that, for much of the history of judicial review, were presumed to rest within the exclusive constitutional authority of the courts.

One may be forgiven, then, for thinking that the twisting paths of the standards of review in Canadian administrative law have finally reached their proper terminus: the "triumph of reasonableness,"[9] and with this, a new understanding of administrative decision-makers as institutionally and constitutionally equipped (and expected) to justify their decisions in law. But as Binnie J predicted in his concurring judgment in *Dunsmuir*,[10] neither the majority's simplification of the standard of review analysis nor the rise of reasonableness as default standard means that we are done fighting about substantive review—in particular, as applied to questions of law. Setting aside the emerging schisms among members of the Supreme Court of Canada about whether or how *Dunsmuir*'s presumptions may be rebutted,[11] much of the instability and contestation once expressed at the stage of selecting the standard has, as Audrey Macklin noted in Chapter 11, moved downstream to the stage of application—more specifically, to application of the reasonableness standard.

The question that drives this chapter's inquiry into reasonableness review—now the presumptive standard on questions of law (or nearly all such questions),[12] fact, mixed law and fact, and discretion—is whether or how deference to administrative decision may be reconciled with the expectation that those decisions be justified. This raises a host of sub-questions. For instance, how important is the quality of reasons, or reasoning, to the assessment of reasonableness? More specifically, if reasons for decision may sometimes be implicit rather than express (as the Supreme Court of Canada has indicated),[13] how far can this principle be extended before it undermines the duty of public authorities to justify their decisions? Moreover, is inconsistency among administrative decisions or interpretations an unavoidable byproduct of deference (given the lack of *stare decisis* among administrative

7 See Lauren J Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014) 173 Can J Admin L & Prac at 182; Robert Danay, "Quantifying Dunsmuir: An Empirical Analysis of the Supreme Court of Canada's Jurisprudence on Standard of Review" (2016) 66 UTLJ 555 ["Quantifying Dunsmuir"].

8 *Ibid*.

9 The Hon John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27:1 Can J Admin L & Prac 101 ["Triumph of Reasonableness"]; Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 Alta L Rev 799 at 800 ["Scope and Meaning of Reasonableness Review"].

10 *Dunsmuir*, *supra* note 1 at para 139, Binnie J.

11 See Chapter 11 by Audrey Macklin.

12 See the discussion of the narrowing of the *Dunsmuir* categories said to attract correctness review in Chapter 11.

13 See the discussion of implicit reasons in Chapter 11 and Section III.B of this chapter.

decision-makers)?[14] Is such inconsistency as may be promoted by deference consistent with a principled approach to reasonableness—or the rule of law?

In recent years, leading commentators have decried the thinness of Supreme Court guidance on these and other matters.[15] The economizing ethos of *Dunsmuir*, commentators have argued, has failed to produce a coherent and workable set of guiding principles on how to conduct substantive review. This is particularly true of reasonableness review, where the Supreme Court's decisions seem to shuttle unpredictably between postures of judicial supremacy ("disguised correctness review")[16] and judicial abdication.[17] All this does little to alleviate the suspicions of administrative lawyers that reasonableness, like correctness, means nothing more or less than agreement with the opinion of the reviewing court.

This chapter takes a back-to-basics approach and asks: how does one begin to make sense of reasonableness in administrative law? Relatedly, how does one engage in effective administration and advocacy under the cloud of confusion (or is it a context-saturated rainbow[18]) that has settled around the application of this now-dominant standard? Given the high stakes of administrative decisions that come before the courts on review—whether one is dealing with the decision of a front-line immigration officer to refuse humanitarian and compassionate grounds relief to one who wishes to avoid deportation and apply for permanent residency from within Canada (as in *Baker*[19] and *Kanthasamy*[20]) or the decision of the governor in council to approve a pipeline argued to jeopardize the environment as well as the rights and interests of Indigenous communities (*Gitxaala Nation v Canada*)[21]—the

14 See Section III.C.1 of this chapter. And see *Altus Group Limited v Calgary (City)*, 2015 ABCA 86 at paras 16-18 [*Altus Group*].

15 See e.g. David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen!" (2013), 42 Adv Q 1 ["The Top Fifteen!"]; David Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (2016) 4:1 Energy Regulation Quarterly ["2015 Developments"]; The Hon David W Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 ["A Plea for Doctrinal Coherence"]; Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527 ["Struggling Towards Coherence"]; "Scope and Meaning of Reasonableness Review," *supra* note 9; John M Evans, "Triumph of Reasonableness," *supra* note 9; Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queen's LJ 59 ["Deference and Reasonableness"].

16 See Mullan, "The Top Fifteen!," *supra* note 15 at 76-81, and *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 at para 27, n8 [*Wilson*].

17 See the sources cited *supra* note 15.

18 The metaphor of reasonableness as rainbow (a context-sensitive spectrum, or continuum, of expectations or levels of intensity on review) was famously put into play in common law judicial review theory by Michael Taggart in "Proportionality, Deference, Wednesbury" (2008) NZL Rev 423 at 451 ff ("We must get beyond simply talking about context and actually contextualize in a way that can generate generalizable conclusions … [W]e need a map of the rainbow of review that is reliable and helpful, and we need willing cartographers" (at 454).). See also, e.g., Dean Knight, "Mapping the Rainbow of Review: Recognizing Variable Intensity" (2010) NZL Rev 393.

19 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

20 *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

21 *Gitxaala Nation v Canada*, 2016 FCA 187, [2016] 4 FCR 418 [*Gitxaala*].

question of what courts should expect under the heading of "reasonableness" is likely to provoke intense disagreement. Is the legal doctrine (or for that matter the model of constitutional democracy) underlying the standard robust enough to support all the weight the standard must bear?

Section II addresses in brief three key elements that continue to shape and inform the law on reasonableness review: (1) shifting and competing views on the proper roles and relationships of administrative decision-makers and courts; (2) shifting and competing approaches to statutory interpretation; and (3) shifting and competing rationales (related to both (1) and (2) on the nature and function of the correctness standard of review. The section concludes with Abella J's recent endorsement of the proposal that the correctness standard be retired.[22] The question this raises is whether reasonableness review is or could be adequate to the institutional and constitutional imperatives that correctness review has been understood to serve.

Section III turns more squarely to *Dunsmuir* reasonableness. Section A sets out the leading judicial statements on the standard. Section B offers a critical assessment of how the standard has been applied, with attention to judgments argued to represent "disguised correctness review" on the one hand and abdication of the proper supervisory role of the courts (particularly with regard to implied decisions and reasoning) on the other. Section C takes up developments in the case law and commentary through which it has been suggested that the principled structure of reasonableness review may be enhanced, by paying more attention to context—while at the same time heightening vigilance concerning certain common indicia or markers of *un*reasonableness.

A central point of the final section, and indeed the chapter as a whole, is that understanding reasonableness review is not a matter of memorizing ready-made tests or categories of error, or, for that matter, of unreasonableness. Rather, it requires that one develop a critical appreciation of—even a theory about—the proper function of administrative decision-making in the constitutional order. In accordance with the central commitment of this text to understanding administrative law in context, one should be prepared to critically evaluate administrative decisions, as well as judgments on review, not only on the basis of their consistency with existing legal doctrine, but also and more fundamentally on the basis of their theoretical and ideological underpinnings and material effects. Yet such critiques are likely to be most effective, and coherent, when grounded in a positive account of how the work of administrative decision-makers and judges *should* be distributed and coordinated in a constitutional democracy, that is, a theory of how administrative law may best advance the dual values of democracy and the rule of law.

The chapter approaches reasonableness review in light of such a theory, or thesis—one that centres on the proposition (put in play by David Dyzenhaus 20 years ago) that deference, and so review for reasonableness, requires judicial "respect for," but not "submission"

22 *Wilson*, *supra* note 16.

to, the decisions and reasons of administrative decision-makers.[23] To conceive of deference "as respect" is to displace the traditional approach to selection and application of the standards of review, as a kind of rarified turf war between courts and administrative decision-makers—an approach focused on identifying zones of exclusive jurisdiction. Instead, the approach positions judicial review as an opportunity for inter-institutional dialogue (or conversation, requiring the participation of all three branches along with affected legal subjects) on the justified uses of public power.[24] In other words, deference as respect conveys the expectation, internal to law or to the rule of law and arguably also internal to democracy, that administrative decision-makers (along with courts and legislatures) can and must actively contribute to forging a "culture of justification."[25]

The deep challenge of reasonableness review is to build in sensitivity or responsiveness to the unique democratic and rule-of-law imperatives arising across the array of decision-making contexts that make up the contemporary administrative state. In particular, the challenge is to ensure that judges respect the purposive insights of administrative decision-makers legally mandated to advance important public ends while also ensuring that those decision-makers show respect for law, including the rights and significant interests of those who find themselves at the "sharp end" of law's administration. Or this is broadly the challenge of substantive review, which at present includes two standards: correctness and reasonableness. Whether reasonableness review is able to internally coordinate these imperatives is a central question of this chapter.

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23 D Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286 ["The Politics of Deference"]. As noted later in this chapter, the phraseology from Dyzenhaus quoted in numerous Supreme Court decisions, beginning with *Baker*, is: "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision." (*Baker*, *supra* note 19 at para 65.

24 Geneviève Cartier builds on Dyzenhaus's ideas to arrive at a conception of administrative discretion not as a site of unconstrained or unidirectional power but rather as a site of relationship and reasoned dialogue: Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or; From Theology to Secularization)" (2005) 55:3 UTLJ 629. Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2012) theorizes the state–subject relationship in a manner that foregrounds the critical relational and normative function of the administrative state.

25 For development of the idea of a culture of justification, see David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11; D Dyzenhaus & E Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v Canada" (2001) 51 UTLJ 193 ["Process/Substance"]; D Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 ["Constituting the Rule of Law"]. See also The Hon Justice B McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 Can J Admin L & Prac 171 at 174-75):

> [S]ocieties governed by the Rule of Law are marked by a certain ethos of justification. … Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. … A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of rationality and fairness.

II. GETTING TO REASONABLENESS

A. Old Habits Die Hard: Jurisdictional Zombies, Discretionary Doughnuts, and the Legacy of AV Dicey

While the standards of review in administrative law bear some similarities to those that apply on appellate review,[26] they have arisen out of a distinct institutional and constitutional context, or set of contexts, which present unique reasons for courts to adopt the principle of restraint on review known as deference. In short, whether judicial oversight of administrative decision-making is formally grounded in the inherent supervisory powers of the s 96 courts or in a statutory right of appeal, considerations of democratic legitimacy as well as institutional capacity are brought to bear to inform analysis of the standard of review. Most importantly, unlike the direction taken in the English law on judicial review,[27] and in Canadian doctrine on appellate review of the decisions of lower courts, this is the case in Canadian administrative law even where the challenge on review is to a question of law. That is, the Canadian law of substantive review requires that no matter what category of question is in issue, there must first be an inquiry (however truncated) into the rationales for and/or against deference: an analysis aimed at identifying the standard of review.

But in order to begin to understand the meaning and function of deference in administrative law, we must take a moment to reflect on the origins and evolution of the Canadian law on substantive review.

1. Successive Eras of Substantive Review: Pre-CUPE to Dunsmuir

The law on judicial review and, in particular, review of substantive administrative decisions, was troubled from the start by the question of whether or in what sense administrative decision-makers were a legitimate part of the constitutional order. As Colleen M Flood explains in Chapter 1, the rise of the administrative state in the 19th and 20th centuries in Canada took the form of Parliament's conferring an increasing range of statutory powers upon decision-makers who were neither democratically elected nor steeped in

26 The leading authority on appellate review is *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. In short, the appellate standards of review are: correctness on questions of law, "palpable and overriding error" on questions of fact, and a murkier territory (sometimes referred to as a "spectrum" of standards) on questions of mixed law and fact. See also *L (H) v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401. For a cogent argument that the appellate standards of review are, or should be, collapsed from their current state to just two—correctness and reasonableness—following *Dunsmuir*'s two-standard model, see Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010) 36:3 Adv Q 269. See also the judgment of Deschamps J in *Dunsmuir*, *supra* note 1 at para 158.

27 See *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147; Mark D Walters, "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010) 300 at 302.

the traditions and conventions of the common law. This provoked deep anxieties on the part of judges.[28]

From the point of view of the judiciary, this new concentration of state power, including powers of adjudication, in the executive and administrative branch was tantamount to putting the fox (the executive) in charge of the chickens (legal subjects—or, more properly, legal powers fundamentally affecting individual rights, including rights in contract and property). But, from the point of view of government, it was necessary to create administrative institutions, often with broad discretionary powers, in order to advance government mandates in the face of unanticipated and shifting regulatory challenges. Indeed, key administrative institutions were created precisely to overcome judge-made law actively obstructing the social welfare state.

There are two apparently contradictory ways that the deep thesis of administrative illegitimacy manifested historically (and arguably continues to manifest) in the law on substantive review. On the one hand, it manifested as reflexive, exclusive prioritization of judicial over administrative judgments on questions given to administrative decision-makers to decide.[29] On the other, it manifested as an unwillingness to oversee administrative decisions, or some subset of these (in particular, decisions classed as discretionary and/or those protected by a privative clause) at all—decisions thereby assigned the status of politics or policy, not law.[30] Finding a principled form of judicial review and moreover a theory of administrative legitimacy that avoided these extremes—judicial supremacy on the one side, and judicial abdication on the other—remains the central challenge posed to the law on substantive review.

Matthew Lewans distinguishes three broad eras in the Canadian law on judicial review, each of which illustrates in different ways a pattern of unpredictable veering between extremes of judicial supremacy and abdication.[31] First was the Formal and Conceptual Era, which ran from the turn of the 20th century to the decision in *CUPE v New Brunswick Liquor* in 1979.[32] The era was marked by legal formalism in that it was committed to an idea of the common law (including principles of statutory interpretation) as a self-contained, internally coherent body of concepts, wholly removed from moral or political controversy and

28 For a careful examination of how different schools of thought about the nature of law and its place in society informed administrative law theory and practice over the 20th century, see Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford and Portland: Hart Publishing, 2016). See also Mark D Walters, *supra* note 27.

29 See Audrey Macklin's discussion of the "preliminary or collateral question" doctrine in Chapter 11.

30 See the judgment of Cartwright J in *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 (discretion untrammelled unless clear statutory limits are stated). Contrast this with the judgment of Rand J in that case. For a hands-off approach to administrative jurisdiction (or errors deemed to fall within jurisdiction), see the judgment of Lord Sumner in *R v Nat Bell Liquors*, [1922] 2 AC 128.

31 Lewans, *Administrative Law and Judicial Deference*, *supra* note 28, ch 5. See also Paul Daly, "The Struggle for Deference in Canada" in Mark Elliott and Hanna Wilberg, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford and Portland: Hart Publishing, 2015) 297.

32 [1979] 2 SCR 227 [*CUPE*]. Lewans, *supra* note 28 at 141-56. For an historically and biographically contextualized reading of Dicey's *Law of the Constitution* against the grain of more conventional (two-dimensional) portraitures of Dicey's thought, see Mark D Walters, "Dicey on Reading the Law of the Constitution" (2012) 32:1 Oxford J Leg Stud 21.

presided over by neutral judges.[33] A key expression of the formalist era was the common law judiciary's devising a range of formal or nominate grounds of review (e.g., "asking the wrong question," or the "preliminary or collateral question" doctrine that Audrey Macklin describes in Chapter 11), which judges applied to administrative decisions otherwise protected from correctness review (e.g. discretionary decisions, or decisions shielded by a privative clause) as if to root out self-evident excesses of statutory power or jurisdiction. This approach tended to relieve courts from having to justify, in a more contextualized and responsive manner, their decisions to displace administrative judgments with the alternative value-laden judgments or interpretations they favoured.

This era was also marked by what scholars have characterized as a uniquely Diceyan constitutionalism, centring upon the separation of powers and a profound suspicion of the administrative state (you met AV Dicey in Chapter 1 by Colleen M Flood).[34] On the Diceyan model, constitutionally sound governance required a clear division of labour among the legislature (with exclusive responsibility for making law), the judiciary (with exclusive responsibility for interpreting law), and the executive and administrative state (effectively the "transmission belt" or vehicle for law's application, lacking legitimate authority either to make or interpret law).[35] Among the primary responsibilities of judges was to discipline administration in the name of the legislature's will.

However, Diceyan judges struggled with how to accommodate the broad, discretionary powers often conferred on administrative decision-makers. That is, discretion presented a conundrum precisely because it (unlike law interpretation, conceived by the Diceyan as the opposite of discretion) resisted top-down judicial supervision in the name of a clear legislative intent. It was, by definition, a form of legal power that lacked express, determinate conditions or controls.[36] Here the Diceyan judge was wracked by conflicting constitutional imperatives: On the one hand, recognition of parliamentary supremacy (and with this, respect for Parliament's intent to confer broad decision-making authority on administration—in some cases, reinforced through the formal mechanism of the privative clause),[37] and on the other, recognition of the judge's duty to protect the rule of law and to ensure that the executive remained within the limits of law. In effect, the judge was torn between impulses of relinquishing and asserting supervisory power over Parliament's administrative delegates.

33 Katrina Wyman surveys some of the diverse uses of the term "formalism" in legal academia in her article "Is Formalism Inevitable?" (2007) 57 UTLJ 685. See especially 688, n7. Compare Dyzenhaus: "Formalism is formal in that it requires judges to operate with categories and distinctions that determine results without the judges having to deploy the substantive arguments that underpin the categories and distinctions." ("Constituting the Rule of Law," *supra* note 25 at 450.)

34 See also Chapter 4 by Mary Liston.

35 See Dyzenhaus, "Constituting the Rule of Law," *supra* note 25 at 453-57.

36 See *Baker*, *supra* note 19 at para 54.

37 Dyzenhaus, "The Politics of Deference," *supra* note 23 at 281. Dyzenhaus adds: "Dicey reconciled [the judiciary's] interpretative authority with the sovereignty of the legislature by adverting to the fact that the English Parliament did not generally use legislation as a blunt instrument to overrule judges' interpretation of statutes in the light of the common law." Yet the "pre-emptive" legislative device of the privative clause, identifying certain administrative decisions as "immune to judicial supervision," threw a wrench in the Diceyan effort to reconcile parliamentary and judicial rule.

The pre-*CUPE* doctrine on substantive review attempted to negotiate these tensions by carving out separate, watertight spheres of exclusive authority for courts and administration, roughly along the lines of "law" versus "policy." But the frustrating thing for the Diceyan judge was that these separate spheres—law/policy, law/discretion, legality/merits, and matters falling within and outside administrative jurisdiction—were and are based on inherently unstable categories.[38]

The next era in the Canadian law on substantive review, the central features of which are described by Audrey Macklin in Chapter 11, was the Pragmatic and Functional Era.[39] This period extended from *CUPE* in 1979 through the consolidation of the four-factor analysis in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*[40] in 1998, until it reached its rough terminus in *Dunsmuir*, in 2008. Over the course of this period, the Canadian law on substantive review began to detach, albeit gradually and unevenly, from the core Diceyan idea that the judiciary holds exclusive authority to interpret law. This was supported by a turn in the doctrine on the standards of review "from formal questions of power, authority or mandate to pragmatic questions about function, perspective, and relative ability."[41]

As you saw in Chapter 11, judges during this period engaged in meticulous efforts to determine how to approach administrative decisions on review—that is, what standard of review to apply—by attending to multiple (sometimes conflicting) contextual signals said to be expressive of legislative intent, an analysis that ultimately centred on relative expertise. The court adopted correctness review where the legislative signals were said to indicate that the matter on review fell within the proper authority or institutional capacities of the judiciary, and deferential review where the matter was deemed more properly to engage the authority or institutional capacities of administration. As such the Pragmatic and Functional Era was organized, like the prior period, around the idea of competing zones of exclusive jurisdiction. The governing question was: "Who should decide?" What was not clear was what exactly courts should do when called upon to oversee those decisions that commanded deference—particularly where the challenge was to administrative law interpretation.

Indeed, deep debates arose around this question, beginning with debates on how courts should operationalize the standard through which Dickson J in *CUPE* first gave expression to the ethos of deference in Canadian administrative law in 1979, using the language of "patent unreasonableness."[42] As Audrey Macklin has described in Chapter 11, the judgment in *CUPE* marked a revolution in substantive review in recognizing that not all questions of law give rise to a single correct answer, and moreover, that there are good reasons, both pragmatic and democratic, to defer to administrative decision-makers even on questions of law. The manner in which Dickson J conducted review in *CUPE* was in key ways consistent with this new understanding of the legitimate role of the administrative branch in the legal order. That is, Dickson J's analysis was anchored not in tribunal-independent scrutiny of the

38 See D Dyzenhaus, "Formalism's Hollow Victory" (2002) NZL Rev 525 at 530-39; "The Politics of Deference," *supra* note 23 at 280-82; "Constituting the Rule of Law," *supra* note 25 at 448-51 and 454-58; Dyzenhaus and Evan Fox-Decent, "Process/Substance," *supra* note 25 at 197-200 and 204-5. See also David Mullan, "A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?" (2010) NZL Rev 233 at 251-53 ["A Proportionate Response?"].

39 See Lewans, *Administrative Law and Judicial Deference*, *supra* note 28 at 156-75.

40 [1998] 1 SCR 982 [*Pushpanathan*].

41 See Walters, *supra* note 27 at 305-6.

42 *CUPE*, *supra* note 32.

statutory text in context, but rather in attentiveness to the decision and reasoning of the tribunal, drawing on and building on its purposive interpretation of the disputed statutory term in dialogical fashion[43] to arrive at the conclusion that it was "no less reasonable than"[44] the conflicting interpretations preferred at the Court of Appeal.

Yet this approach to substantive review raised new questions for reviewing courts. How should they deal with situations where an administrative decision-maker adopted an interpretation that differed from the judge's own understanding of the statutory text in context? This became particularly tricky where the difference lay in competing conceptions of the statutory purpose, or the significance or priority to be given to different and potentially warring elements of the statutory text or mandate. Was it appropriate to allow that competing, even contradictory, approaches to an interpretive problem were equally reasonable? And if (as in *CUPE*) it was recognized that this may sometimes be the case, what were the justified limits of that principle? When should the court's, or for that matter the decision-maker's, opinion trump?

Three competing approaches emerged after *CUPE*, which continue to be discernible in the contemporary law on deference (or reasonableness). These were exemplified in *Caimaw v Paccar of Canada Ltd.*[45] The first approach (illustrated in the concurring majority judgment of Sopinka J) was rooted in the idea that problems of statutory interpretation tend to deliver up one right answer, which courts are best positioned to identify. Sopinka J counselled that courts reviewing a disputed interpretation of law should first seek the correct answer, and only then, if the opinion of the decision-maker differed, grant the decision-maker a "margin of error."[46] This approach has since largely been rejected as overly judge-centric. In practical terms, judges are highly unlikely to give credence to administrative interpretations after deeming them incorrect. More broadly, the approach is inconsistent with what has become a core principle of deferential review: that reviewing courts must pay respectful attention to the reasons and decisions of administrative decision-makers, and, moreover, must assess administrative law interpretations in a manner that is informed and enriched by such respectful attention. However, as we will see, the idea that judges engaged in reasonableness review must first apply "the ordinary tools of statutory interpretation"[47] to determine whether there is a single right (or reasonable) answer, before even broaching the possibility of deference (understood, on this approach, as defaulting to the administrator's interpretation where it falls among competing reasonable options), remains prominent in the law on reasonableness review today.[48]

The second approach articulated in *Paccar* (in the concurring majority judgment of La Forest J) was rooted in a more decidedly pluralist understanding of law or of administrative law. That approach regarded administrative law interpretation (or more specifically those interpretations deemed to fall under the protection of a privative clause) as the expression of policy choices within the proper authority of administrators and not courts. The

43 *Ibid*.

44 *Ibid* at 242.

45 [1989] 2 SCR 983 [*Paccar*].

46 *Ibid* at 1017-20, Sopinka J. *Contra* this approach, see e.g. *Law Society of New Brunswick v Ryan,* 2003 SCC 20, [2003] 1 SCR 247 at paras 52-53 [*Ryan*]: "Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable."

47 *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 at para 38, Moldaver J [*McLean*].

48 *Ibid* at paras 38-40.

approach counselled broad tolerance for such policy choices, including (indeed, in particular) where they conflicted sharply with the judge's construction of statutory purposes. This approach, too, continues to have influence, and may be discerned in contemporary judgments on the ability of reasonableness review to accommodate multiple, even starkly contradictory administrative interpretations and applications of law as so many instantiations of reasonableness.

Finally, a third approach articulated in *Paccar* (most clearly in the dissenting judgment of L'Heureux-Dubé J, and supported in that of Wilson J) centred upon attention to, and acknowledgment of the reasons for deference to, tribunal reasoning. At the same time, this approach allowed for evaluation of administrative decision-makers' interpretive reasoning in light of the wider interpretive field, and invalidation of those interpretations on the basis that they were incompatible with (and/or inattentive to) the judge's best construction of statutory purposes (and/or wider legal norms).[49] On applying this approach in *Paccar*, L'Heureux-Dubé J concluded that the statutory purpose animating the collective bargaining regime in issue—namely, advancement of peaceable labour relations through promotion of equality of bargaining power—had been ignored and therefore defeated by the tribunal's interpretation; thus, the interpretation was patently unreasonable.

The question of how exactly to express deference on review was in many ways still unresolved when the third standard, "reasonableness *simpliciter*," was interposed between correctness and patent unreasonableness in the mid-1990s.[50] As Audrey Macklin explains in Chapter 11, this standard reflected an effort on the part of the courts to respond to conflicting signals gleaned from pragmatic and functional analysis (e.g., cases in which there was a statutory right of appeal and yet relative administrative expertise relevant to the question in issue). In other words, reasonableness *simpliciter* was fashioned out of a kind of Goldilocks logic: it was to be neither too interventionist nor too deferential. The new standard also reflected the concern that deference should not (at least, not in the situations attracting this middle standard) allow *any* tolerance of unreasonableness, regardless of whether it might take significant "searching" to root out.[51]

Ensuing efforts to distinguish the two deferential standards tended to take one of two forms: reference to "the magnitude of the defect" or reference to its "'immediacy or obviousness' … and thus the relative invasiveness of the review necessary to find it."[52] Neither approach managed to stabilize the practices of courts or the expectations of parties on review. Indeed, the failure of the case law to produce a distinction of any conceptual or practical value as between review for reasonableness *simpliciter* and review for patent unreasonableness led the court in *Dunsmuir* to conclude that the efficiency-based merits of reducing the standards to just two (representing deference and non-deference, respectively) were not outweighed by any competing considerations.

49 *Paccar*, *supra* note 45 at 1042-44, L'Heureux Dubé J.

50 *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1 [*Southam*]; there, the newly articulated standard is said to have also been engaged in *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, 114 DLR (4th) 385 [*Pezim*].

51 See the decision of Gonthier J in *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324, 74 DLR (4th) 449.

52 *Toronto (City) v CUPE, Local 79*, *supra* note 4 at para 78, LeBel J.

The contemporary era (Lewans calls it "the Dis-Functional Era"—we might also call it the era of Neo-Formalism) was consolidated with *Dunsmuir* in 2008.[53] As Audrey Macklin explained in Chapter 11, the *Dunsmuir* majority observed that the four-factor pragmatic and functional approach to selecting the standard of review had become both overly complicated and, at the same time, unpredictable. The solution offered involved a partial return to formalism, in a bid to attain the certainty that had been missing from the previous era's multi-dimensional contextual analysis. Thus, *Dunsmuir*'s standard of review analysis focuses on categories of question typically, or presumptively[54]—or in the case of the correctness categories, always—attracting one of just two standards: reasonableness (deference) or correctness (no deference). *Dunsmuir* also reflects an intensified focus on the democratic and pragmatic bases for deference, such that questions of law (arising under the home statute or closely connected statutes) are said to "usually"[55] attract reasonableness review and so deference. Such categorical shortcuts, however, sit uneasily with continuing anxieties about whether or how the diverse functions and capacities of *particular* administrative decision-makers (elements of the decision-making context once canvassed through the pragmatic and functional analysis) should inform the approach taken to particular questions on review. Which brings us to the present moment, which is marked by signs and portents of another imminent revolution in the law on the standards of review, likely to bring renewed attention to contextually informed reasons *not* to defer (or to defer … differently, in different contexts).

In sum, for much of the history of substantive review in Canada, courts sought to negotiate the felt tensions between democracy (conceived as legislative supremacy) and the rule of law through efforts to carve out competing zones of exclusive jurisdiction for courts and administrative decision-makers. Those competing zones were constructed and manipulated in ways that expressed the Diceyan judge's unease at the prospect of legislatively constructed "black holes," whether in the form of broad discretionary administrative powers or privative clauses ostensibly immunizing administrators' interpretations and applications of law. The contemporary law on substantive review since *CUPE* has struggled against this history to affirm the legitimacy of the administrative state, and so to acknowledge the democratic as well as pragmatic reasons for respecting administrative decisions while preserving a meaningful role for courts in upholding the rule of law.

This is where we now sit: with two standards of review, one of which (reasonableness) is nearly always applied in the review of substantive administrative decisions. The pressing question is: what does (or what should) reasonableness mean in any given case? Or more precisely: how should the imperatives of deference (and so the constitutional and institutional rationales for deference) be reconciled with the expectations of public justification—again, in any given case?

With this recap of the evolution of the law on the standards of review and the gradual rise to dominance of the reasonableness standard in mind, that central question can now be pursued. We start with a word on statutory interpretation, which is both the engine of

53 Lewans, *Administrative Law and Judicial Deference*, *supra* note 28 at 175-80.

54 See Chapter 11 by Audrey Macklin.

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

substantive review and the site of deep controversies about the nature of law, and the role of judges and of administrative decision-makers in advancing and protecting the rule of law.

2. Statutory Interpretation and Substantive Review: Getting Past "One Right Answer"

Assessment of the substantive legality of an administrative decision is steeped in the work of statutory interpretation.[56] Interpretation assists in selecting the standard of review, and in resolving discrete disputes about the meaning of statutory terms, whether classed as questions of law or questions concerning the limits on discretion.

It may be difficult to reconcile the ubiquity of statutory interpretation in substantive review with the deference required under the now-dominant standard of reasonableness review, for the principles of statutory interpretation have been crafted by—and tend to be understood as falling within the exclusive institutional and constitutional capacities of—judges. Thus, before moving on to take a closer look at the two standards of review in play post-*Dunsmuir*, it is worth pausing to consider what is involved in statutory interpretation as it arises in administrative settings and on review.[57] The objective is not to attempt an exhaustive account of the relevant principles,[58] but rather to make a few basic observations aimed at disrupting the common assumption that statutory interpretation necessarily or regularly yields a single correct answer that judges are best placed to discern.

The natural starting point is the "modern principle" of statutory interpretation, articulated in the second edition of Driedger's *Construction of Statutes* and repeatedly endorsed by the Supreme Court:

> Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[59]

General judicial acceptance of this principle tends to obscure continuing conflicts among judges (and sometimes even among decisions of a single judge) as to the factors that should be deemed of primary relevance when interpreting contested statutory texts.[60] As Ruth Sullivan states: "the modern principle has been used in Canada to justify every

56 "To a large extent judicial review of administrative action is a specialized branch of statutory interpretation": *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1087. Beetz J (writing for the court) is quoting SA de Smith, H Street & R Brazier, *Constitutional and Administrative Law*, 4th ed (Harmondsworth, UK: Penguin, 1981) at 588. Compare JM Keyes, "Judicial Review and the Interpretation of Legislation: Who Gets the Last Word?" (2006) 19 Can J Admin L & Prac 119.

57 A further question of interest, not explored here, is whether administrators do or should approach statutory interpretation differently than judges. See S Slinn, "Untamed Tribunal? Of Dynamic Interpretation and Purpose Clauses" (2009) 42 UBCL Rev 125; JL Mashaw, "Small Things like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State" (2001) 70 Fordham L Rev 17.

58 An excellent introduction to statutory interpretation in public law is found in C Forcese et al, *Public Law: Cases, Commentary and Analysis,* 3rd ed (Toronto: Emond Montgomery, 2015) at 425-523.

59 EA Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

60 See R Sullivan, "Statutory Interpretation in the Supreme Court of Canada" (1998) 30 Ottawa L Rev 175 ["Statutory Interpretation in the Supreme Court of Canada"]; S Beaulac & P Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 RJT 131.

possible approach to interpretation and, more importantly, has been used as a substitute for real justification."[61]

Of course, statutory texts do not always give rise to significant disagreement. But the cases that tend to come before tribunals and courts as contests about interpretation are typically "hard cases." That is, these disputes tend to require the adjudicator to make a contestable judgment involving selection among competing elements of the text or context, or potentially competing fundamental legal norms or values (the rule of law, democracy, equality, liberty). Sullivan observes: "While most cases that come before tribunals and courts are hard, Driedger's modern principle does not acknowledge this problem and offers no guidance on how to resolve it."[62]

It is worth underlining this point so as to correct the misconception that statutory interpretation is in many or most cases simply a matter of finding the right answer by expertly applying the right tools. But does this mean that it is "all subjective"—that is, a matter of the judge's or administrator's personal moral or political preferences? Sullivan advances an approach to hard cases that she presents as a form of "pragmatism." The approach requires decision-makers to prioritize and choose among competing bases for stabilizing interpretation (statutory text, legislative purposes and history, and the wider normative context of interpretive presumptions and legal values). Such strategies are necessarily contestable, and may give rise to deep disagreement even (and perhaps particularly) among those accorded the status of experts. Competing interpretations may admit of ranking as better or worse, or more or less appropriate—based, for instance, on whether a given interpretation is able to account for a wider or narrower range of considerations arising under the different modes of analysis. But the ranking of interpretive judgments, too, is contestable, and so is similarly steeped in the effort to persuade.

Sometimes interpretive conflicts may be mediated by reference to meta-rules, such as the rule that statutory terms must be determined to be ambiguous at the level of text and legislative–historical context before they may be interpreted in light of the values or norms of the Charter or international law.[63] But even these meta-rules require contestable judgments—for instance, on what counts as ambiguity.

a. Competing Approaches to Interpretation and Implications for Substantive Review

As noted above, contemporary understandings of statutory interpretation have mostly outgrown the simple thesis that statute law necessarily or even often yields a singular and determinate legislative intent. However, it is still possible to identify in the contemporary case law—including the case law on substantive review—what we may call positivist (and

61 R Sullivan, "Statutory Interpretation in Canada: The Legacy of Elmer Driedger" in T Gotsis, ed, *Statutory Interpretation: Principles and Pragmatism for a New Age* (Sydney: Judicial Commission of New South Wales, 2007) 105 ["Statutory Interpretation in Canada"]. The question of what "real justification" is, is of course at the heart of review for reasonableness.

62 *Ibid* at 123. Critical examination of the function of Driedger's modern principle in Canadian law is provided in Nicholas Hooper, "Notes Toward a Postmodern Principle," Can JL & Jur (forthcoming, 2018).

63 *Bell ExpressVu Ltd Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 [*Bell ExpressVu*]; *Gitxaala*, *supra* note 21. For a critique, see Sullivan, "Statutory Interpretation in Canada," *supra* note 61 at 119-22.

static) approaches to statutory interpretation, and to distinguish these from normative (and dynamic) approaches.[64]

A positivist approach to statutory interpretation flows from the presumption, long debunked in linguistic theory, and increasingly marginalized in law, that statutory language contains a singular and unified meaning that is stable over time.[65] Judges adhering to that presumption tend to assume (or to appear to assume) that this stable meaning may be ascertained through interpretive techniques proper to and perfected by the judiciary.[66] Those techniques may involve a strict focus on the statutory text or efforts to situate the text in its legislative–historical context. On either variant of this approach, the objective is to "find" a determinate legislative intent.[67]

A general criticism raised against the positivist approach to law interpretation is that it smuggles into legal judgment contestable value-driven choices, where those choices should be explicitly submitted for public justification.[68] In administrative law, a positivist approach may further be argued to work against deference, in that it restricts the potential for judges to acknowledge their own value-laden presumptions in the face of the potentially competing values or perspectives of administrative decision-makers.

In contrast, it is the explicit submission of the value-laden bases of legal judgment for public justification that marks a normative (and dynamic) approach to statutory interpretation.[69] Such an approach proceeds on the assumption that contested matters of statutory interpretation cannot be resolved by exclusive reference to the text,[70] or even by situating the text in its social or legislative–historical context,[71] but also require judgments about the competing values or social priorities informing alternative statutory constructions. This approach is reflected in the acknowledgment of L'Heureux-Dubé J, in her judgment in the

64 Ruth Sullivan in "Statutory Interpretation in the Supreme Court of Canada," *supra* note 61, distinguishes textualist and intentionalist (which I am loosely calling "positivist") from pragmatic (which I am calling "normative") approaches to statutory interpretation. On the static/dynamic descriptors, see Forcese, *supra* note 58 at 429-32, and William Eskridge, *Dynamic Statutory Interpretation* (Cambridge, Mass: Harvard University Press, 1994). I adopt the "positivist"/"normative" dichotomy because it puts the claim to value-neutrality at the centre of the distinction.

65 *Cf* N Hooper, *supra* note 62. See also David Dyzenhaus, "David Mullan's Theory of the Rule of (Common) Law" in G Huscroft & M Taggart, eds, *Inside and Outside Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) 448 at 474 [*Inside and Outside*]: "[T]he point of the positivist conception of law is to insist that real law is the determinate content of valid law, where determinate means determinable in accordance with tests that do not rely on moral considerations and arguments, including arguments about the principles of an internal morality of law."

66 This approach is therefore consistent with a Diceyan or formalist approach to the rule of law, focused on the separation of powers. See the discussion of Diceyan formalism in Section II.A.

67 Compare J Gardner, "Legal Positivism: 5½ Myths" (2001) 46 Am J Juris 199 at 218-22. Gardner argues that legal positivism is not committed to either textualism or originalism in statutory interpretation. Again, see "Statutory Interpretation in the Supreme Court of Canada," *supra* note 61.

68 "Statutory Interpretation in the Supreme Court of Canada," *supra* note 61 at 220-25.

69 *Ibid* at 184-87 and 220-27 (on the "pragmatic" approach to interpretation).

70 Sullivan, *ibid* at 185, makes this point, and canvasses a set of standard critiques of textualist and intentionalist approaches: "[C]ommunication through natural language is never a sure thing; rules drafted by legislatures tend to be general and are often abstract; and legislatures cannot form intentions with respect to how these rules should apply to every possible set of facts."

71 See Hanoch Dagan, "The Realist Conception of Law" (2007) 57 UTLJ 607 at 649.

Baker case,[72] that law interpretation is continuous with and not strictly distinct from the exercise of discretion.[73] That is not to say that, on this model, law is without any anchor beyond the whim of the judge—or the administrative decision-maker. Rather, the normative model of law interpretation implies a conception of the rule of law in which the legitimacy of state action (including law interpretation) depends on the efforts of judges and administrative decision-makers alike to justify their decisions in light of the important public values inscribed in our social and legal traditions.[74] Yet just as these values and traditions are not monolithic or static, so does a normative approach to interpretation tend to be dynamic—approaching interpretation as an opportunity for ongoing public deliberation about the nature and relative priority of legal norms.

The distinction between positivist and normative approaches to statutory interpretation sheds light on the tension between correctness and reasonableness review. If there is a right and wrong way to interpret a statute, independent of contestable value judgments, then it follows that the rule of law should empower expert, independent courts to correct the errors of administrative decision-makers. Alternatively, if interpreting statutes necessarily involves contestable value judgments, then it follows that administrative decision-makers, steeped in the policy imperatives of particular governments and specialized fields of government activity, are (sometimes? often?) best placed to decide—or, in any case, that their decisions should be accorded respectful attention and even presumptive weight by the courts on review.

A further refinement of the normative model of statutory interpretation, and of the relationship between statutory interpretation and judicial review, is suggested by David Dyzenhaus in his account of "the politics of deference."[75] Dyzenhaus traces the erratic reviewing habits of the Diceyan judge (shuttling between postures of abdication of supervisory authority and supremacist interventionism) to irreconcilable commitments to "democratic positivism" or law-as-legislative-will on the one side (respect for the legislature's will to confer broad discretion on administration), and "liberal anti-positivism" or law-as-liberal-morality on the other (as expressed through the commitment to individual rights). Dyzenhaus suggests a way past these contradictory commitments that turns upon an understanding of judicial review, and deference, not as a zero-sum game of warring claims

72 *Supra* note 19.

73 L'Heureux-Dubé J writes (for the majority) in *Baker*, *supra* note 19 at para 54:

> It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.

74 The function of moral values in law and in the claim to legitimate rule (or to the rule of law) is recognized in the following statement of McLachlin CJ for the court in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 67, 161 DLR (4th) 385 [*Secession Reference*]: "[A] system of government … must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values." See also Mary Liston's discussion of the *Secession Reference* in Chapter 4 of this text.

75 Dyzenhaus, "The Politics of Deference," *supra* note 23.

to exclusive jurisdiction, but rather as a dialogical encounter based on "respect."[76] More generally, deference "as respect" (an idea that we will see has been adopted by the Supreme Court of Canada) forms part of a wider account in Dyzenhaus's work of the relationship of law or the rule of law to legitimate, or morally justified, governance. On this account, governance according to the rule of law requires the fostering of a "culture of justification"[77]—a legal culture that enacts and is expressive of a moral relationship of reciprocity as between legal authorities and legal subjects.[78]

Consistent with this purposive understanding of law or the rule of law, Dyzenhaus conceives of statutory interpretation, and, in particular, the interpretive work of the administrative state, may be regarded as an opportunity for activating inclusive deliberation about how the deep moral and political values inscribed in our social and legal traditions should inform the proper exercise of public power. For Dyzenhaus, this has bearing on the expectations of judges on review. That is, given the critical role of administrative decision-makers in enabling the participation of legal subjects in the interpretation and application of law, and so in ensuring that state action is publicly justified in a way that takes account of and indeed speaks to those directly affected, judges must both hold decision-makers to account in light of the participatory and justificatory norms through which the rule of law is secured, and be respectful of the purposive reasoning through which decision-makers demonstrate their adherence to those norms.[79]

One does not have to accept Dyzenhaus's account of the broad functions of administrative statutory interpretation and judicial review in securing a culture of justification in order to engage seriously with this area of law. However, one's approach to statutory interpretation in the context of judicial review necessarily depends upon and reflects a thesis or theory about the nature and purposes both of law and of the administrative state. That thesis, or theory, will affect one's approach to the central challenge for judicial review as it is expressed through the reasonableness standard: to recognize the capacities and responsibilities of administrative decision-makers to engage in statutory interpretation, without wholly surrendering the work of delimiting executive and administrative powers (or of identifying the deeper legal values of relevance to the legitimate exercise of those powers) to the executive and administrative branch. This is the challenge referred to above as coordinating the imperatives of deference and public justification.

B. Correctness: The Antithesis of Reasonableness?

As the exploration of statutory interpretation above has begun to suggest, one way of making sense of reasonableness review is to ask whether or how it is distinct from correctness review. But is there a practical difference between these standards? If so, what exactly is that difference?

76 *Ibid* at 286, cited e.g. in *Baker*, *supra* note 19 at para 65.

77 Dyzanhaus, "Law as Justification," *supra* note 25, on the concept of a "culture of justification."

78 See Dyzenhaus, "Constituting the Rule of Law," *supra* note 25 at 501 and Fox-Decent, *Sovereignty's Promise*, *supra* note 25. And see Geneviève Cartier, "The Baker Effect: A New Interface Between the Canadian Charter of Rights and Freedoms and Administrative Law—The Case of Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 61 at 79-85 ["The Baker Effect"].

79 Mark D Walters "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Wilberg & Elliott, eds, *The Scope and Intensity of Substantive Review* at 418 ["Respecting Deference as Respect"]. And see Dyzenhaus, "The Politics of Deference," *supra* note 23 at 305, 307.

1. Correctness in Theory

As discussed by Audrey Macklin in Chapter 11, the majority in *Dunsmuir* indicates that a correctness standard will presumptively apply in certain types of cases, including those that raise constitutional questions,[80] "true questions of jurisdiction or *vires*,"[81] questions about the relative jurisdictional scope of different tribunals,[82] and questions of law that are "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."[83] From the start, *Dunsmuir* reduced the reach of correctness review by lending increased specificity to the broad category of questions of "general" law previously attracting this standard, and indicating that a narrow approach should be taken to the category of jurisdictional questions. The subsequent case law has reduced the reach of these categories even further. Consequently, as Audrey Macklin relates, correctness review has only rarely been applied at the Supreme Court of Canada in the years since *Dunsmuir*. It has mostly been overtaken by the presumption of deference to administrative decision-makers' interpretations of their home statutes.[84]

But what does correctness imply in the context of substantive review? Review for correctness may at first appear so obvious or plain in meaning as to need no further explanation. That is, asserting a requirement of correctness appears to amount merely to an insistence that the decision-maker get it right, full stop. On reflection, however, the meaning of "getting it right" and the method by which this should be evaluated are less than transparent; indeed, as suggested in the previous section, these matters open onto fundamental questions about law, interpretation, and the roles and responsibilities of the three branches of government.

Guidance from the courts has focused on a very basic, and important, feature of correctness review as distinguished from review for reasonableness. Thus, in *Ryan*,[85] Iacobucci J wrote that where a correctness standard is imposed, "the court may undertake its own reasoning process to arrive at the result it judges correct."[86] This may be contrasted with what is arguably the most important feature of deferential review—that is, the requirement that judges make an effort to consider the administrative decision-maker's reasoning on its own terms.

The *Dunsmuir* majority confirms this point:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[87]

Beyond this rather perfunctory description of what it means to review administrative decisions on a correctness standard, the majority in *Dunsmuir* further gestures at the standard's underlying rationale. Thus, the standard is said to find its foundation in a commitment to the rule of law. More specifically, maintaining a correctness standard of review in relation to

80 *Dunsmuir*, *supra* note 1 at para 58.
81 *Ibid* at para 59.
82 *Ibid* at para 61.
83 *Ibid* at para 60.
84 *Ibid* at para 41. And see Danay, *supra* note 7.
85 *Supra* note 46.
86 *Ibid* at para 50.
87 *Dunsmuir*, *supra* note 1 at para 50.

"jurisdictional questions and some other questions of law" is asserted to be essential in order to "promot[e] just decisions and avoi[d] inconsistent and unauthorized application of law."[88] Implicit in this statement is the suggestion that the reasonableness standard conflicts with these imperatives—at least where the categories of question referred to are in issue. This is a proposition we will have occasion to pursue.

2. Correctness in Practice

To better understand the distinction between correctness and reasonableness review, consider briefly three examples of correctness review in action. First is the pre-*Dunsmuir* case *Barrie Public Utilities v Canadian Cable Television Assn*.[89] *Barrie Public Utilities* involved review of a decision of the Canadian Radio-Television and Telecommunications Commission (CRTC), which had granted the applicant cable television companies access to the power poles of certain provincially regulated electrical power utilities. The CRTC's authority to make that order had turned upon its determination that the poles in question constituted "the supporting structure of a transmission line."[90]

In his judgment for the majority, Gonthier J characterized this determination as a matter of "pure statutory interpretation"[91] outside the CRTC's expertise, thereby attracting correctness review. He then proceeded to identify the plain meaning of the phrase in question and of other elements of the statutory scheme,[92] with an emphasis on elements of the text and context suggesting that power poles did not qualify as "supporting structures of a transmission line." The contrary interpretation, favoured by the CRTC, had been based on objectives that it considered fundamental to its mandate. That is, while the CRTC had taken account of various elements of the statutory scheme, its primary focus had been to avoid "the construction of duplicative distribution infrastructures," a consequence that it determined "was not in the public interest."

Bastarache J criticized the majority's approach, in comments that drew on the reasons of L'Heureux-Dubé J for a unanimous court in *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*:[93]

> Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*.[94]

The thesis that statutory interpretation is not (or is "no longer") an exact science has gained increasing acceptance in law, and in particular in the law on judicial review, since *Barrie Public Utilities*. Moreover, post-*Dunsmuir* there are few circumstances in which challenges to

88 *Ibid*.
89 2003 SCC 28, [2003] 1 SCR 476 [*Barrie Public Utilities*].
90 *Telecommunications Act*, SC 1993, c 38, s 43(5).
91 *Barrie Public Utilities, supra* note 89 at para 16.
92 *Ibid* at para 42.
93 [1993] 2 SCR 756, 105 DLR (4th) 385 [*Domtar*].
94 *Barrie Public Utilities*, *supra* note 89 at para 128, Bastarache J, quoting *Domtar*, *ibid* at 775.

decisions under the home statute will attract correctness review.[95] Yet correctness review may continue to apply to interpretation of the home statute in some circumstances (for instance, where the courts and decision-maker have concurrent jurisdiction over the question at first instance).[96] Moreover, correctness-style approaches to statutory interpretation may at times be discerned in instances of ostensible reasonableness review (a prospect discussed below). Therefore, it is important to remain alert to the sorts of deep disputes evident in a case like *Barrie Public Utilities*, on whether or in what circumstances it is appropriate to conclude that there is just one right answer to an interpretive dispute concerning the proper exercise of administrative powers—and whether or in what circumstances the courts should be confident in their ability to discover that answer in a manner that ignores, or otherwise departs starkly from, the reasoning and with this the value-laden priorities reflected in the decision on review.

A second notable case of correctness review—again, pre-*Dunsmuir*—is *Pushpanathan v Canada (Minister of Citizenship and Immigration)*.[97] In *Pushpanathan*, the court applied correctness review to a decision of the Convention Refugee Determination Division of the Immigration and Refugee Board. The board had determined that a provision of the *Immigration Act* excluding from refugee status persons who have "been guilty of acts contrary to the purposes and principles of the United Nations" functioned to exclude persons convicted of drug trafficking. Correctness review was justified on the basis that the decision engaged a "general legal principle," a characterization supported by the formal certification of the question in issue by the Federal Court (Trial Division) as a "serious question of general importance."[98]

Ultimately, the majority and dissent in *Pushpanathan* differed fundamentally on how best to assemble and prioritize the evidence and arguments concerning whether drug trafficking was contrary to the purposes and principles of the UN, and reached contradictory conclusions. Thus, *Pushpanathan* reminds us that application of the correctness standard does not necessarily mean that there is an obvious or uncontroversial answer to the interpretive dispute; rather, the standard may apply in situations in which the right or best answer is highly contested, even among the nation's top judges. In such cases, it is the need for finality and for system-wide normative and doctrinal coherence that appears to recommend the standard. The question is again whether or when it is defensible for reviewing courts to approach such matters without any engagement with the reasoning of the decision-maker—that is, simply asking what the right answer is, rather than inquiring specifically into the strength or justification of the decision-maker's approach.

Finally, *Mouvement laïque québécois v Saguenay (City)*[99] is a post-*Dunsmuir* example of correctness review that, like *Pushpanathan*, reflects rule of law imperatives that appear

95 For empirical support for this claim, see Danay, *supra* note 7 at 595-97. However, there remain important exceptions—justified, for instance, by anomalous language in the statutory right of appeal (*Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161), concurrent jurisdiction as between the courts and tribunal at first instance (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 [*Rogers*]), and/or classification of the matter on review as a question of general law of central importance to the legal system as a whole and outside the decision-maker's expertise (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*].

96 See *Rogers*, *supra* note 95.

97 *Supra* note 40.

98 Per s 83(1) of the then *Immigration Act*, RSC 1985, c I-2.

99 *Supra* note 98.

to spring not from positivistic expectations that law interpretation necessarily yields clear and determinate answers, but rather from the institutional imperative that questions of system-wide legal importance yield consistent interpretations, informed by and coherent with the wider fabric of general or fundamental (system-wide) legal norms.

In *Saguenay*, the Supreme Court of Canada upheld a decision of the Quebec Human Rights Tribunal that a municipality's practice of reading a prayer prior to municipal council meetings (and its display of religious symbols in council chambers) constituted a discriminatory breach of freedom of religion and conscience, contrary to Quebec's *Charter of Human Rights and Freedoms*. The majority segmented the decision into a few discrete elements. It identified correctness review as appropriate to what it identified as the first step in the required analysis: ascertaining "the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the Quebec Charter."[100] Correctness review was adopted for this issue in light of its importance "to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner."[101] Added to this was the argument that the tribunal's jurisdiction on this question was exercised concurrently with the first-instance jurisdiction of the courts.[102]

On applying the correctness standard, Gascon J, for the majority, drew on case law precedents as well as academic sources. He concluded that "the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others."[103] Notably, this brought the court into full agreement with the tribunal: "The Tribunal was therefore correct in holding that the state's duty of neutrality means that a state authority cannot make use of its powers to promote or impose a religious belief."[104] In contrast, the Court of Appeal, which had rejected the tribunal's conclusion as "excessively radical,"[105] was deemed to have been incorrect.

In short, the majority in *Saguenay* indicated that, while Quebec's Human Rights Tribunal got it right on the scope of the state's duty of religious neutrality, its reasoning and conclusion were inessential and so superfluous to the reasoning and conclusion of the court. Audrey Macklin has discussed in Chapter 11 the historical controversy around whether human rights tribunals should be accorded deference, given the system-wide importance (and constitutional status) of human rights norms. The judgment in *Saguenay* serves as a reminder that even decision-makers with express authority to deal with system-wide norms may be susceptible to correctness review, and so to relegation of their reasoning to inconsequentiality on review. The question is: is this consistent with the purposes of judicial review—or with the proper institutional and constitutional relationships of judges and administrative decision-makers?

100 *Ibid* at paras 23, 49.
101 *Ibid* at para 51.
102 *Ibid*.
103 *Ibid* at para 76.
104 *Ibid*.
105 *Ibid* at para 77, citing the Court of Appeal in 2013 QCCA 936 at paras 70, 74.

3. The Demise of Correctness Review?

In *Wilson*,[106] Abella J made the bold suggestion that the correctness standard should be retired in favour of a single standard of reasonableness. She advanced two primary rationales in support of this proposal. First, parties and courts continue to spend too much time in disagreement over the standard of review. Second, Abella J suggested, once one grasps the proper nature and function of contemporary reasonableness review, it becomes clear that the correctness standard is redundant, or in any case that it "can live comfortably under a more broadly conceived understanding of reasonableness."[107] That is, reasonableness has become a big tent with "the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review in *Dunsmuir*."[108]

To these arguments, Abella J added the fallback position that if the rest of the court rejected her proposal for a single (reasonableness) standard of review, it should nonetheless refrain from expanding the reach of correctness review beyond the preset categories of question expressly said to attract the standard in *Dunsmuir*.[109]

What difference would a shift to a single standard make? While Abella J suggests that efficiency gains may accrue as there would be no need for argument on which standard to adopt, it is nonetheless likely that similar disputes would surface downstream in the form of efforts to adjust the expectations of reasonableness to the context at hand.[110]

Yet beyond the debatable efficiency gains, adoption of a single standard of (reasonableness) review holds out the possibility of extending the ethos of deference "as respect" (i.e., respectful attention to administrative reasoning and evaluation of administrative decisions against a presumption of reasonableness) to all administrative decisions, including those engaging system-wide norms. Such a shift would convey the expectation that administrative decision-makers function as both capable and responsible participants in the rule-of-law project of public justification. The dangers, however, are twofold. On the one hand, (depending on the care taken reasonableness review to distinguish deference from submission), the approach may weaken fundamental legal protections.[111] On the other hand, the ethos of deference as respectful attention may itself be weakened by intensified incursions of correctness-style reasoning into a more sharply differentiated or "contextualized" reasonableness review. The question is: are there ways of conceiving of or applying big-tent reasonableness that are likely to avoid both these dangers while maintaining the commitment to deference "as respect"?

106 *Wilson*, *supra* note 16.
107 *Ibid* at para 24.
108 *Ibid* at para 31.
109 *Ibid* at para 38.
110 See the discussion in Section III.C of this chapter.
111 See the discussion of *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] in Section III.C of this chapter.

4. Conclusion—Correctness

Examination of how correctness review has been described and applied reveals tensions between a positivist approach to statutory interpretation, which looks to statutory text (or perhaps text in historical context) as a closed system indicative of a determinate legislative intent, and a dynamic, normative approach, which views problems of statutory interpretation in light of shifting, contestable social facts and value-laden purposes. Arguably, the normative approach, taken seriously, begins to erode the idea that courts need not give any weight or respect to the justificatory efforts of tribunals on the matters traditionally reserved for correctness review.

This proposition is further supported by the observation that it may be difficult, if not impossible, ever to achieve a surgical separation of fact and law or policy and law. That is, if it is accepted that questions of law are unlikely ever to be fully disengaged from the factual as well as normative dimensions of interpretation—that is, from judgment calls about the likely effects of a given interpretive decision and the relative importance of the values and interests engaged by alternative interpretations—then it is unclear why the opinions of administrative decision-makers on these matters would ever be relegated to the status of legal irrelevance. That is, if one is prepared to recognize that administrative decision-makers are often likely, empirically speaking, to be uniquely attuned to the sectors in which they carry out their mandates, and, moreover, that they should be expected, normatively speaking, to strive to identify and implement the best ways of carrying out those mandates, then it does not make sense to dismiss administrative reasoning as superfluous to the deliberative work of law interpretation.

The implicit bedrock of correctness review remains the concept of jurisdiction, and the corresponding imperative that administrative decision-makers must not be permitted to exceed their legislatively conferred authority. Further, the correctness standard reflects the rule-of-law concern for stability in legal ordering, and moreover for impartial and even-handed justice, particularly in matters of general legal (including constitutional) significance. For all that, the standard sits uneasily with the democratic and rule-of-law aspiration of integrating the work of administrative tribunals more fully into the constitutional order. For signals that this is an aspiration that is central to the modern law on substantive review, we turn to the now-dominant standard: *Dunsmuir* reasonableness.

III. DUNSMUIR REASONABLENESS

The question at the heart of reasonableness review—indeed, one that has troubled the standard even in its pre-history as review for "patent unreasonableness"—is how the imperative of judicial deference and the expectation that administrative decisions must be reasonably justified may be integrated or reconciled. As described above, this question has driven successive transformations in this area of law over the past three decades, as courts have struggled to strike a principled understanding of the relationship between these imperatives. The question is whether *Dunsmuir*'s unified standard of reasonableness will assist in achieving equilibrium where prior doctrine has not.

A. Dunsmuir Reasonableness in Theory

Having ousted patent unreasonableness from the menu of common law standards of review—on the basis that it lacked practical utility, conceptual coherence, and normative (rule of law-based) justification—the majority in *Dunsmuir* frames its discussion of the two remaining standards with reference to a fundamental tension in the principled foundations of judicial review. The model of judicial review the majority adopts is based on an understanding of constitutional democracy in which the rule of law (conceived in terms of the supervisory role of judges) is in tension with democracy (conceived as parliamentary supremacy).[112] The question is whether this endorsement of the Diceyan idea that democracy threatens the rule of law, and vice versa, is bound to perpetuate the historical pattern of courts veering between these ostensibly competing commitments, or whether, instead, the approach adopted in *Dunsmuir* or the ensuing case law offers a coherent and practicable means of reconciling them.

1. Expectations of Reasonableness: Reasoned Justification

The *Dunsmuir* majority begins its discussion of reasonableness review with the oft-quoted lead-in to the oft-quoted 47th paragraph:

> 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.

Recognition that the questions brought to administrative decision-makers do not necessarily yield a single right answer appears to support the proposition that reviewing courts should not oversee *all* decisions on a standard of correctness. It also invites speculation about which questions do and which do not lend themselves to one right answer. Relatedly, the statement invites speculation, and, potentially, dispute, about whether or how deference will inform the "margin of appreciation within the range of acceptable and rational solutions." Just how, one may ask, will establishing the margin of appreciation be distinguished from the traditional (manipulable, judge-centric) exercise of delimiting administrative "jurisdiction"?

a. Practising Reasonableness Review: Deference as Respect

The passages in *Dunsmuir* offering guidance on the newly unified standard of reasonableness are constructed around the central imperative of judicial deference to administrative reasoning and decisions. More specifically, the majority affirms prior case law endorsing David Dyzenhaus's idea of deference "as respect"—or, to quote more fully from Dyzenhaus's

112 *Dunsmuir*, *supra* note 1 at paras 27-32.

statement on which the majority relies: deference as "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."[113]

Two key elements of Dyzenhaus's conception of deference as respect ("not submission") have been repeatedly affirmed: (1) reviewing courts must pay close (respectful) attention to the reasoning of administrative decision-makers (deference requires "respect"); and (2) administrative decision-makers must ensure their decisions are reasonably justified in light of the relevant law and facts (deference does not mean "submission").

The first imperative has been confirmed and elaborated in a few key cases. In *Ryan*, Iacobucci J urged judges to "stay close to the reasons" for an administrative decision, while searching for "a 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."[114] In *Egg Films Inc v Nova Scotia (Labour Board)*, Fichaud JA elaborated upon this statement:

> Reasonableness isn't the judge's quest for truth with a margin of tolerable error around the judge's ideal outcome. Instead, the judge follows the tribunal's analytical path and decides whether the tribunal's outcome is reasonable. [*Law Society v Ryan* … .] That itinerary requires a "respectful attention" to the tribunal's reasons … .[115]

However, just what is required in order to meet the second imperative—justification—and relatedly, what is meant by deference to reasons that have not been but "could be offered" are questions that continue to attract significant controversy.

b. Expectations Placed on Administrative Decision-Makers: Reasons and Outcomes

The *Dunsmuir* majority devotes a brief discussion to "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."[116] The majority states:

> 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.[117]

This passage offers three conceptual touchstones for the assessment of administrative reasoning: "justification, transparency and intelligibility."[118] The first of these terms arguably falls more toward the substantive end of judicial review (even carrying connotations of s 1 of the Charter, and its allowance for limitations on Charter rights where these may be "demonstrably justified in a free and democratic society"). The second two terms are more suggestive of the procedural fairness side of judicial review. Together, these touchstones suggest a coordination of traditional process and substance values in support of reasoned justification.

113 *Dunsmuir*, *supra* note 1 at para 48, citing Dyzenhaus, "The Politics of Deference," *supra* note 23 at 286. The passage is also cited with approval in *Baker*, *supra* note 19 at para 65.

114 *Ryan, supra* note 46 at paras 49, 55

115 *Egg Films Inc v Nova Scotia (Labour Board)*, 2014 NSCA 33 at para 30.

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

117 *Ibid*.

118 *Ibid*.

However, the terms are stipulated rather than explained—and have, since *Dunsmuir*, received little to no elaboration.

Also more suggestive than elucidative is the way the statement aligns these three guiding concepts with the "process of reasoning" while apparently consigning the evaluation of administrative conclusions to a distinct analysis of the "possible, acceptable outcomes which are defensible in respect of the facts and the law." On this description, administrative conclusions are isolated from the strength or weakness of administrative reasoning rather than evaluated in light of that reasoning.[119]

Some provincial courts of appeal subsequently interpreted *Dunsmuir*'s statements on reasonableness as mandating a distinct, two-stage inquiry, first into the reasoning process and then into whether the decision falls into the range of reasonable outcomes.[120] But in 2011, Abella J, writing for a unanimous court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,[121] rejected the suggestion that *Dunsmuir* stood "for the proposition that a reviewing court undertake two discrete analyses—one for reasons and a separate one for the result."[122] Rather, the assessment of reasonableness was said to be "a more organic exercise—the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[123]

This is a sensible enough proposition: A reviewing court should inquire into whether the reasons and conclusion are mutually supportive. To this, the court in *Nurses' Union* added that "the 'adequacy' of reasons" is not "a stand-alone basis for quashing a decision."[124] That is, judges on review should not fixate overly upon flaws (including apparent gaps) in reasoning, and should instead assess reasons in light of the wider decision-making context including the relevant law and the supporting evidence and arguments on the record.[125] All this is consistent with deference "as respect." However, in drawing back from the idea that administrative reasoning may serve as an independent basis for invalidation, *Nurses' Union* arguably risks weakening the expectations of reasoned justification articulated in *Dunsmuir*. This occurs through the judgment's emphasis on the imperative (drawn from the well-worn statement on deference from Dyzenhaus) that courts should "supplement" gaps in administrative reasoning.[126] This imperative has been applied in the ensuing case law in a manner that, as

119 However, the application of all three criteria to both reasons and outcomes is suggested in the majority judgment in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] in the statement that "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 a preferable outcome" (at para 59).

120 See *Casino Nova Scotia v Nova Scotia (Labour Relations Board)*, 2009 NSCA 4, 307 DLR (4th) 99; *Communications, Energy and Paperworkers' Union, Local 1520 v Maritime Paper Products Ltd*, 2009 NSCA 60 278 NSR (2d) 381; *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628, 311 DLR (4th) 389.

121 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Nurses' Union*].

122 *Ibid* at para 14.

123 *Ibid*.

124 *Ibid* at para 27.

125 See *Ryan*, *supra* note 46 at para 55. See also *Canadian Broadcasting Corp v Canada (Labour Relations Board)*, [1995] 1 SCR 157 at paras 48-49.

126 *Nurses' Union*, *supra* note 121.

explored in Section III.B, has arguably gone some distance to erode the expectation that administrative decision-makers justify their decisions in light of the relevant law and facts.

c. Conclusion: Dunsmuir Reasonableness in Theory

So far, a few principles of *Dunsmuir* reasonableness are clear. Courts should avoid an approach to judicial review that starts with the court's view of the right answer; instead, they should give respectful attention to administrative reasoning. Moreover, respectful attention is distinct from submission; that is, courts must evaluate administrative decisions and reasons and be prepared to invalidate these where they are unreasonable. But the central question remains: How may courts ensure that their evaluation of administrative decisions and reasons is consistent with deference? What exactly does it mean to give respectful attention (or as one judgment elaborates, "considerable weight"[127]) to those decisions and reasons while maintaining principled expectations of legality?

In what follows, it is argued that the principles from *Dunsmuir* have been extended and applied in the post-*Dunsmuir* case law in ways that conflict with the idea of deference "as respect." That idea, as described earlier, was plucked from a wider theory of constitutional legitimacy (most prominently advanced in the work of David Dyzenhaus), which centres upon the co-participation of all three branches, in interaction with legal subjects, in enacting a "culture of justification." The administrative branch plays a special role in this theory, functioning as a kind of constitutional feedback loop by informing the interpretation and application of law with the diverse interests and views of affected legal subjects. One of the themes in the following section is that the central expectation underpinning the deference owed by judges to administrative reasoning and decisions—namely, that administrative decision-makers *demonstrate* expertise, and so justify their decisions in ways that evince responsiveness to the relevant context including the significant interests of those directly affected—has as yet failed to find adequate traction in the law on reasonableness review.[128] Another related theme is that judges have failed to consistently pay respectful attention to administrative reasoning.

B. Dunsmuir Reasonableness in Practice

While, in theory, *Dunsmuir* reasonableness aims at reconciling the imperatives of justification (identified with the rule of law) with the imperatives of judicial deference (identified with respect for the legislature's intent to confer significant decision-making powers on administrative decision-makers), in practice, review for *Dunsmuir* reasonableness has expressed the same contradictory impulses toward judicial supremacy and judicial abdication that have long marked the law on judicial review.

127 See *Southam*, *supra* note 50 at para 62: "In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise."

128 See Walters, "Respecting Deference as Respect," *supra* note 79 at 417.

1. Deference as Supremacy? Disguised Correctness Review

a. Dunsmuir: Judicial Supremacy in Practice?

A number of decisions issued post-*Dunsmuir* that ostensibly adopt a reasonableness standard have proven susceptible to the argument that they are better characterized as examples of "disguised correctness" review.[129] That is, they are said to be marked by a lack of concern for the reasoning of the decision-maker on review, and instead apply a standard of simple concordance with the court's favoured reasoning and conclusion. Two prominent examples of decisions vulnerable to this critique are *Dunsmuir* itself, and *Mowat*.[130]

In Chapter 11, Audrey Macklin discussed the facts of *Dunsmuir*, along with the central question posed in that case. This was whether a labour arbitrator's interpretation of certain statutory provisions governing the employment relationship between public servants and the government of New Brunswick—provisions located primarily in two provincial statutes, the *Civil Service Act*[131] and the *Public Service Labour Relations Act*[132]—was reasonable. Was the Supreme Court's unanimous conclusion that the decision was unreasonable a good example of *Dunsmuir* reasonableness in action?

The arbitrator in *Dunsmuir* determined that the two statutes could be read together so as to give a non-unionized public employee a right to inquire into whether ostensibly no-cause dismissal was in fact dismissal for cause, potentially triggering a greater range of remedies from government than would be available under the common law of employment. According to the Supreme Court, this interpretation was unsupportable. In coming to this conclusion, the majority judgment entered briefly into an analysis of the statutory scheme, focusing primarily on a term of the *Civil Service Act* preserving the common law of contract in the public employment relationship. The majority concluded that to allow a non-unionized employee to go behind no-cause dismissal would disrupt this statutory guarantee of an employment relationship structured in accordance with private law, in the absence of a clear statutory basis.[133]

Despite the *Dunsmuir* majority's stated commitment to deference to administrative decision-makers' field-sensitive interpretations of statutes they encounter on a frequent basis,[134] its application of a reasonableness standard to the arbitrator's decision proceeded quickly

129 See Mullan, "The Top Fifteen!," *supra* note 15. And see P Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on the Standard of Review" (2012) 58:2 McGill LJ 483 at 496-501 ["Dunsmuir's Flaws Exposed"]. Arguable "disguised correctness" cases include examples in which correctness-style reasoning ends up in agreement with the decision-maker: *Plourde v Wal-Mart Canada Corp*, 2009 SCC 54; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 [*Agraira*]; *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45. In other examples, correctness-style reasoning sets the court's opinion in opposition to that of the decision-maker: beyond *Dunsmuir* and *Mowat* (both discussed below), see *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52; *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 SCR 108 [*Halifax*]; *John Doe v Ontario (Finance)*, 2014 SCC 36, [2014] 2 SCR 3.

130 *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*].

131 SNB 1984, c C-5.1.

132 RSNB 1973, c P-25.

133 *Dunsmuir*, *supra* note 1 at paras 72-76, especially para 74.

134 *Ibid* at para 54.

to the conclusion above. What is most disturbing, according to David Mullan,[135] is that the majority's reasoning is seemingly driven by an automatic or reflexive prioritization of common law values (specifically, freedom of contract) over the competing remedial purposes (securing comparable protections for non-unionized civil servants to those afforded unionized civil servants) that the administrator appears to have privileged in his construction of the statutory regime.

Mullan asks: was the arbitrator's decision properly construed as outside the range of reasonableness?[136] Or did the decision instead fail to pass muster because of its starkly different weighting of the competing norms and interests engaged by this problem of law interpretation than was preferred by the Supreme Court?

Revisited in this manner, it is arguable that in *Dunsmuir* the court failed to adhere to the very expectations for reasonableness review (deference "as respect") it had just set out.

b. Mowat: Displacing Purposive Reasoning in Favour of the "Right Answer"

A second example of a Supreme Court of Canada decision that may be characterized as "disguised correctness review" is *Mowat*.[137] The case originated in a determination by the Canadian Human Rights Tribunal that it could order a respondent to pay the legal costs of a successful complainant. This turned upon interpretation of ss 53(2)(c) and (d) of the *Canadian Human Rights Act*,[138] which granted the tribunal authority to "compensate the victim … for any expenses incurred by the victim as a result of the discriminatory practice." In support of its interpretation, the tribunal canvased five Federal Court decisions, three of which had held that the sections in question empowered it to award costs and two of which had come to the opposite conclusion. The tribunal went with what was then the "predominance of authority from the Federal Court." More substantively, it adopted from these decisions the proposition that the absence of the term "legal costs" or "costs of counsel" in s 53(2)(c) was not determinative, and that the language of the section in the Act was broad enough to include the power to award costs. According to the tribunal, this conclusion was further supported by policy reasons; indeed, in its opinion, the contrary interpretation would defeat the remedial purposes of the Act.[139]

The unanimous decision of the Supreme Court of Canada on review adopted a reasonableness standard, as interpretation of the compensation clause was "inextricably intertwined with the tribunal's mandate and expertise to make factual findings relating to discrimination." That is, this was "a fact-intensive inquiry" that "afforded the Tribunal a certain margin of discretion."[140] LeBel and Cromwell JJ, for the court, further acknowledged that human rights legislation expresses fundamental values and pursues fundamental goals, and

135 "Let's Try Again!," *supra* note 3 at 137-40.
136 *Ibid* at 139.
137 *Supra* note 130. Again, see the discussion in Mullan, "The Top Fifteen!," *supra* note 15; Daly, "Dunsmuir's Flaws Exposed," *supra* note 129 at 496-501.
138 RSC 1985, c H-6.
139 *Mowat*, *supra* note 130 at paras 22-23.
140 *Ibid* at para 26.

"must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect."[141] However, they continued, it was essential to adopt "an interpretation of the text of the statute which respects the words chosen by Parliament."[142]

The judgment of LeBel and Cromwell JJ in *Mowat* then turned briefly to the tribunal's reasoning. In two sentences, the judges noted that the tribunal had relied in part on judicial precedents and in part on policy rationales "relating to access to the human rights adjudication process."[143] However, they stated: "[O]ur view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs." The judges concluded, rather, that there was but one reasonable answer to this interpretive problem, taking account of the statutory text and the legislative–historical context, which together weighed against the purposive reasoning of the tribunal.

First, the judges reasoned, had Parliament intended to allow costs awards as part of compensation for expenses arising from discrimination, it would have included a clause expressly indicating this.[144] The logic flows as follows: typically, authority to award costs is expressly conferred; thus, if the legislature intended a departure from this convention, it would have done so expressly. However, a counterargument is available, rooted in the competing convention of broad, liberal, purposive interpretation of human rights statutes, and the complementary convention that where the legislature intends to circumscribe or limit human rights, it must do so expressly.[145] A second argument raised by LeBel and Cromwell JJ focused on redundancy, as two separate sections of the Act (dealing respectively with employment-related and goods-and-services-related discrimination) referred to compensation for "expenses."[146] Similar counterarguments (based on liberal, purposive interpretations) apply.

Perhaps the strongest argument offered in *Mowat* in support of the determination that there is but one reasonable conclusion to this interpretive problem is based on legislative history. LeBel and Cromwell JJ observe that the *Canadian Human Rights Act*, as originally drafted, included a provision contemplating costs awards to the successful party—but this was removed before the bill became law. This, they suggest, indicates an intention to preclude costs awards. Similarly, a later proposed amendment allowing the tribunal to award costs against the commission failed to be passed into law. And further, at another point, the commission itself recommended that the Act be reformed to give the tribunal the express power to award costs—and this recommendation, too, failed to be acted upon. However, none of these proposals was specifically focused on costs awards against respondents, or, therefore, on promotion of the interests of complainants. Moreover, failure of a recommended reform to become law does not settle the interpretive question, as the recommended reform may be understood to simply make explicit what was already implicit.

141 *Ibid*, citing R Sullivan, *Sullivan on the Construction of Statutes,* 5th ed (Markham, Ont: LexisNexis, 2008) at 497-500.

142 *Mowat, supra* note 130 at 497-500.

143 *Ibid*.

144 The discussion of *Mowat* in this section draws significantly on a note on the judgment written by Denise Réaume (on file with author). My thanks to Professor Réaume for sharing her work and permitting me to cite it here.

145 See *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, L'Heureux-Dubé J, in dissent.

146 *Mowat*, *supra* note 130 at para 37.

A related argument accepted by the judges was that because the statute confers power on the commission to take carriage of complaints before the tribunal "in the public interest," interpretation of the Act should reflect a presumption that the commission will fulfill that function. Yet the Act does not require this of the commission; it confers a discretion. Denise Réaume comments:

> In *Mowat*, the government, as respondent, argues that because Parliament intended that the Commission is supposed to play an active role (which it can't do because government, as government, doesn't provide sufficient funds), the Act should be read not to permit damage awards to be levied against respondents, mainly the government, that include legal fees. How does that honour the parliamentary intent behind the anticipated active role of the Commission?[147]

These counterarguments challenge the Supreme Court's conclusion that the tribunal's interpretation was unreasonable. As Réaume observes: "To uphold the Tribunal's decision, one does not need to show that it is right, or even better, just that it's reasonable."[148] Recent judgments of the Supreme Court have been clear in stating that there may in some cases be just one reasonable answer to an interpretive problem—a claim that has been specifically illustrated through reference to *Mowat*. And yet it is not at all clear that the reviewing court in *Mowat* accorded the kind of respectful attention or presumptive weight that is demanded on review for reasonableness. Rather, the judgment de-centres the tribunal's decision and reasoning in favour of a detailed accounting of controversial textual and contextual considerations. As a result, the judgment arguably not only fails to produce an indisputably right answer, it produces an unreasonable answer, one that defeats the human rights-promoting purposes of the Act.

2. Deference as Abdication?

If one extreme of the post-*Dunsmuir* case law on reasonableness review has taken the form of disguised correctness, the other flirts with judicial abdication.

a. Review of Implicit Administrative Reasoning

i. Nurses' Union: Deference or Abdication?

The Supreme Court judgment in *Nurses' Union*[149] was noted above for the principle that reasonableness review is an organic exercise in which "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[150] This and other principles stated in the judgment were directed at how a court should proceed where it is alleged that administrative reasoning is fatally flawed. The allegation may be that the decision-maker has failed to address an issue potentially determinative of the outcome, or has otherwise failed to lay down a clear reasoning path from the relevant evidence or law to the conclusions reached. The guidance provided by Abella J for the court (and the application of this guidance in subsequent cases) aims to advance the

147 Réaume, *supra* note 144 at 3.
148 *Ibid*.
149 *Supra* note 121.
150 *Ibid* at para 14.

cause of deference. However, the principles stated, which converge on the imperative that courts must attempt to "supplement" obscure or conspicuously absent administrative reasoning before arriving at a conclusion of unreasonableness, have spawned questions about whether the post-*Dunsmuir* case law has gone too far in downplaying the responsibility of courts on review to discipline failures on the part of administration to adhere to conventions of reasoned justification.

Writing on behalf of the court in *Nurses' Union*, Abella J first addressed whether allegations of incomplete or inadequate reasons should be decided through an inquiry into substantive reasonableness, or alternatively, an inquiry into whether the duty to provide reasons was met as a matter of procedural fairness. Abella J concluded that the question of whether any (as opposed to no) reasons have been given should be decided on procedural fairness grounds (i.e., the law on the duty to give reasons). But where questions arise about "the *quality*" of reasons, this is a matter for substantive review. This alleviates the prospect of inefficient doubling of efforts to address sufficiency of reasons on both procedural and substantive grounds. It also ensures that the imperatives of deference will not be subverted by review of tribunal reasoning under the head of procedural fairness, where the standard applied has conventionally been understood to be correctness.[151]

However, the approach gives rise to new questions. First, there will inevitably be borderline cases in which there is uncertainty about whether the appropriate allegation is that no reasons were given, or that the reasons, while given, are of very poor or overly perfunctory quality. For instance, what if the decision-writer simply states: "I have considered the evidence and arguments, and conclude that the application must fail"? Or what if reasons are given on some issues but not others? There is law suggesting that the right approach in such cases (or some subset of these) is to select reasonableness review.[152] A second question arises where the quality of reasons is indeed determined to be in issue, and reasonableness review is applied. What limits should the reviewing court place on deference to reasons that are incomplete, or difficult to follow, or that otherwise fail to fully or clearly support the conclusion reached? As we will see, this is the central question raised in the wake of *Nurses' Union*.

Nurses' Union arose out of a grievance decision challenged by the union on the basis that the arbitrator had failed to clearly articulate the reasoning path from certain agreed-upon statements of fact and law to the conclusion reached. The chambers judge agreed that the arbitrator had failed to directly address or resolve the central interpretive issue in dispute. In contrast, Abella J, writing for the Supreme Court, concurred with the Court of Appeal that "'a more comprehensive explanation' would have been preferable,"[153] and affirmed that the decision was reasonable. According to Abella J, the reasoning could be discerned, when the passages in question were read in light of the background information the arbitrator had supplied (for instance, the relevant terms of the collective agreement and applicable interpretive principles), along with "a plain reading of the agreement itself."[154]

151 See *Nurses' Union*, *supra* note 121 at para 21. And see Alice Woolley, "The Continued Complexity of Administrative Law Post-Dunsmuir" (14 December 2010), *ABlawg: The University of Calgary Faculty of Law Blog*, online: <http://ablawg.ca/wp-content/uploads/2010/12/blog_aw_mitzel_dec2010.pdf>.

152 See *Agraira*, *supra* note 129.

153 *Nurses' Union, supra* note 121 at para 9.

154 *Ibid* at para 7.

Was this deference, or abdication? Importantly, Abella J in *Nurses' Union* gave particular attention both to efficiency concerns and to what the parties affected by the decision would have likely understood to be the basis for the decision. She stated: "[Labour arbitrators] are not writing for the courts, they are writing for the parties who have to live together for the duration of the agreement. Though not always easily realizable, the goal is to be as expeditious as possible."[155]

Thus, Abella J suggested that the chambers judge had focused overly myopically on a few passages in the written reasons, rather than asking whether the basis for the decision would have been apparent to the parties, viewed in light of the wider legal, institutional, and factual context, and the arguments on which the parties had relied.

Abella J uses this occasion to state some general principles on reading administrative reasons in context. She first affirms that reasons must, in order to meet the bar of reasonableness, "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes."[156] However, "[p]erfection is not the standard."[157] Here Abella J draws on the now-authoritative statement from David Dyzenhaus on deference as respect, which indicates that the requisite respect must be directed at "the reasons offered *or which could be offered* in support of a decision."[158] To this is appended an expectation (again rooted in Dyzenhaus's 1997 statement)[159] that "[a] court must first seek to *supplement* [administrative reasons] before it seeks to subvert them."[160] Abella J elaborates: "This means that courts *should not substitute their own reasons*, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome."[161]

More generally, Abella J adds, a reviewing court may (or, if no reasonable basis for the decision is otherwise apparent, should) situate the decision-maker's conclusions in "the context of the evidence, the parties' submissions and the process."[162] Thus, it is not simply reasons and conclusions that are to be read together on the organic approach to reasonableness review promoted in *Nurses' Union*, but reasons, conclusions, and other contextual information available from the record (and perhaps other contextual sources).

In sum, *Nurses' Union* affirms that reasons (read in context) must explain why the decision-maker arrived at its conclusion, and affirms, moreover, that courts must refrain from substituting their reasoning for that required of decision-makers. However, the judgment—specifically, its emphasis on the duty of reviewing courts to supplement facially inadequate administrative reasons—lays the groundwork for an approach to reasonableness review that marginalizes (and potentially even renders obsolete) the expectation that decision-makers give reasons that meet the criteria of "justification, transparency, and intelligibility." Precisely this marginalizing effect may be discerned in the subsequent case law. However, to understand

155 *Ibid* at para 23.
156 *Ibid* at para 16.
157 *Ibid* at para 18, citing Evans JA in *Public Service Alliance of Canada v Canada Post Corporation*, 2010 FCA 56, [2011] 2 FCR 221.
158 *Ibid* at para 12 (emphasis added), citing Dyzenhaus, "The Politics of Deference" *supra* note 23.
159 Dyzenhaus made this statement (on deference to reasons that "could be offered") prior to the Supreme Court of Canada's endorsement of a common law duty to give reasons.
160 *Nurses' Union, supra* note 121 at para 12, citing Dyzenhaus, "The Politics of Deference," *supra* note 23.
161 *Nurses' Union, supra* note 121 at para 15 (emphasis added).
162 *Ibid* at para 44.

these developments, one must also be apprised of the closely related yet distinct principles stated in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*.[163]

ii. Deference to Implicit Decisions

The judgment of Rothstein J for the majority in *ATA*,[164] released the day before *Nurses' Union*, offers a more delimited pronouncement on the sort of case in which judges may speculate on the reasons that "could be offered" in support of an administrative decision. At the same time, the judgment expands the set of supplementary sources that may be drawn upon by reviewing courts faced with an absence of or alleged gaps in tribunal reasoning.

The decision in issue in *ATA* involved interpretation of a section of Alberta's *Personal Information Protection Act* stating that an inquiry must be completed within 90 days unless the commissioner gives notice of an extension of time. The commissioner had not given notice until months after the 90-day period had expired. No arguments were raised concerning the commissioner's power to extend time in this fashion; however, such an argument was raised on review.

Thus, *ATA* presented a situation in which a question (here, involving law interpretation) that was potentially of determinative importance to the outcome of a wider administrative decision-making process was implicitly decided, but was not expressly addressed in reasons. Critically, the situation was moreover one in which the party raising the issue on review had failed to alert the decision-maker that the question was in dispute, and so failed to put the decision-maker on notice about the importance of taking account of the arguments on both sides, and of giving reasons on point.

In such cases, the reviewing judge has discretion concerning whether to deal with the issue.[165] Indeed, Rothstein J indicates that ordinarily, the judge should refuse to deal with such after-the-fact challenges,[166] for three reasons: (1) deference to the expertise of the tribunal, which should have an opportunity to address such matters in the first instance; (2) the potential for prejudice to other parties, who will not have had the opportunity to put relevant evidence or argument on the record; and (3) the related prospect that the matter raised on review will lack a sufficient evidentiary foundation.[167] Accompanying these rationales is disapproval of those who sleep on their rights, whether strategically or out of sheer lassitude or both.

However, Rothstein J recognized that exceptions may be made to the general principle of refusing to hear such challenges (raised for the first time on review). These exceptions arise where (1) there are alternative ways of ascertaining the decision-maker's reasoning on point, and (2) there is no prejudicial effect to other parties (e.g., where the issue is a "straightforward determination of law," not requiring a detailed evidentiary record).[168] In *ATA*, Rothstein J determined that the interpretive issue raised was indeed a straightforward question of law, and moreover that there was an adequate alternative way of ascertaining

163 *Supra* note 5.
164 *Ibid*.
165 *Ibid* at paras 22-28.
166 *Ibid* at para 23.
167 *Ibid* at paras 24-26.
168 *Ibid* at paras 26-28.

the decision-maker's reasoning. Specifically, the court was supplied with past decisions of the commissioner and "his delegated adjudicators," dealing with the same interpretive question as it arose under the provision in issue and a similarly worded provision.[169] Rothstein J stated: "[I]n the circumstances here, it is safe to assume that the numerous and consistent reasons in these decisions would have been the reasons of the adjudicator in this case."[170] Those decisions "easily" established "that a reasonable basis exists for the adjudicator's implied decision."[171]

Justice Rothstein further emphasized that adverting to the reasons that "could be offered" in such cases must not collapse into submission to defective reasoning, or substitution of judicial for (again, defective) administrative reasoning.[172] The question in *ATA* was rather how to deal with *absent* reasoning. Rothstein J acknowledged that "deference under the reasonableness standard is best given effect when administrative decision-makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided."[173] But, he added, "[w]hen there is no duty to give reasons … or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review."[174] In *ATA*, only "limited reasons [were] required," it seems, specifically because of the failure of the applicant to raise the question before the decision-maker. One key issue emerging out of *ATA* is what other situations may give rise to the conclusion that only "limited reasons are required."

Rothstein J further indicates that where the exceptional conditions are met for review of an implied decision (on a question not argued before the decision-maker), the first question is whether "a reasonable basis for the decision is apparent to the reviewing court." If a reasonable basis is apparent—even if it is not certain that this would be the reasoning path of the decision-maker—reasonableness should generally be affirmed on that basis. For, Rothstein J adds, remitting for reasons may "undermine the goal of expedient and cost-efficient decision making."[175] However, where no such reasonable basis is apparent, it is more consistent with deference to remit the question to the decision-maker for reasons on the point in issue than to quash the decision and require a full redetermination.[176]

In sum, *ATA* addresses a situation in which administrative reasoning is not merely flawed, as in *Nurses' Union*, but rather is wholly absent in support of a decision (or subdecision) of potentially determinative relevance. The situation addressed is moreover one in which the applicant could have, but did not, make arguments on point to the administrative decision-maker. *ATA* responds with two important principles on the review of what it calls implicit decisions: one, on when such decisions may be heard despite a failure to raise the matter before the decision-maker, and the other, on the sources that may stand

169 *Ibid* at para 56.
170 *Ibid*.
171 *Ibid*.
172 *Ibid* at para 54. See also *Khosa*, *supra* note 119 at para 63.
173 *ATA, supra* note 4 at para 54.
174 *Ibid.*
175 *Ibid* at para 55.
176 *Ibid.*

in for or supplement the missing reasoning. These principles seek to rationalize review of implicit decisions in a manner that neither subverts deference nor abdicates the responsibilities of legal oversight. However, following the 2011 decisions in *ATA* and *Nurses' Union*, the cracks have begun to show in judicial efforts to express both deference and expectations of public justification in the review of implicit (or absent) decisions and reasons.

iii. Cracks in the Foundations: McLean, Agraira, and Tran

Briefly, three further decisions suggest that the principles out of *Nurses' Union* and *ATA* are susceptible to application in ways that are in tension with the duty of administrative decision-makers to publicly justify their decisions.

The dispute that gave rise to the 2013 Supreme Court judgment in *McLean v British Columbia (Securities Commission)*,[177] involved a fight about interpretation of a provision of the BC *Securities Act* stating a limitation period applicable to "secondary proceedings"—that is, proceedings commenced by the commission against persons who had entered into settlement agreements with securities regulators in other jurisdictions. The question was whether the limitation period stated in the Act was triggered by the misconduct giving rise to the proceedings or, alternatively, the individual's entry into such a settlement agreement. In contrast to the situation in *ATA*, arguments on the interpretive question raised on review had been put to the commission (indeed, these were the only arguments made by McLean at that stage). Therefore, the principles from *ATA* on when a court should exercise its discretion to refuse review of an implicit decision were not in issue. Rather, the question was whether the decision of the commission to commence secondary proceedings despite the arguments made—and with no express reasons given on point—should be upheld as reasonable.

Given that, as noted, the applicant in *McLean* had made arguments to the commission that the proceedings were time barred and received no reasons on point, there appears to have been justification for the court to quash the decision or remit for reasons.[178] However, the majority determined that the decision was reasonable (as did the concurrence of Karakatsanis J). This was informed in significant part by the interpretive reasoning advanced by the respondent executive director of the commission. Moldaver J commented:

> Unlike *Alberta Teachers*, in the case at bar, we do not have the benefit of the Commission's reasoning from its decisions in other cases involving the same issue (see paras 56-57). However, a basis for the Commission's interpretation is apparent from the arguments advanced by the respondent, who is also empowered to make orders under (and thus to interpret) s 161(1) and (6). These arguments follow from established principles of statutory interpretation. Accordingly,

177 *Supra* note 47.

178 The Court of Appeal (2011 BCCA 455) had dismissed McLean's argument that the secondary proceedings in BC were time barred. In contrast, that court concluded that the question of whether BC's order against McLean was in the public interest (a question that McLean had not argued before the commission) should be remitted to the commission for a "brief explanation" (at para 31).

> though reasons would have been preferable, there is nothing to be gained here from requiring the Commission to explain on remand what is readily apparent now.[179]

Moldaver J here omits the distinguishing fact that McLean *had* made arguments on point to the commission. However, efficiency considerations appear to win out over the expectation that decision-makers give (reasonable) reasons for their decisions. There is "nothing to be gained" by remitting the question to the decision-maker for reasons, as it is anticipated that those reasons would simply mirror the arguments of the executive director on review. Yet it is important to note that the majority in *McLean* determined that *both* the interpretation advanced by the respondent and the contradictory interpretation advanced by McLean were "reasonable." That is, there was apparently room for policy choices in this interpretive field. Moreover, the decision was not the executive director's to make. Finally, what is missing from the statement above is consideration of the principle that agency representatives should not be permitted to shoehorn (or "bootstrap") after-the-fact reasons through arguments on review in this fashion. It is a practice that erodes the duty to give reasons.[180] In short, the approach taken to the review of implicit reasons in *McLean* arguably undermines the expectation from *Dunsmuir* that administrative reasoning be expressive of justification, transparency, and intelligibility.

A second example of post-*Dunsmuir* application of the law on implicit reasons and decisions is the 2013 Supreme Court of Canada decision in *Agraira v Canada (Public Safety and Emergency Preparedness*).[181] This case involved a review of a ministerial decision under s 34(2) of *Immigration and Refugee Protection Act*,[182] which provides that "a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest"[183] may be treated as admissible, despite engagement of one or more grounds of inadmissibility. The minister rejected Agraira's application under s 34(2) on grounds that the Supreme Court characterized as resting primarily or exclusively on national security and public safety. The focus of review became the minister's implied interpretation of the term "national interest." While the minister had given no express reasons on this interpretive issue, and there were no prior ministerial decisions on point, LeBel J, writing for the court, read the minister's reasons in light of the applicable guidelines and drew the highly speculative conclusion that,

> had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations.[184]

179 *McLean*, *supra* note 47 at para 72.

180 On the general condemnation of tribunal "bootstrapping" of reasons for decision—along with a canvassing of the rationales for granting standing to administrative decision-makers in certain circumstances—see *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44, [2015] 2 SCR 147. For further criticism of *McLean* along these lines, see Daly, "Scope and Meaning of Reasonableness Review," *supra* note 9 at 817-18.

181 *Supra* note 129.

182 SC 2001, c 27

183 *Supra* note 129 at para 42.

184 *Ibid* at para 62.

In this way, LeBel J imputed to the minister an interpretation that accorded with the judge's own appraisal of the text, legislative history, "evident purpose," and statutory/soft law context.

As Paul Daly has observed, among the many surprising things about *Agraira* is that the interpretation imputed to the minister is contrary to that which the minister argued on review was the proper, or reasonable, interpretation.[185] That is, the court rejected the interpretation advanced by the minister in favour of an interpretation it first stipulated to have been the minister's and then relied upon to affirm the decision's reasonableness.

The line of case law on review of implicit decisions and reasoning in which *McLean* and *Agraira* participate puts reviewing courts in a difficult position when faced with decisions that lack express supporting interpretations of the relevant law. Consider the 2015 Federal Court of Appeal decision in *Canada (Public Safety and Emergency Preparedness) v Tran*,[186] heard on appeal at the Supreme Court of Canada in December of 2016 and discussed by Audrey Macklin in Chapter 11. In *Tran*, an officer with the Canadian Border Services Agency had refused to engage with key interpretive questions raised by the applicant (including questions involving the relevance of Charter values to the interpretive problem) on the basis that he lacked competence to address questions of law. Based in part on the officer's reasoning (and without further interpretive analysis), a ministerial delegate referred Tran's case to an admissibility hearing. Gauthier JA, who upheld the decision of the minister's delegate, commented on the difficulties presented to reviewing judges by the state of the law on deference to implicit reasons:

> In cases, like this, where it is not evident that only one interpretation is defensible, it is quite difficult to do what the Supreme Court of Canada mandates us to do given the number of interpretative presumptions and principles that can be considered and applied. Some further guidance would certainly be welcomed in that respect, especially when the relative weight to be given to competing presumptions and interpretative tools has never been clearly dealt with by the Supreme Court of Canada.[187]

Daly argues that in a situation like *Tran*, the appropriate response must be to remit the matter to the decision-maker to squarely address the statutory and/or Charter arguments.[188] More generally, where the reasoning of a decision-maker is not clear to the reviewing court (and not likely to be clear to the parties) despite attentiveness to the evidence and argument on the record, the principles out of both *Nurses' Union* and *ATA* indicate that the court should remit the matter to the decision-maker for reasons—short of compelling counterarguments like those entertained in *ATA* (where no arguments were made on point in the first instance).[189] This would be most consistent with "deference as respect." However, the examples above suggest a turn in the substantive review jurisprudence toward deference as abdication—or, rather, a concerning

185 See Daly, "Scope and Meaning of Reasonableness Review," *supra* note 9 at 817-18.

186 2015 FCA 237, [2015] 2 FCR 459 [*Tran*]. The judgment of the Supreme Court of Canada in *Tran* was issued just as this chapter was going to press: 2017 SCC 50. Côté J for the court determines that "on either standard of review" the "assumed interpretation" of the minister's delegate could not be sustained. The court does not address the concerns about implicit reasons raised by Gauthier JA.

187 *Tran, supra* note 186 at para 46.

188 See Paul Daly, "A Snapshot of What's Wrong with Canadian Administrative Law: MPSEP v Tran, 2015 FCA 237" (13 November 2015), *Administrative Law Matters,* online: <http://www.administrativelawmatters.com/blog/2015/11/13/a-snapshot-of-whats-wrong-with-canadian-administrative-law-mpsep-v-tran-2015-fca-237>.

189 See Paul A Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016) 29 CJALP 87.

confluence of abdication and supremacy, as judges absolve decision-makers of expectations of public justification while at the same time filling the void with their own reasoning on review.

3. The Rule Against Revisiting the Weight Accorded Factors of Legal Relevance

A more controversial claim regarding judicial abdication centres on reasonableness review of discretion: specifically, the principle that judges should not revisit the weight that administrative decision-makers place on the factors of legal relevance to discretion.[190] The question is: *should* judicial reassessment of the importance of factors relevant to discretion (including the significant interests of those affected by discretionary action) be discouraged as contrary to deference, or is this sort of evaluation required by a defensible conception of reasonableness?

The rule against revisiting the weight placed on factors of relevance sits uneasily with another line of case law, in which unreasonableness takes the form of unreasonable "failure *to consider*" a factor of legal relevance (an analysis ostensibly putting aside contestable questions of weight). The tension arises because it is not uncommon for the "failure to consider" analysis to be impugned, by commentators or dissenting judges, as a disguised reassessment of the weight or relative importance of the considerations said to have been (expressly and/or implicitly) ignored.[191]

The tension between the rule against revisiting the weight placed on factors relevant to discretion and the law on "failure to consider" came to a head in *Baker*—a case you have already encountered in this text. In *Baker*, the decision of an immigration officer to deny Mavis Baker humanitarian and compassionate grounds-based relief from imminent deportation was deemed unreasonable for "failure to give serious weight and consideration"[192] to the best interests of Baker's children. This ruling was presented as consistent with deference—understood (in accordance with Dyzenhaus's phraseology) as requiring respectful attention, but not submission, to the reasons offered or that could be offered for the exercise of ministerial discretion.[193] At the same time, the ruling was based on the expectation that discretion be exercised consistent with "the values underlying the grant of discretion."[194]

In elaborating on what it means to defer to discretionary decisions, L'Heureux-Dubé J indicated that judges "may give substantial leeway to the discretionary decision-maker in determining the 'proper purposes' or 'relevant considerations' involved in making a given determination."[195] This extends the parameters of deference to discretion beyond the traditional Diceyan division of labour, whereby judges were understood to have exclusive responsibility for identifying the legal limits on discretion (i.e., the considerations of mandatory legal relevance) while administrative decision-makers were given free rein within those limits. Attentiveness to the views of the decision-maker on the factors of mandatory relevance is

190 See e.g. *Southam*, *supra* note 50 at para 43, and the cases discussed below.

191 See e.g. the majority and dissenting reasons in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29.

192 *Baker*, *supra* note 19 at para 65.

193 *Ibid*.

194 *Ibid*. The legal and factual background to the case, along with a more complete analysis, is provided by Geneviève Cartier in Chapter 11 of the second edition of this textbook, Administrative Discretion: Between Exercising Power and Conducting Dialogue, online: <www.emond.ca/adminlaw3e>.

195 *Baker, supra* note 19 at para 56.

exhibited in *Baker* through the special attentiveness given to ministerial guidelines—although the attention paid to those guidelines is as demanding as it is (respectfully) attentive.

In elaborating on where or how the "values underlying the grant of discretion" may be discerned, L'Heureux-Dubé J lists a formidable array of sources: the decision-maker's enabling legislation and associated regulations, instruments of soft law such as departmental policies and guidelines, the common law ("the principles of administrative law"), the Constitution ("the principles of the rule of law" and "the principles of the *Charter*"), international law, and the "fundamental values of Canadian society."[196] This list of sources of legal limits on discretion has arguably been under-interpreted and under-applied in the years since *Baker*—although, as we will see, the spirit behind it has been revived in some measure (in controversial and partial fashion) in *Doré*.[197]

The values relevant to the grant of discretion exercised in *Baker* were inferred from the statute, an international convention ratified but not incorporated into domestic legislation, and the applicable ministerial guidelines. Together, held L'Heureux-Dubé J, these sources established that "the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the 'humanitarian' and 'compassionate' considerations that guide the exercise of the discretion."[198] Contrary to this principle, the officer's notes failed to reflect that the decision-maker was "alive, attentive, or sensitive to the interests of Ms. Baker's children," and moreover established that he "did not consider [those interests] an important factor in making the decision."[199] Therefore, the decision failed to meet the standard of reasonableness *simpliciter*. Notably, L'Heureux-Dubé J added that "the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children."[200] That is, failure of the decision-maker to accord appropriate weight to Mavis Baker's lack of sociological attachment to Jamaica, her disability, and her interest in maintaining her relationship with her children constituted independent bases for deeming the exercise of discretion unreasonable. These considerations, however, are not typically brought out in the case law and commentary on *Baker*, which has tended to focus on failure to consider the best interests of the child.[201]

The judgment in *Baker* was followed by uncertainty in the case law and commentary as to whether this marked a radical departure from the reigning principles on review of

196 *Ibid* at paras 56, 67.

197 *Supra* note 111.

198 *Baker, supra* note 19 at para 73.

199 *Ibid*.

200 *Ibid* at para 73.

201 As Pless and Fox-Decent explain in Chapter 6, the Supreme Court expressly opted to deal with Baker's claim on administrative law bases rather than the Charter, despite the fact that Charter arguments had been raised by Mavis Baker and various interveners. Alyssa Clutterbuck argues that the judicial preferencing of administrative law analysis in *Baker* functioned to construct the claim as one of individualized arbitrariness—that is, a decision-making anomaly on the part of a single officer—thereby obscuring the structural violence of immigration norms that, as a matter of course, exclude applicants on intersecting bases of disability, poverty, race, and gender. See Alyssa Clutterbuck, "Rethinking Baker: A Critical Race Feminist Theory of Disability" (2015) 20 Appeal 51.

discretion, or this was just an unusual application of those principles. In *Suresh v Canada (Minister of Citizenship and Immigration)*,[202] the court responded by stating that *Baker* "does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process." Rather, the majority in *Baker* had drawn "on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations or patently relevant factors."[203] The court in *Suresh* added:

> To the extent this Court reviewed the Minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.[204]

That is, the problem with the decision on review in *Baker* (according to the court in *Suresh*) was the decision-maker's *failure to consider* the best interests of the child, rather than a failure to accord that factor sufficient weight. Or if an element of weight was involved, this reflected the unusual nature of the consideration in issue: one that arguably carried inherent "elements of weight or degree"[205] and, moreover (apparently most important to the court in *Suresh*), one that was, after all, self-imposed (by way of "published instructions" to immigration officers).

In *Canada (Citizenship and Immigration) v Khosa*,[206] a majority of the court again confirmed the traditional prohibition. *Khosa* was a judicial review of a decision of the Immigration and Refugee Board (Immigration Appeal Division) to deny Sukhvir Singh Khosa's application for humanitarian and compassionate relief from deportation following completion of his sentence for criminal negligence causing death. The majority wrote: "The weight to be given the respondent's evidence of remorse and his prospects for rehabilitation [factors of mandatory relevance under the applicable legal test] depended on an assessment of his evidence in light of all the circumstances of the case."[207] This assessment was to be left to the tribunal.

In dissent, Fish J argued that the tribunal had placed irrational or inordinate weight on one consideration (Khosa's failure to admit that he had been street racing), which, Fish J argued, had caused it to ignore the importance of other legally relevant considerations that favoured granting the application.[208] Despite these strong objections, the traditional prohibition was held to apply: the majority refrained from second-guessing the tribunal's

202 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*].

203 *Ibid* at para 37.

204 *Ibid* at para 36.

205 See David Mullan, "Deference from Baker to Suresh and Beyond—Interpreting the Conflicting Signals" in David Dyzenhaus, ed, *The Unity of Public Law* (Portland, OR: Hart Publishing, 2004) 21 at 31-37.

206 *Supra* note 119 at para 61, Binnie J for the majority: "I do not believe that it is the function of the reviewing court to reweigh the evidence." And see para 64: "It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts."

207 *Ibid* at para 66.

208 *Ibid* at para 159, Fish J: "To be sure, the majority at the IAD stated that even if it were to have found that Mr Khosa did not present a risk to the public 'in balancing all the relevant factors, I determine the scale does not tip in [Mr Khosa's] favour and decline to exercise favourable discretion' (para. 23). This sort of conclusory statement, however, cannot insulate the IAD's decision from review when the rest of its reasons demonstrate that its decision rests on an unreasonable determination of central importance, as in this case."

assessment of the relative weight of the various considerations of legal relevance to the tribunal's decision.

The question raised by the dissent of Fish J in *Khosa*, and raised more generally under this line of case law, is whether the prohibition on revisiting the weight or importance placed on factors of relevance to discretion fits with the importance placed on justification in *Dunsmuir*—or, more broadly, in a political and legal order committed to a "culture of justification."

The tension is further illustrated by the 2015 judgment in *Kanthasamy v Canada (Citizenship and Immigration)*.[209] There, the decision on review again involved a humanitarian and compassionate grounds-based exemption under the *Immigration and Refugee Protection Act*.[210] The statutory grant of discretion (reformed since *Baker*) now expressly required that the decision-maker take "into account the best interests of a child directly affected." The applicant in *Kanthasamy* was a 17-year old Tamil from Sri Lanka who had come to Canada out of fear for his safety, following his arrest and questioning by Sri Lankan authorities. He had been unsuccessful in establishing a refugee claim, and again at the stage of pre-removal risk assessment. In his humanitarian and compassionate grounds application, he sought an exemption from the ordinary requirement to apply for permanent residency from outside Canada.

An immigration officer rejected the application. In this she expressly relied on factors set out in guidelines developed to assist in interpreting the Act[211]—in particular, a section stating that humanitarian and compassionate grounds decisions require applicants to demonstrate either "unusual and undeserved" or "disproportionate" hardship.[212]

A majority of the Supreme Court of Canada held that the officer had unreasonably applied the guidelines as if they imposed "three new thresholds for relief," rather than being merely "descriptive" of the types of hardship qualifying for relief. The officer's fixation on these terms had diminished her "ability to consider and give weight to all relevant humanitarian and compassionate considerations in [the] particular case."[213] In particular, the officer had "failed to give sufficiently serious consideration to [the applicant's] youth, his mental health, and the evidence that he would suffer discrimination if he were returned to Sri Lanka."[214] All this supported the majority's conclusion that the decision was unreasonable, and in particular that it had failed to meet the requirement under s 25(1) of taking into account the best interests of a child directly affected.

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209 *Supra* note 20.

210 The section provides:

> 25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that *it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected*. [Emphasis added.]

211 *Guidelines on International Protection No 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, HCR/GIP/09/08, 22 December 2009.

212 *Ibid*, s 5.10. See also s 5.11, cited in *Kanthasamy, supra* note 20 at para 27.

213 *Kanthasamy, supra* note 20 at para 33.

214 *Ibid* at para 45.

The dissent in *Kanthasamy* argued that the majority had failed to accord the officer's decision the requisite deference.[215] According to the dissent, the majority "parse[d] the Officer's decision for legal errors, resolve[d] ambiguities against the officer, and reweigh[ed] the evidence." The dissent added:

> Lest we be accused of adopting a "do as we say, not what we do" approach to reasonableness review, this approach fails to heed the admonition in *Newfoundland and Labrador Nurses*—that reviewing courts must be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fatal (para 17). As is the case with every other court, this Court has no licence to find an officer's decision unreasonable simply because it considers the result unpalatable and would itself have come to a different result.[216]

Kanthasamy raises important questions. Is the majority judgment a good example of "deference as respect"? Or is it disguised correctness? The difficulty one may have in answering this arguably reflects the instability in the law on reasonableness review concerning whether courts should revisit the weight placed by decision-makers on factors of legal relevance. The Diceyan approach classes the attribution of weight or importance as a function of policy, not law. But is that approach coherent with the purposes or ambitions of reasonableness review, as the dominant tool in administrative law for ensuring that the exercise of public power is justified?

Two recent judgments of appellate and lower courts have attempted in different ways to walk the line between *Baker*'s insistence that administrative decision-makers exercising discretion take account of fundamental legal values and the caution stated in *Suresh* and *Khosa* that reviewing courts not revisit the weight accorded considerations of legal relevance to discretion. They also walk the line between constitutional and administrative law. That is, one employs "failure to consider a relevant factor" to support a determination of unreasonableness, while the other employs a variant of the "failure to consider" analysis (given specific expression in the law on the obligations of government in its relations with Indigenous Peoples) to support a determination of unconstitutionality.

The first case is *Kainaiwa/Blood Tribe v Alberta (Energy)*,[217] a decision of the Alberta Court of Queen's Bench. This was a judicial review of a ministerial refusal to transfer to the Kainaiwa/Blood Tribe Band subsurface rights to lands the band had previously acquired through a settlement with the Crown, pursuant to the Specific Claims process. Justice Jeffrey held that the Crown was under no legal duty to transfer the subsurface rights; moreover, given the absence of express statutory limits on the minister's discretion and the hands-off approach of the courts to rights in property, the discretion was deemed so broad as to be "almost unfettered."[218] Yet the decision was nonetheless invalidated as unreasonable.

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215 *Ibid* at para 111.

216 *Ibid* at para 112. The dissent adds, in response to the conclusion of the majority that the officer fettered her discretion by overly meticulously focusing on the considerations set out in the guidelines:

> [H]ad the Officer *failed* to discuss each factor individually, and instead simply listed the facts and stated her conclusion on the evidence as a whole, this appeal might well have been before us on the basis of insufficient reasons [at para 114].

217 2017 ABQB 107 [*Kainaiwa*]. I thank Janna Promislow for bringing this decision to my attention. Nigel Bankes provides a useful summary and reflections in his blog post "Reasons, Respect and Reconciliation" (3 March 2017), *ABlawg: The University of Calgary Faculty of Law Blog*, online: <https://ablawg.ca/2017/03/03/reasons-respect-and-reconciliation/>.

218 *Kainaiwa, supra* note 217 at paras 109, 130.

That determination was based in part on the minister's failure to give intelligible and transparent reasons (express or implicit) for the decision.[219] The minister's position had been inconsistent over time, and the communications on the record failed to evince a rational connection between the reasons given and the outcome.[220] Moreover, while failure to meet the duty to give reasons had not been argued as a basis for quashing the decision on procedural fairness grounds, the duty to give reasons in a manner and form expressive of *respect* was suggested by the judge to have been heightened by the special context of this decision, which engaged the constitutional principle of the honour of the Crown.[221] That is, this principle had the effect of informing and so enhancing the expectations of reasonableness—intelligibility, transparency, justifiction—applied to the minister's decision. That said, the reasons that could be ascertained from the record were deemed to be so flawed as to dash even low expectations.

The determination of unreasonableness in *Kainaiwa* also rested more specifically—in what was arguably the boldest element of the judgment—on the minister's *failure to consider* the constitutionally mandated objective of reconciliation between Aboriginal peoples and the Crown.[222] More specifically, the minister failed to consider "the importance his decision might play in promoting the process of reconciliation with the Band."[223] Just how the objective of reconciliation should be weighed against competing considerations was a matter that, according to the judge, fell within the minister's discretion; thus, the judge remitted the matter to the minister for redetermination.[224] But the narrowness of the range of reasonable options (even the potential that that range might include expectations of proportionality)

219 *Ibid* at paras 115, 122-25, 128, 131. It seems the band did not argue that the honour of the Crown supported a duty to give reasons or more specifically that failure to do so in this case was a breach of procedural fairness.

220 *Ibid* at para 128.

221 *Ibid* at para 117:

> Even though the honour of the Crown does not require that the Minister grant the Band's request, it does extend to the nature and manner of the Minister's communications with the Band. Communicating reasons to the Band is a sign of respect. Providing reasons displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation. Providing reasons is also important for a decision holding such significance to the Band as does this one. Of course there are also here the more common benefits from proper reasons, of revealing to the losing party whether they were properly understood, of the losing party learning why their thinking was not persuasive, and of enabling the losing party to consider whether to challenge the decision by legal process.

The statements of Jeffrey J on the importance of reason-giving where the Crown makes decisions affecting First Nations is affirmed in the recent decision of the Supreme Court of Canada in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 62.

222 *Kainaiwa, supra* note 217 at para 129:

> Opportunities to advance and promote this "process of reconciliation" warrant attention and consideration with that in mind. It is constitutionally mandated by Section 35 of the Constitution Act, 1982: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24. At paragraph 42 of that decision the Court states:
>
> > The purpose of s. 35(1) of the Constitution Act, 1982 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.

223 *Supra* note 217 at para 130: "His considering that possibility might not have changed the outcome, but it was a mandatory consideration given the circumstances presented."

224 *Ibid* at paras 130, 133.

was suggested by the judge's observation that transfer of the subsurface rights would have "at most [a] nominal adverse impact" on the province's interests.

In keeping with this volume's case study on pipelines, consider the additional example of the Federal Court of Appeal's decision in *Gitxaala Nation v Canada*.[225] This was a judicial review of a decision of the federal governor in council (by way of order in council) to approve the Northern Gateway Pipeline project.[226] That decision marked the final stage of a complex, multi-phased process of consultation and deliberation informed, *inter alia*, by constitutional obligations to affected Indigenous groups. The process had included oral hearings convened by a joint review panel acting under authority of the *Canadian Environmental Assessment Act* and the *National Energy Board Act*, submission of a report and recommendations from the joint review panel to the governor in council, and ultimately the decision of the governor in council on whether to accept the recommendations. The application for judicial review rested on a number of bases, including failure of the Crown to meet its constitutional obligations to consult and accommodate Indigenous communities, and alleged unreasonableness of the governor in council's decision.

In dealing with the common law administrative law issue of unreasonableness, the majority focused on the polycentric nature of the decision. It observed: "[T]he Governor in Council's discretionary decision was based on the widest considerations of policy and public interest assessed on the basis of polycentric, subjective or indistinct criteria and shaped by its view of economics, cultural considerations, environmental considerations, and the broader public interest."[227] Thus, the majority concluded that a "very broad margin of appreciation"[228] was due. Correspondingly, after devoting much of its judgment to the complex multi-staged processes through which the proposed project was evaluated, the majority dealt with the decision's reasonableness in remarkably light-touch fashion: in two brief paragraphs that in the main pointed back to the preceding discussion of the scope and complexity of the project approval process, thus reinforcing the rationales for deference (or, for refraining from closely scrutinizing the governor in council's reasoning or the joint review report on which it relied).[229]

However, the majority dealt quite differently with the arguments that government had breached its constitutionally grounded responsibilities. Here, "failure to consider" was determinative. More properly there were two main bases for invalidation. On the one hand, government officials had failed to satisfy their constitutionally mandated duty to consult, specifically during the final phase of the process.[230] On the other hand, the governor in council's reasons (even when read in light of the joint review panel's report and the record of communications from Canadian officials) had failed to address the core question of whether the Crown's duty to consult had been fulfilled. In these circumstances—where the rights and interests of affected Indigenous communities were significant enough to require a duty of "deep consultation"—reasons responsive to those communities' affected rights

225 *Supra* note 21 leave to appeal to the SCC refused (21 September 2016), File 37201.

226 Subsequently, the government under Justin Trudeau withdrew Cabinet support in November of 2016.

227 *Gitxaala, supra* note 21 at para 154.

228 *Ibid* at para 152. On contextual analysis of the "margin of appreciation" or "range of reasonable outcomes," see Section III.C, below.

229 *Ibid* at paras 156-57.

230 *Ibid* at para 279.

and interests and to their concerns about the consultation process were constitutionally required. That duty was enhanced, rather than diminished, by the polycentric nature of the decision; that is, "where, as in this case, the Crown must balance multiple interests, a safeguard requiring the Crown to set out the impacts of Aboriginal concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of the impacts on Aboriginal rights."[231]

Both *Kainaiwa* and *Gitxaala* thus reflect special, constitutionally grounded expectations imposed on the Crown in its relationship with Indigenous Peoples.[232] Yet in *Kainaiwa*, the constitutional obligation of the Crown to advance reconciliation is integrated into an administrative law analysis of the minister's broad ("almost unfettered") discretionary powers, such that failure to consider this constitutionally mandated objective takes on special normative force, even as the reviewing court leaves the common law prohibition against revisiting the importance or weight of factors relevant to discretion formally undisturbed. In *Gitxaala*, the discretion of the governor in council is, for the purpose of common law administrative law, so broad as to be *de facto* unfettered; unlike the situation in *Kainaiwa*, the analysis of reasonableness is not informed or delimited by constitutional values or objectives. Accordingly, that analysis refrains from overt scrutiny of the reasoning offered or whether it justifies the conclusion. Yet on switching gears to constitutional obligations, the expectations placed on the governor in council's reasoning, both express and implicit, are comparatively robust.

Is it appropriate that expectations of public justification are bifurcated across constitutional and administrative law in the manner illustrated in *Gitxaala*? Is it better or worse for constitutionally mandated norms[233] to expect that they be integrated into common law administrative law reasoning? This question goes to the implications of the *Baker* judgment or its core principle that discretion must be exercised in accordance with "the values underlying the grant of discretion." How should this principle inform strategies of argumentation and justification in administrative law—or the relationship between administrative and constitutional law?

C. Dunsmuir Reasonableness in Context

So far, this chapter's discussion of the theory and practice of reasonableness review has focused mostly on the frequency with which theory and practice diverge. This final section inquires into recent and evolving developments in the case law and commentary that reflect efforts to give more structure, predictability, and coherence to reasonableness review. The first development builds on the idea that reasonableness takes its "colour from context" by using contextual analysis to inform the "range of reasonable outcomes." The second

231 *Ibid* at para 315. See further Chapter 3 by Janna Promislow and Naiomi Metallic in this text.

232 Another important recent example is *Twins v Canada (Attorney General)*, 2016 FC 537, [2017] 1 FCR 79 [*Twins*]. There, Southcott J overturned a decision of the Parole Board of Canada revoking an Indigenous woman's parole on the basis that the board failed to take into account principles derived from *R v Gladue* [1999] 1 SCR 688. Those principles require consideration of the effects of colonialism and systemic discrimination in producing the overrepresentation of Indigenous Peoples in Canada's prisons and jails, and consideration of how alternatives to incarceration may be promoted in the case at hand.

233 It is also worth carefully considering the proposition that the *constitutional* expectations placed on reason-giving in *Gitxaala* (and the related case law) are unduly informed by the minimalist common law expectation that fundamental rights and values must simply be "considered."

(related) development, formally endorsed by the Supreme Court but attracting increasing critical scrutiny in the case law and commentary, contextualizes reasonableness specifically by imposing an expectation of proportionality where discretion engages Charter values. The third development, reflected in case law at the Federal Court of Appeal and in academic commentary,[234] seeks to add a dash more formalism to reasonableness review by articulating discrete indicia or markers of unreasonableness, in order to guide and in some respects standardize the analysis.

1. Assessing the "Range of Possible, Acceptable Outcomes Which Are Defensible in Respect of the Facts and Law"

A subject of growing controversy in the post-*Dunsmuir* case law is what should be expected of courts by way of contextual analysis in order to set the expectations of reasonableness for the decision at hand. In what sense (if any) are courts supposed to operationalize the idea that reasonableness "takes its colour from context,"[235] or that each decision carries a variable, context-sensitive "range of reasonable outcomes" marking off acceptable from unacceptable decisions? Should these and other statements be taken to support a dedicated pragmatic and functional-type inquiry at the outset of reasonableness review? And is there a danger that an analysis of this sort may conflict with the imperative of deference (as respect)?

a. Degrees of Deference, Scope of Authority: What's the Difference?

Binnie J, in his concurring reasons in *Dunsmuir*, suggested that adoption of a single standard of reasonableness would require context-sensitive adjustment of the level of deference appropriate to the specific decision on review.[236] He added that the considerations likely to be of relevance would include those that had informed the pragmatic and functional analysis for selecting the standard of review. To these, Binnie J added the significance of the interests affected (not historically entertained among the pragmatic and functional factors), which in certain circumstances, he said, should attract an expectation of "proportionality."[237]

Binnie J's position in this regard was rejected in the majority reasons of Rothstein J in *ATA*. Rothstein J wrote:

> Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of discretion. Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not.[238]

234 See the sources in note 15 (particularly the work of Stratas JA and Paul Daly). See also *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56, [2015] 2 FCR 1006 at para 100 [*Farwaha*]; and *Workplace Health, Safety and Compensation Commission v Allen*, 2014 NLCA 42 at para 67.

235 *Khosa*, *supra* note 119.

236 *Dunsmuir*, *supra* note 1 at para 139.

237 *Ibid* at para 151, Binnie J. And see L Sossin & CM Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 UTLJ 581 at 596.

238 *ATA*, *supra* note 5 at para 47.

Rothstein J's rejection of the idea of degrees of deference reaches back to the dual thesis of conceptual incoherence and practical unworkability relied upon by the *Dunsmuir* majority in rejecting two separate reasonableness standards. In short, if it was not possible to distinguish between patent unreasonableness and reasonableness review without sending courts on fruitless quests to adjust for the allowable "depth of probing" or "magnitude of error," then further attempts to fine-tune deference into infinite degrees are likely to be of little use—and worse, may distract courts from the central work of explaining why the decision on review is or is not reasonable.[239]

Rothstein J's comments were recently echoed in the judgments of Abella and Cromwell JJ in *Wilson*.[240] Their disapproval of the idea of variable degrees of deference was provoked by the observation of Stratas JA in the Court of Appeal decision below that the statutory interpretation problem in issue had involved "relatively little specialized labour insight beyond the means the courts have at hand," such that, were a reasonableness standard to be applied, it would afford "only a narrow margin of appreciation."[241] The disapproving comments of Abella and Cromwell JJ appear to be informed at least in part by the worry that judicial reappraisal of such factors as relative expertise subsequent to settling on reasonableness review will undercut the commitment to deference.

Yet Abella J simultaneously gave strong support, in *Wilson*, to the notion that reasonableness review does and should include context-sensitive evaluation of the range of reasonable outcomes supportable on the law and facts. Indeed that proposition (which, after all, was endorsed in *Dunsmuir*) was at the heart of Abella J's proposal in *Wilson* to retire the correctness standard. As explored earlier, that proposal was grounded in the idea that the expectations of reasonableness may be adjusted to reflect the legitimate scope of the decision-maker's authority in any particular case—and, in some cases, will admit of only one reasonable interpretation or outcome.

Even if we accept, for the sake of argument, that contextualization of reasonableness review aims at illuminating the scope of authority and not adjusting the degree of deference (setting aside the question of whether this is a meaningful distinction), questions remain. For one: what considerations or contextual factors are relevant to the analysis of the "range"? And second: in what sense, if any, is this analysis to reflect the imperative of deference "as respect"?

b. What Context? And Whither Deference?

The statements above from members of the Supreme Court in rejecting the idea of degrees of deference suggest that contextual assessment of the range or scope of authority is to be guided primarily or perhaps exclusively by the nature of the question—its classification as law, discretion, fact-finding, or application of law to fact. However, as explored below, there is also Supreme Court precedent supportive of the proposition that other contextual factors, relating, for instance, to relative institutional capacities as well as (at least in the case of Charter-protected interests or "Charter values") the significance of the interest at stake, may play an important role in informing the expectations of reasonableness appropriate to the

239 *Ryan*, *supra* note 46 at para 46.
240 *Supra* note 16.
241 *Wilson v Atomic Energy of Canada Ltd*, 2015 FCA 17 at para 58, Stratas JA.

case at hand. The Federal Court of Appeal has gone the farthest to formalize the contextual factors informing the range of reasonableness (or margin of appreciation), taking account of the significance of the interest at stake (including non-Charter-protected interests such as the interest in employment) as well as relative expertise, in addition to the nature of the question, in order to orient the court to the breadth or narrowness of acceptable or justified approaches to the decision on review.[242] Given the support of a powerful four-judge dissent in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*[243] for recognizing the full set of pragmatic and functional factors as relevant to contextualizing reasonableness review, this is a debate that one should continue to watch.

c. Discretion and the Range of Reasonable Outcomes: Catalyst Paper

Where a decision is classed as *discretionary*, it appears that analysis of the contextual factors or signals informing the range of reasonable outcomes should take account of factors that are not (or not as obviously) engaged where the question is classed as law or law interpretation—where (as noted below) the range appears to be set through application of the "ordinary" tools of statutory interpretation.[244] (Of course, this turns on a bright-line distinction between law and discretion, which, as suggested earlier, is under increasing attack in and beyond administrative law.)

A key Supreme Court precedent illustrating contextualized reasonableness review of discretion is *Catalyst Paper Corp v North Cowichan (District)*.[245] This case involved review of a municipal by-law that imposed a markedly higher rate of property tax on industrial ratepayers in comparison with residents. McLachlin CJ, writing for the court, affirmed that a review for reasonableness "must be assessed in the context of the particular type of decision making involved and all relevant factors," and is therefore "an essentially contextual inquiry."[246]

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242 See *Farwaha*, *supra* note 234.

243 2016 SCC 47, [2016] 2 SCR 293. The four-judge dissent wrote at para 89:

> [C]ontext does not cease to be relevant once the standard of review is selected. Even if the applicable standard of review were reasonableness, it is a contextual analysis—guided by the principles of legislative supremacy and the rule of law—that defines the range of reasonable outcomes in any given case …. In short, "context simply cannot be eliminated from judicial review."

The dissent relies heavily (as have other courts on this point) on the work of Paul Daly, specifically "Struggling Towards Coherence," *supra* note 15. See also the contribution of Jonathan M Coady on this issue: "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017) 68 UNBLJ 79 especially at 104-5 (suggesting that the contextual factors giving content to a single standard of (reasonableness) review should address: (1) "[t]he nature of the decision-maker"; (2) the nature of the question; (3) "[t]he content of the statutory scheme" (including statutory purposes as well as existence of a privative clause or right of appeal); and (4) relative expertise). Just how, and why, institutional considerations like relative expertise should inform substantive expectations of reasoned justification is a question that requires further attention in the Canadian case law and commentary.

244 The phrase is from Moldaver J in *McLean*, *supra* note 49, and is used to describe the approach to be taken to assessing the range of reasonable outcomes where the question centres upon statutory interpretation.

245 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst Paper*].

246 *Ibid* at para 18.

To this she added: "The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation."[247]

The contextual factors that came together to inform recognition of a broad "range of reasonable outcomes"[248] (and permissible considerations)[249] in *Catalyst Paper* included:

1. the nature of the decision (an exercise of discretionary authority lacking express statutory constraints, indeed described as "virtually unfettered");[250]
2. the statutory purpose or function of the decision-maker (characterized as "legislative" and as allowing for consideration of "an array of social, economic, political and other non-legal considerations"); and
3. the municipality's democratic legitimacy or more specifically electoral accountability.[251]

These contextual considerations informed the approach taken by the court to the process as well as the substance of the municipality's decision. On process, McLachlin CJ observed that municipal by-law-making need not be supported by formal reasons; rather, reasons may be reconstructed through attention to the record of municipal debates and any ensuing policy statements.[252] On substance, the chief justice articulated a sub-species of reasonableness review that drew expressly on the English judgment *Associated Provincial Picture Houses, Ltd v Wednesbury Corp*,[253] and its highly forgiving concept of "Wednesbury unreasonableness."[254] In *Wednesbury*, Lord Greene stated that the decision of a public authority on a matter within its competence should be upheld unless it is "so unreasonable that no reasonable authority could ever have come to it"—demonstration of which, he further indicated, "would require something overwhelming."[255] Following this approach, McLachlin CJ stated (modifying the test slightly, in light of "the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws"):[256] "The applicable test is this: only if the by-law is one no reasonable body informed by these factors could have taken will the by-law be set aside."[257] Thus, the expectations of reasonableness are adjusted to reflect the particular nature (and institutional context) of this highly political, quasi-legislative decision.

247 *Ibid* at para 18.
248 *Ibid* at para 25.
249 *Ibid* at paras 17, 19.
250 *Ibid* at para 26.
251 *Ibid* at para 19.
252 *Ibid* at para 28.
253 [1948] 1 KB 223 (CA) [*Wednesbury*].
254 For contrasting accounts of the nature and cogency of (variegated) *Wednesbury* analysis, compare Paul Daly, "Wednesbury's Reason and Structure" (2011) Pub L 238 with Andrew Le Sueur, "The Rise and Ruin of Unreasonableness?" (2005) 10 Jud Rev 32 at 32-33. Daly follows in the tradition of Jowell and the other editors of De Smith's *Judicial Review*, 7th ed (London: Sweet & Maxwell, 2013) in identifying implicit structuring principles or forms of unreasonableness in *Wednesbury* unreasonableness. In contrast, Le Sueur states the major criticisms of and proposals for common law reform of *Wednesbury* unreasonableness. Dyzenhaus subjects the judgment of Lord Greene to critique of a form similar to that raised to patent unreasonableness review in *Dunsmuir* in "Formalism's Hollow Victory," *supra* note 38 at 542-48.
255 *Wednesbury*, *supra* note 253 at 230, Lord Greene.
256 *Catalyst Paper*, *supra* note 245 at para 24.
257 *Ibid*.

McLachlin CJ was quick to add that the discretionary power of municipalities to make by-laws is not wholly untrammelled. Indeed, she built in further traditional common law parameters, drawing now on the nominate grounds of review for abuse of discretion:

> If, for instance, [by-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires."[258]

If it was surprising to unearth *Wednesbury* unreasonableness to inform review of municipal by-law-making in *Catalyst Paper*, it is perhaps even more surprising to reprise the nominate grounds from English law, traditionally applied without concern for deference.

Yet for all its casting lines back to old English precedents, the judgment in *Catalyst Paper* is arguably a good example of deference "as respect." First, it confirms that there are always legal limits on the decision-making powers of statutory decision-makers—regardless of whether those decision-makers are democratically accountable, or their decisions are deemed policy-rich.[259] Second, it carefully and respectfully explores the rationales for the decision (reconstructed from the municipal debates), and, in accordance with the relatively recent principle that courts should show deference to a discretionary decision-maker's opinions on what considerations are relevant,[260] confirms the relevance of the array of social, economic, and political considerations that the municipality identified as critically important. Finally, rather than moving to correct the property tax differential on the basis of intuitive perceptions of injustice, or disproportionality, the judgment affirmed the distributive justice rationale relied on by the municipality: its concern to ensure that long-time residents on fixed incomes were not forced out of their homes by steeply rising property taxes. It took account, as well, of the municipality's efforts to gradually reduce the burdens placed on the industrial class.[261] These elements of deferential reasoning are arguably informed by the earlier contextual analysis through which the court was apprised of the municipality's legitimate role and function.

d. Law Interpretation and the Range of Reasonable Outcomes: Return of the Jurisdictional Zombie?

If *Catalyst Paper* approaches analysis of the range of reasonable outcomes in a manner that aims to be fit for discretion (or, more specifically, for municipal by-law-making), Moldaver J in *McLean*[262] articulates an approach that aims to be fit for law, or law interpretation. The

258 *Kruse v Johnson* (1898), 2 QB 91 at 99-100 (Div Ct), Lord Russell CJ, cited in *Catalyst Paper*, *supra* note 245 at para 21 (emphasis in original).

259 The judgment in *Catalyst Paper* importantly rejects the principle from *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106 at 115 that matters of municipal policy-making are not subject to judicial review. *Catalyst Paper*, *supra* note 245 at paras 14-15.

260 See *Baker*, *supra* note 19 at para 56. And see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 74 [*JP Morgan*].

261 So perhaps there is an analysis of proportionality in the background, after all. I would argue that the decision centres upon this principle—and exemplifies its context-sensitive and deferential application. This is supported by McLachlin CJ's affirmation of the nominate grounds from *Kruse v Johnson*.

262 *Supra* note 49.

question is whether the approach advanced moves beyond the old habits of shuttling between supremacy and abdication.

Moldaver J, writing for the majority in *McLean*, devotes his judgment in part to offering general guidance on analysis of the "range of reasonable outcomes" in cases involving law interpretation. He frames these statements by recalling from *Dunsmuir* the possibility that some interpretive problems engaged by administrative decisions may admit of multiple reasonable interpretations. However, he takes pains to convey that instances in which multiple interpretations are supportable in law are rare (statute law, he says, "will on occasion be susceptible to multiple *reasonable* interpretations"[263]). Against this background, Moldaver J states:

> Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision-maker adopts a different interpretation, its interpretation will necessarily be unreasonable—no degree of deference can justify its acceptance …. In those cases, the "range of reasonable outcomes" … will necessarily be limited to a single reasonable interpretation—and the administrative decision-maker must adopt it.[264]

On this approach, the "ordinary tools of statutory interpretation" are what circumscribe the range of reasonable outcomes; no other contextual factors are in view. Moldaver J cites *Mowat* as exemplary of the form of analysis he has in mind.[265] As we have seen, in *Mowat*, the process of narrowing the range of reasonable outcomes to just one was effected primarily, if not exclusively, though statutory interpretation principles and strategies.[266] However, what was not apparent in the court's approach was adherence to the imperative of deference. That is, the court made little to no discernible effort to supplement the tribunal's framework of reasoning, or to entertain counterarguments to the court's preferred reasoning—or otherwise to position the decision in its best light.

As Paul Daly has suggested,[267] the approach to questions of law interpretation counselled by Moldaver J in *McLean* arguably marks the introduction into Canadian law of the approach adopted in the US in *Chevron USA Ltd v Natural Resources Defence Council Inc*.[268] Under that doctrine, courts reviewing an administrative interpretation of law must first determine whether a disputed statutory provision is or is not ambiguous (i.e., whether there are two or more "plausible" interpretations). Only if ambiguity is established do they move on to adopt the posture of deference, specifically by asking whether the administrative interpretation falls among the plausible options. This approach to deference, that is, first ascertaining whether there is one "right answer" and then moving to a posture of deference

263 *Ibid* at para 32 (emphasis on "reasonable" in original, emphasis on "on occasion" added).

264 *Ibid* at para 38.

265 *Ibid*.

266 See *Mowat*, *supra* note 130 at para 34. The use of statutory interpretation principles to identify the existence of just one reasonable interpretation was also in play in *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 SCR 300—although in a manner that confirmed the interpretation taken by the decision-maker.

267 Paul Daly, "Deference and Reasonablenes" (23 March 2013), *Administrative Law Matters* online: <http://administrativelawmatters.blogspot.ca/2013/03/deference-and-reasonableness.html>. See also Daly, "Scope and Meaning of Reasonableness Review," *supra* note 9 at 824-25.

268 467 US 837 at 842-43 (1984).

only if there is not, is similar in key respects to the position of Sopinka J in *Paccar,*[269] an approach widely condemned in the case law and commentary as overly judge-centric.

Yet while the approach to setting the range of reasonable outcomes counselled in *McLean* veers on the one hand toward judicial supremacy, it arguably also veers on the other toward judicial abdication. Specifically, Moldaver J indicates that where the framing analysis of the range of reasonable outcomes suggests that there is *more than one* plausible interpretation—that is, that more than one interpretation has "*some* support in the text, context, and purpose of the statute"[270]—and the tribunal's interpretation is among those, then deference requires that the court simply affirm the decision's reasonableness: the tribunal wins by default. What the court should not do is inquire into whether the interpretation favoured by the tribunal (or some competing interpretation) was the best.[271] This reflects the concern, pervasive in judicial review and especially in substantive review, to ensure that courts do not bump aside the field-sensitive interpretations of democratically mandated administrative decision-makers in favour of their own policy preferences. The question is whether the baseline criterion of merely having "some support" in the statutory text, context, and purposes is sufficient to govern the evaluation of reasonableness. For instance, is an interpretation that fails to reflect Charter values or values at international law (and yet meets the baseline requirement of "plausibility") "as reasonable" as an interpretation that accords with those values? Here it is worth recalling that one of the dominant principles of statutory interpretation states that statutory ambiguity (and so baseline "plausibility") is to be assessed without reference to Charter values or the values reflected in international human rights law.[272]

Further concerns arise where competing interpretations (recognized as reasonable on a minimalist assessment of interpretive plausibility) produce contradictory conclusions and result in differential treatment of similarly situated individuals. For instance, in *Tran*,[273] (which, as discussed above, involved review of a decision to refer Tran's case to an admissibility hearing on grounds of "serious criminality"), one of the interpretive questions was whether the phrase "a term of imprisonment"[274] included a conditional sentence (i.e., a sentence with no jail time). Was it appropriate—or concordant with a defensible understanding of reasonableness review—that the Federal Court of Appeal deemed the officer's (implicit)[275] interpretation, whereby Tran's 12-month conditional sentence did so

269 *Supra* note 45. (And see the discussion above.)

270 *McLean*, *supra* note 47 at para 39.

271 See *ibid* at paras 38-41.

272 See *Bell ExpressVu*, *supra* note 63 at para 62; *Gitxaala Nation v Canada*, 2015 FCA 73 at para 17 ("As a practical matter, this canon of construction [the principle that interpretation should be consistent with Canada's obligations at international law] is seldom applied because most legislative provisions do not suffer from ambiguity and, thus, 'must be followed even if they are contrary to international law': *Daniels v White*, [1968] SCR 517 at 541, 2 DLR (3d) 1.") For critical commentary on the requisite determination of "ambiguity" prior to informing interpretation with wider legal and constitutional values (including those at international law), see Sullivan, "Statutory Interpretation in Canada," *supra* note 60 at 119-21.

273 *Supra* note 186.

274 Per s 36(1)(a) of the IRPA.

275 On the separate difficulties raised by *Tran* in connection with review of implicit decisions, see Section III.B.2.

qualify, *as reasonable as* the alternative interpretation argued by Tran?[276] Or would it be more appropriate in such a case for the court to weigh in—in light of Charter values, say—on the *best* interpretation?

In *McLean*, the competing interpretations before the court also produced inconsistent conclusions. The statutory limitation period for commencing secondary proceedings was triggered either by the underlying misconduct, or by the person's entering into a settlement agreement with another provincial securities commission. The majority recognized that the commission's approach (using the settlement agreement as the baseline) clearly advanced the statutory purpose of interprovincial cooperation of securities regulators. It added that the appellant's competing approach, while not clearly "inconsistent with" this purpose, was less clearly supportive of it. Karakatsanis J, in her concurrence, disagreed: she argued that the appellant's approach was inconsistent with the statutory purpose and so was unreasonable. She added that the majority's legitimizing both interpretations had produced a result that was itself counterproductive to the fundamental statutory purpose of interjurisdictional cooperation. That is, the majority's conclusion served to exacerbate the uncertainty and so lack of coordination around when secondary proceedings may be launched.

It is important to note that the Supreme Court has repeatedly rejected arguments for the imposition of correctness review on the basis of alleged inconsistency among administrative decisions.[277] The concern is that this would fundamentally undercut deference.[278] That is, it would allow judges to sidestep deference by finding inconsistency or threatened inconsistency under every interpretive dispute. Moreover, it would undercut the institutional objective of ensuring that administrative decision-makers have "flexibility to adjust to new arguments and circumstances"[279]—indeed, in some settings, to adjust to the shifting policy objectives of the governments of the day.

Notably, however, recent developments in the appellate case law have been more circumspect about inconsistency among administrative decisions. These judgments advance the principle that the presence of "directly conflicting"[280] tribunal precedents may *narrow the range of reasonable outcomes*. That is, in such circumstances, the courts will inquire into "whether both interpretations can reasonably stand together under the principles of

276 *Tran*, *supra* note 186 at para 87: "In the circumstances, considering the current teachings of the Supreme Court of Canada and although there may clearly be other defensible interpretations, I cannot conclude that the interpretation adopted by the Minister's delegate in this case is unreasonable. Obviously the deference granted to administrative decision-makers is in part meant to give them flexibility to adjust to new arguments and circumstances." On the response of the Supreme Court of Canada, see *supra* note 189.

277 *Domtar*, *supra* note 93; *Wilson*, *supra* note 16.

278 *Domtar*, *supra* note 93. The court in *Domtar* also makes the important observation that "internal mechanisms developed by administrative tribunals to ensure the consistency of their own decisions" may be employed as an alternative to judges' having the last word. However, as pointed out by the dissents in *Wilson*, *supra* note 16 at para 82, and in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, *supra* note 243 at para 80, this is not a possibility in all administrative decision-making regimes. For further discussion, see Paul Daly's blog, "Threats to Stare Decisis: The Consistency Problem" (19 May 2015), *Administrative Law Matters*, online: <http://www.administrativelawmatters.com/blog/2015/05/19/threats-to-stare-decisis-the-consistency-problem/>.

279 *Tran*, *supra* note 186 at para 87.

280 *Altus Group*, *supra* note 14 at para 31.

statutory interpretation and the rule of law."[281] Is this any different from correctness review? Assuming that the reviewing court gives respectful attention to the reasoning informing the competing interpretive approaches, does it instead represent a defensible way of reconciling deference with the rule of law?

The approach to inconsistency above among administrative decisions has yet to be confirmed at the Supreme Court. Indeed, it arguably runs against the grain of key precedents[282]—including the judgment of Moldaver J in *McLean*. For, again, on that approach, once vying (including inconsistent) interpretations have attained the minimal status of plausibility, they are to be treated as so many policy choices, immune from assessment on a standard of better or worse.

Arguably, the principles stated by Moldaver J on evaluating the range of reasonable interpretations of law straddle both poles of the Diceyan dialectic: supremacy and abdication. On the one side (in particular, at the stage of determining whether or not there is "ambiguity") is an affirmation of the judge's supremacy in relation to law. On the other (following a judge's discerning ambiguity) is an understanding of the role of administrative decision-makers as one of making choices within a relatively undifferentiated field of policy preferences. Does this approach to review of law interpretation strengthen, or weaken, the system-wide commitment to a "culture of justification"? Is it the best we can make of deference?

e. Conclusion: Home on the Range?

Whether or how deference may be reconciled with (or may perhaps require) a discrete contextual analysis within reasonableness review aimed at setting the expectations of reasonableness, or the range of reasonable outcomes, has yet to be firmly settled at the Supreme Court.

But as long as reviewing courts prioritize respectful attention to the reasoning of administrative decision-makers,[283] it is arguably perfectly appropriate to inform the expectations of reasonableness with attention to contextual factors, including not only the nature of the question, but also the decision-maker's function viewed in light of the statutory purposes and wider statutory scheme, and the nature and significance of the affected interests. Such an analysis amounts to methodically taking account of the legal and factual context in light of which the decision must be evaluated. The more difficult question is how a court may legitimately, and so consistent with deference "as respect," distinguish (in light of these and/or other factors) questions that give rise to just one reasonable conclusion from those that support more than one; that is, how to ensure that courts do not simply substitute their own

281 *Ibid* at para 31. Contrary to this proposition, see *McLean*, *supra* note 47 at para 39. See also *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458 at para 79, per the dissent. See also LJ Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014) 27 Can J Admin L & Prac 173; Evans, "Triumph of Reasonableness," *supra* note 9 at 105.

282 See *Domtar*, *supra* note 93, and see also *McLean*, *supra* note 47 at para 39.

283 See Fichaud JA's integrating the dicta on the range of reasonableness from McLean with the law mandating a deferential approach (prioritizing the decision-maker's reasoning) in *Ghosn v Halifax (Regional Municipality)*, 2016 NSCA 90 especially at paras 22-23.

preferred interpretations and conclusions for those of administrators, while ensuring that they (and those whose decisions they review) follow through on their responsibility to uphold the rule of law.

2. Reasonableness, Proportionality, and "The Charter Context"

An alternative approach to contextualizing reasonableness counters the dominant spatial metaphors that have had such a hold on the judicial imagination for so long ("range," "scope," "margin," "jurisdiction") with the "balancing" metaphor of proportionality. Yet recent limited moves of the Supreme Court to inform reasonableness review with proportionality analysis have so far produced more questions than answers.

a. Background

For over two decades, common law jurisdictions throughout the world have debated whether or how proportionality has a place in common law judicial review.[284] Should the analysis be reserved for evaluating state action under dedicated human rights instruments? Or should it be integrated into common law judicial review to deal with a special subset of rights, values, or interests deemed "fundamental"?[285] Or, on yet another alternative, should proportionality analysis be introduced more pervasively into common law judicial review, to deal with a wider range of decisions and interests, beyond those associated with fundamental rights?[286] Further, if some form of proportionality analysis is admitted, what form should it take?[287] A simple "balancing" test? Or a more structured inquiry, along the lines of Canada's *Oakes* test[288]—that is, taking account of the importance of state purposes, means-end rationality, and minimal impairment, in addition to the relative weight of salutary and deleterious effects?

284 See e.g. David Dyzenhaus, M Hunt, & M Taggart, "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 Oxford University Commonwealth Law Journal; M Taggart, "Proportionality, Deference, Wednesbury" (2008) NZL Rev 423 ["Proportionality, Deference, Wednesbury"]. In the Canadian context, the thesis that proportionality is an essential component of the legal expectations internal to reasonableness review was advanced by some scholars prior to the Supreme Court's decision in *Doré*. See Guy Régimbald, "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" (2005) 31 Man LJ 239 ["A New Standard"]; Mullan, "A Proportionate Response?," *supra* note 38; Evan Fox-Decent, "The Internal Morality of Administration" in *The Unity of Public Law*, *supra* note 78 at 143 ["The Internal Morality"]; Cartier, "The Baker Effect," *supra* note 81. Also see Dyzenhaus, "The Politics of Deference," *supra* note 23 and "Constituting the Rule of Law," *supra* note 25.

285 See Taggart, "Proportionality, Deference, Wednesbury," *supra* note 284.

286 See Mark Elliott & Hanna Wilberg, "Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature" in Wilbert & Elliott, eds, *The Scope and Intensity of Substantive Review*, *supra* note 31 at 24-30.

287 See Sir Jeffrey Jowell, "Proportionality and Unreasonableness: Neither Merger nor Takeover" in Wilberg & Elliott, eds, *The Scope and Intensity of Substantive Review*, *supra* note 31 at 54-55.

288 Section 1 of the Charter has been the subject of extensive case law elaboration, beginning with Dickson J's 1986 judgment in *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]. See further Chapter 6 by Evan Fox-Decent and Alexander Pless.

In the United Kingdom, where proportionality analysis has been used for some time to deal with matters arising under the *Human Rights Act 1998*[289] and the *European Convention on Human Rights*,[290] the law remains unsettled on whether proportionality has a place in common law judicial review; however, there is increasing support for the idea at the UK Supreme Court.[291] In Canada, proportionality analysis has for some time been applied at the s 1 justification stage of Charter rights claims. But it has not, until recently, been endorsed as part of common law judicial review.

Some commentators in the United Kingdom and Canada argue that expectations of proportionality are already implicit in common law (reasonableness) review—for example, in cases concerned with the onerousness of a decision's effects, or with whether certain considerations in a multifactor balancing test have been given disproportionate weight.[292] Yet the deeper conflict is less about the kind of reasoning that already informs reasonableness review and more about the kind of reasoning that should inform it.[293]

The core purposive rationale in favour of integrating proportionality analysis into common law reasonableness review complements that which animates the idea of deference "as respect"—that is, the goal of fostering a culture of justification.[294] In this, the proposal reflects the thesis that public law, and with it law's administration, is not just about getting the job of governing done: it is a central mechanism for promoting the moral relationship of reciprocity that marks legitimate governance.[295] More concretely, the proposal reflects the view that administrative law should be sensitive to the moral relevance of the interests of those affected by administrative decisions. That view, or aspiration, was at least part of what moved the Supreme Court to recognize a place for proportionality review in administrative law, in *Doré*.[296] As Abella J remarked, referencing *Baker*: empowering administrative decision-makers to interpret and apply fundamental values, while at the same time holding them to account in light of those values, "allows the Charter to 'nurture' administrative law, by emphasizing that Charter values infuse the inquiry."[297]

However, once again the rift between aspiration (or the integration of the Charter and administrative law in theory) and reality (the many institutional and constitutional puzzles produced by *Doré*) is painfully in evidence.

289 1998, c 42.

290 ETS 5; 213 UNTS 221.

291 *Kennedy v Charity Commission (Secretary of State for Justice intervening)*, [2014] UKSC 20, per Lord Mance; *Pham v Home Secretary,* [2015] 1 WLR 1591.

292 See e.g. Jeffrey Jowell, *supra* note 287, especially at 52-57; Mullan, "A Proportionate Response?," *supra* note 38 at 254; Régimbald, "A New Standard," *supra* note 284 at para 80; Evan Fox-Decent, "The Internal Morality," *supra* note 284; Geneviève Cartier, "The Baker Effect," *supra* note 81. But see also *Khosa*, *supra* note 119.

293 See e.g. Paul Craig, "The Nature of Reasonableness" (2013) 66 CLP 131.

294 See the sources cited in note 25 (on the concept or ideal of a "culture of justification").

295 Dyzenhaus, "Constituting the Rule of Law," *supra* note 25.

296 *Doré*, *supra* note 111.

297 *Doré*, *supra* note 111 at para 29, citing Dyzenhaus and Fox-Decent, "Process/Substance," *supra* note 25 at 240.

b. Doré Proportionality

In Chapter 6, Evan Fox-Decent and Alexander Pless situate *Doré* within a wider set of doctrinal developments on the interaction of the Charter and administrative law. They offer a critical foundation on which to assess the increasingly prominent arguments that the approach advanced in *Doré* weakens or disrupts the normative, institutional, and doctrinal coherence of Charter law. Here, I briefly assess the implications of the decision for reasonableness review.

First, a few basics. In *Doré*, Abella J, writing for a unanimous court, took the opportunity to revisit the principles that apply to judicial review of discretionary decisions where these engage, or limit, Charter guarantees.[298] Inquiry into whether such limitations are justified, indicates Abella J, is from *Doré* forward to be analyzed not by way of application of s 1 of the Charter (with its attendant *Oakes* test), but rather application of common law reasonableness review.

More specifically, Abella J states that where administrative decisions engage Charter values, "the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives." She adds: "If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one."[299] Requiring proportionality analysis in such cases, Abella J observes, is merely an expression of the principle recognized in *Catalyst Paper* that the nature of the reasonableness analysis is always contingent on its context—the context here being "the *Charter* context."[300]

But what is a "proper balance" and how is disproportionate impairment to be ascertained? Abella J offers a little further guidance—here speaking directly to the work of administrative decision-makers, and the critical question of how they are to avoid illegal intrusions on Charter-protected interests in the first place. Decision-makers, she states, are to "balanc[e] the *Charter* values with the statutory objectives." She continues: "In effecting this balancing, the decision-maker should first consider the statutory objectives."[301] Next, the decision-maker "should ask how the *Charter* value at issue will best be protected in view of the statutory objectives." Abella J adds: "This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives."[302]

298 Abella J refers a few times to Charter guarantees, but more commonly refers to the Charter-based triggers for proportionality analysis as *Charter values*. Just what is a Charter value, and whether or how it relates to a Charter right, is addressed in Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 SCLR (2d) 391. See also Peter Hogg, "Equality as Charter Value in Constitutional Interpretation" (2003) 20 SCLR 113 at 116-17.

299 *Doré*, *supra* note 111 at para 7.

300 *Ibid* at para 7, citing *Catalyst Paper*, *supra* note 245.

301 *Doré*, *supra* note 111 at para 55.

302 *Ibid* at para 56. Note the phrasing: the severity of the interference "of" (not "with") the Charter protection. The premise appears to be that the Charter interferes with the discretionary decision, rather than vice versa.

Abella J then addresses the role of the court on review, stating that where a court applies a reasonableness standard to decisions of this sort, "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play."[303] Here we arrive at the issue of deference. Abella J states that just as, in the review of impugned laws for justification under s 1, courts must accord some leeway to the legislator (such that the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives"),[304] so, in common law review of discretionary decisions engaging Charter values, decision-makers are entitled to a measure of deference so long as the decision (in the words of *Dunsmuir*) "falls within a range of possible, acceptable outcomes."[305]

Extending deference to discretionary decisions that engage Charter values is suggested by Abella J to reflect a rationale similar to that supporting deference to administrative interpretations of law: "An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values."[306] The counterargument, however, is that government and state-appointed actors may be too embedded in sector-specific values or majoritarian interests to warrant deference on matters involving fundamental human rights.[307] The question is whether such concerns may be met, in the context of reasonableness review, through an approach to deference as "respect," not "submission." That is, is reasonableness review able to meaningfully incorporate the heightened expectations of justification appropriate to the seriousness of Charter rights?[308]

Abella J attempts to stave off the anticipated concern that the deference accorded on reasonableness review will compromise Charter rights through an appeal to parity with the analysis under s 1 of the Charter, which, as noted, also contemplates "giving a 'margin of appreciation'" to government.[309] But there are at least four reasons for doubting the claimed parity:

1. The s 1 analysis involves a shift in onus to government following the applicant's establishing rights infringement, while the reasonableness analysis does not (indeed, *Doré* does not even clearly make rights infringement analytically prior to the analysis of "balancing");

303 *Ibid* at para 57.

304 *Ibid* at para 56, citing *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 160.

305 *Doré, supra* note 111 at para 56, citing *Dunsmuir*, *supra* note 1 at para 47.

306 *Doré, supra* note 111 at para 47.

307 See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, Ont: LexisNexis, 2009) at 625: Most "non-judicial interpreters have little training in legal interpretation. Their focus tends to be narrow and coloured by the concerns and possibly by the biases of their own professional culture. They may have particular interests to promote on behalf of their department or agency, or they may have strong views respecting the groups or problems regulated by their legislation. This may put them into an adversarial position with other interested parties."

308 Audrey Macklin answers with a resounding "no" (or at least, not without major repairs). See Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561 ["Charter Right or Charter-Lite?"].

309 *Doré*, *supra* note 111 at para 56.

2. Significant weight is conventionally accorded to public or regulatory purposes in administrative law, a phenomenon arguably distinct from but adding to the hurdles (for applicants) posed by the doctrine of deference and bearing of the burden;
3. Common law judicial review has (as discussed above) traditionally prohibited judges from revisiting the weight placed by administrative decision-makers on factors of relevance to their discretionary decisions, including the significant interests of legal subjects. *Doré* runs against that grain; and
4. Moving from breach to remedy, it is not clear that administrative law remedies are as flexible or as responsive to Charter rights infringements as those available under s 24(1) of the Charter.[310]

These concerns represent just a few of the deep institutional and constitutional worries raised in the wake of *Doré*.[311]

c. A Future Together?

I conclude with a note on the prospect (signalled, for instance, in the way the minority in *Loyola High School v Quebec (Attorney General)*[312] simply ignored *Doré* in favour of a more conventional Charter analysis) that reasonableness and proportionality may not have much of a future together. Acknowledging that there may be good reasons for maintaining distinct institutional pathways to vindicating Charter rights claims and claims in common law judicial review (similar to the parallel options of statutory and Charter-based discrimination claims), there arguably remain good reasons, too, for persisting with (and even extending) the integration of proportionality analysis into common law reasonableness review.

That proposition turns upon the claim that the most compelling reason for integrating proportionality analysis into reasonableness review in *Doré* was not, as Abella J suggested, the doctrinal incoherence of Charter-based review of discretion. Rather, it was the importance of enhancing, or "nurturing"—or addressing the moral vacuum at the heart of—reasonableness review. It is the stark contrast between the respect accorded the significant interests of legal subjects in human rights law and the lack of any equivalent in common law

310 On the remedies question, see Hoi Kong, "Doré, Proportionality and the Virtues of Judicial Craft" (2013) 63 SCLR (2d) at 517-18. On the required responsiveness of s 24(1) Charter remedies to a Charter breach, see *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at paras 55-59. See also *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28.

311 Important critical discussions of the reasoning in and implications of *Doré*, beyond the work of Fox-Decent and Pless in this text, include Hoi Kong, *supra* note 310. See also the general arguments against collapsing human rights-based proportionality analysis into common law judicial review in Jason NE Varuhas, "Against Unification" in Wilbert & Elliott, eds, *The Scope and Intensity of Substantive Review*, *supra* note 31 at 92. For a guardedly positive reception of *Doré*, see Matthew Lewans, "Administrative Law, Judicial Deference, and the Charter" Constitutional Forum at 29; and Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice," *supra* note 298.

312 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*] (the minority adopts a conventional Charter analysis and fails even to advert to the *Doré* principles applied by the majority). For a highly critical judicial appraisal of *Doré*, see the reasons of Lauwers and Miller JJA in *Gehl v Canada (Attorney General)*, 2017 ONCA 319.

judicial review that has fuelled the debates in common law countries around bringing proportionality into administrative law. At the same time, carving out an explicit place (or places) for proportionality analysis in reasonableness review promises to bring the values already informing the judgments of administrators and judges alike to the surface, where they may be publicly contemplated (and challenged).

The problem with *Doré* is that it functions (or threatens to function) to subordinate Charter-based judicial review to a relatively unrehabilitated model of common law judicial review.[313] One way to strengthen the normative resources of reasonableness review may be to extend proportionality, as an expectation of reasonableness, beyond Charter rights (or their shadowy cousin, Charter values) to become a generalized expectation in all cases in which administrative action (or specifically, discretion) affects the significant interests of legal subjects. As Mullan suggests, the analysis may also sensibly apply to cases in which it is alleged that disproportionate weight has been placed on one or more factors in a multi-factor balancing test.[314]

This need not mean reducing all rights and interests to an undifferentiated sea of values. Rather, as both Mullan and Macklin have argued, proportionality analysis in administrative law may be and should be adjusted to context, including (most obviously) the significance of the interest at stake. Macklin adds to this the compelling suggestion that the expectations placed on administrative decision-makers to justify their decisions on reasonableness review should be especially heightened where the decision engages Charter rights, and, moreover, the decision-maker lacks independence—effectively standing with government in an adversarial relationship with the affected party.[315] That is, the harnessing of decision-makers to majoritarian impulses should arguably narrow the range of reasonableness where the decision affects the rights or significant interests of a marginalized individual or group.

In short, the claim is that contextualizing reasonableness review should be about more than assembling background information about the statutory text and context, or, for that matter, about comparative institutional competencies potentially supplying prudential reasons for judges to back off (or not). It should (also) be about ensuring that the weight assigned to the important values and interests engaged by administrative action is reasonably justified. In this, common law proportionality review need not wholly displace the option of pursuing Charter remedies by way of a formal Charter challenge to administrative discretion. Yet neither should existence of the Charter route wholly displace or diminish common law reasonableness-as-proportionality.

3. Indicia of Unreasonableness

Last in this survey of developments oriented to contextualizing reasonableness is a proposal (most prominent as yet in the commentary, but gaining some traction in the appellate case law) to add structure to reasonableness review by formally identifying certain indicia or markers of *un*reasonableness.

The concern that judges post-*Dunsmuir* have been falling prey both to the mistake of judicial supremacy (whereby judges illegitimately substitute their opinions for those of

313 See Walters, "Respecting Deference as Respect," *supra* note 79 at 422.
314 Mullan, "A Proportionate Response," *supra* note 38.
315 Macklin, "Charter Right or Charter-Lite?," *supra* note 308 at 587.

administrative decision-makers) and to the mistake of judicial abdication (whereby judges illegitimately refrain from holding administrative decision-makers to expectations of reasoned justification) has led a few commentators to propose consolidation of certain indicia[316] (or "badges"[317]—or markers) of unreasonableness. The idea is to pull together some common bases on which unreasonableness has been discerned in the precedents, and designate these as *prima facie* indicators of unreasonableness, identification of which should trigger further inquiry into whether the reasons taken in context overcome the suspicions raised.

The point is to give more structure, and so consistency and predictability, to reasonableness review.[318] At the same time, it is argued that inquiry guided by designated indicia of unreasonableness may avoid the errors of formalism through an emphasis, both in articulating the indicia and in their application, on the deep values animating judicial review: the values of democracy and the rule of law.[319]

Justice Stratas summarizes the approach in one of a few recent decisions in which it has been applied at the Federal Court of Appeal:

> For example, a decision whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well raise an apprehension of unreasonableness … . In that sort of case, the quality of the explanations given by the administrator in its reasons on that point may matter a great deal. Another badge of unreasonableness is the making of key factual findings with no rational basis or entirely at odds with the evidence. But care must be taken not to allow acceptability and defensibility in the administrative law sense to reduce itself to the application of rules founded upon badges. Acceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and-ready, hard-and-fast rules.[320]

The following list consolidates a few common forms of—or, to follow this line of analysis, indicia of—unreasonableness. Some have featured already in this chapter; consequently, this assembling of indicia affords an opportunity for review. Others are suggested, for instance, in the work of Paul Daly, Justice David Stratas, and Sir Jeffrey Jowell.[321] As Stratas JA cautions, it is important to emphasize that these are not self-executing heads of error, but rather aids for context-sensitive inquiry into justification, to be applied in a way that reflects deference "as respect."[322]

316 See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), ch 4.

317 See Mullan, "A Proportionate Response?" *supra* note 38.

318 See Stratas JA in *Farwaha*, *supra* note 234 at para 100; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 37 [*Delios*].

319 See Daly, "Struggling Toward Coherence," *supra* note 15.

320 *Delios*, *supra* note 318 at para 27.

321 Daly, *A Theory of Deference*, *supra* note 316; Daly, "Struggling Towards Coherence," *supra* note 15 at 557-58; Stratas, "A Plea for Doctrinal Coherence," *supra* note 15 at 63-67; *Delios*, *supra* note 318; *Farwaha*, *supra* note 234.

322 As Stratas JA states, the analysis is to be subordinated to the principle that the reviewing court must focus on the reasoning of the decision-maker, rather than "developing, asserting and enforcing its own view of the matter" (*Delios, ibid* at para 28).

4. Indicia or Markers of Unreasonableness: A Few Examples to Consider

1. **Unintelligibility**: "Unintelligibility" may be understood to describe situations in which it is not clear why or how the decision-maker arrived at the decision it did. It may take the form of incoherent or illogical reasoning,[323] gaps in reasoning (i.e., missing inferences or logical links),[324] or other situations in which it is simply not clear how the decision-maker intended to support its conclusions of fact or law.[325] In review of discretion, unintelligibility may include failure to explain how competing factors of relevance were weighed against each other, where it is not otherwise clear how the decision was supported on the law and facts.[326]

   As explored in Section III.B (on review of implicit reasoning and decisions), evaluation of alleged unintelligibility once a legitimate basis (i.e., a *prima facie* case) for the allegation has been established requires the reviewing court to supplement express reasons (if any) through attention to the record[327] or other sources, including other decisions from within the administrative regime on the same issue.[328] However, such efforts should not extend to substituting judicial for defective administrative reasoning.[329] (For tensions in the case law on this principle, see the discussion in Section III.B, above). Query whether the reviewing court should supplement (or backfill) absent reasoning where it is not clear which of a few alternative reasoning paths the decision-maker would have taken.[330]
2. **Inconsistency:** Where an administrative decision-maker fails to explain inconsistency with the decision of an internal administrative appeal body that has remitted a matter to the decision-maker for reconsideration,[331] or inconsistency with advice of a designated adviser,[332] this may give rise to an apprehension of (or *prima facie* case of) unreasonableness. Again, this should spur further inquiry into the administrator's reasoning, viewed in light of the wider legal and factual context, in order to determine whether the decision is nonetheless justified.

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323 See *Reed v Nova Scotia (Human Rights Commission)*, 2017 NSSC 85 at para 13 [*Reed*]: "[T]he second HRO's decision letter offers eloquent reasons why the first HRO was in error; (while stating the opposite—that she was correct?? [*sic*])."

324 This was the allegation in *Nurses' Union*, *supra* note 121, discussed in Section III.A.1.

325 An illustration of review oriented to analysis of gaps in reasoning is *Canada v Kabul Farms Inc*, 2016 FCA 143 at para 34:

> Here, the Director has provided no rationale for the base amounts or reductions he chose [in imposing an administrative monetary penalty]. The evidentiary record before the Director also sheds no light on the matter. To conduct reasonableness review here, we would have to simply assume or trust that the Director had good reasons for the numbers he chose. As this Court said in *Leahy* (at para 137), that "is inconsistent with our role on judicial review." We are to review, not trust or assume.

326 *LeBon v Canada (Attorney General)*, 2012 FCA 132 at para 25 [*LeBon*]; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55.

327 *Nurses' Union*, *supra* note 121.

328 *ATA*, *supra* note 5.

329 *Nurses' Union*, *supra* note 121 and *ATA*, *supra* note 5.

330 See the discussion of *Tran*, *supra* note 186.

331 *RP v Alberta (Director of Child, Youth and Family Enhancement)*, 2015 ABCA 171.

332 See *LeBon*, *supra* note 326.

As discussed in Section III.C.1, above, more controversial is inconsistency among administrative decisions made under the same statutory grant of authority, resulting in differential treatment of similarly situated subjects. Despite rule of law concerns about consistency, predictability, and even-handedness in the administration of law, the courts will not impose a standard of correctness based solely on the alleged prospect of inconsistency.[333] However, as noted above, recent appellate case law has recognized inconsistency as a factor that may narrow the range of reasonable outcomes, raising the question of "whether both interpretations can reasonably stand together under the principles of statutory interpretation and the rule of law."[334] This line of authority has yet to receive approval from the Supreme Court.

3. **No evidence (lack of a reasonable basis in the evidence):** Reasonableness review of questions of fact or fact-finding is typically framed as an inquiry into whether there was "some" or alternatively "no evidence" (or no legally probative evidence) in support of the conclusion of fact.[335] This is also the standard adopted on patent unreasonableness review where that standard applies by operation of statute.[336] There is some support for the proposition that reasonableness review imposes the more demanding expectation that conclusions of fact require a *sufficient* basis in the evidence.[337] However, the Supreme Court has repeatedly confirmed that it is not "the function of the reviewing court to reweigh the evidence."[338] On a separate but important note, decision-makers are precluded from immunizing themselves from review by withholding material evidence.[339]
4. **Unreasonable interpretations or applications of law—defeating the purpose:** Perhaps the deepest challenge presented to reasonableness review (and so deference) is that of overseeing the consistency of administrative decision-making with statutory purposes and/or wider legal norms. Courts cannot be understood to fulfill their constitutional role, whether as guardians of the rule of law or as partners in a culture of justification, unless judicial review is guided by expectations of concordance with statutory purposes.[340] At the same time, in view of the imperative of deference ("as respect"), courts must inquire into suspected lack of concordance in a

333 *Domtar Inc*, *supra* note 93; *Wilson*, *supra* note 16.

334 *Altus Group*, *supra* note 14.

335 *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 [Dr Q]. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 at paras 72-99

336 *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, [2016] 1 SCR 587; *Toronto (City) Board of Education v Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 SCR 487.

337 *Hartwig v Saskatoon (City) Police Assn*, 2007 SKCA 74 at paras 27-29. For counterargument, see *142445 Ontario Limited (Utilities Kingston) v International Brotherhood of Electrical Workers, Local 636*, 2009 CanLII 24643 (Ont Sup Ct J (Div Ct)): "Generally speaking, in the absence of a statutory right of appeal, the courts are confined to ensuring that the findings on which the decision is based are supported by some logically probative evidence on which the decision-maker may lawfully rely," citing Brown & Evans, *Judicial Review of Administrative Action in Canada* at 12:3100.

338 *Khosa*, *supra* note 119 at para 61.

339 *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 77-78.

340 See e.g. the reasoning of L'Heureux-Dubé J in dissent in *Paccar, supra* note 47 (discussed in Section II.A, above).

manner that is led by tribunal reasoning. Courts must not simply displace the purposive reasoning of decision-makers for their own preferred interpretations.

So long as the principles of deferential review are adhered to, unreasonableness may be established on the basis that the decision-maker's interpretation or application of the law was inconsistent with, or defeated, statutory purposes.[341]

5. **Lack of reasonable support in the legislative text/context:** Where purposive reasoning is argued to stretch interpretation of the legislative text beyond its plausible meaning (taking account of the wider statutory scheme and legislative–historical context), this too raises an apprehension of unreasonableness.[342] Again, the ensuing inquiry should pay respectful attention to the tribunal's reasoning, supplementing that reasoning through efforts to place it in its best, purposive light.
6. **(Unreasonable) failure to consider a relevant factor:** There is a line of appellate authority indicating that this and other traditional or nominate grounds of review for abuse of discretion have been integrated into reasonableness review.[343] Where a (*prima facie*) case is made that a factor of potentially determinative relevance to the decision was not considered—whether the consideration in question involves evidence, law, or a legal argument put to the decision-maker—this should trigger (deferential) inquiry into whether the factor was indeed expressly or implicitly considered, and whether failure to consider the factor in question would be unreasonable.

   It is important to note, however, that the principles out of *Newfoundland Nurses' Union* (on supplementing reasons before subverting them) conflict with automatic correctness-style invalidation for failure to expressly address the factors deemed by the reviewing court to be of mandatory legal relevance.[344]

   Examples of "failure to consider" that may give rise to an apprehension of unreasonableness include: (1) failure to consider or address evidence or argument of potentially determinative legal importance;[345] (2) failure to apply a legal test of mandatory relevance (traditionally dealt with on a correctness standard);[346] and (3) failure

341 Again, see the reasoning of L'Heureux-Dubé J in dissent in *Paccar, ibid*. An example in which a decision-maker's interpretation was deemed contrary to statutory purposes (indeed, contrary to "plain and grammatical meaning of the words; statutory and international contexts; and legislative intent" (at para 76)) is *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704. However, it is debatable whether the process of reasoning that the court adopts on review in that case is consistent with deference "as respect." See also *Montréal (City) v Montreal Port Authority*, 2010 SCC 14, [2010] 1 SCR 427. A recent Nova Scotia decision that focused in part on unintelligibility (or lack of coherence in the reasoning) and in part on defiance of the statutory mandate is *Reed*, *supra* note 323.

342 See *Mowat*, *supra* note 130 at para 33; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, *supra* note 266 at paras 26-29; *Izaak Walton Killam Health Centre v Nova Scotia (Human Rights Commission)*, 2014 NSCA 18.

343 See *Dr Q*, *supra* note 335 at paras 22, 24; *Baker*, *supra* note 19 at para 56; *JP Morgan*, *supra* note 260 at para 74.

344 *Nurses' Union*, *supra* note 121. See also *Agraira*, *supra* note 129 at paras 18, 60-61; *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13, [2013] 1 SCR 594 [*Antrim Truck Centre*].

345 *Turner v Canada (Attorney General)*, 2012 FCA 159 [*Turner*] (Human Rights Tribunal failed to consider one of the grounds of discrimination alleged); *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 (officer deciding application for humanitarian and compassionate grounds exemption determined that she lacked jurisdiction to consider evidence and argument properly before her and of central importance to the application).

346 *Halifax*, *supra* note 129 at para 43; *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761 at para 41.

to take account of an element of a multifactor balancing test. But, again, see the law on deference to implicit reasoning, which joins with the traditional prohibition on revisiting the weight accorded factors of relevance to present significant challenges to establishing unreasonableness on this basis.[347]

Discretion may also be challenged on the basis of failure to take account of a fundamental legal value or principle (including those reflected in the Constitution or in international law) argued to be of mandatory relevance to a decision.[348] In such cases, the principles from *ATA* on the expectation that the issue must have been raised before the decision-maker may apply;[349] however, query whether or in what circumstances the decision-maker is expected to take account of such factors regardless of whether they are raised in argument, on the basis that they are "values underlying the grant of discretion" that administrative decisions must "always" consider.[350] The argument may be strengthened where the value or principle in question is reflected in applicable policies or guidelines.[351]

7. **Consideration of an irrelevant factor:** Here "the appropriate question will be: 'Was it reasonable for the tribunal to treat this factor as relevant?'"[352] This ground (along with bad faith) was engaged in *Roncarelli v Duplessis*, although the challenge was formally framed as an action for damages at civil law.[353] Even where a decision-maker has taken account of a consideration deemed to be irrelevant, the reviewing court must adopt a holistic analysis and assure itself that the consideration was potentially determinative of the result.[354]
8. **Disproportionality:** See the discussion of *Doré* proportionality in Section III.C.2, above. Where an "adjudicated," "individual" discretionary discretion engages "Charter values," reasonableness requires proportionality as between pursuit of the statutory mandate and harm to the relevant Charter right or value. The applicant may argue that the decision was not minimally impairing of a Charter right or value, and/or that it failed to reflect a proportionate balancing of the purposes informing the decision and the effects on the Charter guarantee.[355] Query whether proportionality analysis should be engaged also in cases where administrative decisions affect significant interests that are not plausibly constructed as engaging Charter rights or values (e.g., interests in employment), or where it is alleged that undue weight was placed on one or more factors in a multifactor balancing test.

347 See the principles stated by Mainville JA in *Turner*, *supra* note 345 at paras 41, 42; see also *Agraira*, *supra* note 129 at para 18; *Antrim Truck Centre*, *supra* note 345 at paras 53-54.

348 See the discussion of *Baker*, *supra* note 19; *Kainaiwa*, *supra* note 217; *Twins*, *supra* note 232.

349 See e.g. *Mikail v Canada (Attorney General)*, 2012 FC 940 at para 34.

350 See *Baker*, *supra* note 19 at para 56; *Doré*, *supra* note 111 at para 35.

351 *Baker*, *supra* note 19 (taking account of the fact that the value placed on the best interests of the child was reflected in the Act as well as the minister's own guidelines); *Suresh*, *supra* note 202.

352 Mullan, "The Top Fifteen!," *supra* note 15 at 58.

353 See David Mullan, "Roncarelli v Duplessis and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 53 McGill LJ 587.

354 *Canadian Association of Regulated Importers v Canada (Attorney General)*, [1994] 2 FC 247 at 260 (CA).

355 Doré, *supra* note 111; *Loyola*, *supra* note 312 at para 40.

IV. CONCLUSION: MAKING SENSE OF REASONABLENESS

This chapter has explored the contemporary doctrine on reasonableness review, approaching that body of law as an effort, over time and across frequent changes of the judicial guard, to meet the challenge of reconciling the imperative of deference to administrative decisions with the expectation that those decisions be justified. The success of the efforts in *Dunsmuir* to simplify the standard of review analysis have placed this challenge at the forefront of contemporary debates on judicial review. And yet, as we have seen, the case law following *Dunsmuir* has exhibited many of the tendencies common to judicial review since the start of the 20th century—tendencies to revert on the one side to the posture of judicial supremacy, and on the other, the posture of judicial abdication. Is there a middle way? Or rather, is there a way to ensure robust protections for those affected by administrative action, while leaving room for the important work of state regulation and governance in the public interest?

The developments discussed in Section III.C under the theme of contextualizing reasonableness may assist in giving more determinate and so predictable shape to the expectations of reasoned justification appropriate to specific administrative contexts. These developments arguably reinforce the proposal made by Abella J in *Wilson* to finally retire the correctness standard of review. Yet it is essential not to simply build correctness-style review back into the reasonableness standard; rather, the question is how deference "as respect" would or should transform review of matters now attracting that standard. It is essential, more broadly, not to lose sight either of the imperative of deference (and its underlying ethic of respectful attention to administrative decisions and reasons) or of the expectation that those decisions be justified. It is only through a constant effort to demonstrate the mutually reinforcing nature of these imperatives, and with them, the values of democracy and the rule of law, that judges and administrative decision-makers may effectively join forces in creating a culture of justification.

In this regard, among the most important developments in the law on reasonableness review since *Dunsmuir* are those that assert the legitimacy of the expectation on review—and at the front lines of administration—that decision-makers take account of the legal values that express the fundamental commitments of constitutional democracy. As Mary Liston has stated, the expectation that decision-makers identify and give appropriate weight to those fundamental values expresses a shift from a "command-and-control"[356] model of administrative law to a model based on reasoned dialogue about the values that make the legal order worth protecting. Here constitutional law and administrative law meet.

In recent years, the decision in *Doré* has been the most prominent and prominently critiqued expression of the Supreme Court of Canada's commitment to the idea that administrative law is an integral part of, and should not be dislocated from, the deep values of the legal order. That decision, for all the important criticisms it has elicited on its institutional destabilization and common law-ification of Charter rights, should nonetheless be regarded as the start of further conversations aimed at ensuring the integrity and protection of fundamental rights under the Charter *and* under common law administrative law—even if these paths are maintained as distinct institutional options. It should be regarded, more concretely, as an effort to invite legal subjects to assert the relevance and indeed central

356 Liston, as cited in *Doré*, *supra* note 111.

importance of Charter guarantees (and, arguably, other morally significant interests) in the context of "ordinary" administrative processes. Ensuring that Charter guarantees, along with other constitutional guarantees and principles such as the duty of the Crown to promote reconciliation with Indigenous Peoples, are identified and given protection in administrative settings while at the same time ensuring that the public purposes of regulatory regimes are also respected is arguably the greatest challenge of contemporary administrative law.

In the end, you may not be satisfied that the shifting approaches to substantive review in judicial review doctrine over the past 40 years—and with this, the veering of courts between attitudes of judicial supremacy and judicial abdication—are best chalked up to a problem at the level of constitutional theory, that is, a failure to settle upon a coherent model of the proper roles of Parliament, the judiciary, and the executive/administrative state in securing the rule of law. You may find more convincing the thesis that the phenomenon of wave after wave of successive substantive review doctrines and unpredictable applications of those doctrines is instead an elaborate cover for the hard truth that substantive review is only ever end-driven reasoning, through which the reviewing court reaches the conclusion it thinks is right—a working out of the "inarticulate first premises" that Oliver Wendell Holmes suggested spring from sources outside law. Alternatively, the doctrinal niceties of substantive review may be argued to be but shifting tactics in an ongoing array of institutional power struggles: struggles for supremacy around who has the last word on the proper exercise of state power, with judges ingeniously couching their bids for dominance in the language of respect for the other two branches.

There is likely to be some truth in all these hypotheses. But it is important to be clear not only about your favoured diagnoses of administrative law's various pathologies, but also about your favoured prescriptions: your views on the proper aspirations of the constitutional order and how these should inform administrative law. That is how to start making sense of reasonableness review, and, more generally, the project of substantive review in administrative law.

SUGGESTED ADDITIONAL READINGS

ARTICLES

Daly, Paul, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527.

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Walters, Mark D, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Mark Elliott & Hanna Wilberg eds, *The*

Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow (Oxford: Hart Publishing, 2015) 395.

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Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61, [2011] 3 SCR 654.

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Dunsmuir v New Brunswick, 2008 SCC 9, [2008] 1 SCR 190.

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Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 SCR 708.