THE SIGNAL AND THE NOISE IN ADMINISTRATIVE LAW

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The signal is the truth. The noise is what distracts us from the truth. This is a book about the signal and the noise.

Nate Silver, *The Signal and the Noise: The Art and Science of Prediction* (London: Penguin, 2013).

Introduction

There has been an unfortunate trend in recent Supreme Court of Canada administrative law cases.[1]

While academics, practitioners and lower-court judges try to establish coherent frameworks to understand the general principles of judicial review, the Court has been resolving cases one by one without, with respect, any serious attempt to explain how they fit into its existing body of administrative law jurisprudence. The institutional context in which the Court operates, explained in Part I, no doubt influences the Court's resolution of individual cases in this way.
Whatever the background institutional context, confusion has been the unfortunate result, as I explain in Part II. How should lawyers read these cases: as attempts to resolve one-off issues of substantive law (workers' compensation law, immigration law, discrimination law and so on) or as continual refinements to an already complex body of administrative law doctrine?

I argue that it is now necessary to distinguish between signal and noise, between those cases that do modify administrative law doctrine and those cases that simply deal with a particular substantive area of law. In Part III, I set out criteria which will help Canadian administrative lawyers to distinguish signal from noise.

This confusion seems to me, however, to be unnecessary. As I suggest in Part IV, the Court could take up judicial and academic proposals for a unified

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[1] My focus here is on the period from 2008 to the present day. I have read all of the Supreme Court of Canada's administrative law output since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] and a significant proportion of the post-*Dunsmuir* case law produced by the lower courts. I appreciate that some of my comments may seem impressionistic. The concerned reader can rest assured that I opine from a solid knowledge base.

reasonableness standard that would allow it to resolve individual cases without creating uncertainty about whether it has also modified administrative law doctrine. Adopting this approach would obviate the need to distinguish signal from noise, because they would both fade into the comforting hum of reasonableness review.

I. Institutional Context

The problem of distinguishing signal from noise must be understood in context.

The Court is an apex court, sitting athwart Canada's judicial hierarchy. With the exception of certain criminal cases where there is an automatic right of appeal, the Court deals only with questions of "public importance", important legal questions and other questions "of such a nature or significance as to warrant [its] decision".[2]

Moreover, its decisions are important not only for the parties that appear before it but also for the wider community: the reasons it gives lay down important guidance for lower courts, litigants and laypeople.

The Court itself is aware of this. In *R v Henry*,[3] Binnie J explained that the traditional common law distinction between *ratio decidendi* – those matters essential to the decision of a case – and *obiter dicta* – everything else – was a "supposed dichotomy" that is an "oversimplification of how the common law develops".[4] Rather:

> The issue in each case…is what did the case decide? Beyond the ratio decidendi which…is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in [*Sellars v The Queen*, [1980] 1 SCR 527] or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.[5]

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[2] *Supreme Court Act*, RSC 1985, c s-26, s 40(1).

[3] *R v Henry* 2005 SCC 76, [2005] 3 SCR 609 [*Henry*].

[4] *Ibid* at para 52.

[5] *Ibid* at para 57.

The result, though, is that even if the decisions of the Court are not treated as legislative pronouncements, there is a temptation to closely parse *obiter* statements for indications of changes in the law. The question is no longer "is this part of the *ratio*?" but rather "is this authoritative?"

The undoubted need to give general guidance is also a reason for enhanced collegiality on an apex court. It has been said that under the stewardship of McLachlin CJ, the Court has placed a premium on collegiality and the production of majority and even unanimous reasons.[6] This can increase certainty and clarity by committing all members of the Court to the same position. But it can also undermine certainty and clarity by achieving a narrow unified position at the cost of drowning out dissenting noises that may prove too loud to ignore in later cases.[7]

II. Signal or Noise?

A problem that can be traced to the institutional context in which the Supreme Court of Canada operates plagues the Canadian law of judicial review of administrative action. Because of the Court's role in answering important questions of law, it is often difficult to determine whether the reasons given for deciding a judicial review case are intended to have an effect on the general principles of administrative law. Administrative law consists of general principles that have to be applied to different areas of substantive law. Decisions in environmental law, discrimination law, workers' compensation law, immigration law and so on are, where taken by administrative decision-makers, subject to judicial review for legality, rationality and fairness.[8] These general principles exist at one remove from the substantive law that provides the context in which administrative decisions are taken.

As a result, the Court may grant leave to appeal (and may eventually decide a case) for one of two reasons: it may wish to answer a question or questions relating to the general principles of judicial review; it may wish to answer a question of substantive law; some combination of the two is also possible. Although reasons for granting or denying leave are not given, my experience is that the Court is much more interested in questions of substantive law than questions relating to the general principles of judicial review.

Indeed, as the judicial body of last resort, the Court *has* to give authoritative guidance on matters of substantive Canadian law to other actors (individuals, politicians, lawyers and lower-court judges), a task that might be impeded by consideration of the general principles of judicial review. According deference to

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[6] See e.g. Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 SCLR (2d) 379.

[7] For a generalized critique of the demise of *seriatim* opinions, see Dyson Heydon, "Threats to Judicial Independence: the Enemy Within" (2013) 129 Law Q Rev 205.

[8] *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at para 24, [2010] 3 SCR 585.

administrative decision-makers, for instance, means favouring legal pluralism, permitting those decision-makers to put their own spin on rules of substantive and procedural law. But as court of final resort, the Court has an institutional obligation to set down clear substantive and procedural rules for courts and decision-makers across the country.

Few of the judicial review cases the Court agrees to hear provide meaningful guidance to lower courts on how to apply the general principles of administrative law. Sometimes the Court ignores the role of the administrative decision-maker entirely – *Febles v Canada (Citizenship and Immigration)*,[9] which involved an important question of immigration law touching upon the interpretation of the United Nations *Convention Relating to the Status of Refugees* is an example; sometimes it dresses up its authoritative exposition of the law in the guise of reasonableness review – so-called "disguised correctness review", in which it says it is applying a reasonableness standard but in fact performs its own analysis of the law and the facts to reach an independent conclusion that it labels 'reasonable' or 'unreasonable'[10]; and sometimes in its drive for coherence it undermines legal pluralism.[11] The techniques are not mutually exclusive, of course, and they are often deployed in combination.

These techniques might permit the Court to provide authoritative guidance on important questions of substantive law, but their use raises inevitable questions about their impact on the general principles of judicial review. When the Court ignores administrative law, engages in disguised correctness review, or otherwise plays fast and loose with administrative law doctrine to enable it to give guidance to the wider community on substantive law, it risks warping the administrative law framework and creating confusion.

Consider *Québec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*,[12] a case that

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[9] *Hernandez Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431.

[10] David J Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (2016) 4(1) ERQ online 2015 Developments in Administrative Law Relevant to Energy Law and Regulation. See e.g. *Canada (Canadian Human Rights Commission) v Canada (AG)* 2011 SCC 53, [2011] 3 SCR 471 though see also the benign interpretation of that decision offered in *Canada (AG) v Canadian Human Rights Commission* 2013 FCA 75 at para 15, [2013] FCJ No 249 (QL), a point to which I will return below in Part IV.

[11] See the discussion below of *Bombardier*, *infra* note 12. See also *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*]; Paul Daly, "Why Would Jurisdiction Be Concurrent? Another Thought on *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16" (17 April 2015) *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/04/17/why-would-jurisdiction-be-concurrent-another-thought-on-mouvement-laique-quebecois-v-saguenay-city-2015-scc-16/>.

[12] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier*].

was resolved decisively in favour of the exposition of national rules of substantive and procedural law.

Latif is a pilot who was denied training by Bombardier in 2004. The denial was based on a national security decision of the American authorities, a decision Bombardier applied because it did not want to imperil its standing with the Federal Aviation Authority. Latif is Pakistani. The Quebec Human Rights Tribunal found that Bombardier had discriminated against him. Although there was no direct evidence of discrimination by Bombardier, the Tribunal based its decision on an expert report and circumstantial evidence about racial profiling in the United States after 9/11.

At first blush, this looks like a straightforward administrative law case that required the Tribunal to weigh evidence and come to a conclusion. Moreover, it conducted the weighing exercise in a very particular context, one in which an individual like Latif is powerless in the face of an unreviewable decision.[13] In this sort of context, one can understand why the Tribunal was not especially impressed by Bombardier's automatic application of the American decision and why the Tribunal thought Bombardier should have been more proactive.[14] As a large institution, it was certainly in a better position than Latif to follow up with the U.S. authorities.

Why, then, did the Court grant leave? There are two large clues in the joint reasons of Wagner and Côté JJ for a unanimous Court.

First, this was the first opportunity for the Court to consider "a form of discrimination allegedly arising out of the decision of a foreign authority".[15]

Second, the Court had "never clearly enunciated the degree of proof associated with the plaintiff's burden" of making out a prima facie case of discrimination.[16] Unsurprisingly, the bulk of Wagner and Côté JJ's reasons are devoted to giving administrative decision-makers and lower courts guidance on these inter-related issues. The guidance is that the civil standard of the burden of proof always applies.[17]

What about legal pluralism? Wagner and Côté JJ accept that tribunals have the authority to adapt their rules of procedure and admissibility of evidence to their

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[13] *Ibid* at para16.

[14] *Ibid* at para101

[15] *Ibid* at para 2.

[16] *Ibid* at para 55.

[17] *Ibid* at para 65, though note that strictly speaking this conclusion only applies to Quebec, which has a specific legislative provision about the burden of proof.

particular regulatory context.[18] But not the burden of proof, "in order to maintain the uniformity, integrity and predictability of the law".[19] It is difficult see a justification here for according the burden of proof a special status different to rules of procedure and evidence. Wagner and Côté JJ say only "that the application of a given legal test must be based on the same elements and the same degree of proof in every case",[20] but this is difficult to square with the Court's openness to allowing administrative decision-makers to mould rules of substantive law to better achieve their regulatory purposes. As Fish J put it in *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, an administrative decision-maker "may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme" and other contextual considerations.[21] Hopefully future reviewing courts will focus on the language highlighting the effective reversal of the burden of proof, because this is the sort of error that superior courts can more plausibly claim they have authority to correct on judicial review.

There then follows an intrusive analysis of the Tribunal's appreciation of the facts, which looks suspiciously like *de novo* review even though it is adorned by the language of reasonableness.[22] At one point, Wagner and Côté JJ comment that the "practical" effect of the Tribunal's decision was to reverse the burden of proof they had previously established,[23] but in their analysis they carefully pick apart the Tribunal's reasons, using different expressions: insufficient evidence,[24] evidence not "tangibly related",[25] evidence "not sufficiently related",[26] or simply "no evidence".[27] But whether the evidence is adequate or not is a matter for the administrative decision-maker. As has been said many times, it is emphatically *not* "the function of the reviewing court to reweigh the evidence".[28]

Further, the evidence was insufficient on only one of the three grounds Latif needed to prove to make out a prima facie case of discrimination — does this mean that a reviewing court is entitled to pick apart a human rights tribunal's decision and

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[18] *Ibid* at paras 67–68.

[19] *Ibid* at para 69.

[20] *Ibid* at para 69.

[21] *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 45, [2011] 3 SCR 616.

[22] *Bombardier*, *supra* note 12 at para 81.

[23] *Ibid* at para 88.

[24] *Ibid* at para 84.

[25] *Ibid* at para 89.

[26] *Ibid* at para 89.

[27] *Ibid* at para 99.

[28] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 60, [2009] 1 SCR 339 [*Khosa*].

examine the sufficiency of the evidence on each ground independently? We have been told, however, that judicial review is not a "line-by-line treasure hunt for error".[29]

Inasmuch as there is any meaningful guidance to lower courts here about the general principles of administrative law, the unfortunate effect would be to license intrusive judicial review of tribunals' appreciation of the facts. In my view, *Bombardier* should be treated primarily as a case about discrimination law. If the Court's goal was — as I suggested — to set out general principles relating to the burden of proof in discrimination cases, Wagner and Côté JJ's reasons surely achieved it; it was a strong signal to lower courts and administrative tribunals about how to proceed in discrimination cases. But as far as administrative law is concerned, its comments on the standard of proof applied by the decision-maker and its close review of the evidence constitute noise that future courts should tune out. To put the point in the terms the Court employed in *Henry*, the "wider circle of analysis" in *Bombardier* is authoritative only as to the substantive law of employment discrimination, not as to the general principles of administrative law.

III. Sorting Signal from Noise

How do the rest of us know when the Court is telling us something about judicial review principles and when it is not? Should lower courts, lawyers and litigants try to integrate all of the Court's judicial-review jurisprudence into their analytical frameworks or should they be selective?

In general, where the Court expressly sets out to give authoritative guidance on the general principles of administrative law its decisions should be closely parsed by administrative lawyers. But the rest, with respect, is "noise" as far as administrative law is concerned. These cases are characterized by purely pro forma references to correctness and reasonableness, an absence of detailed discussion of the general principles of standard of review and lengthy explanations of substantive law designed to guide lower courts.

This last characteristic is important. I am not saying that these cases should be ignored, but that they should be treated as authoritative only in respect of the particular area of substantive law they address. What is "noise" to someone interested in the general principles of judicial review may be a very strong "signal" to someone interested in, say, access-to-information law, or human-rights law. From the perspective of the general administrative lawyer, the distinction between "signal" and "noise" will be viewed differently and many cases of interest to others will have to be discarded.

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[29] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458.

There are several well-known examples of cases in which the Court has explicitly sent signals about administrative law: *CUPE v New Brunswick Liquor Corporation*;[30] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*;[31] and, most recently, *Dunsmuir v New Brunswick*.[32] These examples are straightforward, however. What is necessary is a set of criteria for identifying other cases that send important signals.

Extent of Treatment of an Issue

First, the Court may give greater or lesser treatment in its reasons to a particular issue.

An easy example is *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*.[33] This was an unexceptional case about the calculation of vacation benefits by a labour arbitrator.

But Abella J began the judgment of the Court by referencing the "transformative" *Dunsmuir* decision, in which the Court had said that the "purpose of reasons, when they are required, is to demonstrate "justification, transparency and intelligibility"".[34] She then set out the issues for resolution: "whether the arbitrator's reasons in this case satisfied these criteria and whether the reasons engaged procedural fairness".[35] Most of her reasons focused not on the facts of the case but on the general principles of administrative law.

She began by laying out "the context for understanding what the Court meant in *Dunsmuir* when it called for "justification, transparency and intelligibility"".[36] She explained that *Dunsmuir* was not authority "for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result".[37] She also rejected the suggestion that "alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a

[30] *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, 25 NBR (2d) 237.

[31] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193 [*Pushpanathan*].

[32] *Dunsmuir*, *supra* note 1.

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

[34] *Ibid* at para 1, citing *Dunsmuir*, *supra* note 1 at para 47.

[35] *Ibid* at para 1.

[36] *Ibid* at para 13.

[37] *Ibid* at para 14.

correctness review".[38] And she laid down a general rule: "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met".[39]

Newfoundland Nurses thus sent an important signal to lower courts (something that was especially important given that some provincial appellate courts had seen the references to "justification, intelligibility and transparency" as inviting close scrutiny of the reasons given for administrative decisions).[40]

I should not be understood as saying that *Newfoundland Nurses* must therefore be read like a statute. To do so would be contrary to the Court's express admonition in *Henry*. In addition, *Newfoundland Nurses* has to be read with other important decisions of the Court. In particular, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[41] decided the previous day, Rothstein J in his majority reasons had specified that the direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision"[42] is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result".[43] It will be necessary in some situations to engage in a classical common law analysis which seeks to reconcile these two decisions.[44] But there can surely be little doubt that *Newfoundland Nurses* sent a signal.

Conversely, cursory treatment of an issue may indicate that the Court's views on a particular point should be considered to be noise. In *Agraira v Canada (Public Safety and Emergency Preparedness)*[45] the underlying issue for decision – the meaning to be given to "national interest" in the context of one of the Minister's discretionary powers – had been certified as a general question of law by the Federal Court for resolution by the Federal Court of Appeal. One might reasonably think that

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[38] *Ibid* at para 21.

[39] *Ibid* at para 16.

[40] See e.g. *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670, (2009) 98 OR (3d) 210.

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

[42] *Dunsmuir*, *supra* note 1 at para 48, citing 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 286.

[43] *Alberta Teachers*, *supra* note 41 at para 54, citing *Petro-Canada v Workers' Compensation Board (BC)*, 2009 BCCA 396, 276 BCAC 135, at paras 53 and 56.

[44] See *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 DLR (4th) 567.

[45] *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 [*Agraira*].

this would have been a strong indication that the correctness standard should apply.[46] But LeBel J simply said, "the standard of review applicable in the case at bar has been satisfactorily determined in past decisions to be reasonableness".[47]

In a subsequent case, the Federal Court of Appeal refused to follow *Agraira* on this point, because it appeared "to depart inexplicably from earlier Supreme Court of Canada jurisprudence", essentially treating it as noise.[48] Instead, the Federal Court of Appeal would continue "its practice of providing the definitive answer to a certified question on a point of statutory interpretation".[49] As a result, the issue had to be resolved expressly by the Court in favour of the *Agraira* approach. In *Kanthasamy v Canada (Citizenship and Immigration)*, the Court gave explicit reasons that constituted a clear signal as to the Court's view of the general principles of judicial review, viz. that the presumption of deferential review of a decision-maker's interpretations of its home statute is not rebutted by the presence of an appeal clause.[50]

Sometimes, a decision of the Court can contain some signal and some noise. Consider, in this respect, *McLean v British Columbia (Securities Commission)*.[51] On the one hand, Moldaver J gave a lengthy exposition of the meaning of the other operative part of paragraph 47 of *Dunsmuir*, namely the injunction that an administrative decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

Moldaver J explained the implications of this injunction for the review of administrative interpretations of statutory provisions: "because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple reasonable interpretations",[52] in which case "the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker…because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* — not the courts — to make".[53] In some cases, however, "[w]here the ordinary tools of statutory interpretation lead

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[46] See *Pushpanathan*, *supra* note 31, though see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193.

[47] *Agraira*, *supra* note 45 at para 49.

[48] *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 30, [2014] 1 FCR 335 [*Kanthasamy*].

[49] *Ibid* at para 35.

[50] *Agraira*, *supra* note 45 at paras 42–44.

[51] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 SCR 895 [*McLean*].

[52] *Ibid* at para 32.

[53] *Ibid* at para 33 [emphasis in original].

to a single reasonable interpretation", the range of reasonable outcomes "will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it".[54] This was a clear signal about how to address questions of statutory interpretation under paragraph 47 of *Dunsmuir*.

On the other hand, Moldaver J dealt summarily with the question of whether deference could be accorded to the Commission's choice between the competing possible reasonable interpretations of the statutory provision that was at issue. The British Columbia Court of Appeal considered it "impossible" to review the interpretation,[55] but Moldaver J was satisfied that "a basis for the Commission's interpretation is apparent from the arguments advanced by the respondent".[56] Does this mean that the reasons to which a reviewing court must pay "respectful attention"[57] include those advanced in argument by counsel for an administrative decision-maker? This is a troubling proposition,[58] the potential wider impact of which Moldaver J did not seem to consider. It would be better, then, for lower courts to consider this aspect of *McLean* to constitute noise.

Concurring and Dissenting Reasons

Second, the presence of concurring and dissenting reasons as to a majority judgment's treatment of the general principles of administrative law will suggest that a decision should be treated as signal rather than noise. Concurring and dissenting reasons tend to concentrate attention on particular points of dispute that might otherwise be obfuscated by a bland set of majority reasons.[59]

For instance, the presence of a lengthy and detailed dissent by Fish J in *Canada (Citizenship and Immigration) v Khosa*, in which he would have quashed the decision of the Immigration Appeal Division for giving too much weight to Mr. Khosa's lack of remorse for engaging in street racing gives additional heft to the holding of the majority that reviewing courts should not reweigh the evidence considered by an administrative decision-maker.[60] That the point was raised by the dissent and decided without equivocation by the majority made it a clear signal about the general principles of administrative law.

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[54] *Ibid* at para 38.

[55] *British Columbia (Securities Commission) v McLean*, 2011 BCCA 455 at para 30, 343 DLR (4th) 432.

[56] *McLean*, *supra* note 51 at para 72.

[57] *Dunsmuir*, *supra* note 1 at para 48, citing Dyzenhaus, *supra* note 42 at 286.

[58] See further Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52 Alta L Rev 799 at 815–817.

[59] See generally James Lee, "A Defence of Concurring Speeches" (2009) Pub L 305.

[60] *Khosa*, *supra* note 28 at para 59.

This was reinforced by *Alberta Teachers'*, in which the majority expressly rejected Binnie J's suggestion in his concurring reasons that there ought to be variable degrees of deference within the reasonableness standard set out in paragraph 47 of *Dunsmuir*. Similarly, Cromwell J's reluctance in his concurring reasons in *Alberta Teachers'* to countenance the abolition of "true jurisdictional questions" as a category of question attracting correctness review[61] underscored that the majority's insistence that this category has to be extremely narrowly construed was a clear signal to lower courts. Finally, the refusal of the majority in *Edmonton East (Capilano) Shopping Centres v Edmonton (City)* to revise the administrative law principles concerning the application of the presumption of reasonableness review even to a statutory framework containing an appeal clause was, in view of the strident dissent on this point, a clear signal of the scope of deference.[62]

Consideration of Lower Court Decisions

Third, detailed consideration of lower court decisions will indicate that a decision contains important signals about administrative law.

Directly at issue in *Mouvement laïque québécois v Saguenay (City)*[63] was a decision of Quebec's Human Rights Tribunal about whether the recitation of a prayer before municipal meetings (allied to the presence of religious symbols) amounted to discriminatory treatment of an atheist who attended the meetings. Indirectly at issue was whether a statutory appeal clause could pre-empt the general principles of administrative law; does the standard of review analysis apply in all cases, even if a statute creates a very broad right of appeal?

Decisions of the Tribunal are appealable, *with leave*, directly to the Quebec Court of Appeal.[64] The relevant statute also provides that the general rules governing appeals are to apply in this context. The Quebec Court of Appeal had split previously on the proper interpretation of its role on appeal from the Tribunal: some judges applied judicial review criteria (following the well-established rule that appeal clauses do not eliminate deference to specialized tribunals) but some applied appellate criteria based on the apparently plain language of the statute and the evident goal of giving the Quebec Court of Appeal a gatekeeping power by limiting appeals to those raising questions of general law.[65]

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[61] See especially *Alberta Teachers*, *supra* note 41 at paras 102–103 and see also Lauren Wihak, "Whither the Correctness Standard of Review: *Dunsmuir* Six Years Later" (2014) 27 Can J Admin L & Prac 174.

[62] *Edmonton East (Capilano) Shopping Centres v Edmonton (City)*, 2016 SCC 47, [2016] 2 SCR 293.

[63] *Saguenay*, *supra* note 11.

[64] *Charter of Human Rights and Freedoms*, CQLR c C-12, ss 132–133.

[65] *Saguenay*, *supra* note 11 at paras 31–37.

Having set out the conflicting approaches at some length, Gascon J came to a firm conclusion based on a comprehensive review of the authorities: "Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles…regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal".[66]

He acknowledged that "the scope of a right to appeal and the absence of exclusive jurisdiction may sometimes affect the deference to be shown to decisions of a specialized administrative tribunal" but held nonetheless that these features of a regulatory scheme would "not justify replacing the standards of review applicable to judicial review with the appellate standard".[67]

Given the lengthy treatment of the conflicting approaches in the court below and the consideration of relevant authority, *Saguenay* sends a very clear signal about the relationship between appeal clauses and the standard of review framework, viz. that language creating a statutory appeal never pre-empts administrative law principles (a point recently underscored again by *Edmonton East*).[68]

Consistency of Treatment

Fourth, a decision which is out of line with other decisions on the general principles of administrative law is more likely to be noise than signal. *Bombardier* is an example, especially on the question whether reviewing courts can reweigh the evidence considered by an administrative decision-maker: one would scour the post-*Dunsmuir* Supreme Court Reports in vain for any indication that reweighing is a permissible activity for reviewing courts.

Another example might be the uncertainty created by *Katz Group Canada Inc v Ontario (Health and Long‑Term Care)*[69] about the scope of the *Dunsmuir* framework. At issue in *Katz* was the validity of a set of regulations imposed by a provincial cabinet on the sale of generic medication. Abella J made no attempt to situate judicial review of regulations in the *Dunsmuir* framework, preferring instead to rely on 1980s authority on judicial review of regulations.[70] This was an odd

[66] *Ibid* at para 38.

[67] *Ibid* at para 43.

[68] See also *Kanthasamy*, *supra* note 48. Interestingly, the only other post-*Dunsmuir* case in which the standard of review analysis has been applied by the Court to a statute containing a leave provision was *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764. Readers will not be surprised to learn that the Court paid no attention to the existence of an appeal clause containing a leave provision.

[69] *Katz Group Canada Inc v Ontario (Health and Long‑Term Care)*, 2013 SCC 64, [2013] 3 SCR 810.

[70] *Thorne's Hardware Ltd v The Queen*, [1983] 1 SCR 106, 143 DLR (3d) 577.

outcome, because the Court had invariably in the post-*Dunsmuir* era applied the *Dunsmuir* framework in administrative law cases.

Subsequently, in *Canadian National Railway Co v Canada (AG)*, Rothstein J denied that *Katz* cast any doubt on the general applicability of the *Dunsmuir* framework, characterizing it is a case limited to a challenge to the vires of regulations issued by a body (and, one might add, an elected body) acting in a "legislative capacity".[71] Similarly, in *Green v Law Society of Manitoba*,[72] the standard of review framework was applied to the question whether rules imposing a mandatory continuing professional development requirement were within the Law Society's statutory mandate;[73] *Katz* was treated as an application of the framework to regulations.[74] Given that *Katz* is inconsistent with the rest of the Court's post-*Dunsmuir* jurisprudence, it must be considered to have been a noise – not a signal – about the general principles of administrative law. The better view is that *Dunsmuir* provides the framework for judicial review of *all* administrative decision-makers.[75]

Conclusion

One way of addressing the problem of distinguishing the signal from the noise in the Court's administrative law cases is to develop criteria along the lines of those I have laid out above. My list of criteria is not exhaustive; the distinction between signal and noise will not always be an easy one to make and will typically require lawyerly judgement, just as sorting *ratio* from *obiter* has never been a purely mechanical exercise.

To anticipate potential objections, I do not think that my distinction between "signal" and "noise" is an incitement to illegitimate judicial disobedience to binding commands issued by the Court. To reiterate the Court's own statements in *Henry*, to think of a "a strict and tidy demarcation" between ratio and obiter is an "oversimplification".[76] For the administrative lawyer, the "noise" cases are limited to their particular facts, but the "signal" cases involve commentary that is part of "a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative".[77]

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[71] *Canadian National Railway Co v Canada (AG)*, 2014 SCC 40 at para 51, [2014] 2 SCR 135.

[72] *Green v Law Society of Manitoba*, 2017 SCC 20.

[73] *Ibid* at para 19.

[74] *Ibid* at paras 20 and 67.

[75] Though it is worth noting that the British Columbia Court of Appeal has applied *Katz* rather than *Dunsmuir* to a regulation adopted by an unelected regulatory body: *Sobeys West Inc v College of Pharmacists of British Columbia*, 2016 BCCA 41, 97 Admin L Rev (5th) 35.

[76] *Henry*, *supra* note 3 at para 52.

[77] *Ibid* at para 57.

If the Court's decisions continue to sow confusion by resolving individual cases in ways that are inconsistent with the general principles of judicial review, administrative lawyers will have to develop analytical tools that permit them to distinguish the important cases from the unimportant cases, the signal from the noise.

IV. Reasonableness and the Court's Institutional Role

However, the Court's decisions need not sow confusion. There is an alternative approach, which would permit the Court to set out general guidance about substantive areas of law in a way consistent with its institutional role at the apex of the Canadian legal system without causing confusion about the operation of the principles of administrative law.

The alternative approach is for the Court to abolish the standard of correctness and subject administrative decisions to reasonableness review in all cases. There is academic[78] and extra-judicial[79] support for this approach, which has recently received the cautious imprimatur of Abella J.

In her partially concurring reasons in *Tervita Corp v Canada (Commissioner of Competition)*, she confessed to finding it "increasingly difficult to discern the demarcations between a reasonableness and correctness analysis" and even floated the possibility that the demarcations could be "completely erased" at some point in the future.[80]

What was implicit in *Tervita* recently became explicit in *Wilson v Atomic Energy of Canada Ltd*.[81] Abella J's reasons were notable for her forthright suggestion that the Court ought to consider collapsing correctness and reasonableness into a single reasonableness standard, the "most obvious and frequently proposed reform of the current system".[82] She set up the question as follows: "whether we need two different names for our approaches to judicial review, or whether both approaches can live comfortably under a more broadly conceived understanding of reasonableness".[83] She also highlighted the key advantage of a general reasonableness standard, that it is flexible enough to allow "a wider range for those kinds of issues and decision-makers traditionally given a

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[78] See e.g. Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) 62 McGill LJ (forthcoming) [Daly, "Struggling Towards Coherence"].

[79] See The Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27.

[80] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 171, [2015] 1 SCR 161.

[81] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*].

[82] *Ibid* at para 28.

[83] *Ibid* at para 24.

measure of deference, and a narrow one of only one 'defensible' outcome for those which formerly attracted a correctness review".[84]

It is this flexibility that makes the reasonableness standard of such utility in responding to the signal and noise problem created by the Court's recent judgments in the area of administrative law.

Dunsmuir's reasonableness standard, with its twin references to "justification, intelligibility and transparency" and a "range of possible, acceptable outcomes",[85] has been refined over the years. It now seems clear that most of the analytical burden has been assumed by the concept of a "range of reasonable outcomes",[86] with the "justification, intelligibility and transparency" requirement satisfied by a decision that is "clearly understand[able]" to a reviewing court.[87]

Reasonableness "takes its colour from its context".[88] The "range will necessarily vary".[89] It "must be assessed in the context of the particular type of decision making involved and all relevant factors".[90]

Of particular interest in the present context is the role of legal principles in narrowing the range of reasonable outcomes.

In *Catalyst Paper*, McLachlin CJ noted that range of reasonable outcomes may be "circumscribed" by reference to "the rationale of the statutory regime".[91]

Similarly, in *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha* Stratas JA explained that, in some cases "Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered – all things being equal, this narrows the range of options the decision-maker legitimately has".[92] An excellent illustration of this principle is the Court's acknowledgement in *McLean* that, sometimes, the range of reasonable outcomes will be so narrow as to admit of only one outcome.

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[84] *Ibid* at para 33.

[85] *Ibid* at para 47.

[86] *Khosa*, *supra* note 28 at para 67.

[87] *Agraira*, *supra* note 45 at para 89.

[88] *Khosa*, *supra* note 28 at para 59.

[89] *Wilson*, *supra* note 81 at para 22.

[90] *Catalyst Paper Corp v North Cowichan (District)* 2012 SCC 2 at para 18, [2012] 1 SCR 5 [*Catalyst Paper*].

[91] *Ibid* at para 25.

[92] *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at para 91, [2014] 2 FCR 1006.

In addition, prior judicial decisions on matters subsequently considered by an administrative tribunal will also tend to narrow the range of reasonable outcomes.[93]

And in *Canada (AG) v Igloo Vikski Inc*, albeit in dissent, Côté J took the view that the range of reasonable interpretations of a tariff schedule was constrained by the need to provide an answer consistent with Canada's international obligations in respect of tariff harmonization.[94]

It has thus been said that "[l]egal matters, as opposed to factual or policy matters, admit of fewer possible, acceptable outcomes".[95] In most cases, this is likely to be true.
The insight that the more legal in nature a question is the narrower the range of reasonable outcomes will be is significant because it allows us to appreciate how the Court might send signals about individual cases for the benefit of the environmental, immigration and workers' compensation lawyers without creating too much noise for the administrative lawyers.

Very simply put, by demonstrating that the range of reasonable outcomes is constrained by statutory language, pre-existing jurisprudence and so on, the Court can provide a significant degree of structure to areas of substantive law. Without necessarily substituting judgment as it would by applying correctness (or "disguised correctness") review, it can indicate that administrative decision-makers have, relatively speaking, a narrower margin of interpretation in some areas than in others.
Although I think that the move to a unified reasonableness standard is the most rational next step in Canadian administrative law, I have significant reservations about a one-size-fits-all reasonableness standard. For one thing, applying the concept of a range of reasonable outcomes risks reintroducing distinctions between questions of law and questions of policy, fact and discretion.[96] For another thing, permitting reviewing courts to define the range of reasonable outcomes in respect of a particular factual and legal matrix will allow judges to confine administrative decision-makers within strict limits.[97]

It would be better in my view for any "range" to be established by reference to the statute as a whole rather than to a particular statutory provision; departure from a line of previous cases, judicial authority or the natural meaning of a statute

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[93] *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75 at paras 16 and 18, [2013] FCJ No 249 (QL).

[94] *Canada (AG) v Igloo Vikski Inc*, 2016 SCC 38 at para 58, [2016] 2 SCR 80.

[95] *Canada (AG) v Abraham*, 2012 FCA 266 at para 45, [2012] FCJ No 1324 (QL).

[96] See Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233.

[97] See Paul Daly, "The Struggle for Deference in Canada" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015).

would constitute *indicia* of unreasonableness that *may* justify judicial intervention.[98] Nonetheless, adopting the range of reasonable outcomes concept is the most rational next step in the development of Canadian administrative law, though judges ought to apply it with due regard to the decisional autonomy accorded by the legislature to the administrative decision-maker under review.[99]

As Iacobucci J explained in *Law Society of New Brunswick v Ryan*, the analytical structure of reasonableness review provides some safeguards against judicial intrusion on administrative decision-makers' autonomy: "Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons".[100] At no point should the reviewing court "ask itself what the correct decision would have been",[101] because even "if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable".[102]

It is thus inappropriate for a reviewing court to set up a benchmark based on its independent view of the legal and factual matrix, because "any departure from the reviewing court's hypothetical decision is bound to appear unreasonable".[103] Rather, a reviewing court should start from the decision and work outwards, identifying "badges of unreasonableness" that cannot be cogently explained by the decision-maker and, as a result, bring the decision outside the range of reasonable outcomes.[104]

Applying this methodology to *Bombardier*, Wagner and Côté JJ could have begun with the Tribunal's decision and gone on to lay out the conventional burden of proof in discrimination cases, as well as the undisputed elements of discriminatory treatment. This would have permitted them to give general guidance to the legal community on the appropriate approach administrative decision-makers should follow in discrimination cases. A departure from the undisputed framework for discrimination cases would have been a badge of unreasonableness.

However, Wagner and Côté JJ could then have emphasized that the Tribunal, in the unique factual circumstances before it, had provided cogent reasons for its modification of the burden of proof (or reasons that were insufficiently cogent, as the case may be). In this way, Wagner and Côté JJ could have given general

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[98] See Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233.

[99] See Daly, "Struggling Towards Coherence", *supra* note 78.

[100] *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 50, [2003] 1 SCR 247.

[101] *Ibid*.

[102] *Ibid* at para 51.

[103] *Ottawa Police Services v Diafwila*, 2016 ONCA 627 at para 66, 270 ACWS (3d) 205.

[104] *Delios v Canada (AG)*, 2015 FCA 117 at para 27, [2015] FCJ No 549 (QL).

guidance on discrimination law without causing confusion about the operation of the general principles of administrative law.

Conclusion

The institutional context in which the Court operates puts pressure on it to provide general guidance on issues of substantive law. Where such issues are first resolved by administrative decision-makers and addressed by the Court only on judicial review, however, the general principles of administrative law may be perceived as inhibiting the Court's ability to provide general guidance. Unfortunately, the Court has in recent decisions prioritized the giving of general guidance over the sound operation of the principles of administrative law.

Accordingly, administrative lawyers need to be able to distinguish between the signal and the noise, between those decisions of the Court that are designed to structure the administrative law framework ("signal") and those that are designed to resolve pressing issues of substantive law ("noise" – at least as far as administrative lawyers are concerned).

Alternatively, however, the Court could take up academic, extra-judicial and now judicial suggestions to adopt a unified reasonableness standard of review. By setting the "range" of reasonable outcomes and rigorously following the well-established analytical structure of reasonableness review, the Court could send signals about substantive areas of law without creating unnecessary noise in the operation of the principles of judicial review. Noise and signal would merge in the comforting hum of reasonableness review.