Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness

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Last year, *Dunsmuir v. New Brunswick*,[1] was cited for the 10,000th time by a Canadian court or administrative tribunal. To put the number in perspective, *Housen v. Nikolaisen*,[2] the leading case on standards of appellate review, has been cited over 4,000 times although it was decided six years before *Dunsmuir* was handed down. Even allowing for the fact that my source is CanLII, which may not adequately cover the early 2000s, the difference is remarkable. *Dunsmuir* is cited roughly 100 times a month, 25 times a week, 5 times a (working) day.

And yet many of its features remain somewhat obscure.[3] As Layh J. put it in *Skyline Agriculture Financial Corp. v Farm Land Security Board*, "locating the goalposts of correctness and reasonableness has remained an elusive target for those obliged to follow [the Supreme Court of Canada's] leadership".[4] Similarly, Slatter J.A. chimed in: "The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day".[5] And Abella J. described standard of review as the "prodigal child" of Canadian administrative law.[6] More recently, an appellate judge has taken the unprecedented step of posting on an open-access website a 27-page "Plea for Doctrinal Coherence and Consistency" in the Canadian law of judicial review, which is referred to as a "never-ending construction site".[7]

Most of the academic commentary on *Dunsmuir* has been cautiously supportive, praising the changes the Supreme Court of Canada sought to effect but often suggesting that more may need to be done to develop a workable approach to reasonableness review. Audrey Macklin's comment that on the whole *Dunsmuir* has made "[t]he job of discerning the appropriate standard of review…simpler"[8] is probably representative, but the recent complaints from the bench and a judge writing extra-judicially suggest that any such early optimism is wearing thin.

Indeed, a majority of the Court seems to appreciate the desirability of modifying the current standard of review framework. In *Wilson v. Atomic Energy of Canada*,[9] Abella J.

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[1] [2008] 1 SCR 190.
[2] [2002] 2 SCR 235.
[3] See generally David J Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action - the Top Fifteen!" (2013), 42 *Advocates' Quarterly* 1.
[4] 2015 SKQB 82, at para. 35.
[5] *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85, at para. 11.
[6] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, at para. 185.
[7] Hon. David W. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency", Social Science Research Network, February 17, 2016.
[8] Audrey Macklin, "Standard of Review: Back to the Future" in Colleen Flood & Lorne Sossin eds., *AdministrativeLaw in Context*, 2d ed (Toronto: Emond Montgomery, 2013), p. 279, at p. 320.
[9] 2016 SCC 29.

aired "in *obiter*" a "proposal" on how to "simplify the standard of review labyrinth we currently find ourselves in", with a view to "starting the conversation about the way forward".[10] Four of her colleagues welcomed her "efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability".[11] The dissenting judges welcomed the "constructive spirit" in which Abella J.'s suggestions were offered (although they "harbour[ed] concerns about their merits").[12] Only Cromwell J. firmly took the view that *Dunsmuir* should not be revisited, commenting that the standard of review framework "does not need yet another overhaul".[13]

Part of the difficulty lies in the attempt in *Dunsmuir* to set out a categorical approach to judicial review of administrative action. In doing so, LeBel and Bastarache JJ. found themselves swimming against a strong tide. The current of modern administrative law has long been pulling towards context. Gone are old categories – "quasi-judicial" and "administrative" decisions[14] – which have been replaced by more nebulous concepts such as fairness and reasonableness which require courts to focus on various contextual factors.[15] The attempt to impose a categorical framework to restore order was as doomed as it was noble.[16] Sure enough, as I explain in Part I, context has returned to the forefront of Canadian administrative law.

Another element is that the Supreme Court of Canada sometimes avoids standard of review analysis in whole or in part. The most egregious example is surely *Febles v. Canada (Citizenship and Immigration)*,[17] an immigration judicial review in which the standard of review was not mentioned so much as in passing, an omission all the more bizarre when viewed in the light of a spirited disagreement between Evans J.A. and Stratas J.A. in the court below on the appropriate approach to questions of international law,[18] a disagreement which the Supreme Court acknowledged but did not deign to resolve in *B010 v. Canada (Citizenship and Immigration)*.[19] But there are many others, some of which I will mention in Part II.

[10] 2016 SCC 29, at para. 19.
[11] 2016 SCC 29, at para. 70.
[12] 2016 SCC 29, at para. 78.
[13] 2016 SCC 29, at para. 72.
[14] For a comprehensive treatment, see S.A. De Smith, *Judicial Review of Administrative Action* (London, Stevens & Sons, 1961).
[15] See *e.g.* David J. Mullan, "Fairness: The New Natural Justice" (1975), 25 University of Toronto Law Journal 281; David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 Canadian Journal of Administrative Law & Practice 59.
[16] See generally Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 Osgoode Hall Law Journal 319.
[17] [2014] 3 SCR 431.
[18] 2012 FCA 324.
[19] 2015 SCC 58, at paras. 22-26.

This paper is not intended to give a comprehensive overview of the post-*Dunsmuir* jurisprudence[20] or literature.[21] My modest goal is to analyze recent cases decided under the *Dunsmuir* framework with a view to determining where Canadian courts might usefully go next.

My focus in Part I will be on the first step in the standard of review analysis: selecting the standard of review. Subsequent to *Dunsmuir*, the Supreme Court of Canada explained the required categorical analysis. Correctness applies to constitutional questions; questions of "general law 'that [are] both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'",[22] jurisdictional conflicts between two or more specialized tribunals; and "true" questions of jurisdiction or *vires*.[23] Meanwhile, the deferential standard of reasonableness "is normally the governing standard"[24] for interpretations of a decision-maker's 'home' statute or statute closely related to its function, matters of fact, discretion or policy and inextricably intertwined legal and factual issues.[25]

Lurking on the edges of this new "analytical framework"[26] were the contextual factors that formed part of the discarded pragmatic and functional analysis: statutory language relating to appeals or privative clauses; relative expertise; statutory purpose; and the nature of the question.[27] These were retained in *Dunsmuir* and in *Alliance Pipeline* served to resolve "[a]ny doubt" whether the categorical analysis identified the appropriate

[20] See especially *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 SCR 339; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708; *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5; *McLean v. British Columbia (Securities Commission)*, [2013] 3 SCR 895; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40.

[21] See generally, Joseph Robertson, Peter Gall and Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Prospects* (LexisNexis, Toronto, 2014). See also Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 Osgoode Hall Law Journal 317; Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012), 58 McGill Law Journal 483; Andrew Green, "Can There be too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 University of British Columbia Law Review 443; Robert E. Hawkins, "Whither Judicial Review?" (2009), 88 Canadian Bar Review 603; Gerald A. Heckman, "Substantive Review in Appellate Courts Since *Dunsmuir*" (2010), 47 Osgoode Hall Law Journal 751; Louis LeBel, « De *Dunsmuir* à *Khosa* » (2010), 55 Revue de droit de l'Université McGill 311; Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's Law Journal 59; David J. Mullan, "*Dunsmuir v. New Brunswick* : Standard of Review and Procedural Fairness for Public Servants : Let's Try Again!" (2008), 21 Canadian Journal of Administrative Law & Practice 117; Lauren J. Wihak, "Whither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014), 27 Canadian Journal of Administrative Law & Practice 173.

[22] *Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 SCR 77, at para. 62.

[23] *Dunsmuir*, at paras. 58-61.

[24] *Smith v. Alliance Pipeline Ltd.*, [2011] 1 SCR 160, at para. 26.

[25] *Dunsmuir*, at paras. 51-54.

[26] *Alliance Pipeline*, at para. 27.

[27] See *e.g.* Diana Ginn, "New Words for Old Problems: the *Dunsmuir* Era" (2010), 37 Advocates' Quarterly 317.

standard.[28] As I discuss in Part I, the precise relationship between categories and context remains uncertain and continues to cause confusion.

In Part II, I will address the second step – application of the appropriate standard of review – though with an emphasis on reasonableness review, because its application is much more complex than the substitution of judgement permitted by correctness review. In *Dunsmuir*, Bastarache and LeBel JJ. offered an elegant definition of reasonableness as "a deferential standard" that gives administrative decision-makers "a margin of appreciation within the range of acceptable and rational solutions" but which nonetheless requires courts to inquire into "the existence of justification, transparency and intelligibility within the decision-making process" and into "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[29] Turning this definition into concrete guidance has proved difficult, however, and much ink has been spilled on "justification, transparency and intelligibility" and the "range of possible, acceptable outcomes".[30]

For all the confusion, perhaps we are edging towards coherence in the standard of review analysis. I will suggest that both in selecting the standard of review and in applying the reasonableness standard, context is reasserting itself. Moreover, it is reasserting itself in a way that has the potential to be consistent with the two principles said to hold the *Dunsmuir* project together, "the rule of law and the foundational democratic principle".[31]

The thesis of this paper is that the rule of law and democracy can and should now be used to guide the contextual inquiry required of reviewing courts, a contextual inquiry that would take the form of a flexible but robust standard of reasonableness review. Obviously, much has been said about these two principles as a matter of legal and political theory.[32] Without wishing to sidestep important theoretical issues altogether, for the purposes of this paper I think it is sufficient to say that the understanding of these principles set out in *Dunsmuir* is relatively straightforward. On the one hand, the rule of law requires courts to ensure that statutory decision-makers "do not overstep their legal authority".[33] On the other hand, the democratic principle "finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers" and in order to respect legislative intent, the courts must avoid "undue interference with the discharge of administrative functions" duly delegated

[28] *Alliance Pipeline*, at para. 29.
[29] *Dunsmuir*, at para. 47.
[30] See *e.g.* Paul Daly, "Unreasonable Interpretations of Law" in Joseph Robertson, Peter Gall and Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Prospects* (LexisNexis, Toronto, 2014); Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015), 52(3) Alberta Law Review 799; John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 Canadian Journal of Administrative Law & Practice 101; Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's Law Journal 59.
[31] *Dunsmuir*, at para. 27.
[32] See in particular David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 Review of Constitutional Studies 87, arguing that the two are not in tension at all.
[33] *Dunsmuir*, at para. 28.

to statutory decision-makers.[34] The rule of law is firmly associated with the idea of legality, that reviewing courts have an important oversight role in ensuring that administrative decision-makers stay within acceptable boundaries, and the protection of important individual interests.[35] Meanwhile, democracy means primarily that reviewing courts ought to respect the legislative choice to vest decision-making authority in bodies other than courts; administrative law doctrine should aim to protect the administrative autonomy accorded by legislatures.

I will leave it to other work to consider whether these understandings of the principles of the rule of law and democracy are defensible in theoretical terms and whether they give courts or administrative decision-makers roles that are not normatively defensible. This paper has the modest goal of providing an overview of recent developments in Canadian administrative law, with some thoughts as to how the law might now move forward. The apparent loss of faith in – or at least frustration with – the *Dunsmuir* framework suggests that there is great wisdom in Matthew Lewans' comment that *Dunsmuir's* "enduring value…lies in its illustration of two persistent problems with judicial review", namely the perennial attraction of jurisdictional error and correctness review, and the inability to articulate a reasonableness standard that is capable of consistent application in different contexts.[36] In Parts I and II I take up the challenge of responding to those problems with the principles articulated in *Dunsmuir* in hand.

This is not my first contribution to debates about the standard of review in Canadian administrative law. In a pair of essays published in 2012, I strongly attacked the decision in *Dunsmuir* and its subsequent application by the Supreme Court of Canada.[37] My two lines of attack related to the replacement of context by categories and were neatly summarized in "*Dunsmuir's* Flaws Exposed: Recent Decisions on Standard of Review". First, "the categorical approach is unworkable and in fact a reviewing court cannot apply the categorical approach without reference to the much-maligned four [contextual] factors (or some variant thereon)". Second, "the single standard of reasonableness is similarly unworkable without reference to some version of the four [contextual] factors". I continue to believe that context is an inescapable feature of the modern Canadian law of judicial review. The analysis in Part I of this paper supports that argument. However, in Part II I build on my 2012 essays by proposing a means by which the contextual analysis can be cabined. Rather than casting courts adrift on a sea of context, I describe the instruments that they can use to navigate the vast seas of administrative law in a more effective and predictable manner. I have also assailed the Supreme Court of Canada's efforts to apply the reasonableness standard to interpretations of law, arguing in

[34] *Dunsmuir*, at para. 27.
[35] See *e.g. Reference re Secession of Quebec*, [1998] 2 SCR 217, at paras. 70-78.
[36] Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's Law Journal 59, at pp. 97-98.
[37] Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 Osgoode Hall Law Journal 317; Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012), 58 McGill Law Journal 483.

"Unreasonable Interpretations of Law" that the Court's approach is analytically weak.[38] In Part II of this paper, I build on my earlier work by laying out an analytically robust conception of reasonableness review, one which draws its structure from the rule of law and democratic principles.

Finally, I should acknowledge that, elsewhere, I have developed my own preferred standard of review framework,[39] one which differs from the unified reasonableness standard I advocate below. There are, as Abella J. observed in *Wilson*, "many models" for standard of review analysis.[40] Accordingly, this paper should be understood as an attempt to articulate a rational next step for Canadian standard-of-review jurisprudence, not an elaborate scheme developed from first principles.

I. Step 1: Selecting the Standard of Review

Several recent Supreme Court of Canada cases merit attention for their treatment of the question of how to select the standard of review. They signal two things: an obvious openness from the country's apex court to the application of correctness review; and a return to context. These cases are the subject of Part I.A. Meanwhile, in Part I.B, I identify lower-court cases that employ contextual analysis and explore the implications of the reasoning there employed.

A. Correctness and Context

Tervita Corp. v. Canada (Commissioner of Competition),[41] is a long, complex and important decision on competition law. It also contains a spirited disagreement between Rothstein and Abella JJ. on the appropriate standard of review of determinations of law made by the Competition Tribunal.

The case concerned sections 92 and 96 of the Competition Act, in particular their application to a merger of companies owning secure landfills in British Columbia. Section 92 prohibits mergers that would lessen or prevent competition; this case involved prevention, because the acquired company had not yet begun to operate its landfill but would have at some point in the future. An acquisition by T, an incumbent, would have had the effect of preventing this. Section 96 provides a defence to the prohibition where the efficiency gains from the merger would outweigh its anti-competitive effects.

The Competition Tribunal is a slightly unusual creature. Its membership is drawn in part from the judiciary and only judicial members are entitled to address questions of law.[42] Moreover, a decision it makes is appealable to the Federal Court of Appeal "as if it were

[38] See also Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015), 52(3) Alberta Law Review 799.
[39] See *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, Cambridge, 2012), chapters 2-4.
[40] 2016 SCC 29, at para. 19. See also Dean Knight, "Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context", [2016] New Zealand Law Review 63.
[41] 2015 SCC 3.
[42] *Competition Tribunal Act*, ss. 3 and 12

a judgment of the Federal Court".[43] Rothstein J. acknowledged the ordinary presumption that interpretations by an administrative decision-maker of its home statute are entitled to deference. Nonetheless, the presumption was rebutted in this case, due to the presence of this unique statutory provision, which was evidence of "a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness".[44]

Abella J. disagreed. She would have applied a reasonableness standard. To do otherwise, in her view, would undermine settled expectations: "judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause — that is notwithstanding legislative wording — when a tribunal is interpreting its home statute, reasonableness applies".[45] Rebutting the presumption in this case would "chip away" at the "precedential certainty" the Court had developed,[46] because it would represent "an inexplicable variation from our jurisprudence that is certain to engender the very 'standard of review' confusion that inspired this Court to try to weave the strands together in the first place".[47] She saw "nothing…that warrants departing from what the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard".[48]

Abella J. is correct that *Tervita* will inject uncertainty into the law. Although the *Competition Tribunal Act* is the only piece of Canadian legislation that contains a provision requiring the appellate court to treat an administrative decision as if it emanated from an inferior court, it relies implicitly on a general principle that statutory language may rebut the presumption of reasonableness. Indeed, in *Stewart v. Elk Valley Coal Corporation*, , the Alberta Court of Appeal wasted no time in employing arguments based on statutory language giving a reviewing court wide remedial powers in appeals from human rights tribunals and creating an enforcement mechanism for tribunal decisions to support a conclusion that the legislature had "indicated that the Court and the Tribunal are dealing with 'rule of law' questions" for which correctness was the appropriate standard.[49] It should be said, however, that the clause in the *Competition Tribunal Act* makes at best oblique reference to standard of review issues and could just as easily be understood as, say, guiding the Federal Court of Appeal in how to deal with the distinction between interlocutory and final decisions or remedial matters.

[43] *Ibid*., s. 13(1).
[44] *Tervita*, at para. 39.
[45] *Tervita*, at para. 170.
[46] *Id*.
[47] *Tervita*, at para. 171.
[48] *Tervita*, at para. 179.
[49] 2015 ABCA 225, at para. 55.

The post-*Dunsmuir* framework recognizes that there are certain categories to which correctness and reasonableness apply: but the categories are not self-applying, such that in hard cases – or maybe even all cases[50] – courts must rely on contextual factors to determine which category applies. Then the presumption of reasonableness review was tacked onto the categorical approach without any explanation of how it might be rebutted, or of its relationship to the categorical approach. As Cromwell J. observed, "Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts".[51] Does correctness review apply whenever a case falls into a correctness category, or only when the presumption has been rebutted, so that 'rebutting the presumption' is simply shorthand for the conclusion that a case falls into a correctness category based on a consideration of contextual factors? Or does an applicant have two bites of the cherry: one to get into a correctness category and another to rebut the presumption of reasonableness, presumably relying on contextual factors on both occasions?

Gleason J. considered these issues in her comprehensive judgment in *Pfizer Canada Inc. v. Canada (Attorney General)*.[52] Gleason J. was surely right to say "the inquiry into standard of review does not necessarily end with the determination that the issue being reviewed involves the interpretation of the decision-maker's home statute or a statute or regulation closely connected with its function and does not fall into one of the four foregoing categories to which correctness applies".[53] Both categories and context are relevant.

The subsequent Supreme Court of Canada decision in *Mouvement laïque québécois v. Saguenay (City)*,[54] underlines the importance of contextual analysis, though in some respects it confuses the state of the law further. To begin with, Canada's human rights tribunals have extensive powers to investigate and redress alleged breaches of fundamental rights by public and private parties. These statutory rights overlap but do not mirror the rights protected constitutionally; the human rights codes they are found in are usually described as "quasi-constitutional". But Canadian courts have typically been cautious in allowing the tribunals to define the scope of their own mandates — especially the scope of protected rights — a caution that can be traced at least as far back as *Canada (Attorney General) v. Mossop*.[55] Post-*Dunsmuir*, the situation has remained the same, either because the scope of fundamental rights is considered a question of general law of central importance to the legal system, or because the presumption of deferential review can be rebutted.

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[50] See Paul Daly, "*Dunsmuir's* Flaws Exposed: Recent Cases on Standard of Review" (2012) 58 *McGill Law Journal* 483.
[51] *Alberta Teachers'*, at para. 92. See also Andrew Green, "Can There be too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 University of British Columbia Law Review 443.
[52] 2014 FC 1243, at paras. 57-120.
[53] *Pfizer*, at para. 89.
[54] 2015 SCC 16.
[55] [1993] 1 SCR 554.

The first strategy is found in an early post-*Dunsmuir* decision from Alberta: *Walsh v. Mobil Oil Canada*, using "existing case law" to justify selecting correctness as the standard of review.[56] The second strategy can be seen in *Canadian National Railway Company v. Seeley*. Mainville J.A. found the presumption of reasonableness review had been rebutted, for several reasons. For instance, "labour arbitration boards, labour relations boards and superior courts" often address human rights questions, creating a "concurrent jurisdiction of a multiplicity of decision makers" which calls for correctness review.[57] Also, the scope of discrimination on family status is a matter of concern across provincial boundaries. So, "for the sake of consistency between the various human rights statutes in force across the country, the meaning and scope of family status and the legal test to find *prima facie* discrimination on that prohibited ground are issues of central importance to the legal system…"[58] One might be puzzled about why these factors *rebut* the presumption of reasonableness rather than *indicate* that the questions at issue fell into the category of questions of general law of central importance to the legal system, but this is further evidence of the uncertain relationship between categories and context.

If anything, the confusion was exacerbated by Gascon J.'s reasons in the *Saguenay* case. The substantive aspects of the decision concerned the state's duty of religious neutrality — violated here by a prayer read by the mayor of a Quebec city before municipal meetings. Ultimately, the Court upheld the conclusion of the Quebec Human Rights Tribunal that the prayer was an impermissible discriminatory interference with the freedom of religion and conscience of an atheist participant, a breach of the provincial human rights code interpreted by the Tribunal. It turned meetings "into a preferential space for people with theistic beliefs" whereas non-believers who participated faced "isolation, exclusion and stigmatization", a breach of the "right to exercise…freedom of conscience and religion".[59]

Gascon J. identified an "important question" implicated by the Tribunal's decision: "the scope of the state's duty of religious neutrality that flows from the freedom of conscience and religion protected by the *Quebec Charter*".[60] Correctness was the appropriate standard of review of this question: "the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable".[61] In addition, the presumption of deference applicable because the Tribunal was interpreting its home statute[62] was rebutted: "the jurisdiction the legislature conferred on the Tribunal in this regard in the *Quebec Charter* was intended to be

[56] 2008 ABCA 268, at para. 55.
[57] 2014 FCA 111, at paras. 47-48.
[58] *Seeley*, at para. 51.
[59] *Saguenay*, at para. 120.
[60] *Saguenay*, at para. 49.
[61] *Saguenay*, at para. 51.
[62] *Saguenay*, at para. 46.

non-exclusive; the Tribunal's jurisdiction is exercised concurrently with that of the ordinary courts".[63]

This is confusing because post-*Dunsmuir*, a question falls either in a 'correctness category' or a 'reasonableness category'. General questions of law of central importance to the legal system that are outside the expertise of the decision-maker under review is a correctness category. If a question is adjudged to fall into this category, that should be the end of the matter: correctness is the standard and it is up to the reviewing court to resolve the issue. Here, Gascon J. concluded — without explaining why: his conclusion was said simply to be "undeniable" — that the state neutrality question was of central importance to the legal system. If this is the case, there is no need to rebut the presumption of deference. Nonetheless, although there was no need to do so, Gascon J. went on to hold that the presumption of deference had been rebutted, because of the existence of concurrent jurisdiction: individuals can ask the Tribunal *or* a court to apply the Quebec Charter.

This further muddies the already murky waters of the relationship between *Dunsmuir's* categorical approach and context. In order to convince a court to apply a correctness standard, does an applicant now have to demonstrate *both* that a decision falls in a correctness category *and* that the presumption of reasonableness can be rebutted? Or is there just one step in the analysis, with the contextual factors used to *determine* whether a correctness category applies? Conceptually it makes more sense to think of a two-step process, relying first on the categories before turning to the contextual factors to confirm that the choice of category is appropriate – and, indeed, *Dunsmuir* envisages this sort of exercise.[64] But this is not the route Gascon J. followed.[65]

Gascon J.'s reference to the concurrent jurisdiction of the Tribunal and the superior court will doubtless give a new lease of life to the gloss applied to *Dunsmuir* by *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*.[66] There, Rothstein J. wrote that concurrent jurisdiction can rebut the presumption of deferential review when a decision-maker is interpreting its home statute. Otherwise, "inconsistent" results could arise depending on whether a question of interpretation was raised at first instance (subject to *de novo* appellate review) or in an administrative setting (subject to deferential review). It had seemed as if the *Rogers* exception had been limited to its special facts: in Evans J.A.'s last set of reasons for the Federal Court of Appeal,[67] he certainly took that view.[68] Indeed, in *Rogers* itself, Rothstein J. said: "Concurrent jurisdiction at first instance seems to appear only under

[63] *Saguenay*, at para. 51.
[64] *Dunsmuir*, at para. 62.
[65] See similarly *Commission de la santé et de la sécurité au travail c. Caron*, 2015 QCCA 1048, at para. 33.
[66] [2012] 2 SCR 283 (reaffirmed in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57.
[67] *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48.
[68] See also *McLean v. British Columbia Securities Commission*, [2013] 3 SCR 895, at para. 24; *Simser v Aviva Canada and Fsco*, 2015 ONSC 2363, at para. 32. For another game effort by a Federal Court of Appeal judge (this time Gleason J.A.) to disentangle the many strands in a Supreme Court decision (this time *Saguenay*), see *Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200.

intellectual property statutes where Parliament has preserved dual jurisdiction between the tribunals and the courts".[69] Evidently not! Context underpins the renewed significance of concurrent jurisdiction, though it bears noting that concurrent jurisdiction was not among the contextual factors mentioned in *Dunsmuir*. Plainly, in rebutting a presumption of reasonableness review, it is permissible to look outside the factors that made up the old pragmatic and functional analysis. It should be noted, however, that Rothstein J. insisted in *Rogers* that the basis for rebutting the presumption of reasonableness review was legislative intent, in other words, an invocation of the democratic principle.

The confusion created by the *Saguenay* decision was entirely unnecessary, as there was unusual statutory language which would have provided a better route to Gascon J.'s conclusion. Decisions of the Tribunal are appealable, with leave, directly to the Quebec Court of Appeal. The relevant statute also provides that the general rules governing appeals are to apply in this context. The Quebec Court of Appeal has split previously on the proper interpretation of its role on appeal from the Tribunal: some judges have applied judicial review criteria (following the well-established rule that appeal clauses do not eliminate deference to specialized tribunals) but some have applied appellate criteria based on the apparently plain language of the statute.[70] Gascon J. held that judicial review criteria apply: the *Dunsmuir* framework is the appropriate one.

Nonetheless, one might reasonably think that the leave requirement is designed to ensure that matters of general importance should be addressed by the courts. One might further deduce from the legislature's reference to rules governing appeals that a differentiation between questions of law (de novo review) and fact (deferential review) is in order. Of course, it has long been the case that the existence of a statutory appeal does not eliminate deference.[71] But a general understanding that deference will often be appropriate even on appeals should not be transformed into a flexible rule that appeal clauses can never rebut the presumption of deference. All appeal clauses are not created equal. Surely the better route to Gascon J.'s conclusion would have been to rely on the unusual statutory language to rebut the presumption of reasonableness, as Rothstein J. did in *Tervita*. Certainly an 'appeal with leave' clause seems like a clearer manifestation of legislative intent with respect to judicial control of the administration than the unusual clause in *Tervita*. All that said, however, the later decision in *Kanthasamy v. Canada (Citizenship and Immigration)* seems to rule out the possibility that appeal clauses can ever be "determinative" of the standard of review:[72] even a procedure whereby a first-

[69] *Rogers*, at para. 19.
[70] *Saguenay*, at para. 24.
[71] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748.
[72] 2015 SCC 61, at para. 44. See also *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 SCR 764.

instance reviewing judge can certify a question of general law for authoritative resolution by an appellate court is not capable of rebutting the presumption of reasonableness.[73]

This is not all. Gascon J. also segmented the question before the Tribunal into two separate parts. On the general question of state neutrality, the standard was correctness. But, "the question whether the prayer was religious in nature, the extent to which the prayer interfered with the complainant's freedom and the determination of whether it was discriminatory fall squarely within the Tribunal's area of expertise", as did "the qualification of the experts and the assessment of the probative value of their testimony, which concerned the assessment of the evidence that had been submitted".[74] Clever lawyers will be licking their lips at the possibility of slicing decisions apart, extracting "general" or — an old favourite — "jurisdictional" issues for intensive judicial review. Abella J. was quite right to warn in her concurring reasons of problems to come. As she asked, rhetorically, "How many components found to be reasonable or correct will it take to trump those found to be unreasonable or incorrect?"[75]

Treating the discrimination based on religious belief as bound up with the facts as found by the Tribunal is more consistent with current trends in reasonableness review *and* with the role of administrative decision-makers: as Abella J. put it in *Moore v. British Columbia (Education)*, they are not Royal Commissions, but respond to particular factual situations.[76] A deferential approach to judicial review is more respectful of the incremental, bottom-up development of policy to which administrative decision-makers are well suited. In *Saguenay*, we are simply told that the state neutrality question is 'undeniably' of central importance to the legal system, without any explanation of why it is important outside the setting of the Tribunal and without any guidance as to how this category might be applied in future cases.

No further guidance was offered in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*,[77] where Rothstein J. performed a standard of review analysis for five separate issues, applying a standard of correctness to one of them and a standard of reasonableness to the rest. The question whether broadcast-incidental copies form part of the "reproduction right" protected by s. 3(1)(d) of the *Copyright Act* was one of law that could arise before the Copyright Board or at first instance in enforcement proceedings and so, following Rogers, was to be resolved on a standard of correctness. This was predictable enough. Most of the other issues related to exercises of discretion or mixed questions of fact and law. In dissent, Abella J. said "this takes judicial review Through the Looking Glass"[78] and in her separate dissent, Karakatsanis J. expressed the concern that Rothstein J.'s analysis "unnecessarily complicates an already overwrought area of

[73] See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, at para. 43. *Cf. Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras. 57-62.
[74] *Saguenay*, at para. 50.
[75] *Saguenay*, at para. 173.
[76] [2012] 3 SCR 360, at para. 64.
[77] 2015 SCC 57.
[78] *SODRAC 2003*, at para. 187.

the law".[79] For Abella J., the possibility of segmentation represents a "new and regressive" step[80] that effects a "significant and inexplicable change" in the law of judicial review.[81] Rothstein's reply — that this was all settled by the *Saguenay* decision[82] — is unconvincing, because neither there nor here is there any explanation of why a particular decision should be segmented (beyond the banal observation that one of its elements is general or legal in nature) or how a reviewing court should perform a segmentation operation.

In summary, categories and context continue to exist side-by-side with little or no authoritative guidance on how they relate to one another. The possibility of 'segmenting' administrative decisions adds a further layer of complexity. In many cases, there will be no dispute about the standard of review, but as soon as there is, the problems with the Court's approach to standard of review are all too apparent.

B. The Return of Context

Both *Tervita* and *Saguenay* demonstrate an openness on the part of the Supreme Court to correctness and contextual analysis. Unthinking application of the reasonableness standard of review is not to be taken for granted. Several appellate decisions indicate that lower courts have understood this message.

A particularly clear example of the attraction of contextual analysis is *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*.[83] At issue was "whether an Assessment Review Board can increase a property assessment when a complaint is brought by a taxpayer seeking a reduction of the assessment".[84] For Slatter J.A., this question had to be answered by the courts: a standard of correctness applied.

Slatter J.A.'s comment that "a mechanical and formalistic test for the standard of review is not reflective of the subtlety of the underlying issues"[85] gives a flavour of his preferred approach. He provided six reasons justifying a correctness standard in this particular case, in particular, to justify his conclusion[86] that the present case "presents either an addition to or a variation of the four 'presumptive' categories" of correctness review set out in *Dunsmuir*, a conclusion that, in its equivocation, is indicative of the confused state of the relationship between categories and context.

First, the legislation provided for an appeal.[87] Second, the appeal to the courts had "specific mandatory parameters"[88] that commanded correctness review: in particular,

[79] *SODRAC 2003*, at para. 194
[80] *SODRAC 2003*, at para. 188.
[81] *SODRAC 2003*, at para. 189.
[82] *SODRAC 2003*, at para. 41.
[83] 2015 ABCA 85. See also *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 8.
[84] *Edmonton East Shopping Centres*, at para. 1.
[85] *Edmonton East Shopping Centres*, at para. 23.
[86] *Edmonton East Shopping Centres*, at para. 24.
[87] *Edmonton East Shopping Centres*, at para. 24.
[88] *Edmonton East Shopping Centres*, at para. 26.

where a case is remitted to the Board the legislation binds it to follow the directions given by the court. Third, the appeal is by way of leave, "a signal that the Legislature wishes to have questions of this sort reviewed by the superior courts, and the legislative intent is not fully realized without a correctness standard of review".[89] Fourth, statutory interpretation "is not the core of [the Board's] expertise".[90] Fifth, taxation is special: "the existence of a right of appeal is in keeping with the general democratic principle that taxpayers are entitled to have their liability to the government determined by the ordinary courts".[91] Sixth, "multiple tribunals" are involved in the assessment process,[92] which creates a need for judicial intervention to ensure coherence.

Having "weighed and considered" all these factors, Slatter J.A. applied a standard of correctness.[93] While one might not necessarily agree with each of Slatter J.A.'s justifications for correctness review, he surely mounted a formidable argument in this particular case, to which one can respond rather than having to read between the lines of his judgment. On the other hand, Slatter J.A.'s invocation of six distinct contextual reasons for favouring correctness review underlines the open-ended nature of the current contextual inquiry. And even if some of the factors, such as the presence of a statutory appeal, might seem to carry less weight in view of recent Supreme Court jurisprudence, the absence of any guidance on how to weigh competing factors and rebut the presumption of reasonableness review makes it difficult to describe Slatter J.A.'s approach or conclusions as wrong.

With context so dominant, categories can never be as categorical as their supporters would like.[94] Consider *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, where a school board had to decide whether to end its contractual relationship with a teacher, on the basis that the teacher had serious criminal antecedents. Having heard from the teacher, the executive committee of the board entered an in camera session during which it deliberated. Once its deliberations were concluded, the board issued a resolution removing the teacher from his position and providing some supporting reasons.

Subsequently, the teacher's union filed a grievance on his behalf contesting the dismissal, alleging for instance that the termination procedure in the collective agreement had not been followed. Notably, the collective agreement provided that a teacher could only be dismissed after "thorough deliberations" by the board. After the board had made its case to the arbitrator, the union called as witnesses the three members of the executive committee who had deliberated in camera. Ruling on the board's objection, the arbitrator

[89] *Edmonton East Shopping Centres*, at para. 27.
[90] *Edmonton East Shopping Centres*, at para. 28.
[91] *Edmonton East Shopping Centres*, at para. 29.
[92] *Edmonton East Shopping Centres*, at para. 30.
[93] *Edmonton East Shopping Centres*, at para. 31.
[94] See *e.g.* Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canada" (2014), 47 *University of British Columbia Law Review* 443.

concluded that the testimony would be relevant in assessing whether the deliberations were "thorough".

The Supreme Court of Canada was unanimous in concluding that it was legitimate for the arbitrator to have the decision-makers testify. It was wrong to suggest that the decision-maker's motives were "unknowable", a principle that "applies only to decisions of a legislative, regulatory, policy or purely discretionary nature made by public bodies".[95] Here, the board was acting as an employer, a situation in which "the principles of employment law that are applicable to any dismissal" apply.[96] Moreover, the principle of deliberative secrecy did not shield the members of the board.[97]

However, the Court divided six to three on the standard of review. For the majority, Gascon J. applied a standard of reasonableness, on the basis that labour arbitrators are to be afforded deference on matters of procedure and substance falling within their area of expertise, it was "up to the arbitrator to apply the rule of relevance to the facts of the case in such a way as he or she deems helpful for the purpose of ruling on the grievance".[98] That the arbitrator was applying general principles that can be applied in areas other than labour relations did not change this analysis, for their application "to a fact situation characteristic of a dismissal" did not "amount to a question that is detrimental to consistency in the country's fundamental legal order".[99]

Côté J. disagreed. Deliberative secrecy, like professional secrecy, must be interpreted in a uniform and consistent manner across regulatory domains. It is a question of general law of central importance to the legal system and outside the expertise of an arbitrator: "Where the question relates not simply to the rules of evidence in general, but to the scope of such basic rules as those relating to the immunities from disclosure and deliberative secrecy, a court reviewing an arbitrator's decision in this regard must be able to go further than merely inquiring into the reasonableness of the decision".[100]

This is further evidence that the categories alone rarely resolve the question of what standard of review to apply in difficult cases.[101] The dominant considerations were, for Gascon J., the relative expertise and scope of authority of the arbitrator and, for Côté J., the essentially legal nature of the question. These, it goes without saying, are contextual factors external to the categories. Context matters even when it is not supposed to.

[95] *Commission scolaire de Laval*, at para. 47.
[96] *Commission scolaire de Laval*, at para. 50.
[97] *Commission scolaire de Laval*, at para. 61.
[98] *Commission scolaire de Laval*, at para. 36.
[99] *Commission scolaire de Laval*, at para. 38.
[100] *Commission scolaire de Laval*, at para. 78.
[101] On this particular point see especially Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 Osgoode Hall Law Journal 317 and "*Dunsmuir's* Flaws Exposed: Recent Decisions on Standard of Review" (2012), 58 McGill Law Journal 483.

Andrew Green has been probably the strongest and most sophisticated defender of the Court's resort in *Dunsmuir* to categorical analysis.[102] I think it is fair to say, however, that Green's defence is lukewarm. He sees the "objective" of greater simplicity as a "move in the right direction", but his analysis of *Dunsmuir* leads him only to say: "The categorical approach *may* therefore reduce some errors and have some beneficial systemic effects…"[103] Moreover, although his institutionalist analysis sheds valuable light on the costs and benefits of categories versus context, it could be more alive to the doctrinal characteristics of modern administrative law. Green persuasively argues that courts will save time in identifying the appropriate standard of review by using categories rather than context. However, his focus is on the "institutional impact" of the categorical framework and "less about the application of the [reasonableness] standard".[104] The key problem is that context simply cannot be eliminated from judicial review:[105] the attempt to remove it from the framework for determining the standard of review has failed (and, as I will demonstrate in Part II, context also seeps into the framework for applying the reasonableness standard[106]). Context is not quite everything in judicial review of administrative action, but it is everywhere.

A way forward is suggested by the Federal Court of Appeal's approach – implicitly followed by a dissenting group of three judges at the Supreme Court of Canada – in *Wilson v. Atomic Energy of Canada Limited*.[107] The *Canada Labour Code* applies to a variety of enterprises falling under the authority of Parliament, i.e. federally-regulated entities. Section 240 protects some categories of employee from unjust dismissal. Wilson was dismissed without cause. He claimed he was unjustly dismissed for whistleblowing on his employer's activities. It fell to an independent adjudicator appointed under the *Code* to decide.

Unfortunately, there are two distinct streams of arbitral jurisprudence on a critical preliminary question. Some take the view that a without cause dismissal is *per se* unjust. Others prefer to say that the absence of cause is a factor to be taken into account in a global assessment of whether the dismissal was unjust.

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[102] Andrew Green, "Can There be too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 University of British Columbia Law Review 443.
[103] See Green at p. 485. My emphasis. See also at p. 469: "There…is a *trade-off* between the benefits of justification (both for monitoring and for the lower court adopting the correct standard) and the costs of complexity in terms of mistakes"; at p. 477: the "complexity [of the contextual approach] *may* have led to biases in the form of review, either through mistakes or manipulation that was difficult to police". My emphasis.
[104] Green at p. 447. See also the comments at p. 459 ("depending on [the reasonableness standard's] content") and p. 468 ("leaving aside the application of the standard").
[105] Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 Osgoode Hall Law Journal 317 and "*Dunsmuir's* Flaws Exposed: Recent Decisions on Standard of Review" (2012), 58 McGill Law Journal 483; Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's L.J. 59.
[106] See also Audrey Macklin, "Standard of Review: Back to the Future" in Colleen Flood & Lorne Sossin eds., *AdministrativeLaw in Context*, 2d ed (Toronto: Emond Montgomery, 2013), p. 279, at p. 320.
[107] 2015 FCA 17.

Stratas J.A. applied a standard of correctness on the basis that this was a general question of law of central importance to the legal system and outside the decision-maker's expertise. Although the majority at the Supreme Court of Canada, *per* Abella J., applied a reasonableness standard on the now-familiar basis that the decision-maker was interpreting materials "within his expertise",[108] the dissenting judges applied a correctness standard. However, Côté and Brown JJ. made no attempt to justify their choice of standard in terms of the *Dunsmuir* framework.[109] Bearing in mind the goal of articulating a rational next step for Canadian administrative law (rather than making a clean break with *Dunsmuir*), it is therefore useful to consider Stratas J.A.'s approach in some detail.

To justify this categorization, Stratas J.A. invoked rule-of-law concerns created by the fact that adjudicators "do not consider themselves bound by the holdings on the other side", with pernicious results: "Draw one adjudicator and one interpretation will be applied; draw another and the opposite interpretation will be applied. Under the rule of law, the meaning of a law should not differ according to the identity of the decision-maker".[110] In my view, explained in greater detail elsewhere,[111] Stratas J.A.'s concern for the rule of law should have been offset by an appreciation of the importance of decisional autonomy, something that follows from the democratic principle relied on in *Dunsmuir*; I agree with the majority of the Supreme Court of Canada that a reasonableness standard was appropriate in this case.[112]

For present purposes, what is interesting about Stratas J.A.'s approach is that it relies less on categorizing the question at issue as a 'general question of law' than it does on contextual analysis. Stratas J.A. appealed not to categories but to the dispute resolution function performed by reviewing courts: sometimes, a question needs a uniform answer and, sometimes, a court will be the only one able to provide it. There is much to commend this approach. It replaces metaphysical musings about reviewing courts' role in keeping decision-makers within their "jurisdiction" with an approach that builds on the judicial role in establishing uniform national standards on important matters of principle.

Stratas J.A.'s approach also points towards a means of cabining the contextual factors: the two principles at the heart of *Dunsmuir* – the rule of law and democracy – can provide a framework for the identification of contextual factors. Insisting that contextual

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[108] 2016 SCC 29, at para. 15.

[109] They did reference the rule of law at some length (para. 79 ff) but made no mention of the conception of the rule of law set out in *Dunsmuir* or of the democratic principle. Their preferred basis for employing correctness was the existence of "one conflicting but reasonable decision" (at para. 89, see also the reference to "discord" at para. 91), which would represent a new correctness category (as the majority explained at para. 17). However, Côté and Brown JJ. did not mention the *Dunsmuir* framework. Nor, for that matter, did they mention *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, which remains a leading decision on conflicting administrative decisions.

[110] *Wilson*, at para. 52.

[111] "The Principle of *Stare Decisis* in Canadian Administrative Law" (2016), 49 Revue juridique Thémis 757, at pp. 773-778.

[112] 2016 SCC 29, at para. 15.

factors be drawn only from these principles would provide some structure to the contextual inquiry.

Moreover, although the confused relationship between categories and context complicates matters, reference to the rule of law and democracy as guiding principles may assist judges who must navigate the morass of the standard of review analysis. It is possible to envisage an approach in which the *Dunsmuir* categories function as "signposts",[113] with contextual factors providing further guidance where necessary, without sight ever being lost of the need to justify the choice of standard of review by reference to the rule of law and democracy.

In addition, as I will explore below, these principles can also assist in structuring reasonableness review, in which case the clear distinction selecting the standard of review and identifying the boundaries of reasonableness would break down, perhaps resulting in a single contextual inquiry that sets the 'range of reasonableness'.

Recognition of this possibility was evidently at the root of Abella J.'s intriguing suggestion, in *Tervita*, that the lines between reasonableness and correctness may soon be "completely erased",[114] a suggestion which became an "option" for future reform in *Wilson*.[115] Contextual factors would still be important, but would operate only to determine the "range" of reasonable outcomes, thereby eliminating the confusion caused by the uncertain relationship between categories and context.[116]

II. Step 2: Reasonableness Review

Reasonableness is fast becoming the dominant organizing principle of Canadian administrative law; in *Wilson*, Abella J. suggested that reasonableness should now become the *only* standard of review. However, it needs to be properly understood. As one commentator has noted, "the Court continues to veer between two approaches to

[113] *Edmonton East Shopping Centres*, at para. 22.
[114] *Tervita*, at para. 171.
[115] 2016 SCC 29, at para. 19.
[116] For the moment, the categories are here to stay. It was suggested in *SODRAC 2003* that one of the categories (true questions of jurisdiction) might be abolished, but a decision was deferred until the Court hears argument on the point, something it has evidently been waiting for since 2011: A*lberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 SCR 654, at para. 34. *Saguenay* also contains a lengthy discussion of the Tribunal's power to consider an ancillary complaint about the display of religious symbols in the municipal chamber (at paras. 53 to 62). The Tribunal is seised of matters after a review by the Commission, a screening body. Here, it was not properly seised of the legality of the religious symbols because there had been no preliminary review. Gascon J. accepted that the religious symbols could be taken into account in determining the overall character of the prayer but held that the Tribunal had no "jurisdiction" to rule on the legality of the display (at para. 156). Yet, no standard of review analysis was conducted of this question. Indeed, given that the jurisdictional limit is found in the Tribunal's home statute one might wonder whether a standard of reasonableness should have been applied to the question of whether the Tribunal did have the competence to make a finding in relation to the display of religious symbols. Another example of the Court dealing with arguably a "true" jurisdictional issue without acknowledging it is *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 SCR 135, at paras. 34-49.

reasonableness review that are at opposite extremes".[117] I argue that contextual factors cabined by the rule of law and democratic principles – an idea introduced in Part I – can shape the content of reasonableness review.

Courts of Appeal around the country have been putting flesh on the bones of the skeletal definition given in *Dunsmuir*. There, reasonableness was said to have two components: first, a decision-making process bearing the hallmarks of justification, transparency and intelligibility; second, a decision falling within the range of possible, acceptable outcomes in respect of the facts and the law. The florid language of the first component has been replaced by a more functional test which asks whether the reviewing court can, from the record and reasons provided, clearly understand how the decision-maker reached its conclusion.[118] Satisfying this functional test is necessary to permit a reviewing court to assess the second component: for without a clear understanding of why the decision was reached and on what it was based, it is impossible for the courts to perform their constitutionally mandated function of judicial review.[119]

As to the second component, there is always a 'range' of reasonable outcomes that "must be assessed in the context of the particular type of decision making involved and all relevant factors":[120]

> In some cases, Parliament has given a decision-maker a broad discretion or a policy mandate – all things being equal, this broadens the range of options the decision-maker legitimately has. In other cases, Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered – all things being equal, this narrows the range of options the decision-maker legitimately has. In still other cases, the nature of the matter and the importance of the matter for affected individuals may more centrally implicate the courts' duty to vindicate the rule of law, narrowing the range of options available to the decision-maker.[121]

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[117] Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012), 38 Queen's Law Journal 59, at p. 94.

[118] See *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 and *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, at para. 89.

[119] See *e.g. Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, at paras. 122-124; *Wall v. Office of the Independent Police Review Director*, 2014 ONCA 884, at para. 54.

[120] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, at para. 18.

[121] *Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha*, 2014 FCA 56, at para. 91. See also *Wilson*, at para. 22, *per* Abella J., though note that Cromwell J., at para. 73, disavowed the suggestion that there could be "unlimited numbers of gradations of reasonableness review". Abella J.'s criticism of the Federal Court of Appeal for developing "a potentially indeterminate number of varying degrees of deference" (at para. 18) is difficult to square with her acknowledgement (at para. 22) that "the range [of reasonable outcomes] must necessarily vary", which was the very point the Federal Court of Appeal has consistently made in its administrative law jurisprudence. The most plausible explanation for this apparent discrepancy is that Abella J. objects to the idea that descriptive labels for particular types of range – e.g. a "narrow" or "broad" range – should have normative content, i.e. that the outcome of a case might turn on the characterization of the range of reasonable outcomes as merely "broad" or "very broad", which would recall the importance given under the defunct pragmatic and

As Gerald Heckman comments, it may be "that *Dunsmuir* has not really simplified the task of ascertaining the appropriate degree of deference, but has simply left it for a later stage in the analysis".[122] Indeed, at times the range of options might be very narrow indeed, especially where the *Charter* is involved. Consider *Loyola High School v. Quebec (Attorney General).*[123] Quebec has a secular religious education course that is mandatory across the province, in public and private schools alike. An exemption is available "provided the institution dispenses programs of studies which the Minister…judges equivalent". Loyola, a Jesuit high school in Montreal, applied for an exemption. It wishes to teach a religious education from (primarily) a Catholic perspective. The Minister refused the application, essentially because Loyola wanted to teach comparative religion and ethics from a Catholic point of view. He wrote, for example: "According to the summary of the program proposed by Loyola High School and transmitted to the department for evaluation, the program does not meet the requirements for the Ethics and Religious Culture program in terms of religious culture, as religions are studied in connection with the Catholic religion".

The Supreme Court of Canada split on how to review this decision. One might have thought that the analytical framework was settled by *Doré v. Barreau du Québec*,[124] a unanimous decision written by Abella J. in which a deferential approach was preferred to review of discretionary decisions affecting *Charter* rights. For a majority of four judges in *Loyola*, Abella J. applied the *Doré* framework to the minister's refusal to grant the exemption. Yet, without mentioning *Doré*, the three judges in the minority — including two who signed onto *Doré* — applied a proportionality test.

As for Abella J.'s application of the reasonableness standard, it is difficult to discern how it is more deferential than, or analytically distinct from, proportionality. She began by saying: "the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the Charter protections at stake and the relevant statutory mandate".[125] But she quickly added: "In the context of decisions that implicate the Charter, to be defensible, a decision must accord with the fundamental values protected by the Charter".[126] Indeed, "in contexts where Charter rights are engaged, reasonableness *requires* proportionality".[127]

Analytically speaking, the conclusions of the majority and minority were almost identical (though they disagreed on an important point about the teaching of ethical issues).[128] For both majority and minority, the Minister's inflexible position that religion had to be

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functional analysis to whether a decision was merely unreasonable or patently unreasonable. Based on her comments in *Wilson*, I think that Abella J. would be receptive to the approach set out in this paper.

[122] Gerald A. Heckman, "Substantive Review in Appellate Courts Since *Dunsmuir*" (2010), 47 Osgoode Hall Law Journal 751.

[123] 2015 SCC 12.

[124] [2012] 1 SCR 395.

[125] *Loyola*, at para. 37.

[126] *Loyola*, ibid.

[127] *Loyola*, at para. 38, emphasis added.

[128] Explained by Abella J. at para. 71 et seq and on remedy, see paras. 164-165.

taught from a neutral perspective violated religious freedom and ran counter to the purpose of the exemption provision. A unanimous win for Loyola, little unanimity on the relationship between constitutional and administrative law, but clarity at least on the narrowness of the range of reasonable options open to a decision-maker who infringes upon *Charter* rights.[129]

In other recent cases involving garden variety statutory interpretation rather than *Charter* issues, the Court has confirmed that, on some occasions there will only be one possible, acceptable outcome.[130]

In general, the range of reasonable outcomes is determined by contextual factors drawn (it seems) from the rule of law and democracy principles invoked in *Dunsmuir*.[131] On the one hand, statutory language (or the "rationale of the statutory regime"[132]) may restrict the range of reasonable outcomes, a nod to democracy, as might the importance of a decision to an individual, a nod to the rule of law. On the other hand, where a decision-making power has been granted to an expert body or a politically accountable minister, the range of reasonable outcomes will generally be larger, because of the body's institutional knowledge or the minister's democratic credentials, and in some cases the legislature might have drawn the relevant criteria in generous terms, which further expands the range. Regardless, the boundaries of reasonableness are drawn in large part by reference to the rule of law and democracy.

Identifying the range of reasonable outcomes is only part of the reasonableness analysis, however. It is necessary to develop the analytical structure of reasonableness to assist courts in determining *why* a decision falls outside the range of reasonable outcomes. Here again the principles of the rule of law and democracy are important. The rule of law, with

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[129] It is worth at least noting that, in some respects, the English courts have adopted a similar approach to reviewing the reasonableness of decisions. The most significant case is *Pham v. Secretary of State for the Home Department*, [2015] UKSC 19, where Lord Sumption noted that in recent decades, English courts have expanded "the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality" (at para. 105). There is now "a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference" (at para. 106). In a passage reminiscent of recent Canadian commentary on the nature of reasonableness review, he said:

> It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter…In some cases, the range of rational decisions is so narrow as to determine the outcome (at para. 107).

[130] *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58.

[131] Compare *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, at para. 22, advocating "a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account" in which the link back to the rule of law and democracy is less clear. See also *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, where reference is made to the separation of powers.

[132] *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 SCR 5, at para. 25.

its concern for the maintenance of the precepts of the legal order, requires reviewing courts to police the boundaries of reasonableness. Equally, however, democracy, with its recognition of the decisional autonomy of the decision-maker chosen by the legislature to regulate a particular area, imposes important restraints on the type of analysis a reviewing court may legitimately conduct.

A. How to Do Reasonableness Review

There is a fascinating review of Canadian administrative law on reasonableness in *Workplace Health, Safety and Compensation Commission v. Allen*.[133] A received benefits for a workplace injury. These benefits were capped at 80% of actual earnings. A then retired and was to receive benefits "equal" to the pension he would have received. The Commission sought to cap the pension at 80% as well. A took a different view but lost in the administrative process. He won, however, on judicial review; the first-instance judge and Court of Appeal both concluded that there was only one reasonable outcome, that benefits could not be capped.

Building on the Supreme Court of Canada decision in *Newfoundland Nurses*, the Commission argued that administrative decisions should be presumed correct. Barry J.A. rejected the suggestion that there was any presumption of correctness of administrative decisions. If anything, there is a presumption of validity that places an "onus" on an applicant "to point to some reason, whether stemming from the facts or the words of the statute to question the reasonableness of the tribunal's interpretation", for which the decision-maker must provide "sufficient justification" in the form of "a convincing explanation why its choice of meanings was reasonable.[134]

Along similar lines, as least as far as the structure of reasonableness review is concerned, is *Delios v. Canada (Attorney General)*,[135] a straightforward review of a labour adjudicator's interpretation of a collective agreement. First, Stratas J.A. noted, although the reviewing court nominally applied a standard of reasonableness, it had "actually performed correctness review".[136] Reasonableness review does not permit a court to arrive at its own preferred interpretation of a provision and then check to see whether the administrative decision-maker's interpretation matches it: "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable". That would be disguised correctness review, "the court developing, asserting and enforcing its own view of the matter – correctness review".[137] Second, Stratas J.A. recalled the now-familiar idea that the range

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[133] 2014 NLCA 42.
[134] *Allen*, at paras. 41-42. Barry J.A. also quoted (see paras. 67-69) generously from Paul Daly, "Unreasonable Interpretations of Law" in Joseph Robertson, Peter Gall and Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Lexis Nexis, Toronto, 2014)). Although Rowe J.A. refused to endorse these paragraphs, he did endorse the discussion just cited, which paraphrases the essence of the argument in the paper from which Barry J.A. quoted.
[135] 2015 FCA 117.
[136] *Delios*, at para. 25; and see the very instructive examples at para. 23.
[137] *Delios*, at para. 28.

of acceptable and defensible outcomes "can be narrow, moderate or wide according to the circumstances"[138] before adding, in a passage that needs to be quoted at length:

> The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility. Here, certain indicators, sometimes called "badges of unreasonableness," may assist…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.[139]

Badges of unreasonableness must be identified in order to justify striking down a decision, as the analyses in *Allen* and *Delios* indicate. Notably, the *indicia* of unreasonableness can be drawn from the same sources as the contextual factors that make up the range of reasonable outcomes: inconsistent decisions, for instance, sound in the rule of law;[140] whereas decisions that fail to take into account important statutory language do violence to the democratic principle.[141] And in general, ensuring that decisions respect the fundamental precepts of the legal system is a means of upholding the rule of law.

But this is not a laundry list of potential reasons for judicial intervention. Sometimes, perhaps even often, what look like badges of unreasonableness on first glance will turn out on a patient review of the record to be perfectly acceptable and defensible ways of expressing a particular thought or justifying a particular conclusion.[142]

Where a decision is indelibly tainted by a badge or badges of unreasonableness, judicial intervention will be more or less appropriate depending on the range of reasonable outcomes. For instance, the narrower the range, the more that will be required by way of explanation of the badge(s) of unreasonableness tainting the decision. Conversely, the wider the range, the less a reviewing court should require by way of explanation. In

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[138] *Delios*, at para. 26.
[139] *Delios*, at para. 27.
[140] See *e.g. Wilson*, above.
[141] See *e.g. Allen*, above and *Corporation d'Urgences-santé c. Syndicat des employées et employés d'Urgences-santé (CSN)*, 2015 QCCA 315.
[142] See e.g. *Saskatchewan Power Corporation v Alberta (Utilities Commission)*, 2015 ABCA 183, at para. 57: "We do not read these paragraphs as conflicting to the degree advanced by the appellants".

searching for these explanations, an administrative decision should be read fairly, not picked apart in a "line by line treasure hunt for error".[143]

To summarize: if the same contextual factors that are relevant to choosing the standard of review are also relevant to determining the range of reasonable outcomes, Canadian law has, despite everything, come a long way towards achieving coherence in the standard of review and, perhaps, towards an all-encompassing flexible reasonableness standard that restricts extremely narrowly or expands very broadly depending on the interplay of the rule of law and democracy in a given case.

This would avoid altogether the problematic relationship between categories and context described above. And it would not necessarily raise constitutional difficulties by eliminating correctness review. In *Alberta Teachers'* Cromwell J. argued that the "constitutional guarantee" of judicial review[144] "does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard".[145] Abella J. had a strong response to this argument in *Wilson*:

> Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there *be* judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have. I see nothing in its elaboration of rule of law principles that precludes the adoption of a single standard of review, so long as it accommodates 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*.[146]

More generally, reasonableness review, guided by the rule of law and democracy, is not "unduly deferential".[147] And if the range of reasonable answers will sometimes be so narrow as to admit of only one possible, acceptable outcome, this ensures that the constitutional guarantee of judicial review is more than an "empty shell";[148] in some cases, it will shade into correctness review, but without engendering endless confusion between categories and context. Doing away with this confusion would save litigants and courts precious resources and thus have its own rule-of-law and, indeed, access-to-justice advantages.

B. How Not to Do Reasonableness Review

These intelligent efforts to explain and structure the reasonableness inquiry can be contrasted with the less impressive guidance from the Supreme Court of Canada. As

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[143] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 SCR 458, at para. 54.
[144] *Crevier v. Attorney General of Quebec*, [1981] 2 SCR 220.
[145] *Alberta Teachers'*, at para. 103.
[146] 2016 SCC 29, at para. 31.
[147] *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, at para. 57.
[148] *Alberta Teachers'*, at para. 103.

Professor Mullan has recently suggested, "If the whole standard of review enterprise is not to fall further into disrepute, the Supreme Court of Canada needs to articulate more fully a template for the conduct of proper or appropriate deferential reasonableness review and to condemn disguised correctness review in all of its various forms".[149]

One case is used here for the purposes of comparison, but many others could be singled out. In general, these are decisions in which the language of reasonableness performs a primarily rhetorical function while the Court applies a form of review that treats the administrative decision as a decorative ornament rather than the considered position of the legislature's designated decision-maker.[150] The Court has understood this in the past. Iacobucci J. concisely explained – in part by reference to the democratic principle – the analytical structure of reasonableness review in *Law Society of New Brunswick v. Ryan*.[151] First, "a court should not at any point ask itself what the correct decision would have been" because the administrative decision-maker, not the court, has been assigned by the legislature "the primary responsibility of deciding the issue according to its own process and for its own reasons".[152] Building on this invocation of the democratic principle, Iacobucci J. warned: "[e]ven 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".[153]

Although the following discussion is primarily analytical, it is underscored by the democratic principle. A legislative choice to designate a decision-maker other than a court as regulator of a specified area should be respected. At the same time, upholding the rule of law requires courts to keep a check on the rationality of administrative decision-making. Applying the reasonableness standard appropriately is the primary way for Canadian courts to respect legislative choices to grant decision-making autonomy to administrative bodies.[154]

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[149] See David J. Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (2016), 4(1) *Energy Regulation Quarterly*, available online: http://www.energyregulationquarterly.ca/articles/2015-developments-in-administrative-law-relevant-to-energy-law-and-regulation#sthash.kdNpH500.8UHTYrEZ.dpbs

[150] See *e.g. Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58; *Wilson v. Atomic Energy Agency of Canada Ltd*, 2016 SCC 29.

[151] [2003] 1 SCR 247.

[152] *Ryan*, at para. 50.

[153] *Ryan*, at para. 51.

[154] As a result, and despite my suggestion to the contrary in "The Scope and Meaning of Reasonableness Review" (2015), 52(3) Alberta Law Review 799, at pp. 824-825, I think it is wrong to say that a narrow range of reasonable outcomes – even one that recognizes only one reasonable outcome – is the functional equivalent of correctness review. Correctness review permits the reviewing court to step into the shoes of the administrative decision-maker, whereas reasonableness review (properly applied) requires a reviewing court to begin with the administrative decision and carefully demonstrate why it is unreasonable.

The province of Quebec allows pregnant workers to exercise a right of withdrawal from dangerous work environments. At issue in *Dionne v. Commission scolaire des Patriotes*,[155] was a supply teacher's thwarted effort to exercise her right of withdrawal. A unanimous Supreme Court of Canada quashed the decision of the *Commission des lésions professionnelles* and held that teacher was entitled to withdraw.

Although it may seem unusual to treat schools as dangerous workplaces, it is common and accepted practice in Quebec for pregnant teachers to withdraw from the workplace because of the risk of contracting harmful diseases from their students. Reading between the lines of the present case, the school board and the *CLP* apparently took umbrage at the teacher's temerity in claiming her statutory rights, evidence perhaps of a disconnect between law-in-the-books and law-in-practice and lingering discomfort amongst employers about assertive employees.

Be that as it may, the most interesting aspect of the case, from an administrative-law point of view, lies in the differing approaches to the task of judicial review taken by the appellate judges involved. In my view, the Quebec Court of Appeal's stance was more appropriate than that of the Supreme Court of Canada. And of the Quebec Court of Appeal judges, the dissenting reasons of Dalphond J.A. are preferable.

First, the facts. Dionne was a qualified teacher. But she did not have a permanent contract of employment. As a supply teacher, she was contacted on a regular basis by the school board and filled in as requested. Once she learned that she was pregnant, she responded to offers from the school board by saying she would be happy to teach but that she would have to exercise her right to withdraw due to her pregnancy.

All agree that when a supply teacher agrees to teach for a particular period of time, a contract is formed between the teacher and the school board. The question was whether, in light of her desire to exercise her right of withdrawal, D was a "worker" for the purposes of the *Act respecting occupational safety*, ss. 40-48 of which provide for the right of withdrawal and associated rights. Properly speaking, the right is to be re-assigned to other activities that are not dangerous, with a right to withdraw, with benefits, if no re-assignment is offered by the employer.

In the Supreme Court, Abella J. made only fleeting reference to the decision under review. She engaged in an analysis of the text and purpose of the statutory provisions at issue, concluding[156] that the legislation "protects pregnant women in two significant ways: it protects their health by substituting safe tasks for dangerous ones, and it protects their employment by providing financial and job security". She mentioned and criticized the *CLP's* conclusion that Dionne could not be treated as a "worker" because her inability to go to the workplace frustrated the creation of a contract of employment. The whole point of the scheme, in Abella J.'s view was "to protect pregnant workers who have a

[155] [2014] 1 SCR 765.
[156] *Dionne*, at para. 30.

contract to work", in which case "[i]t would be anomalous, to say the least, to use the legislated right of a pregnant worker to withdraw from an unsafe workplace to conclude that her withdrawal negates the formation of the contract of employment…"[157] Thus, Abella J. continued, as soon as Dionne had accepted the offer, she became a "worker" within the meaning of the statute: "Her pregnancy was not an incapacity that prevented her from performing the work, it was the dangerous workplace, and that in turn triggered her statutory right to substitute that work with a safe task or withdraw".[158]

This was the core of Abella J.'s reasoning and justified her conclusion that the *CLP's* decision was unreasonable. The thrust of Abella J.'s analysis was that the *CLP should* have answered the question before it in a particular way. Passing references to unreasonableness[159] cannot obscure the fact that Abella J. essentially stepped into the shoes of the *CLP* and rendered what she thought was the most appropriate decision in the circumstances. Reading the judgment from start to finish, one could be forgiven for thinking the Supreme Court was sitting in an appellate capacity, rather than conducting a judicial review.

Contrast this approach with that of Dalphond J.A., dissenting in the Quebec Court of Appeal.[160] Both Dalphond J.A. and Abella J. reached the same result, but by very different means. Dalphond J.A. began with the decision of the *CLP*, underlining its central elements:

> Partant, pour qu'il y ait formation d'un nouveau contrat, il faut que la personne soit en mesure de s'obliger à effectuer un travail sous la subordination d'un employeur et qu'elle soit rémunérée en conséquence, selon les termes de l'article 2085C.c.Q.
>
> Le tribunal ne peut donc partager l'opinion de la procureure de madame Dionne quand elle allègue qu'une seule offre de suppléance acceptée par madame Dionne entraîne la formation d'un contrat. En effet, il manque une cause essentielle à ce contrat, soit une prestation de travail. Ainsi, les dix fois, en novembre 2006, où madame Dionne accepte une offre de suppléance, il n'y a pas formation de contrat puisque aucune prestation de travail n'est offerte ou ne peut être offerte par elle…[161]

Plainly, the *CLP's* conclusion was based on the absence of a contract between the parties. Dalphond J.A. went on to examine the text and purpose of the legislation, but primarily to provide context for his conclusion that the *CLP's* position was contrary to the text and purpose of the law.[162]

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[157] *Dionne*, at para. 39.
[158] *Dionne*, at para. 43.
[159] *Dionne*, at paras. 36 and 45.
[160] 2012 QCCA 609.
[161] 2012 QCCA 609, at paras. 37-38.
[162] 2012 QCCA 609, at para. 40.

He gave three reasons why the *CLP's* decision was unreasonable. First, the *CLP's* own logic supported the conclusion that offer and acceptance of occasional work triggered the right to withdrawal and related provisions, but the school board had made no effort to give Dionne other tasks, such as correcting work or dealing with small groups of students.[163] Second, for the *CLP* to deny that a contract had been created was contrary to its own factual conclusions and the evidence in the record.[164] Third, the *CLP's* position was irrational, because it placed teachers like Dionne in an invidious position of choosing between potential harm to their child and the loss of statutory benefits.[165]

Dalphond J.A.'s approach is notable because he carefully examined the reasons given for the administrative decision and, by demonstrating their internal inconsistencies and irrational effects, justified his decision to intervene. Rather than establishing an external benchmark based on his examination of the law and the facts against which to judge the decision, as Abella J. did, he worked from *within* the decision to demonstrate why it was untenable. Whereas Abella J. asserted[166] that, based on the evidence, there was no contract, Dalphond J.A. preferred to say that the *CLP's* own conclusion was that there was a contract and that its refusal to recognize this led to perverse results.

III. Conclusion

In the wake of the recent Supreme Court of Canada decisions on standard of review, discussed in Part I, it seems fair to say that both correctness and context are firmly in vogue. Lower courts have already fastened onto these decisions to justify more contextual approaches to selecting the standard of review and to applying a correctness standard.

Given that the Supreme Court has not yet been clear on the precise relationship between categories and context, or the contextual factors to which reviewing courts might legitimately have regard, there is reason to fear that *Tervita* and *Saguenay* might create confusion in Canadian administrative law. However, the Federal Court of Appeal decision in *Wilson* and Abella J.'s *obiter* comments on appeal indicate that the contextual factors may be confined by the two principles said to underlie the *Dunsmuir* framework: the rule of law and democracy. Hopefully, in future cases, courts will explain how the contextual factors relied upon relate to these core principles. Otherwise, unfortunately, the law will become more confused.

One might quibble that this simply represents "the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense".[167] However, it is better "to adapt the framework of judicial review to varying circumstances and different

[163] 2012 QCCA 609, at paras. 48-49.
[164] 2012 QCCA 609, at para. 50.
[165] 2012 QCCA 609, at para. 51.
[166] *Dionne*, at para. 43.
[167] *Dunsmuir*, at para. 139, *per* Binnie J.

kinds of administrative actors than it is to go through the same checklist of factors in every case, whether or not they are pertinent".[168]

Another reason to hope that these principles come to structure the standard of review inquiry is that they are already influential in applying the reasonableness standard discussed in Part II. In particular, the range of reasonable outcomes can be determined by reference to contextual factors drawn from the rule of law and democratic principles, and the *indicia* of unreasonableness that must be identified to justify judicial intervention also sound in these underlying principles. Recognizing the conceptual unity between the task of selecting the standard of review and applying reasonableness points the way to a further simplification of the *Dunsmuir* framework: collapsing the correctness and reasonableness standards into one range of permissible outcomes that expands or contracts depending on contextual factors.

But attention must also be paid to the analytical structure of reasonableness review. If reasonableness is not applied in a way that is respectful of the democratic principle embodied in the legislative choice to grant decision-making authority to a body other than a court, confusion lies ahead. Hopefully, 10,000 more citations to *Dunsmuir* from now, Canadian courts will have achieved the greater degree of conceptual clarity that now seems possible.

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[168] *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, at para. 195, *per* LeBel J. See similarly *Dunsmuir*, at para. 160, *per* Deschamps J., emphasizing the desirability of focusing "on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself".