The Life and Times of Reasonableness

Justice Joel Fichaud, Nova Scotia Court of Appeal

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Standard of review a dry subject. Yet it agitates people. Some of the critical commentary leaves the impression that, at the extremes and depending on your level of esteem for it, standard of review analysis is either a force of nature or a whack-a-mole game.

The vagueness of "jurisdiction", "reasonable", "deference", "justification, transparency and intelligibility", and "acceptable" outcomes means those terms' effective features are crafted by an inductive process that is highly responsive to the circumstances in particular cases. The one constant is – if an administrative decision clearly offends the legislative intent, lawyers and judges will find a way to fix it. But we work with terminology. So acute legal minds compose tests until our clutter gets in the way. Then we recoil from the mess, we houseclean, and on it goes. The evolution of the jurisprudence fills the waste basket with crumpled up theories that once seemed ineluctable.

There is less to the topic than meets the eye. Judicial review is about getting comfortable with simplicity.

1. Reasonableness – Formative Years

In the beginning, judicial review inhabited a sunlit valley where picket fences separated judicial, legislative and executive functions. Judges patrolled their territory with a warrant from Dicey. They hunted down errors of jurisdiction and law on the face of the record. Their pristine enclosure was secured by s. 96 of the *British North America Act* which entrenched judicial review for jurisdictional error: *Crevier v. Attorney General of Québec*, [1981] 2 S.C.R. 220, at pp. 234, 237-8. Their weapon was correctness because the alternative hadn't been invented.

Sadly, the judges were tempted by envy. Jealous of the tribunals' expanding authority over administrative functions, they devised decisional jurisdiction. This was the notion that if a tribunal errs somewhere on its chain of reasoning, it loses jurisdiction to go to the next link. The judges euphemized this as a preliminary or collateral error or failure of a condition precedent: *e.g. Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.) and *Bell v. Ontario (Human Rights Commission)*, [1971] S.C.R. 756.

It came to pass that decisional jurisdiction assumed the form of virtual appellate review. However the tribunals' home statutes forbade judges from tasting the appellate fruit. And so, for the judges' transgression, there followed a time of self-reproach. The purging begat multiple standards of review that have vexed us since.

For their atonement, the judges were expelled from the tidy garden into the messy land of context. Not an abrupt finger-pointing banishment, but by successive nudges from the Supreme Court of Canada. There the judges made the acquaintance of reasonableness, whose natural habitat was the contextual netherworld. This was a foggy place of possibilities, not absolutes.

In 1979, judges were told "not to be alert" to characterize a case as "jurisdictional", but to ask instead whether the tribunal's interpretation was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation". *C.U.P.E. v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, at pp. 233 and 237, per Dickson J. for the Court.

Nine years later, the Supreme Court intertwined jurisdictional error and patent unreasonableness with what it called a "pragmatic and functional" approach:

- A tribunal "will exceed its jurisdiction" either "if it errs in a patently unreasonable manner" or if its error "concerns a legislative provision limiting the tribunal's powers".
- A proper application of "patently unreasonable error" represents a "pragmatic and functional analysis".
- This "pragmatic or functional analysis is better suited to the concept of jurisdiction".

U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at pp. 1086, 1088 and 1089, per Beetz J. for the Court. Parenthetically, today all three concepts – jurisdiction, patent unreasonableness and "pragmatic and functional" analysis – have been eclipsed.

After another nine years, the Court situated a new standard – reasonableness *simpliciter* – between correctness and patent unreasonableness. Patent unreasonableness was "principally a jurisdictional test" while reasonableness *simpliciter* involved subdued correctness with "somewhat probing examination" and "significant searching or testing". *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at pp. 776-77, per Iacobucci J. for the Court.

The following year, the Court sanctioned both the rationale of legislative intent and the mechanics of context-based analysis, and marginalized "jurisdiction":

- The "central inquiry … is the legislative intent of the statute creating the tribunal whose decision is being reviewed".
- The "pragmatic and functional approach" involves the selection of a standard – from correctness, reasonableness and patent unreasonableness – by weighing four criteria, *i.e.* privative clauses, "relative expertise" of the tribunal and court, the legislative purpose and "The 'Nature of the Problem': A Question of Law or Fact?"
- " 'Jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown". This was after years of associating jurisdictional error with patent unreasonableness.

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at pp. 1004-1010, per Bastarache J. for the majority.

Another five years on, the Court adjusted the rationale to balance legislative intent and rule of law:

> … the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

The Court rejected categorical correctness and reiterated contextual analysis:

> …it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on that basis, demand correctness from the decision-maker. … I must emphasize that consideration of the four factors should enable the reviewing judge to address the core issues in determining the degree of deference. It should not be viewed as an empty ritual or applied mechanically.

Dr. Q. v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, at paras. 21, 25-26, per McLachlin C.J.C. for the Court.

In the same year, the Court refurbished the mechanics of "reasonableness":

> the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision…
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> when deciding whether an administrative action is unreasonable, a court should not at any point ask itself what the correct decision should have been. ... The standard of reasonableness does not imply that a decision-maker is afforded a "margin of error" around what the court believes is the correct result.
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> … there will often be no single right answer to the questions that are under review against the standard of reasonableness. …

Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, at paras. 49-51, per Iacobucci J. for the Court.

Meanwhile, the Court continued to apply patent unreasonableness, while expressing concern about its utility: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 and *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, per LeBel J., concurring.

With all this patchwork, clearly standard of review analysis needed some tailoring.

2. Reasonableness Comes of Age with *Dunsmuir*

This brings us to *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, which has been cited about a thousand times yearly since its release. Justices Bastarache and LeBel for the majority wove the loose strands into a pattern. The decision had six key elements.

Rationale for judicial review: Justices Bastarache and LeBel explained the rationale – a balance of constitutional rule of law and legislative supremacy – for judicial review:

> [29] … the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers [citing *Crevier*] … .
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> [30] … In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.
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> [31] … The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*.
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> [52] … The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. …

Pledge of workable simplicity: *Dunsmuir* arrived with promises of coherence, workability and simplicity:

> [32] … the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.
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> [33] … it has become apparent that the present system must be simplified.
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> [43] … What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is required.

The Court heralded this initiative by decluttering the phrase "pragmatic and functional":

> [63] … Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to "standard of review analysis" in the future.

Two standards: The Court also jettisoned "patent unreasonableness", leaving only correctness and reasonableness. Justices Bastarache and LeBel (para. 41) accepted Professor Mullan's critique:

> Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

Justices Bastarache and LeBel continued:

> [42] … it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality is not clear *enough*. [Supreme Court's italics]
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> …
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> [45] We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards – correctness and reasonableness. …

Choice of the standard: The reasons of Justices Bastarache and LeBel stated two approaches, and impliedly acknowledged a third, for the selection of a standard of review.

First was the prescribed contextual test:

> [52] The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. …
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> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically … . We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined … and cannot be readily separated.
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> [54] … Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. …
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> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in specific cases.

Second, they said (paras. 57 and 62) that a full standard of review analysis would not be required where existing jurisprudence had sufficiently identified the standard.

The third approach followed by implication from the definition of four categories for correctness. If none of the correctness categories exists, then reasonableness applies by default. Correctness would govern:

- "True" jurisdiction (resuscitated from *Pushpanathan*):

  > [50] … it is also without question that that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. …
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  > [59] Administrative bodies must also be correct in their determination of true questions of jurisdiction or *vires*. … "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. …

- Constitutional issues:

  > [58] … constitutional questions regarding the division of powers between Parliament and the provinces … as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution.

- Legal issues of central importance:

  > [60] … courts must also continue to substitute their own view of the correct answer where the question is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" … because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. …

- Competing jurisdictions:

  > [61] Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis … .

Methodology of reasonableness: Reasonableness isn't a pre-fabricated bookshelf. It has taken various forms over the past forty years. To satisfy the Court's pledges of simplicity, coherence and workability, it was critical that there be guidance on the meaning and methodology of reasonableness. Otherwise, we haven't simplified anything.

Justices Bastarache and LeBel did not adopt *Southam*'s muted correctness test for reasonableness *simpliciter – i.e.* the "somewhat probing examination" with "significant searching or testing". Rather, they adapted *Law Society v. Ryan*'s approach of tracking the tribunal's reasons toward a "possible outcome". Justices Bastarache and LeBel directed the reviewing court to assess whether the tribunal's reasoning and outcome occupied the span of interpretation, discretion and application of policy that the governing legislation had delegated to the tribunal. From that perspective, "reasonableness" is merely a genus of statutory interpretation:

> [46] What does this revised reasonableness standard mean? …
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> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> [48] … What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered to support a decision" … .
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> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.

> As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime"… . In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

Procedural fairness: Justices Bastarache and LeBel (paras. 79, ff.) did not subject procedural fairness to the standard of review analysis and reasonableness approach that they applied to tribunals' merits rulings. Procedural fairness would continue to operate with its own set of rules, derived from authorities like *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

3. Reasonableness Living Large after *Dunsmuir*

According to Justices Bastarache and LeBel in *Dunsmuir*, the tribunal's interpretation of its "own statute" was just one aspect of the "nature of the question", which in turn was one factor in the multi-faceted contextual analysis. Since *Dunsmuir*, the "home statute" criterion has swallowed everything else. We now have a virtual categorical "home statute" test and, as the presumption signals deference, we have a single (reasonableness) standard in all but exceptional cases.

In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, Justice Rothstein for the majority said:

> [34] … unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

The Supreme Court has reiterated this presumption: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, paras. 22-23, per Karakatsanis J. for the majority; *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, para. 26, per Fish J. for the majority; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, paras. 19-22, per Moldaver J. for the plurality; *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] 1 S.C.R. 161, para. 35, per Rothstein J. for the majority; *Commission scolaire de Laval v.*

Syndicat de l'enseignement de la région de Laval, [2016] 1 S.C.R. 29, paras. 32 and 34, per Gascon J. for the majority; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, paras. 45-47.

Every tribunal ostensibly applies its home statute or a closely related one. So the issue quickly becomes whether the presumption is rebutted by exceptional circumstances. After *Dunsmuir*, the other contextual criteria and the four categories of correctness – *i.e.* the potential sources of such an exception – have withered. I will discuss these in turn.

Other contextual criteria: *Dunsmuir*'s first contextual criterion was whether a privative clause points to deference. As the rationale for selecting a standard of review stems from legislative intent, one would expect the converse proposition also would be worthy of serious inquiry – *i.e.* does the statute express an intent that a reviewing court should apply correctness? For instance, does a full right of "appeal on issues of law" suggest the legislature's preference for correctness on legal issues? Absent an express statutory direction that the reviewing court shall apply "correctness", the Supreme Court has repressed any enthusiasm for that proposition: *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 S.C.R. 909, at paras. 43-44, per Abella J. for the majority; *Edmonton (City)*, paras. 27-31, and authorities there cited, per Karakatsanis J. for the majority; *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at paras. 29, 31-44, per Gascon J. for the majority. See also *Alberta Teachers'*, *McLean*, *Smith v. Alliance*, and the debate in *Tervita*, paras. 34-39, 169-79, between Justices Rothstein and Abella.

Dunsmuir's second and third contextual criteria – the tribunal's purpose as determined from the governing legislation and the nature of the question – dovetail into the proposition that the tribunal's interpretation or application of its home statute attracts reasonableness.

Dunsmuir's fourth contextual criterion is the tribunal's expertise, a factor that has undergone a transition:

- In *Southam* (1997), para. 50, Justice Iacobucci for the Court had termed expertise as "the most important of the factors that a court must consider in settling on a standard of review", and noted that "[t]his Court has said as much several times before".

- Nonetheless, in *Alberta Teachers'* (2011), para. 1, Justice Rothstein said that "legislatures confer decision-making authority on certain matters to decision makers who are *assumed* to have specialized expertise with the assigned subject matter" [emphasis added]. To similar effect: *Dunsmuir*, para. 68, *Edmonton (City)*, para. 33, and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, para. 53, per Fish J. for the Court. We have a legal presumption of expertise for issues that emanate from the home statute.

- *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("*Mowatt*") illustrates the presumption's potency. The issue was whether the Canadian Human Rights Tribunal had remedial authority to award costs. Justices LeBel and Cromwell for the Court *selected* reasonableness because, among other factors, costs was a "question … of law" within the Tribunal's institutional "core function and expertise", deduced from the Tribunal's statutory authority:

> [25] The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). …

However, for the *application* of reasonableness the Court dug deeper, saying the Tribunal's unfamiliarity with " 'costs' in legal parlance" assisted the Court to determine that the Tribunal's decision was unreasonable:

> [40] Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning: Sullivan, at p. 57.

In short, for the selection of a standard of review, the tribunal's institutional expertise to apply its home statute is presumed from the home statute's assignment of authority, and the presumption is virtually irrebuttable. So *Dunsmuir*'s inquiry into expertise is a question-begging exercise. The circumstances that might have rebutted the presumption are shifted to the application of reasonableness.

Next are *Dunsmuir*'s four categories of correctness.

"True" jurisdiction: In *Dunsmuir*, Justices Bastarache and LeBel considered "true jurisdiction" to be "without question" a viable basis for correctness review, albeit within the attenuated perimeter of "whether or not the tribunal had the authority to make the inquiry". It hasn't worked out that way.

In *Alberta Teachers'* (2011), Justice Rothstein for the majority said:

> [33] … Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction … .
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> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review".

In *Alberta Teachers'*, Justice Cromwell's firm defense of jurisdiction represented a minority view.

In the same year, in *Mowatt*, Justices LeBel and Cromwell for the Court said:

> [24] … Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or reasonableness should apply [citations omitted]. In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

Five years later, in *Edmonton (City)*, Justice Karakatsanis for the majority, that included Justice Cromwell, disposed of "true jurisdiction" by citing *Alberta Teachers'*, then saying:

> [26] … The issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.

The bottom line is – when the tribunal acts under its home statute – *i.e.* almost always – *Dunsmuir*'s notion of "true jurisdiction" evaporates. The choice of a standard of review turns on the rebuttable presumption of deference to the tribunal's interpretation of its authority under the provisions of its home statute.

Constitutional issues: In *Dunsmuir*, Justices Bastarache and LeBel said that constitutional issues "are necessarily subject to correctness review". This accorded with the then prevailing view, expressed by Justice Charron for the plurality in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256:

> 20. The complaint is based entirely on this constitutional freedom. The Court of Appeal therefore erred in applying the reasonableness standard to its constitutional analysis. The administrative law standard of review was not relevant. Moreover, if this appeal had instead concerned the review of an administrative decision based on the application and interpretation of the *Canadian Charter*, it would, according to the case law of this Court, have been necessary to apply the correctness standard. (*Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54, at para. 31).

However, in *R. v. Conway*, [2010] 1 S.C.R 765, Justice Abella for the Court (para. 68) held that an administrative tribunal could be a court of competent jurisdiction to issue a remedy under s. 24(1) of the *Charter*, provided (1) the tribunal's enabling statute gives the tribunal authority to decide issues of law, and (2) that statute does not "clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction". Justice Abella (paras. 94-95) noted that the tribunal's exercise of its statutory discretion merits deference.

Similarly, in *Doré v. Barreau du Québec*, [2012] 1 S.C.R 395, Justice Abella for the Court held that a tribunal's discretionary decision which applied "*Charter* values" among statutory criteria, should be judicially reviewed under the administrative reasonableness standard, that balances the *Charter* values with the legislative objectives, rather than the proportionality test of *R. v. Oakes*, [1986] 1 S.C.R. 103. To similar effect: *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613, per Abella J. for the majority; *Groia*, para. 111.

Reasonableness has breached the perimeter of the courts' constitutional citadel. *Charter* values are weighed with the legislative objectives of the tribunal's home statute, and the court defers to the tribunal's balancing exercise.

Legal issues of central importance: In *Dunsmuir*, Justices Bastarache and LeBel said that issues of central importance to the legal system, outside the tribunal's specialized expertise, "require uniform and consistent answers", meaning "courts must … continue to substitute their own view of the correct answer".

This directive, like the others, now filters through the lens of the "home statute" presumption.

In *Nor-Man*, Justice Fish for the Court held that a labour arbitrator's use of the equitable doctrine of estoppel was reviewable for reasonableness. The Court (paras. 37-38) rejected the submission that estoppel occupied *Dunsmuir*'s "central importance" category. Justice Fish explained:

> [5] Labour arbitrators are not legally bound to apply equitable and common law principles – including estoppel – in the same manner as courts of law. Theirs is a different mission, informed by the particular context of labour relations.
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> [6] To assist them in the pursuit of that mission, arbitrators are given a broad mandate in adapting the legal principles they find relevant to the grievances of which they are seized. They must, of course, exercise that mandate reasonably, in a manner that is consistent with the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievance.
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> …

> [38] … Our concern here is with an estoppel imposed as a remedy by an arbitrator seized of a grievance in virtue of a collective agreement. No aspect of this remedy transforms it into a question of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" within the meaning of *Dunsmuir*".

Eight years earlier, in *Toronto (City) v. C.U.P.E., Local 79,* [2003] 3 S.C.R. 77, at paras. 15 and 60, Justice Arbour for the unanimous Court on this point, held that a labour arbitrator's use of estoppel was reviewable for correctness as a general issue of law. Yet in *Nor-Man*, the Court's reasons do not mention the Court's precedent in *C.U.P.E.*.

In *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, Justice Abella for the majority said the point is whether the issue has legal significance:

> [66] The Court of Appeal's conclusion that a standard of correctness is warranted in this case rests, at bottom, on its assertion that "at its core this appeal is of importance to the public at large" (para. 56). … With respect, the prospect that this dispute may be of wider public concerns because of the risks posed by the mill cannot, of its own, transform the legal question here into a "question[n] of law that [is] of central importance to the legal system as a whole and that [is] outside the adjudicator's expertise … . On the contrary, this case asks whether management's exercise of its unilateral rule-making power can be justified under a collective agreement. That question is plainly part of labour arbitrators' bread and butter. The dispute has little *legal* [Justice Abella's italics] consequence outside the sphere of labour law and that, not its potential real-world consequences, determines the particular standard of review.

In *Commission scolaire de Laval*, Justice Gascon, for the majority, said that issues of central importance are "rare' and are "limited to situations that are detrimental to the fundamental legal order of our country":

> [34] … As the Court explained in *Dunsmuir* that standard [correctness] can apply to questions of law that are of central importance to the legal system as a whole and are outside the decision maker's area of expertise (paras. 55 and 60). Such questions must sometimes be dealt with uniformly by courts and administrative tribunals "[b]ecause of their impact on the administration of justice as a whole" (para. 60).

> However, questions of this nature are rare and tend to be limited to situations that are detrimental to "consistency in the fundamental legal order of our country": *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at paras. 26-27; see also *Dunsmuir*, at para. 55.

Dunsmuir's issue of "central importance to the legal system" has become a "legal" issue "fundamental" to national integrity. Issues that would appear to be centrally important, on a stand-alone basis, attract reasonableness when they filter through the prism of the tribunal's authority under its home statute: *Nor-Man*; *Groia*, paras. 51, 54-56. When there is such an exceptional issue, such as the state's duty of religious freedom that flows from the *Quebec Charter of human rights and freedoms*, correctness is confined to that legal principle, and does not extend to the principle's application: *Mouvement laïque v. Saguenay*, at paras. 49-50.

Competing jurisdictions of two tribunals: The courts must apply correctness to determine whether the jurisdictions of two administrative tribunals are mutually exclusive: *e.g. Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360; *Vaughan v. Canada*, [2005] 1 S.C.R. 146; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185; *Syndicat de la fonction publique du Québec v. Quebec (Attorney General)*, [2010] 2 S.C.R. 61. Otherwise, one tribunal would enjoy deference for its interpretation of the other tribunal's authority under the other tribunal's different "home statute". That proposition will never get airborne.

When there is no mutual exclusivity – *i.e.* the authorities of two tribunals overlap – the courts apply a deferential standard to each tribunal's interpretation of its authority from its own home statute: *e.g. British Columbia (Workers' Compensation Board) v. Figliola*, [2011] 3 S.C.R. 422, at paras. 21-22, 54, 56.

Summary – Application of Reasonableness Currently: Usually the choice of a standard of review is straightforward. The tribunal acts under its home statute. Nothing exceptional rebuts the *Alberta Teachers'* presumption. So it is reasonableness. Difficult issues, like the impact of expertise in *Mowatt*, are deferred to the application of reasonableness.

In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 59, Justice Binnie for the majority said: "Reasonableness is a single standard that takes its colour from the context". Colourizing is the hard part, and is left to the application stage.

For the application of reasonableness, *Dunsmuir*'s methodology was – follow the tribunal's reasoning path, ask whether the tribunal's reasoning intelligibly leads to an outcome permitted by the legislation, then stop, and never ask what the court thinks is the preferred outcome. Often the crux is whether the tribunal's outcome is a permissible or "acceptable" deduction from the interplay of broad legislative principles. This can be a surly steed to harness under *Dunsmuir*'s generic test: *e.g.* in *Groia*, compare paras. 58-158 for the majority to paras. 182-218 for the dissent.

Since *Dunsmuir*, the Supreme Court has not always exercised rigorous self-discipline to implement *Dunsmuir*'s prescription, and some of its rulings have been criticized as disguised correctness. Other commentators have dissected those rulings, and the topic is outside the scope of my paper. (See, *e.g.*, The Honourable Justice David Stratas, *The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency*, (2016), Government of Canada - Federal Court of Appeal, pp. 6-9; and *Groia*, paras. 58 ff and para. 177). I will just cite Justice Abella in *Tervita*:

> [171] … I am aware that it is increasingly difficult to discern the demarcations between a reasonableness and correctness analysis, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible. …

A clear reiteration of the mechanics of reasonableness, followed by a consistent application of that methodology, would be helpful. Otherwise, as Justice Binnie cautioned in *Dunsmuir* (para. 139), the debate about which standard mutates into the fortuitous application of a standard, and just "shift[s] rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense".

Application of reasonableness to procedural fairness: There is some uncertainty – perhaps just terminological – in how the standards of review apply to procedural fairness.

In *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, Justice Arbour for the Court said:

> 74 The third issue requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation. …

Similarly, in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, Justice Binnie for the majority elaborated:

> 102 The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations.
>
> 103 On occasion, a measure of confusion may arise in attempting to keep separate these lines of enquiry. Inevitably, some of the same "factors" that are looked at in determining the requirements of procedural fairness are also looked at in considering the "standard of review" of the discretionary decision itself [Justice Binnie's underlining]. Thus in *Baker* [*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817] … the Court looked at "all the circumstances" on both accounts, but overlapping factors included the nature of the decision being made (procedural fairness, at para. 23; standard of review, at para. 61); the statutory scheme (procedural fairness, at para. 24; standard of review, at para. 60); and the expertise of the decision maker (procedural fairness, at para. 27; standard of review, at para. 59). Other factors, of course, did not overlap. In procedural fairness, for example, the Court was concerned with "the importance of the decision to the individual or individuals affected" (para. 25), whereas determining the standard of review included such factors as the existence of a privative clause (para. 58). The point is that, while there are some common "factors", the object of the court's inquiry in each case is different.

In *Burt v. Kelly*, 2006 NSCA 27, a ruling often quoted in Nova Scotia, Cromwell J.A., as he then was, said:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the board breached that duty. …

> [21] The first step – determining the content of the tribunal's duty of fairness – must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step – assessing whether the Board lived up to its duty – assesses whether the Board met the standard of fairness defined at the first step. …

My reading of these authorities is that, unless there is a "decision" that rules on the procedural issue, the court's assessment of procedural fairness involves no "standard of review". That is because there is nothing to "review". Rather, the Court directly establishes the "standard of procedural fairness" under *Baker*'s criteria, then decides whether the tribunal infringed that standard. On the other hand, if the tribunal has issued reasons for its procedural ruling, there is something to "review"; so the normal standard of review analysis applies, meaning reasonableness to the tribunal's application of the procedural provisions of its home legislation. See: *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, para. 90, leave to appeal refused [2012] S.C.C.A. No. 237 and *Labourers International Union of North America, Local 615 v. CanMar Contracting Ltd.*, 2016 NSCA 40, paras. 45-53, leave to appeal refused [2016] S.C.C.A. No. 358. See also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 22, per Abella J. for the Court.

However, in *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, per Justice LeBel for the Court said simply:

> [79] … the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be "correctness".

To similar effect: *Canada v. Khosa*, at para. 43, per Binnie J.

Khela does not change the usage of *Baker*'s criteria to fashion the content of the standard of procedural fairness. I am less clear, however, what standard applies when a tribunal issues formal reasons on a procedural issue – is it correctness under *Khela*, or is it reasonableness if the tribunal's reasons apply the procedural provisions of its home statute? In *Labourers v. CanMar*, paras. 45-63, the Nova Scotia Court of Appeal said reasonableness, and the Supreme Court refused leave to appeal.

Reasonableness for subordinate legislative functions: *Dunsmuir* dealt with administrative decisions. It did not address the enactment of subordinate legislation. However, in its post-*Dunsmuir* procession to ubiquity, reasonableness may have reached the *vires* of subordinate legislation.

In *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, the issue was the standard of judicial review to assess the validity of a municipal bylaw that established tax rates. Chief Justice McLachlin for the Court said:

> [13] A court conducting substantive review of the exercise of delegated powers must first determine the appropriate standard of review. This depends on a number of factors , including the presence of a privative clause in the enabling statute, the nature of the body to which the power is delegated, and whether the question falls within the body's area of expertise. Two standards are available: reasonableness and correctness. See, generally, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 55. ….
>
> [15] … The delegating legislator is presumed to intend that the authority be exercised in a reasonable manner. …
>
> [16] This brings us to the standard of review to be applied. The parties agree that the reasonableness standard applies in this case. The question is whether the bylaw at issue is reasonable having regard to process and whether it falls within a range of possible reasonable outcomes (*Dunsmuir*, at para. 47).

The Chief Justice then applied *Dunsmuir*'s contextual standard of review analysis to determine that reasonableness governed the issue, and concluded (para. 36) that "the bylaw fell within the range of reasonable outcomes". Ironically, *Catlyst*'s contextual analysis was fuller than we see in many administrative judicial reviews, where the court simply asks whether the "home Act" presumption is rebutted by exceptional circumstances.

The following year, the Supreme Court dealt directly with *vires* of subordinate legislation in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 S.C.R. 810, paras. 24-28. Justice Abella's reasons, for the Court, mentioned neither *Dunsmuir* nor the Court's decision the year before in *Catalyst*. This may leave *Dunsmuir* reasonableness as applicable only to municipal subordinate legislation, based on a distinction that escapes me.

4. Is Reasonableness Headed for a Midlife Crisis?

In *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, [2015] 3 S.C.R. 615, at paras. 35-40, Justice Rothstein's majority reasons separated five issues, each with its own standard of review analysis. Justice Abella, dissenting, at paras. 185-7, felt the dissection of issues for standard of review analysis resulted in "obfuscation", "cluttered the journey" and "takes judicial review Through the Looking Glass". Justice Karakatsanis, dissenting, at para. 194, worried that the majority's "issue-by-issue approach … unnecessarily complicates an already overwrought area of the law".

In *Wilson v. Atomic Energy Canada Ltd.*, [2016] 1 S.C.R. 770, Justice Abella, paras. 19-38, proposed a single standard of review to simplify "the standard of review labyrinth we currently find ourselves in". Four concurring justices, at para. 70, welcomed a discussion to improve the clarity of judicial review, but found it unnecessary to rule on the matter.

In *Edmonton East (Capilano)*, Justice Karakatsanis for five justices cited Justice Abella's initiative in *Wilson*, then added:

> [20] … The majority appreciated Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. In my view, the principles in *Dunsmuir* should provide the foundation for any future direction. However, any recalibration of our jurisprudence should await full submissions. …

On May 10, 2018, the Supreme Court granted leave to appeal in three cases (*Bell Canada v. A.G. Canada*, *National Football League v. A.G. Canada* and *Minister of Citizenship and Immigration v. Vavilov*), accompanied by the statement:

> The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir* …. To that end, the appellants and respondents are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review …

My prediction, for what it is worth, is this.

In my respectful view, it is mistaken to consider legislative intent and rule of law as equal but opposing principles, from whose collision multiple standards of review emerge as a Hegelian synthesis. The rationale is simply legislative intent.

Clearly, correctness applies the court's view of legislative intent.

So does reasonableness, though usually the view is deduced from more general statutory language:

- When the **legislation** admits of only one possible outcome, any other outcome will be set aside, and effectively reasonableness and correctness are the same thing: *McLean*, para. 38; *Dunsmuir*, para. 75. This is not because of the rule of law *per se*, but because the outcome contravenes **legislative** intent.

- When the **legislation** expects the tribunal to interpret a vague or ambiguous provision, or delegates discretion to the tribunal, or authorizes the tribunal to apply policy considerations, then a range of outcomes is permitted by the **legislation**.

- Then, if the tribunal's reasoning and outcome is outside the range contemplated by the **legislation**, the decision will be unreasonable: *Mowatt*, paras. 34-60; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, paras. 50-58. Again, this is not because of a stand-alone application of the rule of law, but because the outcome contravened the **legislative** intent.

- On the other hand, if the tribunal's reasoning and outcome occupy the range permitted by the **legislation**, then the decision will be reasonable. But that is only because the tribunal acted within the "margin of appreciation", as *Dunsmuir* (para. 47) phrased it, contemplated by the **legislation**.

Why introduce the rule of law into the matter? Because, when the tribunal exercises discretion or makes policy decisions, there is potential that the discretion may be exercised arbitrarily. To address that concern, the **statute is interpreted** by constraining the exercise of discretion to serve the purposes of the **legislation**: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, per Rand J.; *Khosa*, para. 20. The rule of law feeds the interpretation of legislative intent to exclude arbitrary exercise of discretion. Nowhere does the rule of law conflict with legislative intent. We don't cite the rule of law every time we interpret a statute.

Every aspect of standard of review, reasonableness and correctness derives from ”the polar star of legislative intent”: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at para. 149, per Binnie J. for the majority.

From that unitary rationale, it is a short hop to a single standard of review. The reviewing court would apply legislative intent. The correctness/reasonableness dichotomy can be dropped. Legislative intent means:

- For issues of discretion, policy or ambiguity, whose analysis the statute left to the tribunal (*i.e.* the tribunal's "margin of appreciation"), the court would presume the Legislature intended that (1) the tribunal makes the call, and (2) the reviewing court considers only whether the tribunal improperly exercised its discretion or its authority to apply policy and resolve ambiguities.

- The first presumption is founded in *Dunsmuir*, and mildly extends of Justice Rothstein's assumption of institutional expertise in *Alberta Teachers'*, para. 1.

- For the second presumption, *i.e.* whether the tribunal acted improperly, the reviewing court would apply the mechanics of reasonableness set out in *Dunsmuir*, paras. 46-49. As noted above, *Dunsmuir*'s methodology of "reasonableness" is merely a form of statutory interpretation, and is fully adaptable to a unitary standard of legislative intent.

- If there is no issue of discretion, policy or ambiguity, then there is no meaningful "margin of appreciation" for the tribunal or the court. Rather, there is just one possible outcome. Then reasonableness and correctness would yield the same result anyway (*McLean*, para. 38), and having only one standard won't matter, except to streamline the analysis.

The legal test needs nothing more. The rest is application of the test. This is basically the "home statute" principle, as it has evolved to date, less the flotsam that now accompanies the distinctions between two standards of review.

This is why I said at the start that judicial review means getting comfortable with simplicity. Einstein told us – If you can't explain it to an 8-year old, you don't understand it. It is feasible to establish workable principles of judicial review that are explicable to an 8-year old.

This single standard of review carries a risk.

C.U.P.E. (1979) did not create a second (deferential) standard for doctrinal reasons, but to leash the exuberance of reviewing judges. Over the past 40 years, much consternation has resulted from attempts to backfill ill-fitting doctrinal bases for a purely utilitarian initiative.

Under a new single standard of "legislative intent", would the unshackled courts introduce a modern version of the pre-*C.U.P.E.* errors of law on the face of the record and decisional jurisdiction? To avoid such revisionism, it would be essential to stipulate that, on matters of statutory discretion, policy and ambiguity, the "legislative intent" is that the tribunals, not the courts, have the "margin of appreciation" and are to choose among the permissible outcomes subject only to *Dunsmuir*'s methodology. Those are the two assumptions bulleted above.

The single standard would leave difficult issues on the table. These include defining the margin of appreciation in each case, intensity of review, sufficiency and attribution of reasons, methodology to balance broad legislative principles and assess points of mixed fact and law: *e.g.* in *Groia*, compare paras. 58-158 for the majority and paras. 182-218 for the dissent. But those difficulties would exist anyway. At least we would eliminate the unnecessary analysis involved with the selection of a standard.

If we do not establish a single standard, what will happen?

Basically, what has happened over the past 40 years. To reach the fair result, case by case, lawyers and judges will tinker with the superfluous elements of unnecessary legal distinctions between standards. The clutter will re-gather, until the Supreme Court re-cleanses every decade, and so on. It is like the dinosaur enclosure in the Jurassic Park movies. They can build the electric fence higher and higher in each movie, but the tyrannosaurus will always get out and gobble up the tourists, because that is his nature. Unless they euthanize the beast, the only solution is to keep the tourists off the island.

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