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Can Pragmatism Function in Administrative Law?

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Introduction

Administrative law is complex, both normatively and practically. Practical complexity arises from the enormity of the administrative state. Across Canada, hundreds of administrative decision-makers implement and oversee a wide range of regulatory initiatives. Each is constituted by its own legislation, operates according to its own formal and informal norms, makes substantive decisions on a range of issues, and is subject to judicial review to ensure that its decisions are rendered fairly and in accordance with law. The plurality of administrative decision-makers makes it practically difficult to assert a single principle or set of principles that govern judicial oversight of those decision-makers.

Normative complexity arises from questions about the interactions between our institutions of government. How can administrative decision-makers ensure their decisions have democratic and legal authority? And how do courts, on review, respect multiple constitutional values including legislative supremacy, the separation of powers, and the rule of law? The normative complexity then gives rise to a further practical complexity: how do courts resolve and respect these difficult normative questions without increasing the cost and complexity of judicial review? These institutional dilemmas become especially vexing given that the parties to judicial review are fundamentally indifferent to the underlying normative questions, caring only about the fair and just resolution of their own administrative problems.

This article draws out the ways in which Justice Rothstein grappled with this complexity. It argues that Justice Rothstein took a pragmatic approach to complexity in administrative law. Specifically, he sought to articulate a framework for judicial review that was workable for

administrative decision-makers, litigants, their lawyers and reviewing courts. In addition, he looked to past experience with judicial review, evidenced in judicial precedent, rather than focusing on abstract theoretical norms.

Taking that approach was not without risks. Purely pragmatic approaches to judicial review have tended to increase, rather than decrease complexity in administrative law.[1] They have also failed to resolve normative problems satisfactorily. Justice Rothstein's commitment to pragmatism did not, however, fail in this way. Rather, we argue that it reshaped the modern architecture of judicial review in a way that is both more practically workable *and* more normatively coherent than in the past. He created greater simplicity and clarity in the standard of review analysis, while also ensuring that that analysis was able to address the key normative questions about the appropriate division of responsibility between the court and the administrative decision-maker. Ultimately, his quest for pragmatism led him closer to a principled approach, in which judges are always required to pay respectful attention to the substance and context of administrative decisions.

The Supreme Court's administrative law jurisprudence remains imperfect. Giving respectful attention to administrative decision-making, while also pushing administrative decision-makers to justify their decisions properly, challenged Justice Rothstein, and continues to challenge the Court. This is a particular problem when the administrative decision-maker offers inadequate reasons or only one side participates in the judicial review such that the application is not thoroughly contested. Under these conditions, it is not always clear how a court ought to accord deference to administrative decision-makers while also ensuring that the individuals affected by their decisions are treated fairly by the state. To the extent that he himself avoided

[1] We offer a brief synopsis of this history in Part I *infra*. See also, e.g., Paul Daly, "The Struggle for Deference in Canada" in Mark Elliott and Hanna Wilberg eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015) 297; David Mullan, "Establishing the Standard of Review: The Struggle for Complexity" (2004) 17 Can J Admin L & Prac 59.

these pitfalls, and adopted an architecture that, while pragmatic, pushed the courts towards the normative model of deference as respect, Justice Rothstein left Canadian administrative law in a considerably better place at the end of his Supreme Court tenure than where he found it.

Part I sets the stage for examining Justice Rothstein's administrative law jurisprudence by introducing the normative and practical complexities that arise in the context of judicial review, the mixed results of the Supreme Court's attempts to address these complexities, and finally, what a satisfactory resolution to the normative and practical problems of judicial review ought to include. It argues that David Dyzenhaus's model of deference as respect – a model to which the Supreme Court has frequently referred – provides a compelling approach for coping with the complexity of administrative law. Deference as respect requires judges to pay respectful attention to the reasons offered by the administrative decision-maker, while also emphasizing the importance of administrative decision-makers providing reasoned justifications for their decisions. The theory underlying deference as respect also offers a potential resolution to the normative tension between legislative supremacy and the rule of law, which has bedeviled much of the Court's administrative law jurisprudence.

Part II then turns to Justice Rothstein's jurisprudence, setting out his response(s) to complexity in administrative law. It argues that Rothstein's approach shares three important objectives with Dyzenhaus. First, Justice Rothstein sought to minimize the role of the standard of review analysis, and to focus the attention of administrative bodies, litigants and the courts on the substance of the decision before them. Second, Justice Rothstein wanted administrative decision-makers to offer cogent reasons for their decisions. And third, he demonstrated a clear willingness to share the project of interpreting law with administrative decision-makers when they reasoned in this way. At the same time, however, Justice Rothstein's focus on pragmatism remained intact. He remained attuned to the potential injustices and unfairness that can arise from the practical complexities of administrative law, leading him, in some cases, to depart from the methodological

approach suggested by Dyzenhaus's notion of deference as respect. But even when he did so, his reasoning remained oriented toward the underlying concerns of deference as respect.

To understand these aspects of Justice Rothstein's jurisprudence, this Part considers first his opinion in *Canada (Citizenship and Immigration) v Khosa*.[2] It casts this opinion in a new light, suggesting that it can be understood as consistent with the three aims that underscore his approach to judicial review. It then turns to the architecture of judicial review that Rothstein's decisions otherwise reflect, both in terms of his structure for how courts should approach identifying the standard of review and in terms of how he approached the act of deferential review in specific cases. Finally, we review the cases in which Justice Rothstein seemed, on the surface, to depart from respectful deference, to show how he reconciled the normative and practical challenges that arise when administrative decision-makers offer incomplete reasons.

At the end of the day, Justice Rothstein's pragmatic approach to administrative law has allowed courts and administrative decision-makers to occupy a shared space in which administrative decision-makers justify their legal decisions and courts respect the justifications that administrative decision-makers offer. The dangers of administrative law remain: the Court always risks unwarranted interference or unjustified deference. But for now the architecture of judicial review developed by Justice Rothstein, and his conscientious adherence to respectful deference in all but a few exceptional cases, have pointed the courts in the right direction.

I. The Normative and Practical Problems of Judicial Review

In *Dunsmuir*, the Supreme Court articulated the normative problem of judicial review:

> Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the

[2] 2009 SCC 12

> initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.[3]

In other words, how does a court uphold the rule of law – by ensuring all exercises of public authority are authorized by law – and simultaneously respect legislative supremacy when the legislature has stated that an administrative body – not the courts – has a mandate to determine questions of law?

The vexing and enduring nature of this tension can be traced back to an "orthodox" interpretation of A.V. Dicey,[4] whose work on the English constitution casts a long shadow over Canadian administrative law.[5] The orthodox interpretation is, in brief, that Dicey envisioned dual monopolies: a legislative monopoly over the making of law and a judicial monopoly over the interpretation of law. This vision of competing monopolies precluded any independent role for the administrative state. Given that the administrative state exists, however, a tension arises that his work does not obviously resolve. When a legislature delegates to an administrative decision-maker the authority to determine questions of law, should the determining factor be the legislative monopoly over law-making or the judicial monopoly over legal interpretation? The court's monopoly over statutory interpretation clashes with the legislature's explicit delegation of that authority to an administrative body. Yet the very fact of legislative delegation also includes some inherent limits on the exercise of delegated power. Privative clauses, which purport to remove the Court's supervisory role and give the administrative decision-maker the final say on legal questions, only enhance this problem.[6] The challenge for the courts is how to address this apparent tension by determining when it is appropriate to defer to the decisions of administrative bodies and when it is appropriate to intervene.

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[3] *Dunsmuir v New Brunswick (Board of Management*), 2008 SCC 9, [2008] 1 SCR 190 at para 32.
[4] Mark D Walters, "Dicey on Writing the Law of the Constitution" (2012) 32 *Oxford J Legal Stud* 21 at 22.
[5] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 280 [Dyzenhaus "Politics"]. *National Corn Growers Assn v Canada (Import Tribunal),* [1990] 2 SCR 1324 at para 74, 74 DLR (4th) 449,Wilson J.
[6] Rethinking, *supra* note **Error! Bookmark not defined.** at 199.
[7] Rethinking, *supra* note **Error! Bookmark not defined.** at 198-199.

a. Past Judicial Approaches

The Supreme Court of Canada has a long history of trying to address this normative tension without confronting it head-on. One solution explored by the courts in the early days of the administrative state was for judges to attempt to distinguish "jurisdictional questions" (or the legislated boundaries of the administrative tribunal's authority) from those questions falling inside those boundaries. On jurisdictional questions, Courts were highly interventionist, substituting their own interpretations with no deference to the administrative decision-maker; on questions not considered jurisdictional administrative decision-makers were effectively free from judicial scrutiny. In practice, this attempt to grant "free rein within bounds" was unable to maintain the court's interpretive authority while also granting autonomy to administrative decision-makers within their jurisdictional mandate. There was no clear basis on which to distinguish ordinary questions of law on which judges would defer, from questions of jurisdiction on which judges would substitute their own interpretation. In the result, judges tended to view all matters of legal interpretation as questions of jurisdiction, and consequently refused to defer to administrative decision-makers' interpretations of law.[7]

The Court's 1979 decision in *CUPE v New Brunswick*[8] ushered in a new era in judicial review. In *CUPE*, the Court urged judges to exercise restraint in identifying questions of jurisdiction. The Court stated that a jurisdictional question is only one that goes to the "scope of the Board's capacity to hear and decide the issues before them."[9] The Court acknowledged that statutory texts are frequently ambiguous, lending themselves to multiple permissible interpretations, and that the Courts needed to share this task of legal interpretation with administrative bodies. The core idea in *CUPE* was that deference ought to be assessed based on the expertise of the administrative decision-maker, the nature of the question before it, the

[7] Rethinking, *supra* note **Error! Bookmark not defined.** at 198-199.
[8] [1979] 2 SCR 227.
[91] *Ibid*. at 234.

existence of a privative clause, and the purpose of the administrative decision-maker in question. This approach, refined and reinforced in subsequent cases, became known as the "pragmatic and functional" test for determining the standard of review, and it directed courts to consider each of these factors in order to determine the legislature's intentions in regard to judicial review.[10] Courts were to weigh these factors in order to determine whether to review a decision on the basis of a standard of correctness, reasonableness, or patent unreasonableness.

The problem with the pragmatic and functional approach was that it did not provide a clear map to allow a judge to navigate the normative tension between the judge's interpretive role and the legislative grant of authority to an administrative decision-maker. Indeed, it arguably elided this tension because it allowed courts to reach a conclusion about deference without interrogating whether the administrative decision-maker or the court had greater legitimacy to answer a legal question. The court claimed that the pragmatic and functional test would discern legislative intention around deference, but it never satisfactorily explained why or how that was the case, either generally or in any specific instance. Nor did the Court explain why legislative intent should be conclusive in all cases, given the inherent contradiction in legislative intention explained above. The pragmatic and functional analysis had a Houdini-esque quality; it produced a standard for judicial review, but the foundations of that standard were opaque, and the Court's stance on the normative dilemma unclear.

Perhaps as a consequence, the pragmatic and functional approach generated an increasingly confusing and inconsistent jurisprudence. Even within specific decisions, levels of court could not agree on the appropriate standard of review, and nor could judges writing for the

[10] See, most notably: *U.E.S., Local 298 v Bibeault* [1988] 2 SCR 1048; *Canada (Director of Investigation and Research) v Southam Inc.* [1997] 1 SCR 748; *Pezim v British Columbia (Superintendent of Brokers)* [1994] 2 SCR 557; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554; *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982; *Law Society of New Brunswick v Ryan* 2003 SCC 20; *Dr Q v College of Physicians and Surgeons of British Columbia* 2003 SCC 19.

majority, concurrence, or dissents within the Supreme Court.[11] These problems were compounded by the Court's development of three standards of review. In addition to unpredictability about which of those standards applied in any given case, the difference between them was uncertain. As Justice LeBel cogently observed in his judgment in *Toronto (City) v CUPE, Local 79*:

> From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter.*[12]

The pragmatic and functional approach to judicial review created problems beyond its incoherence and unpredictability. It forced lawyers and their clients to dedicate significant resources to an issue ancillary to the problem being brought to the court for review. Where, for example, a party was looking to the court to assess fundamental questions such as the meaning of a human rights statute, the authority of a professional body to consider matters of equality or religious freedom, or the effect of international agreements on domestic immigration law, parties and the court could not focus solely on the merits of those issues. Rather, they had to begin by navigating the complex jurisprudence related to standard of review, engaging in what Justice Binnie later memorably referred to as the "law office metaphysics" of judicial review.[13]

The Court itself recognized the inadequacies of the pragmatic and functional approach, and sought to develop a different method for identifying the standard of review in its decision in *Dunsmuir*. While the Court, as quoted above, recognized the underlying normative tension, its approach did nothing to resolve it. While the majority purported to articulate a new approach to judicial review, it determined the standard of review through the equivalent of the pragmatic and functional analysis. Indeed, the judgment of the majority in *Dunsmuir* seemed, even at the time

[11] See, e.g., *Mossop*, *supra* note 10; *Trinity Western University v British Columbia College of Teachers* 2001 SCC 31.
[12] 2003 SCC 63, [2003] 3 SCR 77 at para 17.
[13] *Dunsmuir, supra* note 3 at para 12.

of its release, unlikely to simplify or reduce the "law office metaphysics" associated with judicial review. As written, while it reduced the number of standards of review available, it did not reduce the complexity of the process for identifying them. Following the majority's new approach, parties and courts could find ample room for lengthy argument, evidence and disagreement on the appropriate standard of review in a given case, evidenced by the fact that the Court divided on the appropriate standard to be applied in the very case that was to clarify the new approach to judicial review. Finally, and most importantly for our purposes here, the majority in *Dunsmuir* simply reiterated the unstable compromise of *CUPE* and the pragmatic and functional analysis. It added some gloss to the process by which a court should determine the standard of review, but it did not provide a stable or coherent way for a court to navigate the normative tension of judicial review in a particular case.[14] It simply used past cases or the standard of review analysis (i.e. the pragmatic and functional test) to generate an answer to the standard of review question, while still not explaining how doing so would generate a response that resolved the tension between legislative power over law's content and judicial power over its interpretation.

The ambivalence evident in *Dunsmuir* and the cases that preceded it is understandable. Judicial power to interpret law and the legislative power to determine law's content conflict in an administrative state, and that conflict is manifest in judicial review. That is not to say, however, that there is no way to address this conflict. Specifically, it may be possible to reduce the tension between the judicial and legislative roles in maintaining the rule of law by rejecting the binary understanding that has underpinned much of the Court's jurisprudence. Instead, we can view these respective roles as complimentary and, to a significant extent, as co-extensive.

b. Dyzenhaus's Theory of Deference as Respect

[14] See in general, Alice Woolley "The Metaphysical Court: *Dunsmuir v. New Brunswick* and Standard of Review" (2008) 21 Canadian Journal of Administrative Law and Practice 259.

The concept of "deference as respect," first articulated by David Dyzenhaus, shows how the tension between the judicial and legislative roles is more apparent than real.[15] The crux of deference as respect is that judges must pay respectful attention to the reasoning process of administrative decision-makers. In Dyzenhaus's view, there is no such thing as a correctness standard of review because there is no "plain fact" of legislative intent to which courts have some unique insight.[16] Statutes always have an interpretive context, and when the legislature delegates authority to an administrative decision-maker, that decision-maker's reasoning becomes part of its interpretative context.[17] On this view, it would never be sensible for "a reviewing court….not [to] show deference to the decision maker's reasoning process [and to] rather undertake its own analysis of the question."[18] Every judicial review ought to examine the reasons of the administrative decision-maker and "operate with a presumption that the reasons offered by the tribunal for its decision could justify a decision, which is not necessarily the decision that the court would have reached had it operated in a vacuum."[19]

This model of judicial review arguably resolves the underlying tension between legislative supremacy and the rule of law. Courts respect legislative supremacy by always being willing to defer to administrative decision-makers; they cannot assert a judicial monopoly over a matter that has been delegated to a frontline administrative decision-maker. At the same time, courts maintain the rule of law by requiring that decision-makers offer adequate justification for their decisions. Deference as respect imposes obligations on administrative decision-makers just

[15] Dyzenhaus "Politics", *supra* note 5.
[16] David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev Const Stud 87 [Dyzenhaus "Dignity"] at 109.
[17] Dyzenhaus "Politics", supra note 5 at 303.
[18] *Dunsmuir*, *supra* note 3 at para 50.
[19] David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 at 495 ["Fundamental Values"]. In Dyzenhaus "Dignity", *supra* note **Error! Bookmark not defined.** at 113, he compares this approach to existing standards of correctness and reasonableness review: "Hence, the thought that deference as respect might be either less or more intrusive than *Dunsmuir* doctrine is misleading, for deference as respect requires of officials that they ensure that their reasons do justify their conclusions and of judges that that issue becomes their sole concern on review."
[20] *Dunsmuir, supra* note 3 at para 48; *Mossop*, *supra* note 10 (per Justice L'Heureux-Dubé); *Ryan, supra*

as much as it insists on respectful deference from courts; deference – like respect – must be earned. And when administrative decision-makers earn the respect of the courts through the practice of giving adequate reasons, courts maintain the rule of law by protecting the citizenry from arbitrary public decisions. On this view, public decisions gain their democratic and legal authority through a process of public justification in which all public decision-makers offer reasons that justify their decisions in light of the constitutional, statutory and common law context in which they operate.

The Supreme Court has consistently cited Dyzenhaus's work with approval and, at least with respect to reasonableness review, has endorsed the position that judges owe respectful deference to the decision-making processes of administrative decision-makers.[20] The high watermark of this endorsement was *Baker v Canada (Minister of Citizenship and Immigration)*, where the Court articulated nearly the full theory underpinning deference as respect.[21] In particular *Baker* stands for three important propositions: first, that those who will be significantly impacted by an important administrative decision are entitled to reasons for that decision; second, that a reasonable decision is one in which the reasons offered justify the outcome reached; and, third, that a reviewing court must therefore examine the reasons for the decision to determine its reasonableness. The Supreme Court quickly retreated from this position in subsequent decisions, however, by stating that it is inappropriate for the Court to engage too closely with the substance of the administrative decision-maker's reasoning.[22] *Dunsmuir* further confirmed that the Court was not fully committed to the theory underpinning deference as respect, as reflected in the

[20] *Dunsmuir, supra* note 3 at para 48; *Mossop*, *supra* note 10 (per Justice L'Heureux-Dubé); *Ryan, supra* note 10. Its relationship to post-*Dunsmuir* cases is discussed in Part 2.
[21] [1999] 2 SCR 817. Rethinking, *supra* note **Error! Bookmark not defined.** provides a detailed analysis of the theory underlying the decision in *Baker*.
[22] ***Suresh v Canada (Minister of Citizenship and Immigration),*** 2002 SCC 1, [2002] 1 SCR 3; *Khosa, supra* note 2.

majority's explicit statement that there is an underlying tension between the rule of law and legislative supremacy.[23]

The key, for our purposes, is the resolution through Dyzenhaus's model of the practical and normative complexities of judicial review. As we have seen, defence as respect resolves the normative complexities by requiring that judges always approach their reviewing task with a respectful frame of mind and with the objective of ensuring that administrative decisions are justified. It promises also to resolve some of the practical complexities of judicial review by requiring judges to always choose reasonableness as the standard of review, and to apply reasonableness by examining whether the reasons for the decision justify the outcome. It encourages judicial efficiency both in identifying the standard of review and in applying that standard to specific cases. This is not to say that respectful judicial review looks the same across administrative decisions – interpretive contexts vary – but that the focus in each case should be on the decision before the court for review, not on how to review it.

It is against this backdrop that Justice Rothstein's administrative law jurisprudence emerged. Almost all of the administrative law cases in which he participated were decided subsequent to *Dunsmuir*; he did not write any administrative law judgments at the Supreme Court prior to that case. Thus, Justice Rothstein's administrative law jurisprudence at the Supreme Court arose in a legal context in which the Court had continuously grappled with the proper approach to determining standard of review but had not yet articulated an approach that resolved the normative tension between judicial authority and legislative supremacy. The Court had failed to simplify the process for assessing standard of review so as to allow courts and parties to focus on the issues in the case. Yet at the same time the Court had, in the form of Dyzenhaus's theory

[23] Mark Walters queries whether the Supreme Court appreciates the theory underlying deference as respect: Mark D Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" Mark Elliott & Hanna Wilberg eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow*, (Oxford: Hart Publishing) 395.

of deference as respect, an approach to understanding judicial review that it endorsed and that could conceivably provide it with a better way forward. By fully adopting a deference-as-respect understanding of review, the Court could (i) eliminate the confusion of the standard of review analysis and focus on the substance of the decision, (ii) require that administrative decision-makers properly justify their decisions through reasons, and (iii) share the task of interpreting the law by deferring to administrative decision-makers when their decisions are justified.

II. Justice Rothstein's Jurisprudence: The Quest for Simplicity

This Part assesses Justice Rothstein's jurisprudence against Dyzenhaus's theory of deference as respect. The following sections, argue that, while Justice Rothstein never endorsed (or even considered) the idea of deference as respect, his administrative law decisions can be understood as seeking to resolve the normative and practical complexities of judicial review along the same three lines as does Dyzenhaus's theory. Justice Rothstein's decisions did so in an appropriately pragmatic fashion: incrementally and by learning from the past inadequacies in the Supreme Court's administrative law jurisprudence. These sections will also show how Rothstein's jurisprudence offers insight into how the Court can remain oriented toward the theory underpinning deference as respect when faced with real-world complexities.

The sections make these arguments through assessment and analysis of: Justice Rothstein's judgment in *Canada (Citizenship and Immigration) v Khosa*;[24] his reshaping of how courts ought to approach identification of the standard of review to allow parties and courts to focus on the substance of the dispute; his approach to deferential review which attends to the reasons that administrative decision-makers offer for their decisions; and, finally, how he responded to some of the pragmatic challenges that may arise in judicial review cases.

[24] *Supra* note 2.

Justice Rothstein did not employ respectful deference unthinkingly or uncritically, but he did take it seriously. And as a consequence his overall approach to administrative law has moved the Court's administrative law jurisprudence in a positive direction toward resolving the normative and practical complexities of judicial review.

a. Rethinking *Khosa*

The argument that Justice Rothstein's administrative law decisions converge with Dyzenhaus's theory of deference as respect, seems likely to fail from its inception given his first administrative law judgment subsequent to *Dunsmuir*: *Canada (Citizenship and Immigration) v Khosa*.[25] In *Khosa*, Rothstein argued that the presumptive standard of review for administrative decisions on questions of law ought to be correctness. Absent an expressed legislative direction – through enactment of a privative clause – courts ought to grant no deference to administrative answers to legal questions.

Rothstein rejected the position that "the creation of expert tribunals automatically meant that there was to be some limitation on the judicial review of the courts, in particular on questions of law."[26] He argued that the tension identified by the courts between judicial and legislative authority arose not from the fact of the administrative state, but rather from the enactment of privative clauses; it was the privative clause that "gave rise to a tension between the two core pillars of the public law system: legislative supremacy and the judicial enforcement of the law."[27]

[25] *Supra* note 2.
[26] *Ibid.* at para 77.
[27] *Ibid.* at para 81.

As a consequence, absent "a privative clause, courts have always retained a supervisory judicial review role."[28]

Justice Rothstein recognized that this position was inconsistent with many Supreme Court decisions, but in his view those decisions obscured the "conceptual clarity" that the Court was striving for in *Dunsmuir*, and should not be followed. Rather, while administrative decision-makers should be granted deference on questions of fact, policy, or mixed fact and law, courts should have the last word on legal questions. That would ensure the consistent application of legal principles across like cases, and respect the fact that "appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision-makers."[29] It would also avoid arbitrariness in the administrative context arising from courts' tendency to assess expertise only through the nature of the tribunal as set out in its enabling statue, rather than by conducting a "full review of its actual expertise."[30]

The standard interpretation – and criticism – of Justice Rothstein's opinion in *Khosa* is that it is a throwback, an attempt to resurrect, albeit with some qualification, pre-*CUPE* judicial overreach in administrative law. Justice Binnie for the majority claimed that Rothstein was trying to "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative law matters which further experience showed they did not possess."[31] The standard criticism is plausible. Both historically and in modern cases, the adoption of the correctness standard created the risk that a court may impose legal interpretations

[28] *Ibid*. at para 76.
[29] *Ibid*. at para 90.
[30] *Ibid*. at para 94.
[31] *Ibid.* at para 26. See also: Gerald P Heckman "Substantive Review in Appellate Courts since *Dunsmuir*" (2009) 47(4) Osgoode Hall LJ 751 at 763-66 and Audrey Maklin, "Standard of Review: Back to the Future?" in Colleen M Flood and Lorne Sossin eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Press, 2012) 279 at 305.

that do not properly reflect the statutory and policy nuances of the administrative regime.[32] Had the Court accepted Rothstein's position that courts ought to grant no deference on legal questions absent a "strong"[33] privative clause, it seems reasonable to have predicted greater judicial interference in the administrative state.

There may, however, be another way to understand Rothstein's opinion in *Khosa*. What his judgment would have essentially required is for courts to review administrative decisions in the same way that appellate courts review trial decisions. Justice Rothstein expressly made this connection, relying on the use of the correctness standard in appellate review of questions of law to justify it as the default standard of review for administrative decisions absent a privative clause.[34] But when appellate courts review trial decisions they do not ignore what the trial judge had to say, or the reasons offered. In determining whether the trial judge made a correct determination on a question of law, they provide respectful attention to the reasons offered by the trial judge. This suggests that a court reviewing an administrative decision in the same way an appellate court reviews a trial judgment would not ignore the administrative decision-maker's reasons, expertise and justifications in assessing whether the decision-maker reached the appropriate legal outcome in a given case.

That judges applying a correctness standard in administrative law have tended not to pay respectful attention to the administrative decision-maker's approach reflects the historical context in which many of them were written – historically, administrative decision-makers have been neither trusted nor respected by the courts. In addition, the fact that correctness exists in contrast to reasonableness means that a court adopting correctness review *instead* of reasonableness may

[32] See, e.g., Alice Woolley, "'Practical Necessity' or 'Highly Sophisticated Opportunism'? Judicial Review and Rate Regulation After *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*" (2006) 44 Alberta Law Review 445-458; "The Importance of *ATCO Gas and Pipelines*: A Response to Marty Kay" (2007) 45(2) Alberta Law Review 515-520

[33] *Khosa, supra* note 2 at para 74.

[34] *Ibid*. at para 90.

feel justified in interfering with the administrative decision in a way that a court adopting correctness review as a default standard would not.

If this is the case, then Justice Rothstein's opinion in *Khosa* ought not to be understood merely as a throwback. Rather, had it been followed, it could have resulted in an administrative law jurisprudence in which, first, parties could have directed their resources to the actual matter at issue in a given case rather than to arguing about the standard of review. Second, the correctness standard could have evolved to mirror something closer to the appellate review of trial judgments, in which the trial judge's reasons for a decision play a central role in the analysis. Third – and this is admittedly both speculative and optimistic – it is possible that courts schooled in the decades of administrative law jurisprudence and near-universal modern acceptance of the legitimacy of the administrative state, could have considered the administrative decision-maker's reasons with awareness of that decision-maker's superior knowledge of the broader policy and factual context to which the law applies. This would require that administrative decision-makers justify their decisions in ways that reflect that superior knowledge, thereby providing the actual information about the decision-maker's expertise that Justice Rothstein fairly noted is not provided by the considerations assessed in the pragmatic and functional analysis.

Regardless – and this is the key point – it is not as obvious as often assumed that Rothstein's judgment in *Khosa* precludes the type of evolution in judicial review that we argued in the prior section to be desirable. If Justice Rothstein's approach in *Khosa* had been adopted in a context in which courts did not forget the lessons learned from the failure of the pre-*CUPE* era, it is possible that it could have created a way for courts and administrative decision-makers to contemporaneously engage in legal interpretation – i.e., for administrative decision-makers to justify their decisions, and for courts to respectfully account for those justifications in determining questions of law.

This case should not be overstated. By retaining two standards of review, Rothstein's approach in *Khosa* would not resolve the underlying normative problem of judicial review.[35] Even if correctness had evolved, it could have continued to invite judicial over-reaching and to raise further questions about the differences in substance between the two standards. It is also the case that in a deference-as-respect model, administrative decision-makers' interpretations of law ought to be given greater consideration than those of a trial judge, because administrative decision-makers have expertise and authority distinct from those of a trial court, including on questions of law. Nonetheless, our point here is that Rothstein's judgment in *Khosa* does not fit as neatly into the pigeonhole into which it has traditionally been slotted.

This point is important not because Rothstein's concurring reasons in *Khosa* require defending. The opinion has no legal standing in current Canadian administrative law, and is in the end only a small part of Rothstein's Supreme Court jurisprudence.[36] Rather, it is important because when *Khosa* is understood in this way – as being about simplifying administrative law but not about trying to push an agenda of judicial interference and activism – its fit with Rothstein's subsequent administrative law jurisprudence becomes clear. Because after *Khosa*, in not a single case did Justice Rothstein argue for an expansion of correctness review. Even when other judges expressed caution about expanding deferential review on questions of law, Justice Rothstein did not join them.[37] Rothstein instead sided with the majority – in 36 out of 42 judgments – and overwhelmingly favoured reasonableness review. Of the 34 cases in which standard of review was at issue (i.e., which turned on substantive issues rather than procedural ones) Justice Rothstein voted with the judgment imposing a reasonableness standard 25 times,

[35] In particular, it fails to address the incoherence of the privative clause as a basis for a more deferential standard.
[36] Michael Fenrick, Jodi Martin and Daniel Rosenbluth, "Parliamentary Supremacy and the Rule of Law: Reflections on Justice Rothstein's Administrative Law Jurisprudence in an Age of Deference" (2016) SCLR *infra.*
[37] *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 (per Deschamps J).

and a partial reasonableness standard 5 times. That is, in close to 90% of his decisions, Rothstein supported some form of reasonableness review.

So if *Khosa* is understood as a return to traditionalism, the only way to explain Justice Rothstein's subsequent jurisprudence is as capitulation or conversion. If, however, *Khosa* offered both simplicity and at least the possibility – if implemented by modern judges who accept the legitimacy of the administrative state – of courts reviewing legal determinations with respect for the justifications offered by administrative decision-makers, then the decision can instead be understood as a pragmatic step (even if a misstep) in Rothstein's attempt to move judicial review toward a resolution of its normative and practical complexities.

b. The New Architecture of the Standard of Review Analysis

Courts and commentators still cite *Dunsmuir* as the current watershed moment in Canadian administrative law. Justice Rothstein's decisions have, however, pushed the Supreme Court to move away from *Dunsmuir* in three notable respects: the Court created a presumption of reasonableness as the appropriate standard of review for questions arising from the decision-maker's home statute; it stopped treating pre-*Dunsmuir* jurisprudence as authoritative on the appropriate standard of review; and it effectively eliminated questions of jurisdiction. In this section, we argue that these changes streamline the approach to judicial review. But they are more than simple, incremental doctrinal developments. Rather, they reflect an underlying conceptual shift in the Court's understanding of its role in conducting judicial review. As we explain, this new architecture of the standard of review analysis reflects a deeper commitment to sharing the task of law-interpretation with administrative decision-makers and undermines the remaining vestiges of the *Dunsmuir* framework.

Justice Rothstein changed the standard of review analysis by creating a presumption of reasonableness for issues requiring interpretation of the administrative decision-maker's home statute. Rothstein established this presumption in *Alberta Teachers' Association*, stating that "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review."[38]

This presumption of reasonableness has been adopted by a unanimous Court on multiple occasions, and has been explicitly endorsed by Justice Rothstein's Supreme Court colleagues.[39] *Alberta Teachers' Association* effectively replaced the two-step framework set out by the majority in *Dunsmuir*. Rather than looking to precedent and then the nature of the question, as per *Dunsmuir*, the Supreme Court now follows *Alberta Teachers' Association* and applies reasonableness as the default standard of review. If the issue arises from the decision-maker's home statute, this presumption can be rebutted by a contextual analysis of the governing statute.[40] Or, if the issue fits into a pre-determined category—the constitutionality of a law, a question of

[38] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2-11] 3 SCR 654 at para 34 (quoting, in part, *Dunsmuir*). See also para 39 for another statement of the presumption of reasonableness. There is nearly two years between the decisions in *Khosa* and *Alberta Teachers' Association*. In between these two milestones for Justice Rothstein, he wrote in *Nolan v Kerry (Canada) Inc,* 2009 SCC 39, 2009 2 SCR 678 and followed the majority's reasons in *Dunsmuir*. *Nolan* hints at the presumption because Justice Rothstein states that correctness on home statute will be "exceptionally rare" (para 34).

[39] *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada,* 2012 SCC 35, [2012] 2 SCR 283; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895; *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135; *Tervita Corp v Canada (Commission of Competition),* 2015 SCC 3; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16; *Ontario (Energy Board) v Ontario Power Generation Inc,* 2015 SCC 44; *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission),* 2015 SCC 45; *Canadian Broadcasting Corp v SODRAC 2003 Inc,* 2015 SCC 57; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58. See also *Catalyst Paper Corp v North Cowichan (District),* 2012 SCC 2, [2012] 1 SCR 5; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364; *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR (where a unanimous Court suggests that reasonableness should be the new default without explicitly endorsing the presumption).

[40] *Rogers, supra* note 39; *Tervita, supra* note 39; *Canadian Broadcasting Corp, supra* note 39.

general importance to the legal system, or an issue about competing jurisdictions of specialized tribunals—correctness will apply.[41]

Justice Rothstein defended this presumption by stating that he was merely making explicit what was already implicit in *Dunsmuir*.[42] However, the presumption is accompanied by two additional doctrinal developments that have come to replace aspects of the *Dunsmuir* framework. First, the presumption means that the Court no longer treats pre-*Dunsmuir* case law as authoritative on the appropriate standard of review.[43] Immediately following *Dunsmuir*, the Supreme Court followed its framework, and considered the effect of prior cases in determining the standard of review. And shortly after *Khosa*, Justice Rothstein, writing for a unanimous Court, relied on pre-*Dunsmuir* jurisprudence to establish that a question of jurisdiction was subject to correctness review.[44] Yet the presumption of reasonableness seems now to override any need to consider pre-*Dunsmuir* precedent. Indeed, only in instances where pre-*Dunsmuir* cases established reasonableness as the appropriate standard has the Supreme Court followed precedent.[45] In contrast, when tribunals, lower courts and litigants have attempted to rely on pre-*Dunsmuir* correctness precedents, the Supreme Court has consistently overturned these decisions to rely instead on the presumption of reasonableness.[46] When the issue pertains to the

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[41] *McLean, supra* note 39 at para 22 and *Canadian National, supra* note 39 at para 55. Unfortunately, Gascon J. muddies this a bit in *Saguenay, supra* note 39 at para 46 by suggesting a question of general importance to the legal system can rebut presumption of reasonableness.

[42] *Alberta Teachers' Association, supra* note 39 at para 41.

[43] *Dunsmuir*, *supra* note 3 at para 62.

[44] *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50, [2009] 3 SCR 309. Note also that the parties were in agreement that the appropriate standard was correctness. See also *MiningWatch Canada v Canada (Fisheries and Oceans),* 2010 SCC 2, [2010] 1 SCR 6 (standard of review not addressed explicitly but treated as correctness) where the parties agreed on correctness based on pre-*Dunsmuir* precedent.

[45] *Ibid.* at para 49; *Communications, Energy and Paperworks Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34, [2013] 2 SCR 458.

[46] *Catalyst, supra* note 39 (effectively overturning *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City),* 2004 SCC 19, [2004] 1 SCR 485); *Halifax, supra* note 39 (overturning *Bell v. Ontario Human Rights Commission*, [1971] SCR 756); *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 (overturning the Court of Appeal's reliance on precedent); ATCO*, supra* note 39 (overturning *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board),* 2006 SCC 4, [2006] 1 SCR 140).

interpretation of the decision-maker's home statute, it seems there is no longer any reason for the courts to examine pre-*Dunsmuir* precedent on the appropriate standard of review.[47]

The second doctrinal development arising from the presumption of reasonableness is the virtual elimination of questions of jurisdiction. In *Alberta Teachers' Association*, Justice Rothstein observed that the residual category of "true questions of jurisdiction" has continued to confuse and confound lawyers and judges.[48] He speculated that true jurisdictional questions are perhaps only mythical creatures of administrative law, observed that the Supreme Court had not identified a single one post-*Dunsmuir,*[49] and that he – as with judges before him – could not articulate a definition of a true question of jurisdiction.[50] While he left open the possibility that a true question of jurisdiction may exist, his development of the presumption of reasonableness sought to eliminate the unnecessary confusion arising from attempts to cast issues as jurisdictional.

The Supreme Court has continued in this vein by consistently rejecting arguments that questions of law are true questions of jurisdiction.[51] Notably departing from a long line of precedent on jurisdictional questions, a unanimous Court found that the legislative authority of municipalities is subject to reasonableness review, and not review for *vires.*[52] In 2012 a unanimous Court also overturned the long-standing *Bell v Ontario (Human Rights Commission)*

[47] It may be the case that lower courts are still relying on the *Dunsmuir* two-step approach to look at precedent.
[48] *Supra* note 39 at para 38.
[49] *Ibid.* at para 33.
[50] *Ibid.* at para 42.
[51] *Halifax, supra* note 39; *McLean, supra* note 39 (see footnote 2); *Canadian National, supra* note 39; *ATCO, supra* note 39.
[52] Catalyst, *supra* note 39. Note, however, that regulation-making by the executive is still subject to *vires* review: *Katz Group Canada Inc v Ontario (Health and Long-Term Care),* 2013 SCC 64, [2013] 3 SCR 810. The Court seems to treat regulation-making as an exception to the *Dunsmuir* framework and did not frame its analysis in terms of a question of jurisdiction. The problems with this decision have been explored by commentators: Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2016) 53 OHLJ *forthcoming*. Justice Rothstein signed onto the unanimous decision in *Katz*, but seems to have tried to limit its scope: *Canadian National, supra* note 39 at para 51.

decision – the original case on jurisdictional questions.[53] In only one post-*Alberta Teachers' Association* case did we detect a possible jurisdictional question, albeit in disguise.[54]

Justice Rothstein took a leading role in reshaping the architecture of judicial review along these three lines. By developing the presumption of reasonableness, minimizing – if not eliminating – the temptation to resort to questions of jurisdiction, and rendering unnecessary the need to examine pre-*Dunsmuir* precedent, Rothstein considerably streamlined the framework for determining the appropriate standard of review. He maintained throughout his decisions that these three developments were all "natural extensions" of *Dunsmuir*.[55] Indeed, one can read his administrative law jurisprudence in this way. He did not disrupt the other residual categories of correctness identified in *Dunsmuir*:[56] constitutional questions,[57] questions of central importance to the legal system,[58] and questions regarding the competing jurisdiction of specialized administrative bodies. Yet it is also true that these residual categories seem to be, like questions of true jurisdiction, losing any practical significance. In only one case since the *Alberta Teachers' Association* decision has the Court identified a question of general importance.[59] The presumption of reasonableness now also applies when courts review administrative decisions that implicate *Charter* values.[60]

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[53] *Bell v Ontario (Human Rights Commission)*, [1971] SCR 756 overturned in Halifax, *supra* note 39.
[54] *Canadian National*, *supra* note 39. Justice Rothstein wrote for a unanimous Court and concluded that the Governor in Council's decision was subject to the presumption of reasonableness but *only after* concluding that it had the authority to consider questions of law. Rather than use this as a basis for judicial intervention, however, Rothstein's careful analysis of the scope of statutory authority provided the basis – absent in the Governor in Council's reasoning – for deference.
[55] *Alberta Teachers' Association, supra* note 38 at para 39.
[56] *Ibid.*at para 43.
[57] *Whatcott*, *supra* note 46 at para 61.
[58] Saguenay, *supra* note 39.
[59] *Ibid*. But note that this argument was rejected in *Canada (Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471; Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals, 2011 SCC 59, [2011] 3 SCR 616; *Irving*, *supra* note 39; *McLean, supra* note 39.
[60] *Doré, supra* note 39. See also *Whatcott, supra* note 46 (where constitutionality of legislation is reviewed on correctness, but decision is reasonableness).

In light of this, it is worth examining the deeper conceptual move that Rothstein made in developing a new, simplified approach to determining the standard of review. While these may appear to be incremental doctrinal changes, collectively they make significant strides in resolving the normative problem underpinning judicial review.

Part I of this article introduced the Diceyan understanding of judicial review, which presumed a judicial monopoly over legal interpretation, and argued that, since *CUPE*, the Supreme Court has maintained that it cannot defend that monopoly while also taking seriously the legitimacy of the administrative state. But at the same time, the Court has struggled to articulate a clear division of labour between courts and administrative decision-makers over questions of law. Justice Rothstein took up this challenge. His solution requires judges to further cede their judicial monopoly and it encourages judges to understand administrative decision-makers as full partners in the interpretive exercise of elaborating the content of the law.

First, Justice Rothstein's presumption of reasonableness clearly signals to courts and administrative decision-makers that they share the task of legal interpretation. Respectful partnership should be the starting point for judicial review, not a concession that judges make in exceptional cases. This mindset of judicial respect for administrative decision-making is supported by the fact that pre-*Dunsmuir* correctness cases seem to hold little precedential value under the new framework for judicial review. Abandoning the commitment to pre-*Dunsmuir* precedent on the proper standard of review reflects the fact that prior judicial decisions did not approach their reviewing task with an appropriately respectful mindset. In short, the presumption of reasonableness (and the concomitant disutility of pre-*Dunsmuir* precedent) is more than just analytical tidiness. It is rather a strong statement about the legitimacy of administrative decision-makers as interpreters of the law.

Second, Justice Rothstein's skepticism about the existence of true questions of jurisdiction undermines the idea, implicit in *CUPE*, that there ought to be or even can be a division of labour between administrative decision-makers and courts. Rothstein wrote, "In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial view."[61] In other words, it is not possible to distinguish a subset of questions of law that go to the tribunal's jurisdiction from regular questions of statutory interpretation. This means that a partnership between courts and administrative decision-makers cannot be achieved through a division of labour, one in which the administrative decision-makers interpret everything inside the boundaries and the courts interpret at the boundaries. Rather, under Justice Rothstein's approach, the interpretive authority of administrative decision-makers and courts are co-extensive. Letting go of the concept of jurisdictional questions means that judges must also let go of the idea that judges possess some inalienable core monopoly over questions of law.

Justice Rothstein's architecture for identifying standard of review is not perfect. He maintained that there are a few final bastions of the old judicial monopoly. Constitutional questions and "general questions of importance to the legal system" could become jurisdictional questions reincarnate, although as noted previously the Court does not currently seem inclined to treat them that way. As Justice Cromwell rightly noted in his concurring reasons in *Alberta Teachers' Association*, there is something bigger afoot in Rothstein's rejection of the concept of questions of jurisdiction.[62] Once judges accept that administrative decision-makers are legitimate partners in the project of interpreting law, there is no reason not to extend this thinking to constitutional questions and general questions of importance. Respecting administrative decision-makers as partners in decision-making means that judges ought to recognize that cogently

[61] *Alberta Teachers' Association, supra* note 38 at para 34. He states this again, and more assertively, in *Canadian Broadcasting, supra* note 39 at para 39.
[62] *Ibid.* at paras 92-3.

reasoned administrative decisions *always* offer some insight into how the content of the law ought to be elaborated.

Recall that this view resolves the tension between the rule of law and legislative supremacy by conceiving of judicial review as part of a democratic conception of the rule of law. By ensuring that administrative decision-makers publicly justify their decisions, judges respect the legislature's delegation of front-line authority to specialized institutions while also protecting citizens from arbitrary (i.e. unreasonable) decisions. Indeed, Rothstein seemed to recognize this shift in the judicial role: from one of policing the boundaries of the statute, to one of ensuring that all administrative decisions are reasonable.[63] On this understanding of judicial review, judges substitute their own view – not because they are the sole guardians of the rule of law – but rather because the administrative decision-maker has failed to adequately justify its decision.

The Supreme Court has not yet completed this shift (and indeed there is no guarantee that it ever will). But we can now see how Justice Rothstein's changes to the architecture of judicial review have moved us much closer to an understanding of judicial review that resolves both the practical and normative problems of judicial review. The new, simplified framework presumes that administrative decision-makers are legitimate partners in elaborating the content of the law. It minimizes the significance of the standard of review analysis, which allows courts to focus on the actual decision at issue. And it contains a much greater scope for the courts to pay respectful attention to the reasoning of administrative decision-makers. We now turn to whether Justice Rothstein's application of reasonableness reflected this kind of respectful attention.

c. Rothstein on Reasons and Reasonableness

Justice Rothstein's approach to the standard of review analysis thus addresseed two aspects of complexity in administrative law: it focused the court's attention on the substance of

[63] *Ibid.* at para 43.

the decision at issue, and it signaled that administrative decision-makers and courts ought to be understood as collaborators in the project of interpreting law. The next question is how, precisely, administrative decision-makers and courts can collaborate to ensure reasonable interpretations of the law – what does deferential review look like in practice?[64] Part I showed that Dyzenhaus presents a coherent vision of what deferential ought to look like in actual cases. Reasonableness, on Dyzenhaus's view, requires administrative decision-makers to justify their decisions with reasons and it requires courts to defer to reasons that adequately justify the outcome. The question here is whether Rothstein followed through on his recognition of administrative decision-makers as collaborators in legal interpretation by deferring when their decisions were justified.

Before addressing Justice Rothstein's jurisprudence, a bit more needs to be said about the judicial concept of reasonableness and its relationship to Dyzenhaus's notion of deference as respect. There are a number of instances in which the Supreme Court has applied reasonableness that are inconsistent with the idea of deference as respect and it is important to state this at the outset to guide the analysis of Justice Rothstein's reasoning about reasonableness.

Recall that in *Dunsmuir*, the majority of the Supreme Court identified two facets of reasonableness. First, they stated, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." Second, a reasonable decision is one that "falls within a range of possible, acceptable outcomes…"[65] This

[64] We consider here only Rothstein's reasonableness decisions, bracketing the small number of cases where he solely used correctness as the standard of review, and in which he did not defer – respectfully or otherwise. Those cases do temper the arguments here, but only in a minor way. They are a very small subset of the Supreme Court's administrative law jurisprudence during this timeframe (10% of Rothstein's own decisions). They reflect the incremental and pragmatic nature of the changes Rothstein has made; he greatly restricts the number of cases in which correctness would apply, but does not undertake the much more radical shift in the Court's approach to administrative law that abandoning correctness would involve. That is not the sort of change a pragmatist can easily make – it requires a conceptual reworking of administrative law that incremental and pragmatic change precludes. We acknowledge that the existence of the correctness cases precludes any argument that Rothstein has implemented fully a deference as respect approach to judicial review; but we also do not believe that these cases can or should undermine the significance of the shift towards respectful deference that Rothstein's decisions reflect.

[65] *Dunsmuir, supra* note 3 para 47.

second facet is inconsistent with a judicial commitment to deference as respect. It restates the traditional judicial monopoly over interpreting law in which judges get to determine the range of acceptable outcomes using their own legal tools of statutory interpretation. When judges understand reasonableness in this way, it risks collapsing into the "free rein within boundaries" approach to review that characterized the pre-*CUPE* era of review. If a court determines that the statute admits a range of reasonable interpretations, then "anything goes" within that range. In contrast, if the court determines there is only one reasonable interpretation, then reasonableness collapses into correctness.

Recall that deference as respect resolves this problem by focusing on the *reasons* offered for the decision. Thus the *Dunsmuir* idea that reasonableness is primarily concerned with justification, transparency and intelligibility reflects the deference-as-respect ambition that there can be a middle-ground collaboration between administrative decision-makers and courts. But we still must be attentive to how judges understand this role. It cannot be the case that *any* set of reasons will be sufficient to immunize a decision from judicial intervention. Judges must, on this approach, require actual justification of the decision.[66] Failing this would be tantamount to judicial abdication. Judges must be prepared to engage with the substance of the decision to ensure it is justified. But, at the same time, judges must resist the temptation to seize on every gap or flaw in administrative reasoning in order to intervene. Paying respectful attention to the administrative decision-maker's reasons, in other words, is far from straightforward.[67] And it is

[66] *McLean, supra* note 39 is particularly problematic here because there are no reasons given by the decision-maker. In Agraira, *supra* note **Error! Bookmark not defined.** the Court inferred reasons that were not given by the Minister.

[67] Other commentators have made similar observations. See, e.g., Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queen's Law Journal 59 (observing "restrictive" and "restorative" approaches to applying reasonableness); Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:3 Alta L Rev *forthcoming* (noting also the problems with *McLean* and *Agraira*).

only complicated by the fact that the reasons offered by administrative decision-makers are often incomplete.[68]

Justice Rothstein was largely able navigate that careful middle ground in assessing the reasonableness of administrative decisions. Two decisions, in particular, exemplify his implicit commitment to deference as respect. The first exemplar comes, perhaps surprisingly, from the *Alberta Teachers' Association* decision itself. This is surprising because in that case the administrative decision-maker had not addressed or given reasons for its implicit decision that s. 50(5)(a) of the *Personal Information Protection Act*,[69] which allowed the decision-maker to extend the 90 day period for an inquiry, also allowed the decision-maker to grant that extension after the expiry of the 90 days. Writing for a unanimous court on this issue, Rothstein relied on other decisions by the decision-maker in which they had considered this question, noting that "a review of the reasons of the Commissioner and the adjudicators in other cases allows the Court to determine without difficulty that a reasonable basis exists for the adjudicator's implied decision in this case."[70] While his decision addressed arguments brought by the Alberta Teachers' Association challenging the interpretation,[71] he relied almost entirely on the analysis of the administrative decision-maker itself to uphold its decision.[72] He reproduced and relied upon the reasoning in earlier decisions, explained why the approach taken in those decisions provided a reasonable justification for the approach taken and, in general, avoided undertaking an independent analysis of the legal issues.

The second exemplar of Justice Rothstein's approach is his dissent, co-written with Justice Moldaver, in *Communications, Energy and Paperworkers Union of Canada, Local 30 v*

[68] We take up this issue in section d *infra.*
[69] S.A. 2003 c. P-6.5. Also considered was the identical language in s. 69(6)(a) of the *Freedom of Information and Privacy Act* RSA 2000 c. F-25.
[70] *Alberta Teachers' Association, supra* note 38 at para 56.
[71] *Ibid.* at paras 64-66; 73-76.
[72] *Ibid.* at paras 56-63; 67-72.

Irving Pulp & Paper Ltd.[73] They argued that a decision by a labour arbitrator invalidating a random alcohol-testing program was unreasonable. Their basis for doing so, however, is revelatory.. Rothstein and Moldaver were concerned with the fact that the arbitrator's invalidation of the random alcohol-testing program departed from the "arbitral consensus" with respect to what must be done to justify such testing. And while, on their view, the arbitrator was free to depart from this consensus, what rendered the decision unreasonable was the arbitration board's failure to justify its decision to do so.[74] In other words, they intervened in the administrative decision, but their basis for doing so was the connection between the decision at issue and pre-existing arbitral jurisprudence. Justices Rothstein and Moldaver did not substitute their own reasoning, but paid careful attention to the arbitral jurisprudence and sought to interpret this jurisprudence as a coherent whole. It was the Arbitration Board's failure to reconcile its outcome with prior arbitral decisions, Rothstein and Moldaver that made its decision unreasonable.[75]

The majority in *Irving* upheld the Arbitration Board's decision, noting the comprehensiveness of its reasons. The majority suggested that Rothstein and Moldaver had conducted a "line-by-line treasure hunt for error."[76] The majority continued, "[i]n the absence of finding that the decision, based on the record, is outside the range of reasonable outcomes, the decision should not be disturbed."[77] As we have seen, however, simply finding that a reasoned decision falls inside a range of reasonable outcomes does not resolve the normative challenge of judicial review because it relies on the implicit judicial monopoly whereby judges get the definitive say on the boundaries of the legislation (i.e. the range of permissible outcomes). Moreover, it does not require decision-makers to *actually* justify their decisions to those they

[73] *Irving, supra* note 45.
[74] *Ibid.* paras 79,para 80.
[75] See also Justice Rothstein's reasons in *Canadian Broadcasting, supra* note 39 where he finds a portion of the Copyright Board's decision unreasonable for failing to consider the principles of technological neutrality (see, e.g. paras 87, 95-96).
[76] *Ibid.* at para 54.
[77] *Ibid*.

affect. The willingness of Justices Rothstein and Moldaver to engage with decision-maker's reasons and query whether those reasons justified the outcome better reflects a commitment to full collaboration between administrative decision-makers and courts.

This requirement that judges conduct a close analysis of the administrative decision-maker's reasons raises the specter of judicial interventionism. Elsewhere, Justice Rothstein nicely captured the idea that a reviewing judge must engage with a tribunal's decisions but without a view to finding fault. In *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright),*[78] Rothstein dissented (with Justices Deschamps, Fish, and Cromwell) and would have upheld the decision by the Copyright Board that photocopying by teachers constituted fair dealing. In his reasons, Justice Rothstein quoted extensively from the Board's decision, and relied upon it to frame and direct his analysis of the issues. He was not uncritical of aspects of the Tribunal's reasoning, but ultimately concluded:

> Tribunal decisions can certainly be found to be unreasonable …However, I do not think it is open on a deferential review, where a tribunal's decision is multifactored and complex, to seize upon a few arguable statements or intermediate findings to conclude that the overall decision is unreasonable. This is especially the case where the issues are fact-based, as in the case of a fair dealing analysis.[79]

In other words, Rothstein did not seek to hold the decision-maker to a standard of perfection. Rather, he sought to determine whether the reasons as a whole justified the decision.

Justice Rothstein also demonstrated a willingness to defer on matters of human rights protection, an area in which courts have struggled to exercise restraint and defer.[80] In *Saskatchewan (Human Rights Commission) v Whatcott*, the Supreme Court considered the constitutionality of the *Human Rights Act*'s prohibition of publications that expose people to hatred or ridicule, or which belittle or otherwise affront the dignity of any person, as well as the

[78] 2012 SCC 37, [2012] 2 SCR 345.
[79] *Ibid.* at para 59.
[80] E.g., *Egan v Canada*, [1995] 2 SCR 513.

determination by the Human Rights Tribunal that Whatcott's publications violated the *Act*.[81] Justice Rothstein, writing for a unanimous court, applied a correctness standard to the constitutional issue but – contrary to the Saskatchewan Court of Queen's Bench and Court of Appeal – applied a reasonableness standard to the determination that Whatcott's publications violated the *Act*. In applying reasonableness, he approached the application of the *Act* through the Tribunal's own reasoning. He relied on the Tribunal's analysis of the problematic aspects of the pamphlets published by Whatcott and relied on their assessment of the pamphlets except where they acted unreasonably by failing to apply the legislation in accordance with earlier Supreme Court jurisprudence. The *Whatcott* decision did not submit to the Tribunal's reasoning, and held aspects of it to be unreasonable, but it paid respectful attention to the justifications the Tribunal offered.

We find considerable support in Justice Rothstein's jurisprudence for the view that his architecture for judicial review results in increased respect for the reasoning of administrative decision-makers.[82] In each of the decisions discussed here he did not independently analyze the legal decision before the court to determine whether it fell within what the court viewed as the range of justifiable outcomes. He did not focus on judicial precedent. Rather, he focused on the reasons offered by the decision-maker, in this case or in others, to assess whether the decision had been properly justified – to determine whether, in that sense, the decision was reasonable. When viewed as a whole, Justice Rothstein's jurisprudence achieves its potential. His decisions do not get bogged down in determining the appropriate standard of review, concentrating instead on the actual issues brought to the court for its review. Further, and importantly, they focus on the

[81] *Whatcott, supra* note 46.
[82] We hasten to add that the same thing cannot be said for the Supreme Court's administrative law jurisprudence as whole. While we hold overwhelmingly positive views about the decisions that Justice Rothstein wrote, we note that he signed onto decisions written by other judges that are very problematic from the perspective of deference as respect. In particular, *Agraira, supra* note **Error! Bookmark not defined.** and *McLean, supra* note 39.
[83] *ATCO, supra* note 39; *Ontario Power, supra* note 39; *Canadian National, supra* note 39.

justifications offered by administrative decision-makers, respectfully but not uncritically reviewing those justifications to determine if they satisfy a standard of reasonableness.

Having said that, it must be noted that in three of his opinions, Justice Rothstein effectively undertook *de novo* consideration of legal issues before the decision-maker while applying a reasonableness standard, and did not meaningfully rely on the reasoning of the administrative decision-maker to determine whether the decision it had reached was reasonable.[83] As the next section will demonstrate, these departures appear to have arisen from Justice Rothstein's attempt to resolve particular pragmatic challenges that those cases presented – to ensure that judicial review produced an efficient, effective and fair resolution of the specific issue brought to the court. The question that the following section will consider is whether, in doing so, Rothstein's jurisprudence undermined its apparent commitment to deference as respect and its requirement that administrative decision-makers actually justify their decisions to those who are affected by them.

d. Normative Resolution, Practical Complexities

We have argued that Dyzenhaus's ideal of deference as respect resolves the normative complexities of judicial review. It also resolves some of the practical complexities, such as the uncertainty surrounding the appropriate standard of review when that standard is up for determination in each case. But additional practical complexities emerge that can complicate a court's adherence to deference as respect. Specifically, courts face practical challenges in following a model of deference as respect in those cases where the original administrative decision offers inadequate or no reasons. The Supreme Court has committed to reviewing decisions for reasonableness even where there are no formal reasons, whether because the reasons are inadequate due to insufficiencies of the administrative decision-maker or because the issue

[83] *ATCO, supra* note 39; *Ontario Power, supra* note 39; *Canadian National, supra* note 39.

that now appears salient was not fully aired by the parties in the original proceeding. This commitment is understandable on pragmatic grounds, but creates meaningful issues for ensuring a coherent and consistent approach to judicial review.[84]

In those cases, there may be no reasoning or justificatory process to which the court can defer. Yet if the court reasons through the issues itself and substitutes its own interpretation, then it shuts the administrative decision-maker out of the law-interpretation process. It also denies the parties the reasons – or justification – for the decision that they were entitled to in the first instance by the administrative decision-maker. But if the court simply remits the decision back to the administrative decision-maker it risks increasing costs and delays associated with the administrative process. This invites parties who benefit from delay to seize on any inadequately reasoned aspect of an administrative decision, thereby increasing the risk of strategic litigation and challenges. When one bears in mind that the administrative state was developed in significant part as a response to the costs and inefficiencies of traditional judicial processes, these risks cannot be lightly dismissed.

These pragmatic difficulties are apparent in Justice Rothstein's administrative law jurisprudence. In some cases he was able to work around the problem, offering respectful deference despite insufficiencies in the reasons. In *Alberta Teachers' Association*, for example, Rothstein assessed an administrative decision in the context of other decisions issued by the decision-maker. In that way, while he was not able to defer to the decision of the specific decision-maker in the case, he still focused on the justifications offered by the administrative decision-maker.

In other cases Justice Rothstein had more difficulties. In *ATCO Gas and Pipelines Ltd. v Alberta (Utilities Commission)*, for example, Justice Rothstein conducted an independent

[84] E.g., *Catalyst, supra* note 39 at para 29.

statutory analysis to determine the reasonableness of the decision.[85] He upheld the decision of the Alberta Utilities Commission disallowing part of ATCO's inclusion of cost of living adjustments in its pension costs. The issue presented to the Supreme Court was whether the Commission acted properly in not using a "no-hindsight prudence test" to determine which costs ATCO could recover. The Commission itself never expressly considered the applicability of such a test and based on a review of the Commission's decision it is not apparent that ATCO or any other party argued that it ought to do so.[86] Its "decision" not to use a no-hindsight prudence test was at best implicit in the reasons – or perhaps simply outside their ambit.[87]

Faced with this absence of express consideration of the issue, attending to the Commission's reasons would not have proven fruitful. Most of the discussion in the original decision addressed specific arguments related to the treatment of the costs in question; it did not address in any real way the overarching legal test later alleged by the utility to govern the Commission's decision. It is not obvious how Rothstein could have found in a decision, which never addressed or even contemplated the "no hindsight" test, any justification for why the Commission's rejection of that test could be viewed as reasonable. Had Rothstein held the decision reasonable without resolving the specific question of statutory interpretation, he would have neglected the Court's obligation to offer adequate justification for *its own decision*, an obligation that includes responding to arguments raised by the parties.

The problem, though, is that in concluding that "[t]he existence of a reasonable interpretation that supports the Commission's implied understanding of its discretion is enough

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[85] *Supra* note 39.
[86] The word "hindsight" does not appear in the decision. The word "prudent" appears twice, but not in this context (it is a quotation from other Commission decisions), and the word "prudence" appears once, but also not in this context. The arguments of the utility on the Cost of Living Adjustment, at para. 50-53, 58, 67-68, 70 and 74 address the appropriate outcome, but not in these terms. The basic submission appears to have been that "CUL [the parent company] has always exercised, and continues to exercise, its discretion in good faith to ensure that ATCO Utilities remains competitive in the employment marketplace": Decision 2010-189.
[87] *Ibid*. at paras 19 and 33. See also Decision 2011-391 at paras 87-92.

for the Commission's decision to pass muster under reasonableness review,"[88] Rothstein imposed no obligation on, and created no incentive for, the Commission to justify its decision. The problem was not that he found the Commission's decision reasonable, but rather that his independent analysis cut the administrative decision-maker out of the interpretive process. It further ignored the fact that the affected individuals were entitled to actual justification in the first instance, not simply the assurance that such a reasonable interpretation exists in the abstract.

On the other hand, what practical alternative did Justice Rothstein have? The only way to encourage proper justification by the administrative decision-maker would have been to remit the matter back to the Commission for further review. But that approach has enormous costs – it ensures that a decision made four years prior to the Supreme Court's own consideration remains unresolved for perhaps several years more. It increases costs and uncertainty for every party to the matter, particularly in the event of future appeals. Further, while it may encourage the regulator to justify its reasons properly, it also has the potential to encourage abusive conduct by parties to the regulatory decision. Parties could search for novel arguments in a judicial review application, knowing that even if those arguments are not in substance accepted on judicial review, the administrative decision-maker's failure to consider them may nonetheless allow for delay in the implementation of the administrative decision. The risk of strategic abuse looms large.

The Commission in *ATCO* did not act in bad faith; it did not hear an argument and then simply choose to ignore it. Rather, it justified its decision in response to the arguments that the parties presented to it; it may have made some assumptions in those justifications that could have been better explained, but it was also not asked for those explanations. In short, this is not a case where the problem was an ignorant or insufficiently motivated administrative decision-maker. It was just an unfortunate outcome arising from a confluence of circumstances – the arguments

[88] *ATCO, supra* note 39 at para 47.

made to the administrative decision-maker, the prominence given to the no-hindsight prudence test by the Ontario Court of Appeal in an analogous case, and the arguable applicability of that test to the issue in *ATCO Gas*. When viewed in that light, Rothstein's approach – of conducting an independent analysis to assess whether the approach of the Commission was in substance reasonable – may have been the least bad alternative. The Court could not respectfully defer to the Commission's reasons, but it did pay careful attention to the context from which the issue arose. Moreover, it is not clear that ATCO was denied adequate justification for the decision, given the issue was one that ATCO did not raise before the Commission despite ample opportunity to do so.

Insufficient reasoning also arose in relation to Justice Rothstein's decision in *Canadian National v Canada (Attorney General)*,[89] where the subject of review was an Order in Council by the Governor in Council. While the Order in Council constituted the "reasons" for the decision, they were not comparable to the kind of detailed reasons offered by, for example, an arbitration board,[90] or required of a Minister issuing a deportation order.[91] The Order in Council did not offer reasons explaining the scope of its statutory authority; instead it simply presumed that the Governor in Council could decide questions of law. Writing for a unanimous Court, Justice Rothstein found the Order in Council was reasonable. But, as with *ATCO*, he had to do quite a bit of independent interpretive work both to justify the Governor in Council's authority over questions of law and its exercise of that authority in the specific instance.

Again, Rothstein could not respectfully defer to the reasoning of the Governor in Council. However, his reasons contained other indications that he was nonetheless oriented toward the underlying concerns of deference as respect. Most significantly, he held that the Order in Council was subject to substantive judicial review, rather than the more limited review for *vires* that

[89] *Supra* note 39.
[90] *Irving*, *supra* note 45.
[91] *Baker, supra* note 21.

would have precluded review of the substance of the decision.[92] The possibility of substantive review, in principle, ought to encourage the Governor in Council to reason more thoroughly in future cases to prevent its decisions from being overturned. And, while he could have remitted the matter back to the Governor in Council for better consideration, we ought to question whether it would have been worth the additional delay and expense for the particular issue in this case. The issue was whether the parties had access to a specialized dispute-resolution tribunal. Upholding the Governor in Council's decision enabled the parties to focus on the substance of the dispute – the effect of the new tariff on the shipping contracts – rather than the manner of its review.

Deference as respect also becomes practically difficult where there is limited participation on judicial review – where only the party challenging the decision is properly represented, either because of the diffusion of interests on the other side, or a lack of resources. In that case, while a court can still focus on the reasons offered by the administrative decision-maker, the court's consideration may be distorted by the absence of a full airing of the issues; what may appear to be inadequacies in the justifications offered by the administrative decision-maker in the first instance might seem quite different when considered from another point of view. A court may be tempted to undertake its own independent analysis as a check on its assessment of the reasonableness of the reasons offered by the administrative decision-maker but, in so doing, it will not offer the deference that it ought to offer. On the other hand, if it does not take some steps to ameliorate the inadequacies in the presentation of the case, it risks being unduly influenced by the party that has superior representation in court.

This was of particular concern in *Ontario (Energy Board) v Ontario Power Generation Inc*,[93] where only the utility appeared as a party on judicial review and, like in *ATCO*, the question regarding the applicability of the no-hindsight prudence test had not been rigorously explored in

[92] *Canadian National, supra* note 39 at para 51.
[93] *Supra* note 39.

the original hearing. In *Ontario Power*, the utility had explicitly raised the no-hindsight test in argument,[94] but the Board had addressed it only indirectly by acknowledging that "[i]n determining the appropriate adjustment, the Board recognizes that it will be difficult for OPG to make significant savings through compensation levels alone in the short to medium-term given the collective agreements with its unions."[95] That limitation in the Board's reasoning, when combined with the one-sided nature of the argument brought before the Court, created the potential to undermine the Court's ability to defer appropriately.

Justice Rothstein addressed this problem by shifting the Court's focus to whether administrative decision-makers ought to be granted standing as parties to the judicial review application. Rothstein took the position that courts ought to grant standing to administrative decision-makers on a discretionary basis, and they ought to do so in significant part because of the ability of such decision-makers to contribute to the court's analysis and interpretation of the law:

> Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or to the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.[96]

Rothstein recognized the risks with a decision-maker's participation, and cautioned against permitting participation by any decision-maker "whose function it is to adjudicate individual conflicts between two or more parties" since such participation could undermine "fairness, real and perceived."[97]

Justice Rothstein also discussed issues related to "bootstrapping" – the concern that an administrative decision-maker might change or add to its reasons during the course of a judicial

[94] As noted in Ontario Energy Board Decision 2010-0008 at 17, 54 and 58.
[95] *Ibid.* at 87.
[96] *Ontario Power*, *supra* note 39 at para 53.
[97] *Ibid.* at para 56.

review and might, as a consequence, create unfairness or be less inclined to offer proper justifications in the first instance.[98] Rothstein concluded that a tribunal ought not to have an "unfettered" ability to raise new arguments, but that it should be allowed to participate in a way that would allow them to "offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons."[99]

In the end, in dealing with the substantive question at issue in *Ontario Power*, Rothstein's judgment was partially deferential. He undertook an independent analysis of whether the no-hindsight prudence test was applicable to every decision made by the Ontario Energy Board, and in that analysis did not consider the administrative decision at all.[100] But in reviewing its decision on the specific costs at issue, he did focus on the Board's reasons, and on whether it had sufficiently justified its disallowance of the costs claimed by the utility.[101] In this decision as well, then, Justice Rothstein did not approach the administrative decision in a way that fully accords with deference as respect; he instead compensated for the limitations in the Board's reasons and the limitations in the arguments before the court by independently analyzing some issues, and by allowing the Board to participate as a party to the judicial review. As was the case in *ATCO*, the Court's approach does not encourage the Board to give adequate reasons to those affected by its decisions. And in this case it does so without some of the rationale that existed in *ATCO*. Here the no-hindsight prudence test was brought to the Board's attention, and it is arguable that they could have provided sufficient justification in the original decision. By allowing them to participate as a party, and by using the Court's process to bolster the original reasons given by the Board, the Court effectively let the Board off the hook in providing the necessary justification to the parties.

[98] *Ibid*. at para 67.
[99] *Ibid*. at para 69.
[100] *Ibid*. at paras 87-105.
[101] *Ibid*. at paras 106-120.

Again, though, what alternative to this approach would have been better? Remitting the matter back to the Board may have incentivized them to provide more pointed reasons next time. But at the end of the day, the approach they took to the specific issue was assessed as reasonable on a deferential review, and even with the no-hindsight prudence test being raised by the party, the Board may simply not have appreciated the need to explicitly address why they were not applying it. They may have felt that their general discussion of why the costs were being excluded from the utility's rate recovery was sufficient – an assessment which, in the end, Rothstein found was justified. Remitting the matter back for further consideration would have increased costs and delay, and created the same perverse incentives identified above in discussing *ATCO*.

In each of these cases, then, it is possible to explain and defend the approach taken by Justice Rothstein, and not just because it solved a practical problem. It also helped to ensure that the parties affected by an administrative decision received an appropriate result in a timely fashion, and that parties would not be encouraged to engage in strategic and potentially abusive challenges to a regulatory decision.

At the same time, however, these cases sound a cautionary note. It will always be the case that the Court supplementing a decision with its own reasons will be more efficient and bring a more timely resolution for the parties than would remitting the decision back to the administrative decision-maker for further explanation. The challenge for the Court is to understand when supplying reasons that the decision-maker could have offered but did not, undermines deference as respect. As Justice Rothstein's decisions evidence, this requires considerable judicial sensitivity to the context in which the decision-maker operates. There is real risk that Rothstein's approach in each of these three cases could be misapplied if lifted whole cloth to different decision-making contexts. As Rothstein's reasons nicely illustrate, interpretive contexts vary. An energy regulator is not the same as an immigration official. The issues, the

stakes and the parties are all part of the context in which the court assesses the reasonableness of the administrative decision.

Conclusion

The architecture of judicial review that Justice Rothstein helped to construct is fragile, and only constant attention from the courts to the values he pursued – focusing on the substantive issue at stake instead of administrative law technicalities, respecting administrative decision-makers as legal interpreters, and focusing on the sufficiency of the justifications they give – will allow it to be maintained. The pitfalls present in the history of administrative law, of a binary approach to review that is at different times unduly interventionist and unduly hands-off, and of incoherent and unpredictable decisions, remain ever present, and will be avoided only through vigilance.

That vigilance need not involve philosophical musings by judges. As this article has made clear, focusing on pragmatic concerns – ensuring that parties to an application receive a timely and effective resolution of their case, ensuring that administrative decision-makers can do their jobs without undue judicial interference, and ensuring that individuals receive adequate justifications for the decisions that affect them – may well allow the Court to continue to build on Rothstein's legacy of practicing respectful deference. There is no problem with pragmatism, provided that it – like Rothstein's approach – focuses on the right concerns and considerations.

Justice Rothstein moved the Court in the direction of resolving the normative and practical complexities that are at the root of every application for judicial review. Like Dyzenhaus's model of deference as respect, Rothstein sought to resolve these complexities by

minimizing the role of the standard of review analysis, by pushing administrative decision-makers to articulate cogent reasons for their decisions, and deferring to these reasons when they justify the decision made. At the same time, Rothstein's overall commitment to pragmatism in judicial review allowed him to remain sensitive to the particular context of the administrative decision and the potential for strategic litigation and perverse effects. When determining whether a decision was reasonable, he sacrificed theoretical purity while remaining oriented to the underlying concern of ensuring individuals received a clear justification for the administrative decisions that affected them.

In the end, though, this discussion of Justice Rothstein's jurisprudence also gives reason for caution in predicting a positive future for judicial review. As the Court's own history demonstrates, and as the practical challenges dealt with in some of Rothstein's own decisions indicate, maintaining an attitude of respectful deference is hard. It requires a Court to be modest in its beliefs about its own competence, and to respect the knowledge and judgment of others, while at the same time not being so subservient to others that it allows itself to be party to an unreasonable or unjust decision. To build on Rothstein's legacy, and to avoid repeating the mistakes that preceded him, the Court has its work cut out for it.