Osgoode Hall Law Journal

Volume 47, Number 4 (Winter 2009) Article 4

Substantive Review in Appellate Courts since Dunsmuir

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Abstract
In Dunsmuir v. New Brunswick, the Supreme Court re-examined its approach to judicial review of administrative decisions to develop a "more coherent and-workable" framework. It merged the deferential standards of reasonableness simpliciter and patent unreasonableness into a single reasonableness standard and emphasized the importance of precedent in determining the standard applicable to a specific category of decision makers. The author makes a preliminary assessment of Dunsmuir's impact on judicial review through an analysis of recent Canadian appellate decisions. He concludes that, white Dunsmuir simplifies the standard of review analysis by encouraging courts' reliance on satisfactory precedents and guidelines to determine the appropriate standard, there is a risk that courts may uncritically adhere to inappropriate precedents or carry out unduly intrusive review by inappropriately characterizing as jurisdictional the questions before them. Substantive review retains its complexity, which now resides at the stage of courts' application of the merged reasonableness standard.

Keywords
Judicial review of administrative acts; Dunsmuir; David--Trials; litigation; etc.; Canada

Commentary

Substantive Review in Appellate Courts since *Dunsmuir*

GERALD P. HECKMAN *

In *Dunsmuir v. New Brunswick*, the Supreme Court re-examined its approach to judicial review of administrative decisions to develop a "more coherent and workable" framework. It merged the deferential standards of reasonableness *simpliciter* and patent unreasonableness into a single reasonableness standard and emphasized the importance of precedent in determining the standard applicable to a specific category of decision makers. The author makes a preliminary assessment of *Dunsmuir*'s impact on judicial review through an analysis of recent Canadian appellate decisions. He concludes that, while *Dunsmuir* simplifies the standard of review analysis by encouraging courts' reliance on satisfactory precedents and guidelines to determine the appropriate standard, there is a risk that courts may uncritically adhere to inappropriate precedents or carry out unduly intrusive review by inappropriately characterizing as jurisdictional the questions before them. Substantive review retains its complexity, which now resides at the stage of courts' application of the merged reasonableness standard.

Dans l'affaire *Dunsmuir c. Nouveau-Brunswick*, la Cour suprême a réexaminé son approche au contrôle judiciaire des décisions administratives en vue de produire un cadre « plus cohérent et fonctionnel ». Elle a unifié les normes commandant la déférence—la norme de raisonnabilité *simpliciter* et celle du manifestement déraisonnable—en une seule norme de raisonnabilité, et mis l'accent sur l'importance des antécédents quand il s'agit de déterminer la norme qui s'applique à une catégorie particulière de décideurs. L'auteur procède à une évaluation préliminaire de l'impact de l'affaire *Dunsmuir* sur le contrôle judiciaire au moyen d'une analyse d'arrêts récents des cours d'appel canadiennes. Il conclut que tandis que l'affaire *Dunsmuir* simplifie l'analyse des normes de contrôle en encourageant les tribunaux à se fier à des directives et à des antécédents satisfaisants

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* Assistant Professor, Faculty of Law, University of Manitoba. I acknowledge the valuable research assistance of Ms. Courtney Pope, LL.B. student, Faculty of Law, University of Manitoba, and the financial support of the Manitoba Legal Research Institute. This commentary is a revised version of a paper presented at the Canadian Institute of Administrative Justice National Roundtable on Administrative Law (Roundtable) in Halifax, Nova Scotia on 29 May 2009. I thank the organizers and participants of the Roundtable for their helpful comments and feedback, as well as Professor David Mullan for his insightful comments on the original Roundtable paper.

pour déterminer la norme appropriée, il est possible que les tribunaux adhéreront, sans esprit critique, à des antécédents inadéquats, ou exerceront un contrôle indûment intrusif en qualifiant erronément de juridictionnelles les questions qui leur sont présentées. La révision de fond des décisions administratives conserve sa complexité qui se trouve désormais au stade de l'application, par les tribunaux, de la norme unifiée de raisonnabilité.

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WELL OVER A YEAR HAS PASSED since the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*[1] "to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable."[2] The majority's judgment sought to simplify the framework by merging the patent unreasonableness and reasonableness *simpliciter* standards of review into a single reasonableness standard, and emphasizing the importance of precedent in determining the standard applicable to a specific category of decisions and decision makers. In this commentary, I examine how *Dunsmuir* has been applied by Canadian appellate courts,[3] and attempt

1. [2008] 1 S.C.R. 190, Bastarache & LeBel JJ. [*Dunsmuir*].

2. *Ibid.* at para. 32.

3. Over a hundred appellate decisions explaining or following *Dunsmuir*'s treatment of substantive review and decided before 1 April 2009 were examined in the preparation of this commentary. Decisions which merely cited *Dunsmuir* were not analyzed. The commentary

to discern general trends that might reveal its future impact on substantive review. I begin with a brief summary of the facts of the decision, the majority judgment, and the two concurring judgments.

I. *DUNSMUIR V. NEW BRUNSWICK*

A. FACTS

David Dunsmuir was a non-unionized lawyer employed by New Brunswick's Department of Justice under the *Civil Service Act*[4] (CSA) and appointed "at pleasure" to the offices of clerk and administrator of the Court of Queen's Bench. Dissatisfied with Dunsmuir's performance, the Department terminated his employment with four months' pay in lieu of notice; the Department did not allege cause. The CSA provided that terminations were governed by the ordinary rules of contract. Dunsmuir filed a grievance of the determination under the *Public Service Labour Relations Act*[5] (PSLRA) which partially extended to non-unionized employees the grievance process made available to unionized employees. Dunsmuir made the arguments that his employer had not notified him of performance concerns or given him a reasonable opportunity to respond to these concerns, that he had been terminated without notice or procedural fairness, and that the notice period was insufficient.[6] When the Department dismissed his grievance, Dunsmuir referred it to adjudication under the PSLRA. An adjudicator determined as a preliminary matter that he was entitled under the PSLRA to determine the "real reasons" for the grievor's termination and, if termination was for cause, to substitute another penalty for the discharge as seemed just and reasonable—a remedy to which unionized employees were entitled under the PSLRA. In other words, Dunsmuir was "entitled to an adjudication as to whether discharge purportedly with notice or pay in lieu thereof was in fact for cause."[7] The adjudicator decided that, although the Department had not terminated Dunsmuir for cause, it had not afforded him procedural

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also considers relevant Supreme Court of Canada decisions and some noteworthy appellate judgments delivered between April and August 2009.

4. S.N.B. 1984, c. C-5.1 [*CSA*].

5. R.S.N.B. 1973, c. P-25, s. 100.1 [*PSLRA*].

6. *Dunsmuir*, *supra* note 1 at para. 9.

7. *Ibid.* at para. 12.

fairness, and ordered his reinstatement.[8] In the alternative, the adjudicator would have extended the notice period.

New Brunswick sought judicial review of the adjudicator's award. Applying the pragmatic and functional approach, the Court of Queen's Bench characterized the preliminary issue as a question of statutory interpretation, reviewable on the correctness standard. It decided that the adjudicator had incorrectly concluded that the PSLRA authorized him to inquire into the reasons for dismissal. The court quashed the reinstatement order as unreasonable, but upheld the alternative award extending notice.[9]

The Court of Appeal dismissed the appeal, deciding that the appropriate standard of review was reasonableness *simpliciter*, given the full privative clause in the PSLRA and the labour adjudicator's relative expertise in the employment context.[10] It held that the adjudicator's interpretation of the PSLRA on the preliminary issue was unreasonable; the employer's election to dismiss Dunsmuir with notice precluded the substitution of a lesser penalty.

The Supreme Court of Canada dismissed Dunsmuir's appeal. While the judges unanimously agreed that the framework for substantive review needed reform—including a merger of the two deferential standards of review into one reasonableness standard—there were significant differences between the majority judgment, penned by Justices LeBel and Bastarache, and the concurring judgments of Justices Binnie and Deschamps.

B. MAJORITY JUDGMENT

1. ONE REASONABLENESS STANDARD

Pre-*Dunsmuir*, the standard of review framework comprised three standards: correctness, where the reviewing court showed no deference to the administrative decision maker, and two "deferential" standards—patent unreasonableness (the most deferential standard) and the intermediate reasonableness *simpliciter* standard. Under this intermediate standard, a tribunal's decision was consid-

8. *Ibid.* at para. 15. The adjudicator relied on the authority of the Supreme Court of Canada in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

9. *Dunsmuir*, *ibid.* at paras. 19-20.

10. *Ibid.* at para. 21.

ered unreasonable if it was "not supported by any reasons that can stand up to a somewhat probing examination,"[11] or put another way, if there was "no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."[12] A "patently unreasonable" decision was one which suffered from a serious and *obvious* defect: one "so flawed that no amount of curial deference can justify letting it stand."[13] This differs from reasonableness *simpliciter*, where the defect rendering a decision unreasonable "might only be discovered after significant searching or testing."[14] In the majority's view in *Dunsmuir*, the existence of two deferential standards was problematic because there was no meaningful way to distinguish between an unreasonable and patently unreasonable decision. As well, upholding an unreasonable decision because its irrationality was not obvious enough seemed inconsistent with the rule of law.[15] A single, merged reasonableness standard, like its predecessors, would recognize that some questions may give rise to several possible conclusions. It would also recognize that:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[16]

However, the move towards a single reasonableness standard did not "pave the way for a more intrusive review by courts"; deference remained central to judicial review:

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11. *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748 at para. 56 [*Southam*].
12. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 55 [*Ryan*]. In *Southam*, the court states that "[t]he defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it." *Ibid.* at para. 56.
13. *Ryan, ibid.* at para. 52.
14. *Ibid.* at para. 53. See also *Southam, supra* note 11 at para. 57.
15. *Dunsmuir, supra* note 1 at para. 42.
16. *Ibid.* at para. 47.

> Deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers." ... [T]he concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."[17]

2. DETERMINING THE APPROPRIATE STANDARD OF REVIEW

As well as opting for a two-standard framework to make the standard of review analysis more coherent and workable, the Court in *Dunsmuir* sought to simplify the selection of the appropriate standard in individual cases. Pre-*Dunsmuir*, it had held that reviewing courts "must always select and employ the proper level of deference"[18] by considering the four contextual factors of the pragmatic and functional approach:[19] (1) the presence or absence of a privative clause or statutory right of appeal;[20] (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question;[21] (3) the purposes of the legislation and the provision in particular;[22] and (4) the nature of the question—law, fact, or mixed law and fact.[23]

In *Dunsmuir*, the majority notes that "[a]n exhaustive review is not required in every case to determine the proper standard of review."[24] A reviewing court

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17. *Ibid.* at para. 48.

18. Ryan, *supra* note 12 at para. 21.

19. *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 26 [*Dr. Q*]. See also *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 [*Pushpanathan*].

20. A statutory right of appeal suggests a searching standard of review; a privative clause suggests deference. See *Dr. Q*, *ibid.* at para. 27.

21. Reviewing courts afford greater deference where a decision maker is more expert than the courts and the question at issue falls within the scope of this greater expertise. See *ibid.* at paras. 28-29.

22. Increased deference is called for where the statutory regime is intended to resolve and balance competing policy objectives or the interests of various constituencies, while less deference is required if the statute seeks to resolve disputes or determine rights as between two parties. See *ibid.* at paras. 30-32.

23. This factor counsels in favour of less deference where the decision maker decides an issue of pure law, particularly one of general importance and precedential value, and more deference for fact-intensive questions. See *ibid.* at para. 34.

24. *Supra* note 1 at para. 57.

must first ascertain whether past cases have "already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."[25] If this inquiry proves unfruitful, the court must perform a contextual standard of review analysis articulated around relevant factors, including the pragmatic and functional factors.[26] It may not be necessary to consider all of these factors, as some "may be determinative in the application of the reasonableness standard in a specific case."[27] The majority summarized the Court's prior standard of review jurisprudence by formulating guidelines,[28] which are set out below.

The first set of guidelines indicated where deference, or a reasonableness standard of review, would be appropriate. Deference "usually" applies "automatically" for questions of fact, discretion, or policy, and "must apply" where legal and factual issues are intertwined and cannot be readily separated. Deference also "usually" results where a tribunal interprets its own statute or statutes closely connected to its function, with which it has particular familiarity. Lastly, deference "may be warranted" where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.

The second set of guidelines indicated the circumstances where a correctness standard of review would be appropriate. Constitutional questions are "necessarily subject" to correctness review. Administrative bodies "must be correct" in determining "true questions of jurisdiction," which arise where a tribunal must "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." Courts "must" apply the correctness standard for questions of general law "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise." Lastly, questions regarding the jurisdictional lines between two or more competing specialized tribunals "have also been subject" to correctness reviews.

In *Dunsmuir*, the majority highlighted the following considerations: (1) the presence of a full privative clause; (2) that the adjudicator, appointed by the mutual agreement of the parties, could be presumed to hold relative expertise in

25. *Ibid.* at para. 62.

26. See *ibid.* at para. 64.

27. *Ibid.*

28. See generally *ibid.* at paras. 54-61.

the interpretation of his enabling statute; (3) that the statute's overall purpose was to establish a time- and cost-effective method to resolve employment disputes; and (4) the remedial nature of the relevant provision.[29] Characterizing the issue before the adjudicator as a legal question within his specialized expertise, the Court reviewed the adjudicator's interpretation of the PSLRA on the preliminary issue on a reasonableness standard and set it aside because it effectively removed the government's contractual right to discharge Dunsmuir with reasonable notice.

C. JUSTICE DESCHAMPS' CONCURRING JUDGMENT

Justice Deschamps proposed a simplified standard of review analysis focused primarily on the nature of the question. Deference was owed to administrative bodies in their determinations of questions of fact or mixed fact and law, their interpretation and application of laws in respect of which they have expertise, and where their decisions are protected by a privative clause.[30] Deference was not owed on the interpretation of laws falling outside their expertise, including laws of general application. In a clear break from prior doctrine,[31] Justice Deschamps decided that deference was not owed on questions of law for which there was a statutory right of appeal.[32] Since the adjudicator lacked specific expertise regarding the common law rules applicable to Dunsmuir's termination, she reviewed his decision on the preliminary issue on a correctness standard and quashed it because it "did not even consider" the employer's common law right to dismiss Dunsmuir without cause.[33]

D. JUSTICE BINNIE'S CONCURRING JUDGMENT

Justice Binnie's judgment pays close attention to the role of context in substantive review, particularly in defining the content of the new reasonableness standard. He alone notes that the pre-*Dunsmuir* existence of both a highly deferential and

29. *Ibid.* at paras. 67-70.

30. *Ibid.* at paras. 161-62.

31. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Southam*, *supra* note 11.

32. *Dunsmuir*, *supra* note 1 at para. 163.

33. *Ibid.* at paras. 168-69.

an intermediate standard of review attempted to recognize that administrative decision makers making certain decisions should be entitled to more deference than other administrative decision makers making different decisions:[34]

> The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represents a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.[35]

A single reasonableness standard would require judges to apply the standard "more deferentially and sometimes less deferentially depending on the circumstances,"[36] an approach the Court had expressly rejected in the context of the framework with three standards of review. The degree of deference measured by the contextual factors, including the four factors from the pragmatic and functional approach, would determine the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."[37]

In Justice Binnie's view, "[r]easonableness is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making."[38] The nature of the question in particular "helps to define the range of reasonable outcomes within which the administrator is authorized to choose."[39] This range will be broader for a decision premised on the exercise of a broad, policy-infused discretion than for one hinging on the interpretation of a relatively static legal standard.

II. JUDICIAL COMMENT AND DEVELOPING TRENDS

Dunsmuir has attracted much academic and judicial comment, and the Supreme Court has applied and explained its new framework for substantive re-

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34. Alice Woolley, "The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review" (2008) 21 Can. J. Admin. L. & Prac. 259 at 264-65.
See also *ibid.* at para. 135.

35. *Dunsmuir, ibid.* at para. 139 [emphasis in original].

36. *Ryan, supra* note 12 at para. 43.

37. *Dunsmuir, supra* note 1 at para. 151.

38. *Ibid.* at para. 144.

39. *Ibid.* at para. 138.

view in several subsequent decisions. In this Part, I discuss how four significant questions[40] arising from *Dunsmuir* have been addressed by the Supreme Court and Canadian appellate courts: (1) When should precedent govern the determination of the appropriate degree of deference? (2) Post-*Dunsmuir*, when is deference appropriate on administrative decision makers' decisions on questions of law, especially where there is a statutory right of appeal? (3) What are the possible implications of the resurrection of the "true question of jurisdiction" for which the standard of review must always be correctness? and (4) What does the new reasonableness standard look like? How must it be applied? Does it comprise a spectrum of degrees of deference?

A. THE ROLE OF PRECEDENT AND THE DUNSMUIR "GUIDELINES"

When will it be appropriate for a reviewing court to eschew a full standard of review analysis in favour of following judicial precedent that has "determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question?"[41] Much depends on the scope of the concept of the "particular category of question." Limiting it to the narrow issue in the case at bar makes it less likely that prior case law will have determined the appropriate standard of review. Extending it to "large, classic labels of 'question of law' or 'mixed question of fact and law' under a particular statutory regime" could sweep "a wide variety of issues into a single standard, without analysis of the expertise of the decision maker and the administrative decision-making context."[42] While this latter, expansive interpretation appears to be consistent with *Dunsmuir*'s generally-stated guidelines for selecting standards of review, the majority characterizes them

40. The question of how courts should approach the interpretation and application of statutory standards of judicial review after *Dunsmuir* is discussed in a more extensive version of this commentary available on the Social Sciences Research Network (SSRN). See Gerald Heckman, "*Dunsmuir* and Substantive Review – Implications and Impact: A Preliminary Assessment" (1 August 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1602044 >.

41. *Dunsmuir*, *supra* note 1 at para. 62. This question has been raised by many commentators. See Ron Goltz, "'Patent Unreasonableness is Dead. And We Have Killed It.' A Critique of the Supreme Court of Canada's Decision in *Dunsmuir*" (2008) 46 Alta. L. Rev. 253 at 259; Laverne Jacobs, "Developments in Administrative Law: The 2007-2008 Term – The Impact of *Dunsmuir*" (2008) 43 Sup. Ct. L. Rev. 1 at 30-31.

42. Jacobs, *ibid.* at 31.

as lessons from prior case law to provide "guidance"[43] with regard to the questions that will be reviewed on a reasonableness standard. The majority also states that "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard."[44] Thus, rather than conclusively setting down the standard of review for broad categories of questions, prior case law provides guidelines that likely serve only to focus and define the arguments that applicants must address to convince a reviewing court that a standard other than that presumptively applicable is warranted.

1. SUPREME COURT DEVELOPMENTS

In *Dunsmuir*, the Court did not rely on prior jurisprudence to define the standard, opting instead to conduct a full standard of review analysis. It has since illustrated the role of precedent in several decisions: *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*,[45] *Canada (Citizenship and Immigration) v. Khosa*,[46] and *Nolan v. Kerry (Canada) Inc.*[47] After briefly describing these decisions, I discuss what lessons they might teach about the role of precedent.

Proprio dealt with the decision of the Association's discipline committee to fine a real estate broker, Proprio Direct, for requiring vendors to pay a non-refundable membership fee when they signed an exclusive brokerage contract, in addition to paying a commission if the property was sold. The committee had found that a sale was a precondition to the receipt of compensation by real estate brokers under the *Real Estate Brokerage Act*[48] (REBA), and that this was a mandatory term of exclusive brokerage contracts. Accordingly, the committee held that Proprio Direct's non-refundable payment practices were illegal, caused prejudice to the public, and thus breached the Association's rules of professional ethics. The Court of Quebec, noting REBA's consumer protection objective, determined that the committee's interpretation and corresponding sanction

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

44. *Ibid.* at para. 57. See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can. J. Admin. L. & Prac. 117 at 126-27 [Mullan, "Standard of Review"].

45. [2008] 2 S.C.R. 195 [*Proprio*].

46. [2009] 1 S.C.R. 339 [*Khosa*].

47. [2009] 2 S.C.R. 678 [*Kerry*].

48. R.S.Q. c. C-73.1.

were reasonable. The Court of Appeal, starting from the premise that laws should be interpreted consistently with freedom of contract, held that the committee had incorrectly determined that the compensation provisions of the exclusive brokerage contracts were mandatory in the absence of an explicit statutory prohibition on amendments by the parties. According to the Court of Appeal, since Proprio Direct's compensation practices were not unlawful, they did not prejudice the public and the committee's sanction was unreasonable.

Justice Abella, writing for the majority of the Supreme Court of Canada, allowed the appeal. She observed that the Court of Appeal, in prior case law, had applied a reasonableness standard to the committee's decisions under two previous versions of REBA—one that provided for a right of appeal and another that comprised a form of privative clause—based largely on the committee's expertise in matters of professional discipline.[49] Rather than performing a full standard of review analysis, she relied on the *Dunsmuir* guideline which prescribed a reasonableness standard for the interpretation by an expert decision maker of its home statute:

> The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply—and necessarily interpret—the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for members of the Association. The question whether Proprio Direct breached those standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association's statutory responsibilities.[50]

Justice Abella's analysis of the relevant provisions and the overarching consumer protection objective of REBA supported the committee's decision.

Justice Deschamps began her dissenting judgment by demonstrating that the REBA, correctly interpreted, does not prescribe mandatory compensation terms. She contended that the cases previously decided by the Court of Appeal were distinguishable: one involved a version of the REBA that contained a privative clause and the other dealt with the appropriateness of a penalty—a question different from the issue of statutory interpretation in *Proprio*. Accordingly, it was not appropriate for the majority to rely on these precedents in adopting a

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49. *Proprio*, *supra* note 45 at paras. 18-19.

50. *Ibid.* at para. 21.

reasonableness standard. Though Justice Deschamps conceded that the committee was interpreting its enabling statute, she noted the following considerations: the committee's expertise was limited to disciplinary matters; there was a broad statutory right of appeal; and the question—whether the Association could impose a single model of practice on Quebec's real estate brokers—was of great significance and could "affect the future of the brokerage profession in Québec."[51] Seeing nothing to warrant showing any deference whatsoever to the committee's decision, Justice Deschamps applied a correctness standard.

Khosa also illustrates the role of precedent in the standard of review analysis. Khosa was a landed immigrant and citizen of India who was convicted for criminal negligence causing death in an automobile street race. Throughout the criminal proceedings, Khosa admitted to speeding and driving dangerously, but denied he was street racing. He received a sentence of two years less a day, including conditions with which he fully complied. The sentencing judge determined that Khosa had favourable prospects for rehabilitation. In view of Khosa's conviction, Canada's immigration authorities ordered him deported. Khosa appealed the order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, which may allow such appeals if "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."[52] The IAD exercised its discretion with regard to several factors, which were the seriousness of Khosa's offence, the possibility of rehabilitation, the length of time spent and the degree to which Khosa was established in Canada, the family and community support available to Khosa, the dislocation to Khosa's family caused by his removal, and the degree of hardship caused to Khosa by his removal.

A majority of the IAD focused its decision on the first two factors. It considered the offence "extremely serious," and observed that Khosa's refusal to accept that he had been street racing reflected "a lack of insight into his conduct."[53] They decided that there was insufficient evidence to determine Khosa's prospects for rehabilitation; even if the prospects were good, balancing all relevant factors, special relief was not warranted. A dissenting IAD member would

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51. *Ibid.* at para. 67.

52. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 67(1)(c) [*IRPA*].

53. *Khosa*, *supra* note 46 at para. 8.

have stayed the execution of the removal order based in part on evidence of Khosa's remorse and rehabilitation. Khosa's application for judicial review was dismissed by the Federal Court, which upheld the IAD's decision as not patently unreasonable.[54] A majority of the Federal Court of Appeal, on the other hand, found that the IAD's decision was unreasonable because it had fixated on the nature of the offence without explaining why its views on Khosa's prospects for rehabilitation conflicted with the findings of the sentencing judge and evidence of Khosa's good post-conviction behaviour.[55]

Writing for a majority of the Supreme Court of Canada,[56] Justice Binnie restored the IAD's decision and overturned the ruling of the Federal Court of Appeal. Applying a reasonableness standard, he determined that the weight to be given to Khosa's evidence of remorse and prospects for rehabilitation—and whether these warranted special relief from a valid removal order—were matters to be resolved by the IAD, not the courts. The IAD's reasons were both transparent and intelligible, and the majority's decision to deny special discretionary relief did not fall outside the range of reasonable outcomes.[57] Justice Binnie noted that the existing jurisprudence pointed to the adoption of a reasonableness standard because lower court decisions favoured either a reasonableness or patent unreasonableness standard, and no authority suggested a correctness standard for IAD decisions under section 67(1)(c) of the *Immigration and Refugee Protection Act* (IRPA). He supported his selection of the reasonableness standard with a full standard of review analysis.

Kerry involved a statutory appeal from a decision by Ontario's Financial Services Tribunal reviewing the determinations of the Superintendent of Financial Institutions relating to the administration of a pension plan. To allow its new employees to subscribe to a defined contribution plan, Kerry changed the terms of its existing defined benefits pension plan by splitting its original trust fund into a "defined benefit" (DB) component and a "defined contribution" (DC) component, administered by separate trustees. Kerry then took contribution holidays from its obligations to its DC employees by using surpluses accumu-

54. *Ibid.* at para. 12.

55. *Ibid.* at paras. 13-14.

56. McLachlin C.J.C. and Binnie, LeBel, Abella, and Charron JJ.

57. *Khosa*, *supra* note 46 at paras. 65-67.

lated in the fund for the DB component. A committee of retired employees benefiting from the DB component sought a ruling from the Superintendent that Kerry's actions were prohibited. They also challenged Kerry's practice of paying third-party expenses (for actuarial, investment, management, and audit services) out of the pension fund. On review of the Superintendent's proposed ruling, the Tribunal determined that Kerry was entitled to pay third-party expenses from the pension fund. Further, based on its review of the pension plan documents, the Tribunal ruled that, though the plan did not permit contribution holidays from the DC component, Kerry could circumvent this obstacle by retroactively amending the plan to designate DC members as beneficiaries of the trust fund. Finally, the Tribunal found that it did not have the statutory authority to order payment of legal costs arising from the dispute from the trust fund.

In determining the appropriate standard of review for the Tribunal's decision, Justice Rothstein (for the majority) noted that the Supreme Court had, in its decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*,[58] applied the standard of correctness to the Tribunal's ruling involving the interpretation of the *Pension Benefits Act*[59](PBA). However, Justice Rothstein decided that a full standard of review analysis was required because *Kerry* involved the interpretation of a pension plan and related texts, not an interpretation of the PBA itself.[60] The Supreme Court ruled that the appropriate standard of review in such questions was reasonableness, given the Tribunal's purpose of protecting employees as part of a complex administrative scheme, and its relative expertise in interpreting pension texts "being both close to the industry and more familiar with the administrative scheme of pension law."[61]

What do these decisions teach us about the use of precedent in the standard of review framework? Justice Binnie's judgment in *Khosa* defined the concept of the "particular category of question" narrowly, focusing on decisions by a specific tribunal under a specific statutory provision. The Court also adopted this narrow approach in *Kerry*, distinguishing a recent precedent based on differences in the nature of the questions at issue. In *Proprio*, Justice Abella ap-

58. [2004] 3 S.C.R. 152.

59. R.S.O. 1990, c. P.8 [*PBA*].

60. *Kerry*, *supra* note 47 at paras. 24, 29.

61. *Ibid.* at para. 29.

peared to view the concept more broadly, relying on precedents that adopted a reasonableness standard under slightly different provisions and for questions of a different nature. Rather than conducting a full standard of review analysis, Justice Abella relied on the *Dunsmuir* guidelines to justify her adoption of a reasonableness standard. Though it shortened the standard of review analysis, this approach was criticized by Justice Deschamps on the basis that Justice Abella had relied on distinguishable precedents and mischaracterized the nature of the question before the discipline committee, and thus relied on the wrong *Dunsmuir* guideline. *Proprio* shows that while courts may welcome precedent-based arguments, prudent lawyers may wish to support them with a full standard of review analysis.[62]

2. APPELLATE DECISIONS

In close to 40 per cent of the appellate cases reviewed in the preparation of this commentary, the court's selection of the standard of review was based primarily on existing precedent, making it the most important determinant of the standard of review. A full standard of review analysis was conducted in less than half as many cases. Where the courts conducted a standard of review analysis or relied on the *Dunsmuir* guidelines to select the appropriate standard, the nature of the question was most frequently afforded the greatest weight in the analysis. The cases raise significant questions and concerns about the courts' use of precedent.

i. COULD *DUNSMUIR* PERPETUATE QUESTIONABLE PRECEDENTS?

While *Dunsmuir* directs courts to rely on precedents that determine the standard of review *in a satisfactory manner*, it may be tempting for courts simply to follow precedent without critically reassessing it in light of more recent jurisprudence. The decision of the Federal Court of Appeal in *Canadian National Railway v. Canadian Transportation Agency*[63] arguably illustrates this risk. Section 150(3)(b) of the *Canada Transportation Act*[64] (*Transport Act*) provides that revenues for demurrage (charges paid by shippers for exceeding time limits for loading or unloading railcars) are not included in the calculation of a company's

62. Goltz, *supra* note 41 at 259.

63. (2008), 378 N.R. 121 (F.C.A.) [*CNR*].

64. S.C. 1996, c. 10.

Western Grain Revenues. In 2007, a majority of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*[65] held that the Canadian Transportation Agency's (CTA) interpretations of its enabling statute should be reviewed on a standard of reasonableness, a position consistent with *Dunsmuir's* guideline that reasonableness should apply to decision makers' interpretations of their home statutes. Further, the Court of Appeal had itself applied a reasonableness standard to the CTA's interpretation of the term "utility crossing" in its enabling statute.[66] Nevertheless, the court in *CNR* decided to rely on an earlier decision[67] in which it had reviewed the CTA's interpretation of the demurrage provision on a correctness standard and prescribed its own view of the provision's correct meaning:

> The only question which arises with respect to demurrage—as the submissions of the parties and the reasons of the Agency demonstrate—is whether the Agency properly understood and applied the reasoning set out in that case. In my respectful view, this Court is better positioned than the Agency to construe its own jurisprudence and I therefore propose to apply a standard of correctness in reviewing this aspect of the Agency's decision.[68]

It would have been appropriate for the Court of Appeal to revisit the standard of review, rather than rely on a precedent that conflicts with its subsequent decisions and is inconsistent with the *Dunsmuir* guidelines. The standard of review for a technical and policy-infused issue, such as the definition of demurrage for the purpose of calculating a company's Western Grain Revenues should likely be reasonableness. Moreover, the CTA had argued that its decision—the calculation of the Western Grain Revenues for Canadian National Rail—was actually consistent with the Federal Court's previous interpretation of the *Transport Act*. This raised a question of mixed fact and law: the application of the legal standard set out in section 150(3) of the *Transport Act* (as previously interpreted by the Federal Court) to a new factual matrix. Such a question at-

65. [2007] 1 S.C.R. 650.

66. *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, [2009] 2 F.C.R. 253 (F.C.A.).

67. *Canadian Pacific Railway Co. v. Canada (Transportation Agency)*, [2003] 4 F.C. 558 (F.C.A.).

68. *CNR*, *supra* note 63 at para. 23.

tracts a reasonableness standard; the Court of Appeal should therefore have asked whether the CTA's application of the law to the facts was reasonable.[69]

ii. DO THE *DUNSMUIR* GUIDELINES HAVE "PRESUMPTIVE FORCE"?

The decision of the Federal Court of Appeal in *Idahosa v. Canada (Minister of Public Safety & Emergency Preparedness)*[70] is noteworthy for its views on the role of the *Dunsmuir* guidelines in establishing the standard of review. *Idahosa* involved a review of an immigration enforcement officer's decision that an Ontario court's child custody order prohibiting the removal of Idahosa's children from Canada did not preclude the enforcement of a removal order against Idahosa herself. This decision involved the interpretation of a provision of the IRPA—the officer's "home statute"—and, under the *Dunsmuir* presumption, would be reviewable on a reasonableness standard. However, the court concluded that other circumstances rebutted this presumption and that a correctness standard applied.[71] First, the officer had limited expertise in legal interpretation, especially regarding the questions of international law and *Charter* rights raised in the application. Second, the statutory provision at issue could be characterized as demarcating which of two specialized tribunals should decide a matter (the Ontario court or the federal enforcement officer), a question which, according to *Dunsmuir*, should normally be reviewed on a correctness standard.

B. IS DEFERENCE APPROPRIATE ON THE STATUTORY APPEAL OF A QUESTION OF LAW?

As noted earlier in this commentary, some judges took the position in *Dunsmuir* that deference is not owed on questions of law where there is a statutory

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69. See also *Stewart v. New Brunswick (Workplace Health, Safety & Compensation Commission)* (2008), 331 N.B.R. (2d) 278 (C.A.). Here, the New Brunswick Court of Appeal relied on precedents to determine that the appropriate standard of review for the Commission's interpretation of the word "accident" in the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 was correctness. These precedents selected correctness based on the "general rule" that it is the appropriate standard for a statutory appeal on a question of law—a rule contrary to *Dunsmuir*'s admonition that deference usually results where a tribunal interprets its own statute or statutes closely connected to its function.

70. (2008), 385 N.R. 134 (F.C.A.) [*Idahosa*].

71. *Ibid.* at para. 19. See also Goltz, *supra* note 41 at 257. Goltz refers to these guidelines as "presumptive principles."

right of review.[72] The majority's silence on this issue[73] raised the possibility that it was wavering on the Court's long-standing position that, even in the presence of a statutory right of appeal, deference to decisions of specialized tribunals on matters which fell squarely within their expertise is warranted on the basis of the concept of specialization of duties. In his concurring judgment in *Khosa*, Justice Rothstein mounted a frontal assault on this principle, arguing that it is inconsistent with the objective of standard of review analysis to ground courts' decisions to intervene in administrative decision making based on legislative intent: "It is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in so doing, assume the role of the legislature to determine when deference is or is not owed."[74] According to Justice Rothstein, it is not the courts but the legislatures that create administrative decision makers that are best placed to assess the expertise of decision makers, and they can express their judgment that tribunals possess superior expertise relative to courts by enacting a privative clause.[75]

Justice Binnie, writing the majority judgment in *Khosa*, renewed the Court's commitment to the principle of deference based on the specialization of duties,[76] which recognized that, where there are several possible valid interpretations of a decision maker's enabling statute, the question is not which interpretation is correct, but, rather, which is the most appropriate. On this question, deference is owed to administrative decision makers because they likely have a better grasp of the impact of particular interpretations on the practical implementation of the legislative scheme and on the achievement of legislative objectives. Justice Binnie decried Justice Rothstein's position as an "effort to roll back the *Dunsmuir*

72. *Dunsmuir*, *supra* note 1 at para. 163 (per Deschamps J), para. 135 (per Binnie J.).

73. But see Michel Bastarache, "Modernizing Judicial Review" (2009) 22 Can. J. Admin. L. & Prac. 227 at 234. Recently retired Justice Bastarache, one of the authors of the *Dunsmuir* majority judgment, states that, in his view, the majority did not intend to "leave open the possibility of deferential or unreason-ableness review even in the face of a statutory right of appeal."

74. *Khosa*, *supra* note 46 at para. 91.

75. *Ibid.* at para. 95.

76. See also *Kerry*, *supra* note 47. In this case, the Supreme Court applied a reasonableness standard to review, on a statutory appeal, the Ontario Financial Services Tribunal's interpretation of its enabling statute.

clock to an era where some courts asserted a level of skill and knowledge in administrative matters, which further experience showed they did not possess."[77]

C. IMPLICATIONS OF THE RESURRECTION OF THE "TRUE JURISDICTIONAL QUESTION"

The role played by the concept of "jurisdiction" in the development of the law of substantive review is well known and will not be detailed here.[78] It is sufficient to note that "jurisdiction" stands for two ideas: (1) that state officials can only exercise powers that are derived from a constitutionally proper statutory source or within the limits of prerogative power; and (2) that superior courts have the constitutional responsibilities to ensure that officials make decisions within the scope of these limits (*i.e.*, within jurisdiction), and to intervene when officials exceed the bounds of their jurisdiction. While this seems to be an attractively simple concept, the exact meaning of jurisdiction has proved elusive. Canadian courts initially distinguished between two categories of questions confronting statutory authorities: (1) questions within the authorities' jurisdiction, over which Parliament intended them to have primary, if not exclusive, authority to decide; and (2) questions that "affected" or "went to" their authority, over which courts were to have the final word.[79] Whether a question fell within a statutory authority's jurisdiction or affected it depended on whether the court classified it as preliminary to, or a prerequisite for, the exercise of further powers. This approach led to the very intrusive judicial review of decisions of expert tribunals—particularly labour boards—on questions relating to the interpretation of their enabling statute that were arguably infused with policy considerations.[80] In *Canadian Union of Public Employees Local 963 v. New*

77. *Khosa, supra* note 46 at para. 26.

78. See Gerald P. Heckman, Book Review of *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* by Grant Huscroft & Michael Taggart, eds., (2007) 86 Can. Bar Rev. 163 at 164-67.

79. This view of substantive review rested on the acceptance of certain fundamental constitutional tenets: Parliament may assign or delegate primary responsibility for the exercise of state power on statutory authorities, and the rule of law does not require the courts to have the final word on all questions of law. See David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 55 [Mullan, *Administrative Law*].

80. See *Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board* (1961), 26 D.L.R. (2d) 589 (Man.

Brunswick Liquor Corporation, the Supreme Court rejected this "classification" approach as unhelpful and warned courts against branding "as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[81] Following that seminal decision, the Supreme Court abandoned its formalistic approach for a "pragmatic and functional" approach still aimed at discerning legislative intent, "keeping in mind the constitutional role of the courts in maintaining the rule of law,"[82] but which also paid "more attention to statutory purposes and structures and the sense they conveyed of the relevant tribunal's expected areas of competence or expertise."[83]

From its near-death in *Pushpanathan*, where Justice Bastarache defined a question "going to jurisdiction" as "descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis,"[84] the true question of jurisdiction has made a comeback.[85] The *Dunsmuir* majority expressly states that it "neither wish[es] nor intend[s] to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in the area for many years," and the Court reiterates its caution in *CUPE*, noting that true questions of jurisdiction "will be narrow."[86] Mullan, however, correctly notes that the statement of the majority in *Dunsmuir* that "true jurisdictional questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter"[87] could accurately describe the preliminary question doctrine followed by interventionist courts before *CUPE*.[88]

C.A.); *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425.

81. [1979] 2 S.C.R. 227 at 233 [*CUPE*].

82. *Dr. Q*, *supra* note 19 at para. 26.

83. Mullan, *Administrative Law*, *supra* note 79 at 63.

84. *Pushpanathan*, *supra* note 19 at para. 28.

85. See *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485.

86. *Dunsmuir*, *supra* note 1 at para. 59.

87. *Ibid.*

88. Mullan, "Standard of Review," *supra* note 44 at 129-30. But see Andrew Wray & Christian Vernon, "*Dunsmuir* Update" (Paper presented to The Six-Minute Administrative Lawyer, Toronto, 24 February 2009) at 19 [unpublished; copy on file with author]. This states that

1. SUPREME COURT DEVELOPMENTS

In *Kerry*, the Supreme Court reiterated its view that the category of jurisdictional questions was narrow. It firmly rejected the claim that the Tribunal's decision (that its enabling statute did not allow it to order that costs of a legal dispute be paid out of a pension fund) raised a question of jurisdiction regarding the scope of the tribunal's authority and should be reviewed on a correctness standard. In selecting a deferential standard of review, it noted that:

> The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness ... standard when interpretation of that statute raises a broad question of the tribunal's authority.[89]

Applying this to the facts in *Kerry*, the court stated that "there is no question that the Tribunal has the statutory authority to enquire into the matter of costs; the issue involves the Tribunal interpreting its constating statute to determine the parameters of the costs order it may make."[90]

2. APPELLATE DECISIONS

Though *Kerry* may go some way towards clarifying the Supreme Court's stand on jurisdictional questions, a review of pre-*Kerry* appellate decisions reveals conflicting approaches to the issue. As the following two Federal Court of Appeal decisions show, some judges heed the Supreme Court's warning to view the category of true questions of jurisdiction narrowly, but its definition in *Dunsmuir* does nothing to hold back those who take a broader view of the concept.

A broad view of the concept of jurisdictional question is illustrated in *Canada (Attorney General) v. Watkin*.[91] Watkin, the Chief Executive Officer of a Canada-based food and drug manufacturer, claimed that Health Canada had

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Dunsmuir's clarification of the nature of true jurisdictional questions may have narrowed the application of the correctness standard.

89. *Kerry*, *supra* note 47 at para. 34.

90. *Ibid.* at para. 35.

91. (2008), 378 N.R. 268 (F.C.A.) [*Watkin*]. See also *Canadian National Railway Co. v. Canada (Transportation Agency)*, [2009] 1 F.C.R. 287 at para. 31 (C.A.). Compare *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819* (2008), 90 O.R. (3d) 451 (C.A.),

discriminated against him and others associated with his company on the basis of ethnic and national origin, by subjecting his company to higher levels of enforcement scrutiny than "Asian" or "First Nations" businesses. This stance, he claimed, violated the *Canadian Human Rights Act* (CHRA), which makes it a discriminatory practice to "differentiate adversely in relation to any individual," on a prohibited ground of discrimination "in the provision of goods, services, facilities or accommodation customarily available to the general public."[92] Health Canada sought judicial review of the Canadian Human Rights Commission's decision that it had jurisdiction to consider Watkin's complaint.

The Federal Court of Appeal characterized the issue before it as "whether government actions which are not 'services' within the commonly accepted meaning can nevertheless be treated as 'services' under section 5."[93] The issue could be characterized as a question requiring the decision maker to interpret a term of its enabling statute, which would ordinarily call for a reasonableness standard. The Commission arguably possesses a considerable degree of expertise in the interpretation of this and other provisions of the CHRA. Whether the interpretation of "services" in section 5 of the CHRA should extend beyond the commonly accepted meaning of that word could also be described as involving policy dimensions and choices that could be informed by the Commission's experience and expertise in human rights protection. Indeed, the Commission relied on human rights jurisprudence to press for a broad interpretation of the term. Finally, this could be characterized as a question of general law of central importance to the legal system as a whole and outside the Commission's specialized expertise, and, thus, deserving of review on a correctness standard; this is in line with the views expressed by the Supreme Court in *Canada (Attorney General) v. Mossop*.[94] The Court in *Watkin* chose to classify the question as "jurisdictional," and thereby mandate a correctness review.

This decision is reminiscent of the Supreme Court's decision in *Bell v. Ontario Human Rights Commission*[95] to classify as jurisdictional whether a property in respect to which rental discrimination was being alleged was a "self-contained

92. R.S.C. 1985, c. H-6, s. 5(b).

93. *Watkin, supra* note 91 at para. 25.

94. [1993] 1 S.C.R. 554.

95. [1971] S.C.R. 756 [*Bell*].

dwelling unit" subject to the Ontario *Human Rights Code*[96] (HRC), a stance criticized as inappropriately interventionist.[97] Mullan, perhaps presciently, noted that *Dunsmuir*'s definition of true question of jurisdiction could give new life to the thinking and philosophies underlying cases like *Bell*.[98] Characterizing the issue as jurisdictional in *Watkin* may not have changed the result, since the Court would also arrive at a correctness standard by characterizing it as a question of law of general importance. It would make a difference, however, if a similar issue were decided by Ontario's Human Rights Tribunal, whose interpretation of the HRC is protected by a privative clause stipulating review on a patent unreasonableness standard.[99] By characterizing the question as jurisdictional, a reviewing court could sidestep the privative clause and review the tribunal's interpretation on a correctness basis—a result that would not automatically follow from the court's characterization of the question as a question of law.

Other Federal Court of Appeal judges take a less expansive view of the "jurisdictional question." The Court's judgment in *Public Service Alliance of Canada v. Canadian Federal Pilots Association et al.*[100] takes a dramatically more restrictive view of the concept, urging a return to the *Pushpanathan* conceptualization of jurisdictional questions as questions for which a standard of review analysis yields a correctness standard. *Public Service Alliance* concerned an application for judicial review of the Public Service Labour Relations Board's (PSLRB) decision to reallocate certain positions from the bargaining unit represented by the Public Service Alliance of Canada (PSAC) to one represented by the Canadian Federal Pilots Association (CFPA) on the grounds that this achieved the "best fit" for collective bargaining purposes. The PSLRB ordered the reallocation, notwithstanding the fact that the CFPA-represented bargaining unit's definition specifically excluded positions in which experience as an aircraft pilot and a valid pilot's licence were not mandatory; the work descriptions for the relevant positions had recently been amended to remove flying duties and were silent on the need for piloting qualifications. Though the

96. R.S.O. 1990, c. H.19 [*HRC*].

97. See P. W. Hogg, "The Jurisdictional Fact Doctrine in the Supreme Court of Canada: *Bell v. Ontario Human Rights Commission*" (1971) 9 Osgoode Hall L.J. 203.

98. Mullan, "Standard of Review," *supra* note 44 at 129-30.

99. *HRC*, *supra* note 96, s. 45.8.

100. (2009), 392 N.R. 128 (F.C.A.) [*Public Service Alliance*].

PSLRB's decision was protected by a strong privative clause, PSAC argued that, in allocating employees to a bargaining unit that expressly excluded them, the PSLRB had amended the definition of the bargaining unit and had exceeded its statutory jurisdiction.

Justice John Evans, writing for the court on the question of standard of review, rejected PSAC's characterization of the question as "jurisdictional" and automatically deserving of correctness review. Noting that *Dunsmuir* enunciated a strong presumption of reasonableness review for tribunals' interpretation of their enabling statute, he remarked that its retention of the category of jurisdictional questions reviewable on a correctness standard was "apt to cause confusion if such questions are to be identified independently of a standard of review analysis."[101] Justice Evans's approach, in addition to dovetailing with the thrust of the Supreme Court's decision in *Kerry*, would do much to clarify this area of the law and reduce the risk that the label of jurisdictional question could be successfully invoked by parties seeking inappropriately intrusive review by courts of decisions that raise questions of statutory interpretation best answered by expert administrative decision makers.[102]

D. WHAT DOES THE NEW REASONABLENESS STANDARD LOOK LIKE?

There are two interrelated questions here. First, is the new reasonableness standard actually a range or spectrum of degrees of deference? Second, when will a decision be reasonable or unreasonable? Justice Binnie's view that the "judicial sensitivity" to differing levels of deference in different situations, accommodated in pre-*Dunsmuir* days by the existence of an intermediate and highly deferential standard of review, can now only be met by multiple levels of deference within the single remaining reasonableness standard[103] is arguably dictated by

101. *Ibid.* at para. 37.

102. For other examples of a restrictive approach to "jurisdictional questions," see *Hibernia Management and Development Co. v. Canada-Newfoundland Offshore Petroleum Board* (2008), 84 Admin. L.R. (4th) 241 at paras. 121-23 (Nfld. S.C. (A.D.)); *Lienaux v. Nova Scotia Barristers' Society* (2009), 274 N.S.R. (2d) 235 at paras. 28-29 (C.A.). See also *Alberta v. Alberta Union of Provincial Employees* (2008), 433 A.R. 159 at para. 29 (C.A.). But see *Smyth v. Perth and Smiths Falls District Hospital* (2008), 92 O.R. (3d) 656 at paras. 14-17 (C.A.).

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

the majority judgment in *Dunsmuir* itself.[104] The majority directed that precedent should govern when the *degree of deference* to be accorded has already been satisfactorily determined for a certain category of questions. Accordingly, where courts have previously determined that a patent unreasonableness standard was appropriate, the post-*Dunsmuir* reasonableness standard should require the same high degree of deference; a result consistent with the majority's assurance that a single reasonableness standard did not imply more intensive review.[105] It is thus logical to conclude that "reasonableness is a standard that admits of varying levels on intensity of review depending on the context,"[106] and that *Dunsmuir* has not really simplified the task of ascertaining the appropriate degree of deference, but has simply left it for a later stage in the analysis.[107]

Related to the nature of the reasonableness standard is the second question of how to apply the standard. The majority states that "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."[108] With regard to the process of articulating reasons, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."[109] With regard to outcomes, it is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[110] Mullan has suggested that *Dunsmuir* proposes a multi-stage review process. First, the court looks at the tribunal's reasons "to see whether they are coherent in the sense of presenting a reasoned and reasonable articulation of the conclusion reached."[111] If they are lacking in this respect, the court must "consider any other arguments (either advanced by counsel, or, perhaps, also developed by the court) that might justify the decision by reference to a reasonableness stan-

104. Mullan, "Standard of Review," *supra* note 44 at 134.

105. *Dunsmuir*, *supra* note 1 at para. 48.

106. Mullan, "Standard of Review," *supra* note 44 at 134. See also Woolley, *supra* note 34 at 266.

107. Mullan, "Standard of Review," *ibid.* at 135. But see Bastarache, *supra* note 73 at 235.

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

109. *Ibid.*

110. *Ibid.*

111. Mullan, "Standard of Review," *supra* note 44 at 136.

dard."[112] This latter requirement flows from the majority's view that deference requires of courts "a respectful attention to the reasons offered or *which could be offered* in support of a decision."[113] Finally, having decided that the reasons present a reasoned and reasonable articulation of the decision maker's conclusion, the court may nevertheless have to "ask the further question whether, in isolation from the reasons provided, the outcome can be justified as reasonable in the sense of coming within what the reviewing court regards as an acceptable range of results by reference to its own assessment of the matter."[114]

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Have subsequent Supreme Court decisions provided further guidance on these questions? In *Lake v. Canada (Minister of Justice)*,[115] the Court was asked to review the Minister of Justice's exercise of a broad discretion to order a fugitive's surrender for extradition. Lake argued that the questions of whether surrender was a justified limit on his section 6(1) mobility rights and whether it infringed his section 7 rights should be reviewed on a correctness standard because they dealt with his *Charter* rights. In dismissing this argument, the unanimous

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112. *Ibid.*

113. *Dunsmuir, supra* note 1 at para. 48 [emphasis added]. Mullan notes that it is also necessary for the review of "highly discretionary, policy decision-making by statutory and prerogative authorities that do not act in an adjudicative fashion," and for which statute or common law procedural fairness may not require reasons or require only minimal reasons. See Mullan, "Standard of Review," *supra* note 44 at 133.

114. Mullan, "Standard of Review," *ibid.* at 136. Recently retired Justice Bastarache observed that it was "difficult to contemplate a situation where rational and coherent reasons could somehow arrive at a conclusion that is not within the range of acceptable outcomes." See Bastarache, *supra* note 73 at 236. For one possible illustration of this situation, see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 67. In this case, an immigration officer rejected Baker's application for a humanitarian and compassionate exemption to the requirement of the now repealed *Immigration Act*, R.S.C. 1985, c. I-2 that she apply for permanent residence from outside Canada. The officer's reason for the decision, that Baker and her many children were and would continue to be a drain on Canadian social assistance programs, was arguably both "rational" and "coherent," but the outcome was not acceptable when measured against the values underlying the statutory grant of discretion, including respect for the best interests of children affected by immigration decisions.

115. [2008] 1 S.C.R. 761 [*Lake*].

Court discussed in significant detail the polycentric and policy-laden nature of the minister's decision.[116] It noted that the minister's assessment of whether the infringement of section 6(1) was justified rested largely on his decision whether Canada should defer to the United States' interest in prosecuting Lake—a largely political decision that would be unacceptable only if it was made for improper or arbitrary motives. This left "room for *considerable deference* to the minister's conclusion that the infringement of [section] 6(1) is justified,"[117] language that strongly implies that reasonableness indeed involves a variable degree of deference. Significantly, in respect of Lake's section 7 argument, the Court relied on its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)* that a minister's decision whether a refugee faced a substantial risk of torture upon deportation was a "fact-driven inquiry involving the weighing of various factors and possessing 'a negligible legal dimension,'"[118] and was thus to be reviewed on the patent unreasonableness standard.

In *Khosa*, Justice Binnie's description of reasonableness as "a single standard that takes its colour from the context"[119] suggests that the standard does *not* comprise a spectrum of degrees of deference. Indeed, Justice Rothstein, in his concurring judgment, interprets his colleague's words in this way. Noting the majority's concern with the perceived rigidity of statutory standards of review in application to a broad range of different decision makers, he observes that the two-standard *Dunsmuir* framework itself is no paradigm of flexibility:

> Regardless of what type of decision-maker is involved, whether a Cabinet minister or an entry-level fonctionnaire, the *Dunsmuir* analysis can only lead to one of two possible outcomes: reasonableness or correctness. *And, as the present majority makes clear, these are single standards, not moving points along a spectrum.*[120]

To be fair to Justice Binnie, though reasonableness is clearly a "single standard," his observation that its "colour" depends on context indicates that the nature of the question, the presence of a privative clause, the purpose of

116. See Jacobs, *supra* note 41 at 24.

117. *Lake*, *supra* note 115 at para. 37 [emphasis added].

118. *Ibid.* at para. 38.

119. *Khosa*, *supra* note 46 at para. 59.

120. *Ibid.* at para. 108 [emphasis added].

the decision maker in light of its enabling legislation, and the decision maker's expertise will have an impact on the *application* of the reasonableness standard. This is per the Court's requirement that a reasonable decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[121] In Justice Binnie's view, the majority and dissent came to opposing views on the reasonableness of the IAD's decision to deny Khosa's humanitarian and compassionate appeal because they took "a different view ... of the range of outcomes reasonably open to the IAD in the circumstances of this case."[122]

Justice Binnie's view of this range was based on his assessment of the third and fourth contextual factors of the standard of review analysis—the purpose of the IAD and the nature of the question before it, including: the exceptional nature of the relief the IAD is empowered to grant; the highly discretionary nature of the IAD's determination of what constitutes humanitarian and compassionate considerations, as well as their sufficiency in a particular case; the fact-based and policy-driven nature of the IAD's assessment; and the fact that the IAD, as first-instance decision maker, had the advantage of hearing and assessing the evidence presented, including the respondent's testimony.[123] Clearly, Justice Binnie relied on these contextual factors not only to select reasonableness as the appropriate standard, but also to determine the range of reasonable outcomes and whether the IAD's decision fell within this range. Ultimately, he could not agree with Justice Fish that the IAD's decision "to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes."[124] Considering the purpose of the tribunal and the nature of the question, this range was broad: a reasonable decision would consider appropriate factors and weigh these factors based on the decision maker's assessment of the evidence before it. The IAD's reasons convinced Justice Binnie that its decision fell within this range and should be upheld.

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

122. *Khosa*, *supra* note 46 at para. 62.

123. *Ibid.* at paras. 56-58.

124. *Ibid.* at para. 67.

2. APPELLATE DECISIONS

Without clear guidance from the Supreme Court, Canadian appellate courts have struggled with the question of how the new single reasonableness standard should be defined and applied to administrative decisions. They are gradually finding their way and definite trends have emerged in the case law.

i. IS THERE A SPECTRUM OF LEVELS OF DEFERENCE WITHIN THE REASONABLENESS STANDARD?

The Ontario Court of Appeal was the first appellate court to reject the proposition that varying degrees of deference apply within the reasonableness standard. In *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*,[125] it reviewed the decision of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) to dismiss Mills's request for a permanent disability assessment on the basis that there was no causal relationship between his back problems and a work injury he had suffered in 1979. The Ontario Divisional Court had set aside the WSIAT's decision, finding that nothing in the record justified its rejection of a medical opinion presented by Mills's physician. The Court of Appeal dismissed the WSIAT's claim that the reasonableness standard contained varying degrees of deference; requiring courts to "puzzle over the degree of deference to give to a tribunal within the reasonableness standard" frustrated *Dunsmuir*'s aim of making judicial review "simpler and more workable."[126] Rather than determining where a floating reasonableness standard falls on a deference spectrum, the decision-making context retains a crucial role in the *application* of a single reasonableness standard:

> Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision-maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual

125. (2008), 237 O.A.C. 71 [*Mills*].

126. *Ibid.* at paras. 19, 21.

> breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.[127]

This view was soon approved by the Federal[128] and Alberta[129] Courts of Appeal. For example, in reviewing the Minister of Revenue's discretionary decision not to waive interest on unpaid taxes in *Telfer v. Canada Revenue Agency*, the Federal Court of Appeal noted the unstructured nature of the minister's "extraordinary statutory discretion"[130] to waive interest. The Court also noted that the fact that the taxpayer had made a different argument in favour of a waiver before the Court than before the minister militated "against a court's subjecting the decision-making process to close scrutiny."[131]

ii. WHAT IS REQUIRED FOR A DECISION TO MEET THE REQUIREMENT OF JUSTIFICATION, TRANSPARENCY, AND INTELLIGIBILITY?

While it is difficult to discern broad principles regarding what is sufficient justification, transparency, and intelligibility within the decision making process, several recent decisions give some content to these concepts. In *Lake*, the Supreme Court addressed Lake's claim that the reasons delivered by the Minister of Justice in support of his decision to extradite Lake to face drug trafficking charges in the United States were inadequate because they did not fully canvass the relevant factors outlined in the leading extradition case.[132] The Court dismissed Lake's argument:

> [The Minister's] reasons need not be comprehensive. The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision. The Minister's reasons must make it clear that he considered the individual's submis-

127. *Ibid.* at para. 22. But see *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008), 92 O.R. (3d) 757 at para. 22 (C.A.). The decision appears to contemplate various degrees of deference.

128. See *Telfer v. Canada Revenue Agency* (2009), 386 N.R. 212 at para. 29 (F.C.A.) [*Telfer*].

129. See *International Association of Machinists and Aerospace Workers, Local Lodge No. 99 v. Finning International Inc. et al.* (2008), 446 A.R. 20 at para. 12 (C.A.).

130. *Telfer, supra* note 128 at para. 34.

131. *Ibid.* at para. 40. See also *Pharmascience Inc. v. Canada (Attorney General)* (2008), 382 N.R. 101 at para. 4 (F.C.A.).

132. See *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469 [*Cotroni*].

> sions against extradition and must provide some basis for understanding why those submissions were rejected. Though the Minister's *Cotroni* analysis was brief in the instant case, it was in my view sufficient. The Minister is not required to provide a detailed analysis for every factor. An explanation based on what the Minister considers the most persuasive factors will be sufficient for a reviewing court to determine whether his conclusion was reasonable.[133]

The Court noted that the minister's reasons stated that he had considered the *Cotroni* factors and emphasized that the alleged conduct occurred in the United States, which was entitled through prosecution to protect its own public and maintain public confidence in its laws and justice system.[134]

In *Khosa*, Justice Binnie determined that the IAD's reasons disposing of Khosa's appeal of his removal order met the requirements of justification, transparency, and intelligibility because they disclosed with clarity the considerations in support of both points of view, considered the appropriate factors, reviewed the evidence and attributed significant weight to the respondent's evidence of remorse and prospects for rehabilitation, and came to their own conclusions based on their appreciation of the evidence.[135]

iii. REASONABLENESS REVIEW BASED ON REASONS THAT *COULD BE OFFERED* IN SUPPORT OF A TRIBUNAL'S DECISION

On several occasions, where appellate courts have reviewed decisions supported by reasons that could be challenged as incomplete or insufficiently detailed, judges have shown a willingness to base their reasonableness assessments on reasons that "could be" (but were not) offered in support of the tribunals' decisions.

In *Mills*, the WSIAT had dismissed Mills's claim for benefits based on the absence of medical evidence establishing that his back problems were due to a prior work injury.[136] Mills argued that the WSIAT's decision was unreasonable because it ignored his testimony that he had asked his physician not to document his back problems to avoid jeopardizing his truck operator's licence. The court determined that the absence of any reference to this testimony in the

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133. *Lake*, *supra* note 115 at para. 46.

134. *Ibid.* at para. 47.

135. *Khosa*, *supra* note 46 at paras. 64-66. See also *Public Service Alliance*, *supra* note 100 at paras. 68-71

136. *Mills*, *supra* note 125 at paras. 37-39.

WSIAT's reasons did not make the WSIAT's decision unreasonable. It inferred from these reasons that the WSIAT had rejected Mills' explanation—a decision amply supported by the evidentiary record.

In *Gagné c. Autorité des Marchés Financiers*,[137] the Autorité des Marchés Financiers (AMF)—Quebec's Securities Commission—had determined that an investment advisor lacked sufficient integrity and had imposed a five-year suspension of its registrant privileges. The Court of Quebec determined that the Commission's penalty was unreasonably low and substituted a lifetime ban. Noting that the Commission's reasons explaining its choice of sanction were "perhaps not as fulsome as [they] might have been,"[138] the Court of Appeal filled in the gaps, finding that a five-year suspension was reasonable based on precedent and on a Commission "General Instruction," which required suspended registrants to pass a rigorous re-qualification process:

> Counsel for the AMF also conceded that the existence of this General Instruction was not brought to the attention of Pinsonnault J.C.Q., who therefore may have been under the misapprehension that at the expiry of his five-year suspension, Mr. Gagné would automatically recover the rights he lost as a result of the suspension. The Panel, on the other hand, as experts in the administration of its "home statute" and the process Mr. Gagné would have to undergo at the expiry of his term of suspension, are presumed to be aware of this General Instruction and its applicability to Mr. Gagné.[139]

III. CONCLUSION

Though it would be foolhardy, if not impossible, to neatly summarize the impact and implications of *Dunsmuir* on substantive review in Canada at this early juncture, a few concluding observations may be drawn from my preliminary research on this question.

My review of appellate cases shows that *Dunsmuir* has served to simplify the standard of review analysis in certain respects. Precedent now appears to be the most significant determinant of the standard of review. Some appellate courts are relying on the *Dunsmuir* guidelines to determine the appropriate

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137. [2008] J.Q. no. 7830 (C.A.) (QL).

138. *Ibid.* at para. 114.

139. *Ibid.* at para. 133. See also *Telfer*, *supra* note 128 at para. 31; *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)* (2009), 93 O.R. (3d) 563 (C.A.).

standard, viewing them as presumptions that may be rebutted by the specific circumstances of the case. The cases reveal that although some appellate courts have heeded *Dunsmuir*'s caution not to brand as jurisdictional questions that are doubtfully so, others have taken a broader view of the category of true questions of jurisdiction—one that is not constrained by the Court's definition of the term. In most cases where appellate courts have performed a standard of review analysis or considered the *Dunsmuir* guidelines, the nature of the question appears to have played the most significant role in the outcome. This finding is significant because, of all the contextual factors, the nature of the question is most amenable to manipulation by the parties, and, possibly, by reviewing courts.[140]

It is at the stage of the courts' application of the reasonableness standard that substantive review retains much of its complexity. Appellate courts appear to be gradually recognizing that, while it may not be accurate to speak of varying degrees of deference within the reasonableness standard, the range of reasonable outcomes is the variable in the post-*Dunsmuir* regime—expanding and contracting under the influence of various contextual factors, including the familiar pragmatic and functional factors. While this new framework brings with it some degree of uncertainty, especially at this early stage in its development, appellate courts are slowly developing their own approaches to make it work. Time will tell whether these are ultimately successful or whether renewed pressure from stakeholders will precipitate another attempt at reform of substantive review.

Accepting that substantive review is inherently complex,[141] by what criteria should we assess the new *Dunsmuir* framework? If "the most that can be asked of the law in this area is that it forces judges to address the relevant questions" and help the judges identify and do "the right thing,"[142] there is much to commend in the *Dunsmuir* framework. Though it does not eliminate the danger that courts will blindly adhere to precedent or resort to jurisdictional labels, it articulates a strong presumption in favour of deference to administrative decision makers' interpretations of their enabling statutes or closely-related legisla-

140. Mark G. Underhill, "*Dunsmuir v. New Brunswick*: A Rose by Any Other Name?" (2008) 21 Can. J. Admin. L. & Prac. 247 at 256.

141. Woolley, *supra* note 34 at 269.

142. David J. Mullan, ed., *Administrative Law: Cases, Text, and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) at 824.

tion. Most importantly, whereas under the pragmatic and functional approach contextual factors were considered by the reviewing court at the preliminary stage of selecting the appropriate standard of review, *Dunsmuir* now requires judges to focus on these factors at the final, crucial, "crowning moment" of substantive review[143]—their assessment of the reasonableness of the tribunals' decisions. This can only assist them to "do the right thing" on judicial and appellate review—to uphold the rule of law and protect individual rights, while respecting legislatures' choice to entrust expert administrative bodies with broad regulatory powers.

143. Sheila Wildeman, "A Fine Romance? The Modern Standards of Review in Theory and Practice" in Colleen Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) 229 at 232.