RENOVATING JUDICIAL REVIEW

Matthew Lewans*

"Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."[1]

I. Introduction

Like a hundred-year-old heritage home, the law governing judicial review of administrative action attracts conflicting opinions. Everyone agrees that it has a sound constitutional foundation, which guarantees[2] that administrative decisions remain subject to independent scrutiny in order to ensure they are rendered fairly[3] and comply substantively with the rule of law.[4] But almost no one is satisfied with the outdated aspects of its infrastructure, particularly the arcane "law office metaphysics"[5] lawyers and judges employ in order to determine the standard of review independently of "the who, what, why and wherefor of the litigant's complaint on the merits."[6]

So every year administrative lawyers, judges, and law professors offer suggestions for reconstructing the law of judicial review by penning thoughtful

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* Associate Professor, University of Alberta. This is a revised version of a paper presented on 18 November 2016 at the Canadian Bar Association Annual Administrative Law, Labour and Employment Law Conference. Thanks to Ashton Menuz for her excellent research assistance and to David Mullan and the anonymous reviewers for their constructive criticism. Comments are welcome at lewans@ualberta.ca.

[1] David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (February 17, 2016) at 1, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751>.

[2] *Crevier v Québec (AG)*, [1981] 2 SCR 220 at 236, 127 DLR (3d) 1 [*Crevier*].

[3] David Mullan, "Fairness: The New Natural Justice?" (1975) 25 UTLJ 281; *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311, 88 DLR (3d) 671 [*Nicholson*]; *Knight v Indian Head School Division No 19* [1990] 1 SCR 653, 69 DLR (4th) 489 [*Knight*]; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*]; Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 UTLJ 217.

[4] *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689; *Baker*, *supra* note 3; David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001) 51 UTLJ 193 at 240; David Dyzenhaus (ed), *The Unity of Public Law* (Oxford: Hart Publishing, 2004).

[5] *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para 122, [2008] 1 SCR 190 [*Dunsmuir*].

[6] *Ibid* at para 154.

opinions,[7] extra-judicial essays,[8] and academic articles.[9] The common theme running through many of these contributions is that the *Dunsmuir* framework is flawed, but there remains deep disagreement about how to repair it. Some argue we should avoid sharp distinctions between different standards of review, because the intensity of judicial review is irreducibly variable and therefore must be calibrated to suit a particular administrative decision;[10] some propose to demolish the categories reserved for correctness scrutiny,[11] so as to facilitate reasonableness review across the board;[12] and some propose to expand *Dunsmuir*'s categories for correctness scrutiny in order to impose some semblance of judicial order on an otherwise heterogeneous corpus of administrative law.[13] And then there are those who think we

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[7] See e.g. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, 402 DLR (4th) 236 [*Edmonton East*] reversing *Edmonton East (Capilano) Shopping Centres Ltd v Edmonton (City)*, 2015 ABCA 85, 12 Alta LR (6th) 236; *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*]; *Commission scolaire de Laval c Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8, [2016] 1 SCR 29 [*Commission scolaire*]; *Canadian Broadcasting Corp v SODRAC 20013 Inc*, 2015 SCC 57, [2015] 3 SCR 615 [*Canadian Broadcasting Corp*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]; *Canada (Human Rights Commission) v Canada (AG)*, 2016 FCA 200, 402 DLR (4th) 160 [*Canada (Human Rights Commission)*]; *Gitxaala Nation v R*, 2016 FCA 187, 485 NR 258; *Kabul Farms Inc v R*, 2016 FCA 143, 13 Admin LR (6th) 11; *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93, 396 DLR (4th) 527 [*Huruglica*]; *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, 131 OR (3d) 113 leave to appeal to SCC granted [2016] SCCA No 418; *Intact Insurance Co v Allstate Insurance Co of Canada*, 2016 ONCA 609, 131 OR (3d) 625; *Québec v ED*, 2016 QCCA 536, 265 ACWS (3d) 797 leave to appeal to SCC granted [2016] SCCA No 223; *Kenyon v British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485, 82 BCLR (5th) 266; *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423, 92 BCLR (5th) 42 leave to appeal to SCC granted 2017 CarswellBC 504 (WL Can); *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225, 19 Alta LR (6th) 219 [*Stewart*] leave to appeal to SCC granted [2015] SCCA No 389; *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59, 376 NSR (2d) 1; *New Brunswick (Minister of Education) v Kennedy* 2015 NBCA 58, 444 NBR (2d) 92.

[8] Stratas, *supra* note 1; Simon Ruel, "What is the Standard of Review to be Applied to Issues of Procedural Fairness?" (2016) 29 Can J Admin L & Prac 259; Beverley McLachlin, "Administrative Law is not for Sissies: Finding a Path through the Thicket" (2016) 29 Can J Admin L & Prac 127.

[9] David Jones, "Administrative Law in 2016: Update on Caselaw, Recent Trends and Related Developments" (2016) online: <sagecounsel.com/wp-content/uploads/2016/09/CBA-Recent-Dev-Sept-16.pdf>; Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016) McGill LJ (forthcoming) online at: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2821099>; Frank Falzon, "Statutory Interpretation, Deference and the Ambiguous Concept of "Ambiguity" on Judicial Review' (2016) 29 Can J Admin L & Prac 135; Shaun Fluker, "Where Are We Going on Standard of Review in Alberta?" (2015) online: <ablawg.ca/2015/03/13/where-are-we-going-on-standard-of-review-in-alberta/>; Lorne Sossin, "The Complexity of Coherence: Justice LeBel's Administrative Law" (2015) SCLR (2d) 145.

[10] Stratas, *supra* note 1; Hilary Cameron, "Substantial Deference and Tribunal Expertise post-*Dunsmuir*: A New Approach to Reasonableness Review" (2014) 27 Can J Admin L & Prac 1.

[11] *Dunsmuir*, *supra* note 5 at paras 57–61.

[12] *Wilson*, *supra* note 7 at paras 28–38. See also Falzon, *supra* note 9; David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev Const Stud 87.

[13] *Ibid* at para 89, per Côté and Brown JJ dissenting. See also *Commission scolaire*, *supra* note 7 at para 79, per Côté, Wagner and Brown JJ dissenting; *Wilson v Atomic Energy of Canada Ltd*, 2015 FCA 17, 467 NR 201; *Huruglica*, *supra* note 7 at para 52; *Edmonton East*, *supra* note 7; *Stewart*, *supra* note 7;

should forgo renovations altogether – at least for the time being – because they would destabilize an already wobbly analytical framework.[14]

In this paper, I want to highlight some of the more remarkable contributions to the debate regarding the standard of review over the past year. But before proceeding, I want to revisit the history to that debate, because if we lose track of important points of reference we might forget some hard-won lessons and thereby lose the ability to critically assess contemporary proposals for reform.

In Part II, I will briefly review the history of judicial review in order to identify two conflicting, but enduring, intellectual frameworks that have shaped that enterprise. The first, formalist intellectual framework relies upon a set of abstract analytical distinctions from which judges purport to deduce the parameters of judicial review without encroaching upon the merits of an administrative decision. The second intellectual framework conceives of judicial review as an evaluative exercise whereby judges scrutinize administrative decision-making processes and reasons in order to ensure that they are consistent with fundamental values which underpin the legitimacy of administrative law. The formalist approach is typified by elaborate attempts to define and deduce the scope of judicial review as a threshold matter without considering the attributes of a particular administrative decision, whereas the evaluative approach proceeds more directly to assess whether a particular administrative decision has been produced and explained in a fair and reasonable manner which warrants the respect of individuals and other legal officials. I will argue that the current controversy regarding the standard of review analysis stems from the fact that the Supreme Court of Canada in *Dunsmuir* erected a more elaborate formalist apparatus for determining the standard of review, which has distracted attention from the fundamental values which underwrite the legitimacy of administrative law and the moral purposes of judicial review. Thus, instead of simplifying the law of judicial review, the *Dunsmuir* framework has produced an esoteric and unproductive debate about how to define and delineate *Dunsmuir*'s formal concepts and categories instead of elucidating how the legitimacy of administrative decisions are tied to their legality in a procedural and substantive sense.

In Part III, I will examine and critique four proposals for reforming the law of judicial review that surfaced in *Wilson v Atomic Energy of Canada Ltd* – a case which served as a lightning rod for the standard of review debate in 2016. I will argue that each of these proposals are unlikely to produce a more principled approach to judicial review, because they seek to resolve confusion about the standard of review by either buttressing *Dunsmuir*'s formalist apparatus or adding

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Lauren Wihak, "Whither the correctness standard of review? *Dunsmuir,* six years later' (2014) 27 Can J Admin L & Prac 173.

[14] *Wilson, supra* note 7 at paras 70–73 per McLachlin CJ, Karakatsanis, Wagner, Gascon, and Cromwell JJ, concurring.

new refinements to it instead of honing an evaluative methodology for assessing the legality of administrative decisions across a broad range of regulatory contexts.

Finally, in Part IV I will conclude by offering a tentative proposal about how we might move beyond the perennial fascination with the standard of review analysis by explaining how judicial review can sustain the procedural and substantive legality of administrative decisions without resorting to categorical or conceptual claims regarding the scope of judicial review. I will argue that such an approach can be gleaned by revisiting the normative underpinnings of L'Heureux-Dubé J's landmark opinion in *Baker v Canada* in order to better understand why administrative decisions which are fair and reasonable merit judicial respect.

II. A Brief History of Judicial Review

Complaints about the erratic nature of judicial review are hardly new. In fact, the common criticism that the law of judicial review is radically incoherent has not changed much since DM Gordon's scathing critique of jurisdictional error in 1929.[15] In undertaking what he likened to a Herculean labour to "ventilate one of the worst corners of the Augean stable," Gordon remarked that "[a]nything like a serious examination at large of the case law on jurisdiction must convince an open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support it cannot be found."[16] In this respect, Gordon strikes the same note as David Stratas, Canada's leading administrative law judge, who noted in 2016 that "[d]octrinal incoherence and inconsistency plague the Canadian law of judicial review. This must stop."[17]

The doctrinal incoherence that Gordon, Stratas, and many others have criticized has a long pedigree,[18] but the basic problem is that judges struggle to articulate a legal framework for judicial review which avoids both judicial quiescence and judicial overreach, and is equally applicable to decisions rendered by arbitrators,[19] labour adjudicators,[20] immigration officials,[21] copyright boards,[22]

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[15] DM Gordon, "The Relation of Facts to Jurisdiction" (1929) 45 Law Q Review 459.

[16] *Ibid* at 459–460.

[17] Stratas, *supra* note 1 at 1.

[18] See e.g. John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 UTLJ 53; Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30 Can Bar Rev 986; Paul Weiler, "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970" (1971) 9 Osgoode Hall LJ 1; David Mullan, "The Re-emergence of Jurisdictional Error" (1985) 14 Admin LR 326; H Wade McLaughlin, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 UTLJ 343; David Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising *New Brunswick Liquor*" (1987) 1 Can J Admin L & Prac 71; David Mullan, "Jurisdictional Error Yet Again: The Imprecise Limits of the Jurisdiction-Limiting *Canada (Attorney General) v PSAC*' (1993) 11 Admin LR (2d) 117.

[19] *Commission scolaire de Laval*, *supra* note 7.

human rights tribunals,[23] law societies,[24] and countless other administrative agencies.[25] The history of how judges have wrestled with this problem is worth recounting briefly, because it helps explain how we got into this standard of review mess in the first place, and to gauge whether we are any closer to cleaning it up.

The doctrine of jurisdictional error, which continues to lurk within the *Dunsmuir* framework, grounded the dominant approach to judicial review until 1978. Its underlying constitutional premise was that the different branches of government perform analytically distinct roles: legislatures have the exclusive power to create law, the judiciary has exclusive power to interpret law, and administrative officials wield residual discretionary power to render findings of fact and implement laws created by the legislature and interpreted by the judiciary.[26] The important point is that this conception of the separation of powers reserved questions of law exclusively to superior courts, while administrative officials merely retained a discretionary power to apply the law to a particular set of facts. When defined in this way, the doctrine of jurisdictional error seemed to be based upon an apolitical (and therefore constitutionally acceptable) account of judicial review, whereby judges determine "jurisdictional" questions of law, but nevertheless allow administrative officials to determine "non-jurisdictional" questions, usually relating to findings of fact and public policy questions left undetermined by statute.[27] But despite projecting a sense of certainty and predictability regarding the conduct of judicial review, the doctrine was formalistic, reductive, controversial, and radically incoherent in practice.

It was formalistic, because it was designed to articulate and maintain abstract conceptual distinctions instead of ensuring that governmental decisions (regardless of their abstract classification) were consistent with fundamental legal values.[28] Thus, instead of explaining how judicial review might vindicate the dignity

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[20] *Wilson*, *supra* note 7.

[21] *Kanthasamy*, *supra* note 7; *Huruglica*, *supra* note 7.

[22] *Canadian Broadcasting Corp*, *supra* note 7.

[23] *Canada (Human Rights Commission)*, *supra* note 7; *Stewart*, *supra* note 7.

[24] *Trinity Western University v Law Society of Upper Canada*, *supra* note 7*; Trinity Western University v Law Society of British Columbia*, *supra* note 7; *Nova Scotia Barristers' Society v Trinity Western University*, *supra* note 7.

[25] Sossin, *supra* note 9.

[26] Martin Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 UTLJ 215; David Dyzenhaus, "Formalism's Hollow Victory" (2002) NZLR 525 [Dyzenhaus, "Formalism's Hollow Victory"]. For an historical account of how a formalist conception of the separation of powers informed the doctrine of jurisdictional error, see Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford, Hart Publishing, 2016) chapters 3 and 5.

[27] See, e.g. *Rex v Nat Bell Liquors, Ltd*, [1922] 2 AC 128 (JCPC).

[28] Loughlin, *supra* note 26; Dyzenhaus, "Formalism's Hollow Victory" *supra* note 26 at 527; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27

of individuals by ensuring that administrative decisions are rendered fairly and provide a public, intelligible, and rationally acceptable legal justification, legal analysis was preoccupied with the relatively esoteric exercise of slotting administrative action into conceptual categories that had no intrinsic connection to principles of political morality. If, for example, a reviewing court deemed that an administrative decision involved a "jurisdictional" question or the exercise of "judicial" or "quasi-judicial" power, the decision would be quashed if a trial-type process had not been observed even in the face of privative clause.[29] Conversely, if a judge deemed that an administrative decision involved the exercise of "administrative" power, the decision would be upheld regardless of whether there had been a hearing.[30] The upshot was an all-or-nothing approach to judicial review, which hinged on an arbitrary, formal categorization of administrative action rather than ensuring that administrative decisions reflected core values which underpin the legitimacy of administrative law.[31]

It was reductive, because it distorted the reality that legislatures regularly delegate authority to administrative officials in order to decide questions of law through a variety of rule-making, adjudicative, and policy development powers in order to realize broadly-worded statutory objectives. While a legislative assembly might be capable of forging sufficient political consensus to enact open-textured objectives and enabling provisions as general guides for administrative action, these utterances rarely provide sufficiently detailed edicts to determine the array of interpretive disputes that typically give rise to judicial review proceedings. For example, legislative assemblies frequently recognize that they cannot foresee subsequent socio-economic or technological developments, and conclude that administrative decision-making processes provide a more accessible, fair, and efficient forum for individuals to tender evidence and legal arguments about how the law ought to be interpreted and applied to a specific set of facts. These institutional reasons explain one of the most important constitutional phenomena of the twentieth century: the rapid and inexorable development of the modern administrative state

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Queen's LJ 445 at 450; Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317 at 320 [Daly, "Unfortunate Triumph"].

[29] See, e.g. *Toronto Newspaper Guild v Globe Printing*, [1953] 2 SCR 18, [1953] 3 DLR 561; *Alliance des Professeurs Cotholiques de Montréal v Quebec Labour Relations Board*, [1953] 2 SCR 140, [1953] 4 DLR 161; *Saltfleet (Township) Board of Health v Knapman*, [1956] SCR 877, 6 DLR (2d) 81; *Jarvis v Associated Medical Services Inc*, [1964] SCR 497, 44 DLR (2d) 407.

[30] See e.g. *R v Legislative Committee of the Church Assembly*, [1928] 1 KB 411; *British Columbia (Labour Relations Board) v Traders Services Ltd*, [1958] SCR 672, 15 DLR (2d) 305; *Calgary Power v Copithorne*, [1959] SCR 24, 16 DLR (2d) 241; *Kinnaird v British Columbia (Workmen's Compensation Board)*, [1963] SCR 239, 38 DLR (2d) 245; *Québec (Commission des Relations Ouvrières) v Burlington Mills Hosiery Co of Canada*, [1964] SCR 342, 45 DLR (2d) 730; *Galloway Lumber Co v British Columbia (Labour Relations Board)*, [1965] SCR 222, 48 DLR (2d) 587; *Bakery and Confectionary Workers International Union of America Local No 468 v White Lunch Ltd*, [1966] SCR 282, 56 DLR (2d) 193; *Quebec (Commission des Relations de Travail) v Canadian Ingersoll-Rand Co Ltd*, [1968] SCR 695, 1 DLR (2d) 417; *Noranda Mines Ltd v Saskatchewan*, [1969] SCR 898, 7 DLR (3d) 1.

[31] Dyzenhaus & Fox-Decent, *supra* note 4; Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford, Hart Publishing, 2016) ch 6.

throughout the western industrialized world, which confounded reasoning premised upon a formalistic conception of the separation of powers.

Consequently, the doctrine also proved to be controversial, because by assuming that the judiciary has exclusive power to determine jurisdictional questions of law, reviewing courts frequently reversed considered decisions rendered by administrative officials who had been empowered through the democratic process to decide those legal questions.[32] For example, despite granting broad authority to administrative officials to interpret and apply labour and human rights codes, judges often ran roughshod over the decisions of labour boards[33] and human rights tribunals[34] even to the point of flouting statutory privative clauses. This pattern of judicial overreach raised serious concerns regarding the constitutional legitimacy of judicial review and the relative competency of the judiciary to supervise increasingly specialized regulatory regimes. One of Canada's leading constitutional law scholars in the 20th century, Professor Bora Laskin, questioned the manner in which judges frequently circumvented privative clauses by arguing that "judicial persistence in exercising a reviewing power involves an arrogation of authority on the basis of constitutional principle (and there is no such principle) or on the basis of some 'elite' theory of knowing what is best for all concerned."[35] His point was that by gainsaying administrative decisions, judges frequently undermined the operation of institutions that play a vital role in modern democratic governance.

Finally as Gordon, Laskin, John Willis, and many others were keen to point out, the doctrine was radically incoherent, because judges vacillated between a narrow conception of jurisdictional error (which focused on whether the express wording of the statute authorized an official to embark on an inquiry) and a broader conception (which interpreted enabling legislation against a background of common law principles like the principles of natural justice).[36] However, much of this confusion was put to rest in cases like *Anisminic Ltd v Foreign Compensation*

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[32] Willis, *supra* note 18; Harry Arthurs, "Protection Against Judicial Review" (1983) 43 R du B 277; Jeremy Waldron, "Authority for Officials" in Lukas Meyer, Stanley Paulson and Thomas Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal Philosophy of Joseph Raz* (Oxford, Oxford University Press, 2003) 45.

[33] See, e.g. *In re Ontario Labour Relations Board: Toronto Newspaper Guild, Local 87 v Globe Printing Company*, [1953] 2 SCR 18, [1953] 3 DLR 561. For academic critique of this case see Laskin, *supra* note 18; Weiler, *supra* note 18.

[34] See, e.g. *Bell v Ontario Human Rights Commission*, [1971] SCR 756, 18 DLR (3d) 1; *Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435, 10 BCLR 257; *Canada (AG) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658. For academic critique of correctness review in the human rights context, see Allison Harvison Young, "Keeping the Courts at Bay: The Canadian Human Rights Commission and its Counterparts in Britain and Northern Ireland: Some Comparative Lessons" (1993) 43 UTLJ 65; Allison Harvison Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993) 13 Admin LR (2d) 206.

[35] Laskin, *supra* note 18 at 991.

[36] See, e.g. the conflicting approaches outlined in the cases cited *supra* note 29 and note 30, and Weiler, *supra* note 18.

Commission, a case in which Lord Reid cast a very broad net for jurisdictional error,[37] prompting HWR Wade to conclude that the House of Lords had effectively stripped administrative officials of their statutory authority to decide questions of law.[38] Nevertheless, the Supreme Court of Canada quickly followed suit, collapsed the distinction between jurisdictional and non-jurisdictional errors in *Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796*, and held that judges should generally review questions of law on a correctness basis.[39]

Beginning in 1978, the Supreme Court of Canada began constructing an alternative, evaluative framework for judicial review, which rejected the premise that only judges were entitled to determine questions of law. It recognized that administrative officials share responsibility for interpreting the law, but sought to preserve administrative fidelity to the rule of law by bolstering and extending administrative officials' common law duty of procedural fairness and demonstrating how that duty entails substantive, but deferential, constraints on administrative action. That alternative approach was built upon three interlocking propositions. The first proposition is that administrative officials owe a general duty of fairness at common law that is triggered and shaped by contextual considerations (e.g. the practical impact of the decision on an individual's rights, interests, property, privileges, or liberties) as opposed to being contingent strictly upon facts or judicial suppositions about legislative intent.[40] This general duty of procedural fairness ensures that individuals affected by an administrative decision are entitled to participate meaningfully in administrative decision-making processes, and to be heard by an impartial decision-maker even when these procedural entitlements are not spelled out explicitly in enabling legislation. Nevertheless, the duty of fairness does not entail that administrative processes must conform to trial-type procedures; it requires fair treatment, but recognizes that an administrative decision-maker "is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case."[41]

The second proposition is that judges should refrain from casting a broad net for jurisdictional errors, and instead defer to administrative interpretations of law provided they are "rationally supported by the relevant legislation."[42] Because administrative officials are empowered through the democratic process to decide

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[37] *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147 at 170 (HL) [*Anisminic*].

[38] HWR Wade, *Administrative Law*, 3rd ed (Oxford: Clarendon Press, 1971) at 97.

[39] *Metropolitan Life Insurance Co v International Union of Operating Engineers, Local 796*, [1970] SCR 425, 11 DLR (3d) 336.

[40] *Nicholson*, *supra* note 3 at 324–28; *Martineau v Matsqui Disciplinary Board*, [1980] 1 SCR 602 at 622–23, 106 DLR (3d) 385.

[41] *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1112, 18 BCLR 124.

[42] *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 at 237, 25 NBR (2d) 237 [*CUPE*].

certain legal questions, and are more proficient in answering those questions than generalist judges, courts should eschew the *Anisminic* proposition that judges are entitled to review all questions of law on a correctness standard. Nevertheless, this did not mean that judges should defer blindly to administrative decisions; rather, it meant that judges engaged in a form of substantive quality control by verifying that an administrative decision-maker responds to the evidence, the parties' submissions, and provides a conclusion which is rationally defensible in light of relevant legal principles.

Third, while legislatures are constitutionally entitled to delegate authority to decide questions of law to administrative officials, they cannot immunize administrative decisions from public scrutiny because individuals have a constitutional right to judicial review.[43] Thus, the parties who are bound by an administrative decision are entitled to challenge the legality of that decision before an independent judiciary to ensure that it has been rendered in a fair and legally justified manner.

When viewed as a package, this evaluative framework rejects the premise that administrative officials are mere ciphers who implement laws which are created by legislatures and whose content are determined by judges. In its place, it recognizes that administrative officials are responsible for developing a body of administrative law that sits alongside legislation and the common law in a democratic legal order, and which merits the respect of both citizens and superior courts. Nevertheless, it seeks to uphold the rule of law by ensuring that administrative processes and decisions are articulated fairly (i.e. in a manner which responds to the evidence and arguments tendered by the parties) and reasonably (i.e. in a manner which is rationally justifiable in light of relevant legal principles drawn from legislation, regulations, the common law, etc.).[44] Reduced to its essence, this understanding of judicial review holds that if an administrative decision is rendered in a fair and legally justified manner, other legal officials (including judges) should respect that decision instead of substituting their own determination of law in its place.

However, instead of making a clean break with formalistic reasoning, the Supreme Court pursued a more subtle transition, which discouraged judges from casting a broad net for jurisdictional errors and instead emphasized contextual factors like the practical impact of the decision on the individual, the underlying purposes or objectives of the regulatory scheme, the democratic legitimacy of administrative institutions, and the relative expertise of administrative decision-makers.[45] As a result, the complexity and confusion associated with judicial review proliferated,

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[43] *Crevier*, *supra* note 2 at 236.

[44] For a similar, theoretical account of the rule of law, see Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L Rev 353.

[45] See, eg *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1088, 35 Admin LR 153; *Knight*, *supra* note 3 at 669–77.

because even while paying lip-service to the idea that judges ought to review administrative decisions according to a deferential standard, they clung to formalist concepts and categories by continuing to review administrative decisions on a correctness standard if they deemed the issue in dispute to be "jurisdictional" or took the absence of an express privative clause as a green light for *de novo* review. And even when the Court did apply the reasonableness standard, it often resembled what David Mullan calls "disguised correctness review,"[46] because the Court would first determine how it would have decided the matter (all things considered) and then proceed to consider whether an administrative decision was sufficiently proximate to the court's to warrant judicial restraint.[47]

This state of affairs often produced conflicted or confused judicial opinions. In decisions like *Pezim v British Columbia (Superintendent of Brokers)*[48] and *Canada (Director of Investigation and Research) v Southam Inc*,[49] the Court held that judges should review administrative decisions according to a deferential standard of reasonableness even when the enabling legislation provides a statutory right of appeal, because administrative officials possess theoretical, experiential, or procedural forms of expertise. In this respect, the Court seemed to be extending the *CUPE* rationale for judicial deference regarding administrative interpretations of law.

However, instead of simply stating that the justification for judicial deference persists in cases where an administrative decision is subject to a statutory right of appeal, the Court went on to say there was a "spectrum" of different degrees of judicial deference that incorporates the problematic distinctions between jurisdictional/non-jurisdictional issues and questions of law/fact which are hallmarks of formalistic analysis. In *Pezim*, Iacobucci J suggested that the highest degree of deference should be reserved for "cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal," and the lowest degree of deference would apply in cases concerning "the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise on the issue in question, as for example in the area of human rights."[50] In *Southam*, he returned to this point in an attempt to clarify the analytical distinction between questions of law, fact, and mixed law and fact.[51] While he acknowledged

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[46] David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen!" (2013) 42 Adv Q 1 at 76 [Mullan, "Unresolved Issues"].

[47] See, e.g. *CAIMAW v Paccar of Canada Ltd*, [1989] 2 SCR 983 at 1017-20, 40 BCLR (2d) 1 *per* Sopinka J, concurring [*Paccar*].

[48] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, 92 BCLR (2d) 145 [*Pezim*].

[49] *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1 [*Southam*].

[50] *Pezim*, *supra* note 48 at 590.

that this distinction might be problematic,[52] his opinion provided fuel for the formalist notion that judges retain exclusive authority to determine general questions of law while the authority of administrative decisions was confined to findings of fact and matters of law application. And when the Court decided *Dr Q v College of Physicians and Surgeons of British Columbia*, McLachlin CJ declared that administrative decisions concerning "pure" questions of fact "will militate in favour of showing more deference towards the tribunal's decision," while decisions involving "pure" questions of law would attract "a more searching review" particularly in cases "where the decision will be one of general importance or great precedential value."[53]

Thus, even while acknowledging that judges should defer to administrative officials' interpretation of their enabling statute, the Court suggested that judges should continue to review certain categories of administrative decisions on a correctness basis (e.g. "jurisdictional" questions, general questions of law, questions of law outside the expertise of the decision-maker). This discourse culminated in decisions like *Pushpanathan v Canada (Minister of Employment & Immigration)*, in which Bastarache J outlined a multi-factor, pragmatic and functional framework for identifying the appropriate standard of review separate and apart from arguments relating to the process or substantive reasoning employed by the decision-maker.[54] That decision instructed judges to consider an array of contextual factors – the presence or absence of a privative clause, the expertise of the decision-maker, the purpose of the legislation as a whole as well as any provision in particular, and the nature of the issue in dispute. But in the process, Bastarache J conceived the pragmatic and functional framework primarily as an attempt to categorize the decision under review – with particular emphasis on determining whether an administrative decision involved questions of law the Court deemed to fall outside the tribunal's expertise. At least in this respect, *Pushpanathan* seems to facilitate analysis quite similar to the doctrine of jurisdictional error – the difference is that "the language an approach of the 'preliminary,' 'collateral' or 'jurisdictional' question has been replaced by this pragmatic and functional approach."[55]

By contrast, L'Heureux-Dubé J's opinion in *Baker v Canada (Minister of Citizenship)* adopts an evaluative approach to judicial review, which focuses on whether a particular administrative process and decision comports with fundamental values instead of attempting to categorize the nature of the administrative decision in

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[51] *Southam, supra* note 49 at para 36.

[52] *Ibid* at paras 35, 37.

[53] *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 34, [2003] 1 SCR 226.

[54] *Pushpanathan v Canada (Minister of Employment & Immigration)*, [1998] 1 SCR 982 at paras 29–38, 160 DLR (4th) 193 [*Pushpanathan*].

[55] *Ibid* at para 28.

the abstract.[56] Thus, she declared that it was "inaccurate to speak of a rigid dichotomy of 'discretionary' or 'non-discretionary' decisions" which entail different standards of review.[57] Instead, she focused on whether the particular decision being reviewed (regardless of its categorization) was fair and reasonably justified.[58] Much like Laskin CJ's opinion in *Nicholson*, L'Heureux-Dubé J articulated a contextualized duty of fairness, whose purpose was "to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[59] However, she expanded upon that idea by explaining how the duty of fairness impacts the legal substance of an administrative decision. In addition to ensuring that an individual had been informed of the case against him and heard by an impartial decision-maker, the duty of fairness required administrative officials to provide reasons "where the decision has important significance for the individual."[60] Furthermore, she noted that those reasons must disclose a reasonable basis for the decision – one which demonstrates that the decision-maker was "alert, alive and sensitive" to relevant legal principles, including "the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[61]

But instead of following L'Heureux-Dubé J's lead in subsequent years, the Supreme Court focused its attention instead on defining different categories of administrative decisions so as to enable judges to identify the standard of review more efficiently.[62] In his concurring opinion in *Chamberlain v Surrey School District No 36*, LeBel J made the insightful observation that a "formulaic" recitation of the pragmatic and functional framework frequently diverts attention "from the real issue of legality to an unnecessary exploration of tangential questions."[63] However, instead of employing the evaluative approach to judicial review set out in *Baker*, LeBel J sought rehabilitate the *Pushpanathan* framework by leaning more heavily upon formalistic reasoning. Thus, the Court soon began developing shortcuts around the pragmatic and functional approach by identifying abstract categories of issues that

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[56] *Baker*, *supra* note 3 at para 56.

[57] *Ibid* at para 54.

[58] *Ibid* at paras 51–56.

[59] *Ibid* at para 22.

[60] *Ibid* at para 43.

[61] *Ibid* at paras 56, 75.

[62] Interestingly, the Supreme Court has not tinkered with the multi-factor *Baker* framework for procedural fairness. Nevertheless, some have advocated for a unified framework for judicial review that would encompass both procedural and substantive grounds for review. See Paul Daly, "Canada's Bi-Polar Administrative Law: Time for Fusion" (2014) 40 Queen's LJ 213.

[63] *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 202, [2002] 4 SCR 710.

would presumptively attract correctness review: constitutional questions,[64] "true" jurisdictional issues,[65] and general questions of law which are of central importance to the legal system.[66]

This trend of heaping additional conceptual distinctions and categories onto the doctrinal structure of judicial review concludes with *Dunsmuir v New Brunswick*, a case in which the author of the *Pushpanathan* framework (Bastarache J) teamed up with its main critic (LeBel J) to coauthor an opinion with the aim of developing "a principled framework that is more coherent and workable."[67] That revised framework can be summarized as follows:

(1) the Court abolished the patent unreasonableness standard of review (leaving only the reasonableness and correctness review);[68]
(2) the Court held that it is unnecessary for a reviewing court to apply the contextual standard of review analysis when the standard of review has been settled by precedent;[69]
(3) in cases where the standard of review is not settled by precedent, the Court held that reviewing courts should apply the standard of review analysis by considering contextual factors such as the presence or absence of a privative clause, the purpose of the tribunal as determined by reference to the enabling legislation, the nature of the question at issue, and administrative expertise;[70]
(4) the Court attempted to simplify the process for identifying the appropriate standard of review by categorizing different types of issues which will presumptively attract either correctness or reasonableness review. The reasonableness standard applies presumptively to decisions protected by a privative clause, findings of fact, interpretations of an administrator's enabling statute, the exercise of discretionary power, questions of public policy, and mixed questions of law and fact;[71] whereas the correctness standard applies presumptively to constitutional questions, "true" jurisdictional issues, questions of law which are of general importance to

[64] *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54 at para 31, [2003] 2 SCR 504; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 20, [2006] 1 SCR 256.

[65] *United Taxi Drivers's Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 5, [2004] 1 SCR 485; *ATCO Gas & Pipelines Ltd v Alberta (Energy Utilities Board)*, 2006 SCC 4 at para 87, [2006] 1 SCR 140.

[66] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 62, [2003] 3 SCR 77.

[67] *Dunsmuir*, *supra* note 5 at para 32.

[68] *Ibid* at paras 41–2.

[69] *Ibid* at paras 57, 62.

[70] *Ibid* at paras 55, 64.

[71] *Ibid* at paras 52–4.

the Canadian legal system and outside the expertise of the decision-maker, and jurisdictional boundaries between competing administrative agencies;[72]

(5) finally, the Court attempted to define and distinguish the reasonableness and correctness standards of review.[73] Reasonableness review is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" so as to ensure that "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[74] By contrast, correctness review entitles a court to "undertake its own analysis of the question" without regard for the rationale offered by an administrative decision-maker.[75]

While the elimination of the patent unreasonableness standard has simplified judicial review to a point, it's fair to say that the other reforms have not panned out as expected.[76] There remains considerable doubt as to whether reliance on precedent will simplify the standard of review analysis because pre-*Dunsmuir* authorities have lost most of their luster, and any judge or counsel worth his or her salt can distinguish the nuances of a present case from past precedent.[77]

But the main problem with the *Dunsmuir* framework derives from its attempt to simplify judicial review by setting out presumptive categories for reasonableness and correctness review which overshadow the normative purposes of judicial review. The problem is not just that the boundaries of these categories are unclear, under-inclusive, or over-inclusive – it's that they are coincident as opposed to being mutually exclusive.[78] As the history of jurisdictional error amply demonstrates, judges are frequently drawn to correctness review or a disguised form of it when an administrative decision-maker is interpreting her home statute.[79] But

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[72] *Ibid* at paras 57–61.

[73] *Ibid* at paras 44–50.

[74] *Ibid* at para 47.

[75] *Ibid.*

[76] Given the parameters of this paper, I cannot offer an extended critique of *Dunsmuir* here. For more thorough discussion of the *Dunsmuir* case, see Daly, "Unfortunate Triumph", *supra* note 28; Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58 McGill LJ 483 [Daly, "*Dunsmuir's* Flaws Exposed"]; Mullan, "Unresolved Issues", *supra* note 46.

[77] Mullan, "Unresolved Issues", *supra* note 46 at 4–6; Stratas, *supra* note 1 at 3–4.

[78] Daly, "Unfortunate Triumph", *supra* note 28 at 330; Daly, "*Dunsmuir*'s Flaws Exposed", *supra* note 76 at 488.

[79] See, e.g. Cromwell J's protestation in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 98 [2011] 3 SCR 654 [*Alberta Teachers' Assoiation*]: that "there are legal questions in 'home' statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of an tribunal's delegated power are more likely to be set out." Some recent cases which demonstrate this line of thinking in action include *Edmonton East, supra* note 7; *Stewart, supra* note 7; *Nova Scotia Barristers' Society v Trinity Western University, supra* note 7; *Wilson, supra* note 7 *per* Côté and Brown JJ dissenting; and *Edmonton East, supra* note 7 *per* Côté and Brown JJ dissenting.

similar observations can be made with respect to the other categories. For example, the resolution of constitutional questions often hinges upon findings of fact, mixed questions of law and fact, a deep understanding of the enabling legislation, or the broader regulatory context.[80] Put simply, if one were to construct a Venn diagram of *Dunsmuir*'s presumptive categories there would be substantial areas of overlap, which explains why judges frequently disagree about whether a given case involves a general question of law outside an administrator's expertise which entitles the court to determine the answer *or* a question concerning the interpretation of an administrator's home statute which warrants judicial deference. The end product, unsurprisingly, is protracted litigation and judicial handwringing over whether a case can be slotted into a particular category in order to determine the appropriate standard of review. But more importantly, that protracted hand-wringing detracts from the more basic, evaluative task of verifying whether an administrative decision is fair and reasonably justified.

This might explain why the Supreme Court has continued to tinker with the *Dunsmuir* standard of review analysis. While the Court has restrained itself from rewriting the standard of review analysis, it initially signaled a clear preference for reasonableness review in all cases concerning the interpretation of an administrator's home statute,[81] and extended the more deferential standard of review to cases where an administrative decision involves *Charter* values[82] and general questions of law.[83] Moreover, while the Court did not abolish the concept of jurisdictional error, it has repeatedly gone out of its way to say that it may be time "to reconsider whether, for the purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the standard of review."[84] This line of post-*Dunsmuir* cases has led at least one administrative lawyer to worry that the rule of law might be compromised insofar as judges might defer to administrative decisions on jurisdictional issues, constitutional issues, and general questions of law.[85] But if one subscribes to a protestant conception of the rule of law which recognizes the

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[80] See, e.g. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola High School*]. See also Geneviève Cartier, "The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law—The Case of Discretion" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 61.

[81] See, e.g. *Alberta Teachers Association*, *supra* note 79; *Canadian National Railway v Canada (AG)*, 2014 SCC 40, [2014] 2 SCR 135; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161; *Ontario Energy Board v Ontario Power Generation Inc*, 2015 SCC 44, [2015] 3 SCR 147; *Movement laïque Québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3.

[82] See, e.g. *Doré*, *supra* note 80 at para 45; *Loyola High School*, *supra* note 80 at paras 37–40.

[83] *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 4, [2011] 3 SCR 616.

[84] *Alberta Teachers Association*, *supra* note 79 at para 34. See also *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2015 SCC 45 at para 27, [2015] 3 SCR 219.

[85] Lauren Wihak, "Wither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014) 27 Can J Admin L & Prac 173 at 175.

potential legitimacy of administrative law (like the one articulated in the *Baker* paradigm) this concern appears to conflate the rule of law with maintaining the judiciary's interpretive monopoly over questions of law.

III. Recent Proposals to Renovate the Standard of Review

If the cases from the past year are any indication, discontent with the *Dunsmuir* framework has reached another tipping point, when the Supreme Court seems primed to change the standard of review analysis yet again.[86] The most telling piece of evidence is *Wilson v Atomic Energy of Canada Ltd*, a case which generated no less than four different proposals to change the standard of review analysis. But unfortunately, many of these proposals do not turn to L'Heureux-Dubé J's opinion in *Baker* for inspiration; instead, they double-down on developing a set of more intricate conceptual definitions to resolve the current malaise.

Like *Dunsmuir*, the *Wilson* case concerns an adjudicator's decision to inquire about an employer's reasons for terminating a non-unionized public sector employee. Besides rewriting the standard of review analysis in *Dunsmuir*, the Supreme Court held that the adjudicator's decision to reinstate David Dunsmuir was unreasonable because the New Brunswick Department of Justice was legally entitled to dismiss him without holding a performance review. In doing so, the Court overturned thirty years of authority stretching back to *Nicholson* and *Knight v Indian Head School Division No 19* by holding that "in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law."[87] When subsequent litigants invited the Court to retrench the general duty of fairness in other regulatory contexts the Court demurred, stating that the *Dunsmuir* exception to the duty of fairness was "rather narrow."[88] Nevertheless, it raised the possibility that the private law of contract might further erode or exclude public law principles of fair process and reasoned justification in other cases involving the dismissal of non-unionized public employees.

Therefore, when Atomic Energy of Canada Ltd ('AECL') terminated Joseph Wilson one year after the Supreme Court issued its decision in *Dunsmuir*, it set out to explore how far the common law of contract might limit or exclude administrative law protections against unjust dismissal under the *Canada Labour Code*.[89] Wilson had been employed by AECL for approximately four and a half years – initially as a Senior Buyer/Order Administrator and later as a Procurement Supervisor. Despite having a clean disciplinary record, Wilson was dismissed summarily on 19 November 2009, at which time AECL offered him a severance

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[86] Stratas, *supra* note 1 at 2.

[87] *Dunsmuir*, *supra* note 5 at para 82.

[88] *Canada (AG) v Mavi*, 2011 SCC 30 at para 51, [2011] 2 SCR 504.

[89] *Canada Labour Code*, RSC 1985, c L-2 [*Labour Code*].

package equivalent to 6 months' salary. When Wilson filed a complaint for unjust dismissal under s. 240 of the *Labour Code*, it triggered the employer's duty under s. 242 to explain the reasons for its decision.[90] Throughout the proceedings, Wilson maintained that his dismissal was, in fact, a form of reprisal to punish him for reporting corrupt procurement practices within his department.[91] However, instead of disputing Wilson's factual assertions or explaining its decision, AECL responded by letter stating simply that Wilson had been "terminated on a non-cause basis and was provided a generous severance package that exceeded the statutory requirements" under ss. 230 and 235 of the *Labour Code*.[92] Unsatisfied with his employer's response, Wilson requested the appointment of an adjudicator to determine whether his dismissal was "unjust" within the meaning of s 242.

At the outset of the proceedings, the parties posed two questions for Stanley Schiff, a retired University of Toronto law professor with over forty years' experience as an adjudicator under the *Canada Labour Code*.[93] The first question was whether AECL could lawfully terminate Wilson's employment on a without cause basis; the second was whether a generous severance package might constitute a just dismissal despite the absence of reasons. After considering the first question, Adjudicator Schiff held that AECL could not lawfully terminate Wilson on a without cause basis,[94] because the Federal Court had declared in *Redlon Agencies Ltd v Norgren* that an employer "cannot avoid the operation of the unjust dismissal provisions by resorting to the severance payment provisions" in the *Code*.[95] Accordingly, he adjourned the proceeding with an invitation to the parties to negotiate a settlement. However, instead of pursuing negotiations with Wilson's lawyer, AECL sought judicial review of his interlocutory ruling. Thus began Wilson's four-year odyssey to the Supreme Court, which ultimately upheld Professor Schiff's decision and sent the matter back so that another adjudicator could hear the parties' submissions regarding the appropriate remedy.

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[90] *Wilson*, *supra* note 7 at paras 8–9.

[91] *Ibid* at para 10.

[92] *Ibid* at para 9. Section 230 of the *Code* provides a notice period or pay *in lieu* of notice of at least two weeks for employees who have completed three consecutive months of employment; and section 235 states that employees who have completed twelve consecutive months of employment are entitled to severance pay equivalent to the greater amount of two days wages for each year of continuous employment or five days wages.

[93] Stanley Schiff is Professor Emeritus of Law, University of Toronto and author of "Labour Arbitration Procedures", a Draft Study on Judicial Review of Labour Arbitration in Canada (Task Force on Labour Relations, Office of the Privy Council 1968). Professor Schiff began serving as an adjudicator under the *Canada Labour Code* in 1970, and *Wilson* would be the final decision he delivered in that capacity. His earliest reported decision is *Re United Steelworkers and TMX Watches of Canada Ltd*, [1970] CLAD No 73.

[94] *Wilson*, *supra* note 7 at para 13.

[95] *Redlon Agencies Ltd v Norgren*, 2005 FC 804 at para 39, 139 ACWS (3d) 1018 [*Redlon*].

The parties raised two issues on judicial review. The first was whether AECL's application for judicial review of the adjudicator's decision was premature; the second was whether the adjudicator's decision was unreasonable.[96] At least at this stage in the proceedings, there was no dispute that the proper standard of review was reasonableness, because both parties had agreed that an adjudicator's decision regarding the interpretation of the enabling legislation in general (and the unjust dismissal provisions in particular) warranted a degree of judicial deference.

Despite acknowledging that "courts discourage the breaking up of proceedings into discrete parcels and encourage the parties to finish their business in the tribunal below before coming to court,"[97] O'Reilly J held that it was nevertheless permissible for AECL to seek judicial review because the adjudicator "had made a final determination on the substance of the matter before him."[98] However, he neglected to mention that s. 243 of the *Code* contains privative clause, which prohibits courts from entertaining an application "to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242."[99] While a privative clause might not be a conclusive factor when determining the standard of review, it clearly directed the Federal Court to refrain from intervening until the adjudicator had rendered a decision on the appropriate remedy.

On the second issue, both parties agreed that reasonableness was the appropriate standard of review, and O'Reilly J concluded that Professor Schiff's decision was unreasonable.[100] In O'Reilly J's view, the adjudicator had "unreasonably relied on *Redlon* for the proposition that employers governed by the CLC must show just cause for all dismissals."[101] Given the Federal Court's explicit statement in *Redlon* that an employer "cannot avoid the operation of the unjust dismissal provisions by resorting to the severance payment provisions," one might have been tempted to conclude the adjudicator's decision was rationally defensible in light of the reasoning expressed in that case.[102] Nevertheless, O'Reilly J asserted that "[a]n employer can dismiss an employee without cause so long as it gives notice or

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[96] *Wilson and Atomic Energy of Canada Ltd, Re*, 2013 FC 733 at paras 10, 18, 230 ACWS (3d) 6 [*Re Wilson and Atomic Energy*].

[97] *Ibid* at para 12.

[98] *Ibid* at para 15.

[99] Section 243 of the *Labour Code*, *supra* note 89, states:

> 243(1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any proceedings of the adjudicator under section 242.

[100] *Re Wilson and Atomic Energy*, *supra* note 96 at para 40.

[101] *Ibid* at para 26.

[102] *Redlon*, *supra* note 95 at para 39.

severance pay."[103] While he recognized that an employee retained the right to complain that his termination was unjust under s. 240, he held that a "without cause" dismissal was not *ipso facto* unjust because such an inference "would fail to take account of the clear remedies provided in ss. 230 and 235 (i.e. notice and severance) for persons dismissed without cause."[104] The upshot of O'Reilly J's reasoning is that as long as an employer provides sufficient monetary severance accompanied by pro forma "without cause" statement which is devoid of malice, discriminatory animus, or reprisal, they might avoid an unjust dismissal inquiry under s. 242 of the *Labour Code*. Practically speaking, O'Reilly J's interpretation of the *Labour Code* would enable public employers to dismiss employees arbitrarily – even for no reason at all – so long as they provided adequate notice and severance.

A month after the decision, AECL's lawyer praised O'Reilly J's decision in the *Lawyers Weekly*, saying that it would have a "monumental impact on federally regulated employers and their non-unionized staff," because "arbitrators have uniformly held that the phrase 'unjust dismissal' means an employer can only terminate an employee for just cause, such as for reasons of misconduct, incompetence or permanent incapacity."[105] In the same column, Professor Michael Lynk from the University of Western Ontario (a former labour lawyer and CLC arbitrator), stated that "[t]his is a break with very consistent arbitral and judicial case law that has provided non-unionized workers in the federal sector with broad rights protections and remedies akin to what they would find in a collective agreement."[106] When cast in this light, O'Reilly J's ruling that the adjudicator's decision was unreasonable seems ironic: it asserts that the rule of law entitled the court to resolve a stalemate between conflicting lines of administrative law when, in fact, experts in the field of employment law generally agreed that the *Labour Code* required employers to explain their decisions to dismiss non-unionized employees instead of terminating them summarily.

Despite the fact that both parties and a Federal Court justice all agreed that the Adjudicator's decision should be reviewed on a reasonableness standard, the case quickly devolved into a protracted debate about the appropriate standard of review. In subsequent legal proceedings, twelve different justices of the Federal Court of Appeal and Supreme Court of Canada went on at length about different proposals to renovate the standard of review analysis, but expended relatively little effort on understanding the Adjudicator's decision on its own terms. In what follows, I will attempt to separate the different camps in this ongoing debate, and examine the different proposals for reforming the standard of review analysis.

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[103] *Re Wilson and Atomic Energy*, *supra* note 96 at para 35.

[104] *Ibid* at para 37.

[105] Christopher Guly, "Court makes 'game-changing' decision on employees: 'No basis' for contention Labour Code demands dismissals with cause, judge rules" (16 August 2013) 33(14) *The Lawyers Weekly*.

[106] *Ibid*. See also Reagan Ruslim, "Unjust Dismissal the Canada Labour Code: New Law, Old Statute" (2014) 5 UWO J Legal Stud 3.

(a) *Judicial Review is a Matter of Degree*

The Federal Court of Appeal dismissed Wilson's appeal on both grounds. Writing for the Court, Stratas JA conceded that litigants should only seek judicial review after exhausting the administrative process, but noted that this principle was attenuated in "rare cases where the effect of an interlocutory decision on the applicant is so immediate and drastic that the Court's concern about the rule of law is aroused."[107] Like O'Reilly J, Stratas JA did not mention that the adjudicator's decision and continuing jurisdiction regarding the appropriate remedy was protected by a privative clause. Later in his reasons, Stratas JA suggested that the adjudicator had bifurcated the proceedings intentionally so as to enable the Federal Court to settle "once and for all" the legal question about whether an employer could lawfully terminate on a without cause basis.[108] But because the adjudicator expressly rested his decision on *Redlon*, he did not appear to be casting about for another Federal Court ruling on the issue; if anything, he seemed to be encouraging the parties to negotiate a settlement, instead of having him impose one that might not be to either's liking. In this respect, the adjudicator was likely drawing upon 40 years of experience serving as a labour adjudicator when he adjourned the hearing.

After dispensing with Wilson's first ground of appeal, Stratas JA considered the standard of review, and held (surprisingly) that O'Reilly J had erred in applying the reasonableness standard. After noting that the Court was not bound by the parties' agreement, Stratas JA called it an "unusual case"[109] in which "the current state of adjudicator's jurisprudence is one of persistent discord."[110] Accordingly, Stratas JA held "the rule of law concern predominates…and warrants this Court intervening to end the discord and determine the legal point once and for all."[111] To support his conclusion, he noted that *Dunsmuir* contemplated correctness review for questions of law which are of central importance to the legal system and outside the expertise of the decision-maker.[112] In the alternative, he asserted that interpretation of the relevant *Labour Code* provisions required "relatively little specialized labour insight," meaning that even if he had applied the reasonableness standard the adjudicator was entitled to "only a narrow margin of appreciation" relative to the Court's interpretation of the *Labour Code*.[113] But regardless of which standard applied, Stratas JA held that O'Reilly J's interpretation of the *Labour Code*, which permitted "without cause" dismissals, was correct and therefore declined to intervene.

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[107] *Wilson v Atomic Energy of Canada Ltd*, 2015 FCA 17 at para 33, 249 ACWS (3d) 347.

[108] *Ibid* at para 39.

[109] *Ibid* at paras 43–46.

[110] *Ibid* at para 52.

[111] *Ibid* at para 55.

[112] *Ibid* at para 56.

[113] *Ibid* at para 58.

Stratas JA's opinion weaves together two slightly different strands of argument, both of which merit further analysis. The first is that in cases where a reviewing court concludes that in cases where administrative interpretations of law conflict, it is entitled to engage in correctness review so as to settle the controversy "once and for all." This line of reasoning would later form the basis for Côté and Brown JJ's dissenting opinion in the Supreme Court, which I will address at greater length below.[114]

The second argument, which has become Stratas JA's trademark over the past few years, is that attempts to draw a sharp distinction between different standards of review are misplaced, because judicial review is essentially a matter of degree.[115] This line of reasoning emphasizes post-*Dunsmuir* signals from the Supreme Court that the reasonableness standard of review "takes its colour from the context."[116] But it also harkens back to Iacobucci J's pre-*Dunsmuir* notion that there is a "spectrum" of review which prescribes correctness review for questions of law,[117] and Sopinka J's suggestion in *CAIMAW v Paccar* that the reasonableness refers to "a logical relationship between the grounds of the decision and the premises thought by the court to be true."[118]

In this vein, Stratas JA asserts in both *ex cathedra* opinions and extra-judicial commentary that the purpose of reasonableness review is to verify whether an administrative decision falls within a range of "acceptability and defensibility" on the facts and the law[119] that widens or narrows depending upon the nature of the issues involved. Thus, it is of paramount importance for reviewing courts to establish the relevant margin of appreciation at the outset *before* moving on to consider the procedural or substantive attributes of the decision under review. In cases where legislation "signals that the standard of review should be correctness" by providing a right of appeal,[120] giving judges the power to certify a question of law for

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[114] See 140–142, below.

[115] See e.g. *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2013 FCA 75, 226 ACWS (3d) 813 [*First Nations Child and Family Caring Society*]. For academic commentary on Stratas JA's opinion in that case, see Paul Daly, "Unreasonable Interpretations of Law" (2014) 66 SCLR (2d) 233.

[116] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 17–18, [2012] 1 SCR 5.

[117] *Southam*, *supra* note 49 at para 30, 54.

[118] *Paccar*, *supra* note 47 at 1017–18:

> Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and the premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.

[119] Stratas, *supra* note 1 at 16. See also *First Nations Child and Family Caring Society*, *supra* note 115 at para 12.

consideration by an appellate court,[121] or setting out "recipes…that must be followed or other constraining words,"[122] Stratas JA asserts that a reviewing court should allow an administrative decision-maker little or no margin of appreciation. By contrast, in cases which turn on "factual appreciation, fact-based discretions, administrative policies, or specialized experience and expertise not shared by the reviewing court on the particular point in issue," he asserts that administrative decision-makers enjoy a relatively wide margin of appreciation.[123] But the bottom line seems to be an inverse correlation between the degree to which an administrative decision involves questions of law (especially statutory provisions and common law doctrine)[124] and the degree to which a court will defer to an administrative decision, because "[l]egal matters, as opposed to factual or policy matters, admit of fewer possible, acceptable outcomes."[125]

In order to throw Stratas JA's theory into stark relief, it is worth comparing the different margins of appreciation he employed in *Delios v Canada (Attorney General)* with the one he applied in *Wilson*.[126] In *Delios*, a case concerning the interpretation of collective agreement provisions establishing an employee's paid leave entitlement, Stratas JA held that the adjudicator was entitled to a "wide margin of appreciation" because "labour adjudicators' decisions are often protected by privative clauses" and:[127]

> interpretations of collective agreement provisions involve elements of factual appreciation, specialization and expertise concerning collective agreements, the disputes that arise under them, the negotiations that lead up to them and, more broadly, how the management-labour dynamic swirling around them plays out in various circumstances.

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[120] On this point, Stratas JA approves of Slatter JA's decision in *Edmonton East*, *supra* note 7, in which he held that a statutory right of appeal implies review on a correctness standard.

[121] Stratas, *supra* note 1 at 4–5. See also *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paras 30–37, 372 DLR (4th) 539.

[122] Stratas, *supra* note 1 at 15. See also *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at para 91, 238 ACWS (3d) 282; *Canada (AG) v Boogaard*, 2015 FCA 150 at para 43, 87 Admin LR (4th) 175; *Canada (AG) v Almon Equipment Limited*, 2010 FCA 193 at para 53, [2011] 4 FCR 203.

[123] *First Nations Child and Family Caring Society*, *supra* note 115 at para 14; *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 82, 246 ACWS (3d) 191.

[124] *First Nations Child and Family Caring Society of Canada*, *supra* note 115 at paras 14–15; *Canada (AG) v Abraham*, 2012 FCA 266 at para 45, [2013] 1 CTC 69 [*Abraham*]; *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 136, 382 DLR (4th) 720.

[125] *Abraham*, *supra* note 124 at para 45; *Hupacasath First Nation v Canada (AG)*, 2015 FCA 4 at para 66, 379 DLR (4th) 737.

[126] *Delios v Canada (AG)*, 2015 FCA 117, 100 Admin LR (5th) 301.

[127] *Ibid* at paras 20–21.

By contrast, in *Wilson* Stratas JA does not mention the relevance of the privative clause and noted that "the statutory interpretation point before us involves relatively little specialized labour insight beyond the regular means the courts have at hand when interpreting a statutory provision."[128] Without further explanation, it is certainly debatable whether the margin of appreciation should vary depending on whether a labour adjudicator is interpreting collective agreement provisions regarding paid-leave entitlements as opposed to unjust dismissal provisions in the *Labour Code*. The unavoidable inference from cases like *Delios*, *Wilson* and others is that whenever administrative officials interpret legislation, Stratas JA's analysis gravitates towards correctness review or, alternatively, a form of deference which is indistinguishable from it.

(b) *Judicial Review Means Reasonable Pluralism…Unless There's Only One Right Answer*

When framed in this way, Stratas JA's proposal for reform is only one small step removed from the doctrine of jurisdictional error, in which judges are entitled to review questions of law on a correctness standard. At most, he is prepared to allow administrative officials a narrow margin of appreciation when interpreting legislation, but it is doubtful whether this makes any practical difference a case like *Wilson* because "whether we conduct reasonableness review or correctness review, the outcome of the appeal would be the same."[129] But such an approach discounts the fact that Parliament empowered adjudicators to interpret and apply the *Labour Code*, and the fact that the adjudicator in this case seemed to be exercising that power in a way which was rationally defensible in light of the *Labour Code*'s objectives, namely to resolve employment disputes in an efficient, but conciliatory, manner. Finally, it seems to conflict with the landmark ruling in cases like *CUPE* and *Baker* that judges should defer to administrative interpretations of broadly worded statutory provisions, provided they are "rationally supported by the relevant legislation."[130]

In the Supreme Court, a majority led by Abella J concluded that the Federal Court of Appeal had erred in applying the correctness standard of review. On the standard of review issue, Abella J pointed out that both parties had agreed that the Adjudicator's decision should be reviewed on a reasonableness standard. But she also relied on two recent Supreme Court decisions – *Dunsmuir* and *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals* – as authority for the proposition that the decisions of labour adjudicators and arbitrators should generally be afforded a significant degree of deference.[131] Abella

[128] *Re Wilson and Atomic Energy*, *supra* note 96 at para 58.

[129] *Ibid* at para 58.

[130] *CUPE*, *supra* note 42 at 237.

[131] *Wilson*, *supra* note 7 at para 15. In another case from 2015, *Kathasamy*, *supra* note 7 the Supreme Court rejected Stratas JA's suggestion that the Federal Court of Appeal should review certified questions of law on a correctness standard.

J's reliance on these two cases is noteworthy, because they both apply the more deferential standard of review to administrative interpretations of enabling legislation (*Dunsmuir*) and common law doctrine (*Nor-Man*), which undercuts the assertion that the degree of judicial deference narrows as the quotient of law involved in an administrative decision increases. And in another case from 2015, *Kanthasamy v Canada (Citizenship and Immigration)*, Abella J authored another majority opinion which rejected the suggestion that the correctness standard ought to apply to cases in which a Federal Court had certified a question of law for consideration by the Federal Court of Appeal.[132] Therefore, at least to this point the Supreme Court is not inclined to adopt Stratas JA's proposal for renovating the standard of review analysis. To underline this point in *Wilson*, Abella J stated that an "attempt to calibrate reasonableness by applying a potentially indeterminate number of varying degrees of deference" was unhelpful, because it would further complicate an area of law was "in need of greater simplicity."[133]

Regarding the Adjudicator's decision in *Wilson*, Abella J concluded that it was reasonable, and therefore sent the matter back for a decision regarding the appropriate remedy. However, it remains unclear whether Abella J upheld the decision simply because she agreed with the Adjudicator or whether she thought the Adjudicator's had articulated a reasonable legal justification for his decision. When it came time to apply the reasonableness standard, Abella J stated:[134]

> The issue here is whether the Adjudicator's interpretation of ss 240 to 246 of the *Code* was reasonable. The text, the context, the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*. The alternative approach of severance pay in lieu falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" because it completely undermines this purpose by permitting employers, at their option, to deprive employees of the full remedial package Parliament created for them. The rights of employees should be based on what Parliament intended, not on the idiosyncratic view of the individual employer or adjudicator.
>
> Adjudicator Schiff's decision was, therefore, reasonable.

This passage suggests that, instead of beginning with an attempt to understand the Adjudicator's reasons on their own terms, Abella J immediately applied traditional canons of statutory construction by engaging in a holistic analysis of the text,

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[132] *Kanthasamy*, *supra* note 7 at paras 42–44.

[133] *Wilson*, *supra* note 7 at para 18.

[134] *Ibid* at paras 39–40.

context, and legislative history in order to determine Parliamentary intent.[135] Once she concluded that Parliament had not intended to allow employers to dismiss on a without cause basis, she considered the Adjudicator's decision to be reasonable because he arrived at the same outcome. Thus, despite disagreeing about the appropriate standard of review, Abella J and Stratas JA agreed that the legality of the Adjudicator's decision should be assessed according to a reviewing judge's understanding of the *Labour Code* –they just parted ways over how to interpret the statute.[136]

The problem with this approach to reasonableness review is that it only pays lip service to the idea that administrative law has a meaningful impact on judicial reasoning about what the law requires. If one unpacks the reasonableness standard in this way, then any quibbling over the standard of review seems both vacuous and misleading, because judges can defer by first determining how the legislation should be interpreted and then verifying that the administrative decision-maker construed the legislation in substantially the same terms.

While Abella J could have rested at this point, she nevertheless offered another proposal for reforming the standard of review analysis in *obiter dicta*.[137] She began by noting that the *Dunsmuir* framework had fallen short of its objectives, because "where once the confusion was over the difference between patent unreasonableness and reasonableness simpliciter, we now find ourselves struggling over the different between reasonableness and correctness."[138] The consequence of this confusion was that judges and counsel engaged in protracted "terminological battles regarding the standard of review at the outset of judicial review, with relatively little regard for the merits of a particular administrative decision.[139] Then, after noting several academic critiques of the *Dunsmuir* framework by leading administrative scholars, she raised the prospect of adopting a universal standard of reasonableness, saying:[140]

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

[135] Another prominent example of this reasoning is *Canada (AG) v Mowat*, 2011 SCC 53, [2011] 3 SCR 471, a case that is frequently held up as an example of disguised correctness review. See Mullan, "Unresolved Issues", *supra* note 46 at 58–59; Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012) 38 Queen's LJ 59 at 90–92.

[136] Jones, *supra* note 9 at 38.

[137] *Wilson*, *supra* note 7 at para 19.

[138] *Ibid* at para 26.

[139] *Ibid* at para 25.

[140] *Ibid* at para 31.

> ability to continue to protect both deference *and* the possibility of a single answer where the rule of law demands it, as in the four categories singled out for correctness review.

So instead of Stratas JA's proposal to draw more fine-grained distinctions regarding varying margins of appreciation, Abella J proposes to collapse different standards of review into one universal reasonableness standard which can accommodate a plurality of reasonable administrative decisions…unless a reviewing court concludes there is only one right answer.[141]

While moving to a universal standard of reasonableness might avoid protracted, unproductive handwringing over which standard of review to apply, defining the reasonableness in these terms will only render the application of that standard more fraught with contradiction. At best, Abella J's proposal might avoid problems associated with applying different standards of review to multiple issues within the same administrative decision.[142] But because the reasonableness standard is construed as requiring deferential assessment of administrative reasons unless the court thinks there is only one correct outcome, there is a substantial risk that the "one right answer" qualification will simply become an "analytical Trojan Horse that invites correctness review under the guise of reasonableness analysis."[143] As the history of judicial review amply demonstrates, judges are prone to overreaching their constitutional role by asserting there is only one right answer on questions of statutory interpretation, even when enabling legislation is cast in relatively general terms and assigns authority to administrative officials to resolve interpretive disputes. In those cases, where a court is convinced that an administrative decision offends the principle of legality, it should at least explain why that decision is unfair or cannot be rationally supported in light of the relevant legal principles.

Finally, it is revealing that Abella J 's proposal would not have made any difference on the way the *Wilson* case unfolded. Despite applying the reasonableness standard at first instance, O'Reilly J held that the Adjudicator's decision was unreasonable because it conflicted with what he deemed to be a proper reading of the *Labour Code* (i.e. that it entitled AECL to dismiss Wilson on a without cause basis). Stratas JA, for his part, thought it made no difference whether the standard of review was correctness or reasonableness, but ultimately agreed with O'Reilly J's general interpretation of the *Labour Code*. While Abella J held that the Federal Court of Appeal applied the wrong standard of review, she essentially engaged in the same exercise, because she measured the legality of the Adjudicator's decision against her own interpretation of the *Labour Code*. Thus, the apparent disagreement between O'Reilly J, Stratas JA, and Abella J over the appropriate standard of review masks

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[141] *British Columbia (Securities Commission) v McLean*, 2013 SCC 67 at paras 37–38, [2013] 3 SCR 895. For an excellent critique of the 'one right answer' gloss on reasonableness review, see Falzon, *supra* note 9.

[142] See, e.g. *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615.

[143] Falzon, *supra* note 9 at 160.

the fact that they all essentially believed there was one right answer to the question posed to the Adjudicator – they just disagreed about what that one right answer was. But by approaching judicial review in this way, all three judges effectively treat the Adjudicator's decision as an ephemeral piece of advice instead of a piece of administrative law which merits judicial respect. This makes one wonder whether all this talk about deference is merely a rhetorical veneer designed to deflect concerns about judicial overreach.

(c) *Let Sleeping Dogs Lie*

Perhaps one should not put too much stock in Abella J's proposal just yet, because the five other five concurring justices distanced themselves from her *obiter* comments. While McLachlin CJ (along with Karakatsanis, Wagner, and Gascon JJ, concurring) appreciated Abella J's "efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability," she said she was "not prepared to endorse any particular proposal to redraw our current standard of review framework at this time."[144] Similarly, while Cromwell J agreed that "developing new and apparently unlimited numbers of gradations of reasonableness review"[145] would not improve matters, he cautioned that "our standard of review jurisprudence does not need yet another overhaul."[146] Although many observers expected the Court to discuss Abella J's proposal in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, it ultimately deferred that discussion to a later date. Writing for a bare majority, Karakatsanis J noted in that case that the day for reforming the standard of review analysis "has not come, but it may be approaching," which suggests that it may take up the cudgel again in the coming year.[147]

While it is difficult to speculate about where the Supreme Court might turn next, the prevailing sense of confusion regarding the standard of review is palpable. As I suggested earlier, the problems associated with the categorical approach to the standard of review in *Dunsmuir* continue to generate considerable litigation. Despite its attempt to signal a preference for reasonableness review in all cases where an administrative agency is interpreting its home statute, this has not deterred litigants and appellate courts from testing the limits of correctness review. In *Wilson*, the Federal Court of Appeal expanded correctness review to include situations where a reviewing court perceives a rift in administrative law; and in *Edmonton East*, the Alberta Court of Appeal expanded correctness review to cases where the enabling legislation includes a statutory right of appeal.[148] Despite ample case law from the

[144] *Wilson*, *supra* note 7 at para 70.

[145] *Ibid* at para 73.

[146] *Ibid* at para 72.

[147] *Edmonton East*, *supra* note 7 at para 20.

[148] *Re Wilson and Atomic Energy*, *supra* note 96 at para 39; *Edmonton East*, *supra* note 7 at para 24.

Supreme Court that the appropriate standard of review is reasonableness in both scenarios,[149] both appellate courts interpreted *Dunsmuir* as authorizing correctness oversight. And as long as litigants perceive they might find a receptive audience for expanding *Dunsmuir*'s categories of correctness review, even in cases concerning the interpretation of an administrator's home statute, they will continue to test the Supreme Court's resolve regarding administrative interpretations of law.

Nevertheless, the majority's reasoning in *Edmonton East* provides a glimmer of hope that reengagement with the underlying principles of fairness and reasonable justification might yet provide helpful guidance about how to verify the legality of an administrative decision without embarking on a quixotic quest to determine the correct outcome to the question posed to the primary decision-maker. The case concerned a decision of the Edmonton Assessment Review Board to increase the assessed value of a shopping mall. The mall had originally been assessed as having a value of $31 million, which the owner challenged on the grounds that it exceeded the market value of the property and/or was inequitable in light of the assessed value of similar properties. However, while preparing for the hearing, the municipality discovered that the mall had been mistakenly classified as a "community centre," which meant that its rental value had been grossly undervalued. The City informed the owner of its mistake, and indicated that it would ask the Assessment Review Board to increase the assessed value of the property at the appeal hearing. During the hearing, counsel for the property owner conceded that the Board had the legal authority to increase the assessed value of the property, because the enabling legislation gave it the power to "make a change to an assessment roll or tax roll."[150] However, when the Board increased the assessed value of the property, the owner sought leave to appeal to the Court of Queen's Bench on "a question of law or jurisdiction of sufficient importance" to warrant judicial intervention.[151]

At first instance, Rooke ACJ held that the appropriate standard of review was correctness, because the Board's decision involved a jurisdictional question about whether it could increase an assessment that had been challenged by a property owner.[152] But the Alberta Court of Appeal (perhaps sensing that the parameters of "jurisdictional error" had waned since *Dunsmuir*),[153] held that the correctness standard applied because the statutory right of appeal implied that "the Legislature clearly intended that the administrative decision maker make the initial decision,

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[149] See, e.g. *Domtar Inc v Quebec (Commission d'appel en matière de lesions professionelles)*, [1993] 2 SCR 756, 105 DLR (4th) 385; *Pezim*, *supra* note 48; *Southam*, *supra* note 49; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160; *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 45, [2015] 3 SCR 147; *ATCO Gas and Pipelines Ltd v Alberta (Utility Commission)*, 2015 SCC 45, [2015] 3 SCR 219.

[150] *Municipal Government Act*, RSA 2000, c M-26, s 467.

[151] *Ibid* at s 470(5).

[152] *Edmonton East (Capilano) Shopping Centres Ltd v Edmonton (City)*, 2013 ABQB 526, 570 AR 208.

[153] See *supra* note 84.

subject to review by the court."[154] In doing so, it proposed to expand *Dunsmuir*'s categories of correctness review to include cases where an administrative decision was subject to a statutory right of appeal,[155] and cited the Supreme Court's recent decision in *Tervita Corp v Canada (Commissioner of Competition)* as authority for this addendum.[156]

In a highly anticipated decision, the Supreme Court restored the Board's decision by a narrow 5-4 margin. In her majority opinion, Karakatsanis J applied what she took to be the predominant approach to judicial review in the post-*Dunsmuir* era. After briefly reviewing the Board's powers under the *Municipal Government Act,* including its statutory power to "change" an assessment, Karakatsanis J held that a presumption of deference applied so as to convey judicial respect for "the principle of legislative supremacy and the choice made to delegate decision making to a tribunal" and foster access to justice administered by a "flexible and expert tribunal."[157] Moreover, she quickly disposed of the submission that the Board's decision involved a jurisdictional question, by saying that this category had been narrowly construed in recent years, and reiterating that the Board's interpretation of its home statute merited a deferential standard of review.[158] In response to the Court of Appeal's suggestion that a statutory right of appeal should be construed as signaling the legislature's preference for correctness oversight, Karakatsanis J noted that such a move conflicted with "strong jurisprudence from this Court."[159]

But the most interesting aspect of Karakatsanis J's decision concerns her method of assessing whether the Board's decision was reasonably justified. Instead of applying ordinary canons of statutory construction to determine directly whether the legislation empowered the Board to increase the property's assessed value, she set out to verify "the existence of justification, transparency and intelligibility within the decision-making process."[160] She began by noting that the City had apprised the owner that it was going to ask the Board to increase the assessed value, and the owner had filed lengthy submissions in response. More importantly, Karakatsanis J highlighted how the property owner's counsel had conceded at the initial Board hearing that the enabling legislation empowered the Board to "change" to the assessment roll, which meant it had the power to increase the assessed value.

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[154] *Edmonton East*, *supra* note 7 at para 24.

[155] *Ibid.*

[156] *Edmonton East*, *supra* note 7 at para 25, citing *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161.

[157] *Edmonton East*, *supra* note 7 at para 22.

[158] *Ibid* at para 22.

[159] *Ibid* at paras 28–31.

[160] *Dunsmuir*, *supra* note 5 at para 47.

Therefore, the Board's decision-making process had clearly been fair and transparent.[161]

But was the Board's decision reasonable in light of the available evidence and relevant law? On this point, Karakatsanis J admitted that when an administrative decision-maker fails to give reasons, "it makes the task of determining the justification and intelligibility of the decision more challenging."[162] While she conceded that complete administrative silence would be a reviewable in cases where the duty of fairness required "some form of reasons," she noted that the duty to provide reasons was not a universal requirement.[163] Thus, she asserted that "when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons 'which could be offered' in support of the decision," including (but not limited to) existing administrative law which articulates reasons which lend support for the decision under review.[164] After reiterating that the Board had treated the property owner fairly by inviting submissions on whether the Board had the power to increase the initial assessment, Karakatsanis J proceeded to review the overarching objectives of the statute, specific statutory provisions, and existing administrative law regarding the purpose and function of the Assessment Review Board in order to verify whether the Board's decision was rationally defensible. She pointed out that the language of the specific provision gave the Board relatively broad powers to "change" an assessment in order to achieve the statutory objective of ensuring that properties are assessed in a fair and equitable manner.[165] Furthermore, she noted a prior decision of the Alberta Municipal Government Board, which had interpreted the provision as enabling the Assessment Review Board to increase or decrease an assessment in order to arrive at a fair and equitable assessment.[166] Therefore, even though she did not define the true meaning of s. 467 of the *Municipal Government Act*, Karakatsanis J was nevertheless able to verify that the Board's decision was reasonable because its interpretation was "consistent with the ordinary meaning of 'change' and the overarching policy goal of the *MGA*, to ensure assessments are correct, fair and equitable."[167]

What is most remarkable about Karakatsanis J's opinion is the attempt to articulate an integrated account reasonableness review – one which draws a connection between judicial deference, fair process, and substantive review. The starting point is a reminder that the purpose of judicial review is to ensure the

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[161] *Edmonton East*, *supra* note 7 at paras 36–40.

[162] *Ibid* at para 36.

[163] *Ibid* at para 37; as L'Heureux-Dubé J noted in *Baker*, *supra* note 3 at para 43 "in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision."

[164] *Edmonton East*, *supra* note 7 at para 38.

[165] See, eg *Municipal Government Act*, *supra* note 150 at ss 293(1), 324(1), and 467(3).

[166] *Edmonton East*, *supra* note 7 at para 44.

[167] *Ibid* at para 61.

legality of an administrative decision, rather than to prioritize judicial interpretations of law. The second point is that the legality of an administrative decision depends partially on whether a party has been given an opportunity to provide submissions regarding how the law should be applied in light of the particular facts and circumstances. Finally, the legality of an administrative decision depends on whether it can be rationally defended in light of the relevant underlying principles of the relevant legal framework for the decision. When viewed in this way, Karakatsanis J's opinion provides a robust, but nuanced, approach to reasonableness review. As in *Baker*, Karakatsanis J leaves aside the question whether the decision under review concerns a question or issue which qualifies for judicial deference in the abstract, and instead asks whether the decision-maker had been attentive to the litigant's submissions and had provided a decision which was capable of being justified in light of relevant law (including administrative law on the subject).

Nevertheless, because Karakatsanis J held that the Board was not required to provide reasons and instead opted to supplement the Board's decision with reasons which might have been offered in support of the decision, her decision does not vindicate the values articulated in *Baker* – especially the value of enabling a party "to see that the applicable issues have been carefully considered."[168] By affirming the proposition that judges can consider reasons "which could be offered" (but were not, in fact, offered by the decision-maker),[169] Karakatsanis J's opinion provides a perverse incentive for decision-makers to issue conclusions without a supporting legal rationale in the hopes that a reviewing court might rectify their omission. From an evaluative perspective – one that takes its cues from *Baker* – the duty to provide reasons is significant because it serves to verify that an administrative authority is "exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*."[170] Therefore, one hopes that the Court will revisit this issue in greater depth in future cases, because it will likely yield important insights about the connection between judicial deference and the fundamental values which legitimate administrative decisions and warrant judicial respect.[171]

(d) *The Rule of Law Requires Correctness Review*

Up to this point, it appears that although judges generally acknowledge that they should defer to administrative decisions, they often renege on that commitment because they remain wedded (consciously or otherwise) to the formalist notion that

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[168] *Baker*, *supra* note 3 at para 39.

[169] *Alberta Teachers' Association*, *supra* note 79 at paras 51–53.

[170] *Baker*, *supra* note 3 at para 56.

[171] For a more thorough scholarly analysis of this connection, see Dyzenhaus & Fox-Decent, *supra* note 4 at 218–238.

questions of law should generally be determined by the judiciary.[172] Sometimes this tendency is couched in terms of allowing administrative officials a narrow margin of appreciation when interpreting legislation and common law principles; sometimes it confuses how judges assess the reasonableness of an administrative decision, even to the point of saying that judges should defer to administrative decisions unless they believe there is only one right answer. But the last proposal for reforming the law of judicial review seeks to clarify it by dispensing with the pretense of judicial deference to administrative decisions on matters of substance altogether.

Recall that when the Federal Court of Appeal dismissed the appeal in *Wilson*, Stratas JA held that the court should review the Adjudicator's decision on a correctness standard because "the current state of adjudicators jurisprudence is one of persistent discord."[173] Therefore, despite recognizing that "Parliament has vested jurisdiction in adjudicators under the Code to decide questions of statutory interpretation" Stratas JA concluded that "the rule of law concern predominates in this case and warrants this Court intervening to end the discord and determine the legal point once and for all. We have to act as a tie-breaker."[174] To support this conclusion, he noted that the *Dunsmuir* framework prescribed correctness review for questions of law which are of general importance to the legal system and outside the expertise of the decision-maker. In his view, conflicting administrative decisions raises a question of general importance, because the outcome of employment disputes would depend on the identity of the decision-maker;[175] and since the issue concerned a matter of statutory interpretation, he thought that "the statutory interpretation point before us involves relatively little specialized labour insight beyond the regular means the courts have at hand when interpreting a statutory provision."[176]

In a remarkable dissenting opinion, three members of the Supreme Court agreed that the Adjudicator's decision should be reviewed on a correctness standard. Like Stratas JA, Côté and Brown JJ (with Moldaver J, concurring) expressed the concern that different Adjudicators had reached different conclusions about whether the *Labour Code* permitted federally regulated employers to dismiss without cause. For the dissenting justices, this raised a "serious concern for the rule of law,"[177] because "what the law means depends on whether one's case is decided by one decision-maker or another."[178] Thus, despite the fact that the Adjudicator was

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[172] Harry Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall LJ 1.

[173] *Re Wilson and Atomic Energy*, *supra* note 96 at para 52.

[174] *Ibid* at para 55.

[175] For a similar argument regarding judicial review of refugee claims, see Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" 38 Queen's LJ 1.

[176] *Re Wilson and Atomic Energy*, *supra* note 96 at para 58.

[177] *Wilson*, *supra* note 7 at para 74.

interpreting his home statute, Côté and Brown JJ concluded that the Court ought to impose its own interpretation of the *Code* because rule of law values trumped what would otherwise be tantamount to "indiscriminate deference to the administrative state."[179]

In order to appreciate the full import of the dissenting opinion, we need to revisit the statutory framework which authorized the Adjudicator's decision. To recap: the *Labour Code* gives non-unionized employees a statutory right to "make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust";[180] the filing of a complaint triggers a statutory duty for the employer "to provide a written statement giving the reasons for the dismissal";[181] if the parties cannot resolve the complaint, the inspector is required to report the matter to the Federal Minister of Labour,[182] who has the discretionary power to appoint "any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint";[183] an adjudicator has the power to "determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions"[184] and determine "whether the dismissal of the person who made the complaint was unjust";[185] and the adjudicator's determination is deemed to be "final and shall not be questioned or reviewed in any court."[186]

Given this legal framework, it seems odd that the dissenting opinion would resort directly to correctness review without even pausing to note that Professor Schiff had been appointed by the Minister of Labour to adjudicate Wilson's complaint, and Parliament had instructed courts to exercise restraint when reviewing the Adjudicator's decision. To characterize reasonableness review as "indiscriminate" under these circumstances conveys remarkable disregard for the will of Parliament, the objectives of the *Labour Code,* and the Adjudicator's reasons for upholding Wilson's complaint. Furthermore, while the dissenting opinion makes a passing reference to *Dunsmuir*,[187] its authors expended no effort to apply the standard of review analysis to the facts at hand. So even as a piece of common law reasoning, the dissenting opinion's standard of review analysis is rather glib. Finally,

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[178] *Ibid* at para 85.

[179] *Ibid* at para 79.

[180] *Canada Labour Code, supra* note 89 at s 240.

[181] *Ibid* at s 241(1).

[182] *Ibid* at s 241(3)

[183] *Ibid* at s 242(1).

[184] *Ibid* at s 242(2).

[185] *Ibid* at s 242(3)(a).

[186] *Ibid* at s 243.

[187] *Dunsmuir, supra* note 5 at para 80.

the dissenting opinion adopts an extremely low threshold for triggering correctness review, by stating "[a]s long as there is one conflicting but reasonable decision, its very existence undermines the rule of law."[188]

But perhaps the most significant aspect of the dissenting opinion, is that its authors have consistently sought to revive the *Anisminic* approach to judicial review by expanding *Dunsmuir*'s presumptive categories for correctness review. In *Wilson*, Côté and Brown JJ (with Moldaver J, concurring) wrote a dissenting opinion which construed the Adjudicator's decision regarding Wilson's unjust dismissal complaint as involving "a matter of general importance, defining the basis of the employment relationship for thousands of Canadians"[189] without even bothering to consider important institutional reasons for judges to respect the Adjudicator's decision. In *Edmonton East*, Côté and Brown JJ wrote another dissenting opinion (with McLachlin CJ and Moldaver J, concurring), which construed a statutory right of appeal as a signal from the legislature not to defer the decisions of the Edmonton Assessment Review Board's interpretation of provisions in its home statute regarding its power to "change" the assessed value of property. And in *Commission scolaire de Laval v Syndicat de l'enseignement de la region de Laval,* Côté J wrote a dissenting opinion (with Wagner and Brown JJ, concurring), which concluded that an arbitrator's decision regarding the admission of evidence at a hearing raises a general questions of law which are of central importance to the administration of justice as a whole and on which an arbitrator has no expertise.

All of these cases raised issues falling squarely within the statutory mandate of various administrative officials, agencies, and institutions. And in all of these cases, the administrative decision-making processes were fair and generated decisions which were justifiable in light of legislative objectives and other sources of administrative law such as prior tribunal decisions or collective agreements. Nevertheless, each of these cases contained a dissenting opinion which attracted 2–4 justices who took the view that the correctness standard applied because the decision either involved a general question of law or the administrative decision-maker lacked relative expertise. While the cleavage on the Supreme Court on matters pertaining to the standard of review still favours a deferential standard of review when administrator's interpret their home statute, there is enough disagreement to entice litigants to push the boundaries of *Dunsmuir*'s categories of correctness review in future cases.

IV. Conclusion

At this point, it seems Canadian administrative law has arrived at yet another crossroad. The question is whether the Supreme Court will stick to the path laid out in post-*Dunsmuir* case law by establishing a deferential baseline for reviewing

[188] *Wilson*, *supra* note 7 at para 89.

[189] *Ibid* at para 91.

administrative decisions, or chart a new course which further complicates the threshold exercise of identifying the standard of review. Judging from the cases on this year's docket, it appears that the Court will confront this issue in the context of administrative decisions concerning human rights.[190] If so, resorting to precedent will be of little use, because there is genuine confusion over whether judges should defer to the decisions of human rights tribunals when they interpret their home statute.[191] And while the Supreme Court held in *Doré v Barreau du Québec*[192] that judges should assess the legality of administrative decisions concerning *Charter* values according to a reasonableness standard, its resolve on that issue seems to have weakened in *Loyola High School v Quebec (Attorney General)*.[193] Furthermore, the presumptive categories in *Dunsmuir* will be of little use, because such cases require a nuanced understanding of an administrator's home statute, but also raise human rights issues which are of general importance. Similarly, if the Court resorts to *Dunsmuir*'s contextual standard of review analysis the contextual factors will likely pull in different directions. The bottom line is that, as long as the *Dunsmuir* framework remains in place, there is a strong possibility that the Court will remain split over whether judges should review administrative decisions concerning human rights on a correctness or reasonableness standard.

One proposal for escaping this predicament is to eschew attempts to define formal categories of administrative decisions which warrant judicial deference, and reinvigorate an evaluative understanding of administrative law in which judges relinquish their interpretive monopoly over questions of law. Such an approach would focus instead on assessing the legality of administrative decisions in light of fundamental values like procedural fairness and reasoned justification. The outline for such an approach can be found in Abella J's proposal for a universal reasonableness standard coupled with L'Heureux-Dubé J's understanding of judicial review as a means for ensuring the legitimacy of administrative law. Such an approach would impose important procedural and justificatory burdens on administrative officials who decide human rights issues, burdens which are analogous to the burdens imposed by courts under s. 1 of the *Charter*.[194] But even though these justificatory burdens entail robust limits on administrative action, they do not empower judges to determine outcomes for administrative officials to implement; rather, they serve to ensure that administrative officials exercise their statutorily delegated authority in a manner which is reasonably justifiable in a free and democratic society. If one takes this proposal seriously, then the perennial

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[190] *Stewart*, *supra* note 7; *Trinity Western University v Law Society of Upper Canada*, *supra* note 7; *Trinity Western University v Law Society of British Columbia*, *supra* note 7.

[191] See, e.g. *Canada (Human Rights Commission) v Canada (AG)*, 2016 FCA 200, 402 DLR (4th) 160; Andrew Pinto, "Deference in Disarray: Standards of Review of Human Rights Tribunal Decisions across Canada" online: <www.cba.org/cba/cle/pdf/Pinto.pdf>.

[192] *Doré*, *supra* note 80.

[193] *Loyola High School*, *supra* note 80.

[194] Dyzenhaus & Fox-Decent, *supra* note 4 at 240.

haggling over the standard of review is rendered obsolete, and judges and lawyers can proceed to ask more important and interesting questions regarding the legality of administrative action.