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The Clarity of Reasonableness Since Dunsmuir: Mission (Mostly) Accomplished

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A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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by

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ABSTRACT

This project develops an interpretive account of the single reasonableness standard as it has evolved in the Canadian Supreme Court case law since its introduction in *New Brunswick (Board of Management) v. Dunsmuir*. My analyses show, contrary to the bulk of the academic commentary, that reasonableness is a clear and coherent standard of review. Specifically I show that in the eyes of the Court, interference owing to unreasonableness is required only when decisions are not justified in the context of the legal framework. Unjustified decisions demand interference because they are arbitrary in the sense that the powers of the state are exerted without regard for the accepted system of rules, meaning they undermine the rule of law. Once a justification has been confirmed to exist, however, all grounds for interference owing to unreasonableness have been extinguished because interference with a justified decision undermines the foundational democratic principle.

Keywords: Canadian administrative law, judicial review, the rule of law, reasonableness, the single reasonableness standard, the standard of review analysis, *New Brunswick (Board of Management) v. Dunsmuir*, judicial interference, the broad and purposive approach to correctness, municipal law, justifications, arbitrary decision making.

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Chapter 1: Introduction

> *Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies.*[1]

1. Seeking Equilibrium

According to the majority of the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, judicial review strives to preserve the rule of law in a manner that does not unduly undermine the will of the democratic majority as expressed by elected representatives, manifest in the decisions of administrative appointees. So understood, the process of judicial review partially balances the powers of the two fundamental institutions of Canada's constitutional order, i.e., Parliament and the provincial legislatures, and the courts. The substance of that balance is found in the standards that define judicial review; they determine when judicial interference is necessary to ensure the rule of law persists, and when judicial interference is prohibited out of respect for the 'foundational democratic principle' as expressed by administrative decision-makers.

This project consists in an extended analysis of the most significant explicit reform to the process of judicial review introduced in *Dunsmuir*, i.e., the single reasonableness standard. I argue that that standard has evolved into "a principled framework that is… coherent and workable."[2] One of the primary ways in which the framework implied by reasonableness is, on my account, coherent and workable is the

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[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*] at para 27.
[2] *Ibid* at para 32.

single, general principle it satisfies: judicial interference with administrative bodies owing to unreasonableness will occur only when interference is necessary to preserve the rule of law. And when judicial interference is not necessary to preserve the rule of law, it is prohibited out of respect for the foundational democratic principle.

Showing that the evolution of reasonableness has been guided by an attempt to establish an equilibrium between judicial interference and a respect for the delegated authority of administrative decision makers requires I elaborate its substance. I show the post-*Dunsmuir* Supreme Court case law holds that reasonableness:

> (i) Consists in a cluster of five interrelated concepts that are semantically clear and imply a coherent conceptual order according to which each must be satisfied.
> (ii) Sets a specific threshold which, when met by an administrative decision, prohibits the possibility of judicial interference.
> (iii) Is applied in an identical manner every time the reasonableness of a decision is assessed.
> (iv) Is concerned exclusively with confirming that legally relevant reasons supporting the impugned decision exist, and so is not directly concerned with assessing the substance of the decision itself. Any decision supported by legally relevant reasons is, by definition, reasonable.

To bolster my case for the clarity of reasonableness, I rely on this framework to resolve two potential confusions about the impact of that standard on the process of judicial review. First, I rely on this account to precisely characterize the change it has yielded to the circumstances in which judicial interference is deemed necessary to preserve the rule of law:

> (v) The single reasonableness standard prohibits the possibility of judicial interference owing to inadequacy, and in that sense requires interference to preserve the rule of law in fewer circumstances than when compared to the pre-*Dunsmuir* understanding of reasonableness.[3]

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[3] As defined by the 'reasonableness *simpliciter*' standard introduced in *Canada (Director of Investigation & Research) v. Southam Inc* [1997] 1 SCR 748 [*Southam*] and elaborated in *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 at para 20, [*Ryan*]. That the circumstances in which judicial interference is necessary to preserve the rule of law were reduced with the introduction of the single reasonableness standard notably contradicts the stated goals of Bastarache and Lebel JJ

I also use the framework to identify and resolve a significant misstatement on the part of the Court in its elaboration of the single reasonableness standard:

> (vi) Owing to the pronouncement that municipal bodies are free from the obligation to present reasons in support of their policy decisions in *Catalyst Paper Corp. v. North Cowichan (District)*,[4] the standard applied in that case was, notwithstanding McLachlin CJ's assertions to the contrary, not reasonableness. It was, instead, the broad and purposive approach to correctness.

An argument in defence of the clarity of reasonableness since *Dunsmuir* faces considerable critical opposition.[5] In his concurring minority reasons, for example, Binnie J criticizes the *Dunsmuir* majority for failing to clarify reasonableness precisely because reviewing courts still need to continue to 'contextualize' each case to determine whether interference is warranted.[6] This critique was elaborated by both David Mullan[7] and Ron Goltz[8] in some of the first scholarly commentary on the ruling. In the words of Goltz: "In *Dunsmuir,* the Supreme Court of Canada attempted to clean up the clutter, confusion, and disarray that it, along with the practising bar, had created. However, the practical

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in *Dunsmuir*. By reducing the number of standards of reasonableness, they sought to simplify the process of judicial review and did not, by contrast, intend to substantively alter the way in which the judiciary "supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority" (*Dunsmuir* at para 28). See also The Honourable Michel Bastarache "Modernizing Judicial Review" (2009) 22 Can J Admin L & Prac 227 at 235. Responding to the concern that the single reasonableness standard is 'variable', Bastarache J maintains that the goal of introducing that standard was merely to "eliminate the tautology that was patent unreasonableness" and was not, therefore, to make any substantive change to an assessment for reasonableness; the single reasonableness standard "will be applied in the same way; the context will just determine the parameters within which the test is to be applied."

[4] *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2 [*Catalyst*].

[5] Though I am not, however, alone in maintaining the impact of the single reasonableness standard has generally been to improve the clarity of judicial review. See, for example, the Hon. Justice John M. Evans "Standards of Review in Administrative Law" (2013) 26 Can J Admin L & Prac 67 at 79: "in my view the Supreme Court has succeeded for the most part in tidying up many of the loose ends left by *Dunsmuir*, which itself usefully simplified the law."

[6] *Dunsmuir*, *supra* note 1 at para 139.

[7] David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117 at 150.

[8] Ron Goltz "Patent Unreasonableness is Dead. And We Have Killed It. A Critique of the Supreme Court of Canada Decision in *Dunsmuir*" (2008) 46 Alta L Rev 253.

consequences do not match the aims."[9] The view that clarity was not achieved in *Dunsmuir* persists in the more recent literature. Paul Daly, for example, argues that the majority "got it badly wrong... Clarification and simplicity have not been achieved."[10] Similarly Matthew Lewans maintains that clarity is lacking in part because in their subsequent rulings "the Supreme Court has generally failed to apply the reasonableness standard in a consistent or principled fashion."[11]

2. Structure

Chapter 2 consists in an overview of the process of judicial review as it existed prior to *Dunsmuir*, along with an introduction to the single reasonableness standard. The two 'concerns' of that standard structure my analyses in Chapters 3, 4, and 5: "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[12] I argue in Chapter 3 that the three listed criteria imply five requirements which, when fulfilled, establish that 'a justification exists'. Chapter 4 uses this account of reasonableness to characterize the reduction to interference it implies when compared with the pre-*Dunsmuir* case law. Chapter 5 articulates the relationship between the criteria and the 'range of possible, acceptable outcomes,' using that account to understand the mistake made by the Court in *Catalyst*.

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[9] *Ibid* at 265.
[10] Paul Daly "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483 at 485.
[11] Matthew Lewans "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's LJ 59 at 63.
[12] *Dunsmuir*, *supra* note 1 at para 47 [emphasis added].

The particular goal of Chapter 3 is to elaborate the sense in which the three criteria restrict reviewing courts to confirming that a justification exists. I show reasonableness requires administrative decision makers to present reasons that they genuinely used in their deliberations, that are meaningful and consistent, and are relevant to their decision given the legal context. Courts engaged in reasonableness review ensure these requirements are met by first summarizing the reasons accompanying the decision, thereby establishing that reasons exist. Then they identify the elements of the legal framework applicable to the case, as a means of determining whether the reasons as summarized are relevant to the decision. When the reasons supporting an administrative decision are not relevant, the decision is unreasonable because no justification exists. In those circumstances alone, judicial interference owing to unreasonableness is necessary to ensure the rule of law obtains.

Chapter 4 relies on the analyses of Chapter 3 to resolve one persistent source of confusion in the academic literature, *viz.*, accurately characterizing the impact of the single reasonableness standard on the circumstances in which interference is necessary. On my account, when compared to the limited permission to interfere with a decision on the grounds that 'better' justifications exist, a permission granted to reviewing courts under the pre-*Dunsmuir* reasonableness *simpliciter* standard, merely confirming the existence of a justification according to the three criteria requires interference in fewer circumstances. I cast this change in terms of the difference between adequacy and relevance; prior to *Dunsmuir*, reviewing courts were in limited circumstances required to interfere owing to the inadequacy of a set of reasons. Since *Dunsmuir*, interference is necessary to preserve the rule of law only if the reasons offered are not relevant to the

decision made; there are no longer any circumstances in which the existence of alternate, and potentially more adequate reasons justify interference.

In Chapter 5 I complete my account of the framework that defines reasonableness by characterizing the relationship between the three criteria and the range of reasonable outcomes. Relying on the majority opinions in *Dunsmuir*, *Khosa v. Canada (Minister of Citizenship & Immigration,*[13] and *N.L.N.U. v. Newfoundland & Labrador (Treasury Board),*[14] I show the three criteria entirely determine the possible scope of the reasonable range. In other words, any decision supported by reasons that satisfy the criteria is reasonable, by definition. This analysis allows me to critically engage the one post-*Dunsmuir* ruling in which the two concerns of the single reasonableness standard are treated as separate and redefined, i.e., *Catalyst Corp v. North Cowichan.*[15] To defend my characterization of the three criteria as the only bases for interference owing to unreasonableness, I argue that the standard applied in *Catalyst* was not reasonableness but was, instead, the broad and purposive approach to correctness.

3. Method – Interpretive Legal Theory

This project is an argument; I am trying to convince readers to accept my conclusions based on my engagement with the case law, the academic literature, and the

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[13] *Khosa v. Canada (Minister of Citizenship & Immigration)* [2009] 1 SCR 339, at para 59.
[14] *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* 2011 SCC 62, [*NLNU*].
[15] *Catalyst* is notably not the only post-*Dunsmuir* ruling which treats the criteria and the range of reasonable outcomes as two separate components of reasonableness review. See for example *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36. At paras 89 and 90 Lebel J, writing for the Court, concludes first that the Minister's decision is reasonable by reference to the three criteria, then separately draws the same conclusion by reference to the 'reasonable range'. *Catalyst* is nonetheless unique since it is the only decision in which the Court asserts that the three criteria are not universal components of reasonableness review, conducting its assessment by reference to 'the reasonable range' only.

strength of my interpretive inferences. In this section I roughly characterize the nature of this argument as an exercise in what Stephen Smith calls 'Interpretive Legal Theory'.[16] According to Allan Beever and Charles Rickett, a scholar producing an interpretive account of the law

> begins with what appear to be salient features of the case law. She then attempts to produce a theory that explains these features. In doing so, she may discover that some of what appeared at the outset to be salient features of the law conflict with her theory. When this occurs, the theorist has a choice. She could revise her theory, or she could decide that the relevant feature of the positive law that conflicts with her theory is erroneous and should therefore be rejected... the task is primarily to reconcile case law with a general account of the law.[17]

Consistent with Beever and Rickett's description, this project explains the single reasonableness standard by arguing it contributes to a single goal, i.e., that judicial interference with administrative bodies occurs only when necessary to preserve the rule of law. My position is 'theoretical' inasmuch as it is based on the plausibility of a set of general inferences drawn from a wide set of independent judicial voices. Following Smith, I strive to articulate "the *intelligible order* in the law, so far as such an order exists."[18] In this case, that order is the combination of a coherent set of concepts that are consistently applied in a manner that implies a singular tipping-point marking the need for, or prohibition upon, judicial interference. My goal is therefore not to simply describe the state of reasonableness review as it has evolved since *Dunsmuir*, but to do so in a manner that reveals the single explanatory principle guiding that evolution.

There are two abstract limits that apply to every exercise in interpretive legal theory. The first is evident in Smith's concession that any attempt to articulate an

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[16] S.A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004).
[17] Allan Beever and Charles Rickett "Interpretive Legal Theory and the Academic Lawyer" (2005) 68:2 Mod L Rev 320 at 325.
[18] *Supra* note 16 at 5 [original emphasis].

'intelligible order in the law' could be futile. It is at least possible that there is no unifying principle by which we can glean insight into the law generally, or the process of judicial review in Canada in particular. Versions of this type of skepticism are most often defended by proponents of 'Legal Realism' and their intellectual progeny in 'Critical Legal Studies'. They are skeptical of the possibility of consistency in the law, convinced that as people, judges are simply not able to separate their legal expertise from their subjective biases. It follows that there can be no unified order in the law, just an *ad hoc* collection of individual decisions made by individual judges according to their individual whims.[19] This form of skepticism limits interpretive legal theory inasmuch as it is not a position one engaged in such a project could address; an interpretive account, by definition, must (at least initially) assume there is an 'intelligible order' to identify.

The second limit to which any interpretive account of law will be subject is an inability to specify 'success conditions'. I have compiled, organized, and articulated what I take to be the most compelling set of judicial pronouncements and scholarly commentary I can offer in support of my several conclusions. But there will be no point at which I will be able to declare my argument is in some conclusive sense 'right,' while all views to the contrary are 'wrong'. This follows from the fact that the 'success' of an interpretive argument is not exclusively dependent on its rational strength; it also depends

[19]In his work *Law and the Modern Mind* (New York: Brentano's, 1930), Jerome Frank defends one variant of this skepticism when he argues that judges decide cases like every other human, i.e., by first deciding according to their intuitions and then articulating the legal rules in a manner that satisfies those intuitions. The result of this observation on his account is that 'the law' will always be unsettled, determined only according to the whims of the presiding judge in the case at bar, meaning outcomes are rarely (if ever) predictable. More recently Duncan Kennedy's *A Critique of Adjudication* (Cambridge, Mass: Harvard University Press, 1998) defends the position that American judges intentionally preserve and propagate an unnecessarily mystical terminology that secures their social importance and masks their 'true' roles as political operatives. Unlike Frank, there is for Kennedy a consistent way to understand the law, but it does not involve relying on official pronouncements set out in the case law.

on the degree to which it is accepted by the relevant audience. A successful interpretive argument is one that is taken up by members of the legal community. The greater the number of judges, scholars, and practitioners using my arguments as a basis to inform their own legal analyses, either in whole or in part, the more successful my argument. Unfortunately, that is a measure of success the achievement of which will not be determinable until long after I have finished writing.

4. The Rule of Law, Justifications, and Reasonableness

In Canada, the single reasonableness standard is one of two legal mechanisms courts rely upon to fulfill their constitutional obligations to uphold the rule of law under sections 96 to 101 of the *Constitution Act, 1867*in respect of administrative actions.[20] As outlined, reasonableness requires courts to confirm that administrative decisions are justified by reference to their enabling legislation, the common law, and the constitutional framework. My final introductory task is to explain how ensuring that an administrative decision is justified preserves the rule of law. I focus on one dominant theme in the scholarly literature: A state governed by the rule of law is one in which an exercise of state authority is never arbitrary. I then explain how the requirement that administrative decisions be reasonable is, in Canada, plausibly construed as one means by which to ensure political authority is not exercised arbitrarily.

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[20] See *Crevier v. Quebec (Attorney General)* [1981] 2 SCR 220, at para 22: "It is true that this is the first time that this Court has declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction." See also David J. Mullan, *Administrative Law: cases, texts, and materials* 5th ed. (Toronto: Emond Montgomery Publications Ltd, 2003). Mullan characterizes the effect of the ruling in *Crevier* at 49: "the judicature sections of the *Constitution Act, 1867*… are now understood primarily as entrenching individuals' access to an independent judiciary to protect their legal rights, or otherwise to ensure that the administration observes the limits of its legal authority."

As a starting point for articulating the rule of law as that which prohibits arbitrary state action, I begin with A.V. Dicey. On his account, if 'the rule of law' is a meaningful phrase

> [i]t means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative... Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.[21]

Note the contrast: State actions consistent with the law are not arbitrary, while actions that are not consistent with the law are 'prerogative,' i.e., a function of the arbitrary whims of the individuals exercising authority. In an effort to elaborate the importance of Dicey's idea that the rule of law limits the possibility of the arbitrary exercise of state power, F.A. Hayek argues it marks the difference between free and totalitarian societies:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law… While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by *ad hoc* action. Within the known rules of the game the

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[21] A.V. Dicey *Introduction to the Study of the Law of the Constitution*, 8th ed (Indianapolis: Liberty Fund, 1982) at 153. Invoking Dicey's account of the rule of law is controversial in the Canadian context. His account has, for example, been singled out and explicitly rejected by two sitting members of the Supreme Court. See the Honourable Thomas A. Cromwell "From the New Despotism to *Dunsmuir*: A Funny Thing Happened on the Way to the Apocalypse" (2011) 24 Can J Admin L & Prac 285 at 286-7. Cromwell J objects in particular to Dicey's position that the rule of law demands reviewing courts carefully restrict the discretionary powers of delegated decision makers. See also *Doré v. Quebec (Tribunal des professions)* 2012 SCC 12 at para 29 wherein Abella J also rejects the claim that the rule of law requires courts to narrowly construe the discretionary powers of administrative bodies. While I do not think Dicey's position entails denying administrative bodies a permission to interpret legislation (so long as their interpretations remain subject to judicial oversight), exploring that claim is unnecessary. What makes Dicey's account of the rule of law important for my purposes is the significance he places on the importance of avoiding arbitrary state action, a significance not rejected by either Justice. For an attempt to show Dicey's aversion to arbitrary state action can inform an understanding of Canadian administrative law in particular, see Geneviève Cartier, "Administrative Law and the Spirit of Legality: From Theory to Practice" (2009) CJLS 313 at 327.

> individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.[22]

Dicey's account of the rule of law as an assurance that state action will always be consistent with 'regular law' and in that sense non-arbitrary is specifically intended to describe the British constitutional order. Hayek extracts from that narrow definition what he takes to be the fundamental feature of any liberal democratic society.

Hayek's emphasis on the rule of law as a condition in which the actions of the state must conform to the pre-established 'rules of the game' offers one noteworthy refinement to Dicey's idea that state action is non-arbitrary when it accords with the rule of law. That refinement appears when he distinguishes between a society that operates by laws and one that conforms to the 'Rule of Law':

> To say that in a planned society the Rule of Law cannot hold is, therefore, not to say that the actions of the government will not be legal or that such a society will necessarily be lawless. It means only that the use of the government's coercive powers will no longer be limited and determined by pre-established rules. The law can, and to make a central direction of economic activity possibly must, legalise what to all intents and purposes remains arbitrary action. If the law says that such a Board or Authority may do what it pleases, anything that Board or Authority does is legal-but its actions are certainly not subject to the Rule of Law. By giving the government unlimited powers the most arbitrary rule can be made legal: and in this way a democracy may set up the most complete despotism imaginable.[23]

So the mere existence of and conformity to 'regular law' is not sufficient to establish that 'the Rule of Law' obtains, because it is possible for laws to grant individuals unlimited discretion. It follows that the rule of law, understood as a limit on arbitrary state action,

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[22] F.A. Hayek *The Road to Serfdom* (New York: Routledge Classics, 2006) at 75 – 76

[23] Ibid at 85 – 86. Of course, it is possible that Hayek is not refining Dicey's position as much as identifying an implication of Dicey's claim that equality before the law, and in particular the 'equal subjection of all classes to the law', prohibits the possibility of administrative bodies operating "beyond the sphere of the civil Courts…" Dicey, *supra* note 21 at 153. In other words, Hayek could be taken to be recognizing the in principle possibility of an administrative body being legislatively empowered with unrestricted discretion (contra-Dicey), but merely denying the decisions of such a body could be consistent with the 'Rule of Law' (in accord with Dicey).

imposes substantive restrictions. At a minimum, laws must be 'pre-established,' and they cannot grant officials unlimited, hence arbitrary, prerogative to respond to changing circumstances.

Lon Fuller's discussion of the 'internal morality of the law' as a set of eight 'principles of legality' that must be satisfied in order to successfully create law[24] are easily interpreted as an attempt to elaborate the substantive conditions Hayek implied lawmakers need to satisfy to prevent arbitrary state action.[25] That the rule of law can be taken primarily to prohibit a state from arbitrarily exercising its power against citizens is most clearly stated when Fuller articulates the consistent flaw he believes to be evident in the works of his four most prominent critics: "One searches in vain in their writings for any recognition of the basic principle of the Rule of Law – that the acts of a legal authority toward the citizen must be legitimated by being brought within the terms of a previous declaration of general rules."[26] For Fuller, the possibility of bringing state action 'within the terms of a previous declaration' presupposes the rules are general, public, prospective, clear, consistent, able to be satisfied, stable, and meaningfully applied in particular cases. When satisfied, the exercise of state authority will be 'legitimated' by reference to the pre-established rules and in that sense non-arbitrary.

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[24] See Lon Fuller *The Morality of Law* (New Haven, Connecticut: Yale University, 1969) at page 39 for a concise statement of the eight conditions every legal system must satisfy. On his account, laws must be (i) general, (ii) publicized, (iii) prospective, (iv) clearly formulated, (v) not internally contradictory, (vi) not impossible to satisfy, (vii) consistent over time, and (viii) administered as written. Fuller elaborates each of these principles over the course of Chapters 2 and 5.

[25] See, for example, Colleen Murphy "Lon Fuller and the Moral Value of the Rule of Law," (2005) 24 Law and Phil 239 at 240: "It is generally agreed that Lon Fuller's eight principles of legality capture the essence of the rule of law."

[26] Fuller, *supra* note 24 at 214. Fuller explicitly identifies the critics he accuses of making this omission at 190 – 191. They were the self-proclaimed 'new Analytical Jurists', specifically H.L.A. Hart, Ronald Dworkin, Marshall Cohen, and R.C. Summers.

Of course, the primacy attributed to the rule of law as that which provides for the possibility of a legal system and/or imposes substantive restrictions on the character of possible laws is not universally accepted. Joseph Raz, for example, has argued that the significance of the rule of law has been overstated; it is not "a complete social philosophy… [but is instead merely]… one important virtue which legal systems should possess."[27] It follows for Raz that "[s]ince the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values."[28] Though Raz minimizes the significance of the rule of law as compared to Dicey, Hayek, and Fuller, he nonetheless does accept that one of the primary values served by the rule of law is limiting the possibility of arbitrary uses of power, i.e., "using public powers for private ends."[29] A narrow construal of the rule of law as the legal norm that opposes arbitrary state action is also reflected in some of the dominant Canadian academic literature. David Dyzenhaus, for example, characterizes the rule of law as "a rule of fundamental constitutional principles which protect individuals from arbitrary action by the state."[30]

To draw the connection between the rule of law and justifications, I need to first explain why the possibility of the rule of law demands citizens be assured state authority is not being exercised arbitrarily. Consider Fuller's requirement that state power must be 'legitimated'. Two conditions are implied: (i) The actions of the state must be 'justifiable' by reference to the stated and pre-established rules, i.e., it must be possible to explain the

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[27] Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979) 210 at 211.
[28] *Ibid* at 228.
[29] *Ibid* at 220.
[30] David Dyzenhaus *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 2.

sense in which any given action conforms, and (ii) The state must actively formulate that justification, i.e., conformity between the rules and actions must be demonstrated or explained. For Fuller, a functioning legal system presupposes government and citizens generally share a "tacit expectation that parliament will act toward the citizen in accordance with its own laws so long as those laws remain unrepealed."[31] Such a commitment cannot obtain in the absence of explicit attempts to demonstrate to citizens that the actions of the state are indeed justified by reference to those laws.

The final step in my attempt to connect the rule of law and the need for state action to be shown to be justifiable by being actively justified is to articulate the role of the judiciary in the process. On Raz's account, three of eight principles he presents as constituent elements of the rule of law are focused exclusively on the courts: A state pursuing the ideal of the rule of law must (i) have an independent judiciary, that is (ii) easily accessible to citizens, and most importantly, (iii) has the power to review the implementation and exercise of the authority of the state "to ensure conformity to the law."[32] Courts therefore serve a unique role in assuring citizens state actions are not arbitrary; they are the primary means by which citizens will be able to seek, or find evidence of, those assurances.[33] The judiciary must therefore be independent of the executive and legislative branches just so citizens can be assured they are able to question state power in front of an impartial arbiter. Similarly, the possibility of carrying such a challenge forward presupposes citizens can access the courts for a hearing when they are

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[31] Fuller, *supra* note 24 at 218.
[32] Raz, *supra* note 27 at 216-17.
[33] Note that Raz and Fuller both agree that the courts are not, and cannot be, the only branch of government concerned to uphold the rule of law. But their role is nonetheless unique in the sense that they are the branch that remains responsible to authoritatively determine what the rule of law requires in particular cases, which entails they must be empowered to limit the actions of the other branches in some cases.

subject to state action, and be able to consult the publically available accounts of those proceedings prior to doing so. Most importantly, the possibility of citizens actually receiving a meaningful hearing presupposes the judiciary has the power to require those exercising the powers of the state to comply with the stated rules.

That the Supreme Court of Canada understands its obligation to uphold the rule of law in the context of judicial review as an attempt to ensure exercises of state authority are non-arbitrary is easy to establish. Consider, for example, Rand J's concurring opinion in *Roncarelli v. Duplessis*. If the Premier of Quebec could direct the liquor authority to revoke Roncarelli's liquor licence for reasons that all parties conceded were unrelated to his practice of selling alcohol, the rule of law would be undermined by arbitrary action.

> That in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of [the] disintegration of the rule of law as a fundamental postulate of our constitutional structure.[34]

The rule of law therefore imposes an implicit requirement on government actors in Canada to ensure administrative decisions be justifiable by reference to pre-existing laws and procedures. This understanding of the rule of law was entrenched into the process of judicial review by the Court in *Baker v. Canada (Minister of Citizenship & Immigration).*[35]

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[34] *Roncarelli v. Duplessis* (1959) SCR 121 [*Roncarelli*] at para 44. For a compelling account of the importance of Rand J's opinion in *Roncarelli* to the understanding of the rule of law as a substantive limit on the possibility of arbitrary state action, see David Dyzenhaus, "The Deep Structure of *Roncarelli v. Duplessis*" (2004) 53 UNBLJ 111 [Dyzenhaus *DSR*].

[35] *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 [*Baker*] It is hard to overstate the impact of the ruling in *Baker* on the structure of judicial review in Canada. See, for example, G. Van Harten, G. Heckman, and D. J. Mullan, *Administrative Law: cases, texts, and materials* 6th ed. (Toronto: Emond Montgomery Publications Ltd, 2010), who use the

Ms. Baker was an illegal immigrant ordered deported in 1992. She sought an exemption from the Minister of Immigration on humanitarian and compassionate grounds; her appeal was denied, and she sought judicial review of the rejection. *Baker* is the first decision in which the Court recognizes the existence of a common law duty requiring administrative bodies to present a justification in support of their decisions.[36] This obligation is significant because it means administrative bodies cannot merely assume their decisions are justifiable, but must actively justify their decisions by showing how they fit the existing legal framework: "though discretionary decisions will generally be given considerable respect, that discretion must be 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*."[37] Had the decision of the Minister been allowed to stand for the reasons given

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majority opinion as the basis upon which to organize the definitive text on Canadian Administrative law. For examples of Canadian legal scholars and practitioners who understand the rule of law as primarily concerned with avoiding arbitrary exercises of state power in the administrative context see Cartier, *supra* note 21 or Hoi Kong "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48 Osgoode Hall LJ, or Basile Chiasson, "Planning, Discretion, and the Rule of Law" (2011) 79 MPLR-ART 10 at 4: "Under the Rule of Law, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. It follows that arbitrary decisions and rules are seen as illegitimate. Rule by decree is unaccepted."

[36] *Baker* at para 43: "In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision." See Dyzenhaus *DSR*, *supra* note 34 at 133 – 135 for an account of the significance of requiring administrative bodies to present reasons.

[37] *Baker* at para 56. See Dyzenhaus *DSR*, *supra* note 34 at 135 and Cartier, *supra* note 21 at 319 for similar discussions of the importance of this statement as the first time the Court maintains that administrative discretion, not just administrative interpretations of the law, is subject to judicial review. See also Mullan 2003, *supra* note 20 at 85.

in this case,[38] it would be arbitrary in the sense that it would be based on the individual biases of that officer, contrary to the values implicit within the legislative framework.[39]

The rule of law is, in both the scholarly literature and in the administrative law jurisprudence of the Supreme Court of Canada, primarily a reference to the need for all actions of the state to be both justifiable and justified by reference to 'regular law', and in that sense not arbitrary. What follows is an attempt to specify the substantive requirements imposed by the single reasonableness standard on those exercising delegated discretionary authority. I argue that since *Dunsmuir*, when a justification exists the impugned decision is not arbitrary and is therefore 'reasonable' by definition. Since it is ultimately the responsibility of the courts to ensure administrative decisions are justifiable, it follows that when a justification has been confirmed to exist there is no threat to the rule of law, meaning judicial interference is prohibited. This approach to reasonableness review, I argue, reduces the conditions under which the reasons of an administrative body could be thought to be 'arbitrary' and therefore unreasonable by eliminating the possibility of judicial interference owing to the inadequacy of a set of reasons.

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[38] Though the Minister did not offer explicit reasons for refusing to grant Ms. Baker an exemption, the Court nonetheless determined at para 44 that "the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for the decision."

[39] *Baker* at para 65. The decision to withhold an exemption was, according to the Court, unreasonable and so arbitrary in the sense that the notes of the subordinate officer were completely dismissive of the interests of Ms. Baker's children, contrary to the requirements of the legal context. For a similarly explicit and post-*Dunsmuir* statement of the sense in which reasonableness review in particular limits the exercise of discretion to prevent the arbitrary exercise of state power, see *Montreal (City) v. Montreal Port Authority* 2010 SCC 14 at para 33: "in a country found on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness."

Chapter 2: Judicial Review Before and in *Dunsmuir*; Judicial Deference, the Standards of Review, and the Scholarly Response

1. Introduction

This chapter sets the context for my analyses in Chapters 3, 4, and 5. I begin with an account of the process of judicial review as it existed immediately preceding *Dunsmuir*.[1] I introduce the three standards that were available to courts reviewing an administrative decision, and summarize the 'pragmatic and functional' approach used to determine which of those three standards were to be applied in any given case. My primary goal is to explain the way in which 'deference' was (and continues to be) used to inversely identify the likelihood that judicial interference would be necessary; a reviewing court obligated to be deferential needed to interfere in fewer circumstances to preserve the rule of law, whereas a court showing no deference needed to interfere in comparatively more circumstances.

In section 3 I explain how the facts and judicial history in *Dunsmuir* made it, in the eyes of the majority, an ideal vessel in which to simplify the process of judicial review. I also offer a brief descriptive account of the changes made to the 'pragmatic and functional' approach. I end with an introduction to the defining statement of the single reasonableness standard and the sense in which it requires courts to defer to administrative bodies. In section 4 I survey the scholarly commentary arising in response to *Dunsmuir* as a means of situating my position. I will, in particular, be concerned to summarize and organize the attempts to understand how the introduction of the reasonableness standard affected the circumstances in which judicial interference is necessary. There are three views expressed in the literature: (i) The ruling had no impact

[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*]

on the need for judicial interference, (ii) *Dunsmuir* increased the need for judicial interference, or (iii) The majority ruling decreased the need for interference.

2. Judicial Review Immediately Preceding *Dunsmuir*

I rely primarily on the majority opinion in *Dunsmuir* to structure my general account of the process of judicial review in and prior to *Dunsmuir*.[2] As noted in Chapter 1, the goal of courts engaged in judicial review was and continues to be maintaining the balance between the rule of law and Parliamentary supremacy. That goal is fulfilled when courts "have the last word on jurisdiction, and... [determine] the applicable standard of review... by establishing legislative intent."[3] The process of judicial review was, following this assertion, in large part an exercise in statutory construction since "[a]ll decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution."[4] In the language of Chapter 1, prior to *Dunsmuir* judicial review ensured the actions of administrative bodies were not arbitrary primarily by ensuring those actions were justified according to the existing legal framework.

As an act of legislative interpretation, the first task for a court engaged in judicial review was to determine how to approach the decision made in light of the particular

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[2] Almost every commentator on *Dunsmuir* offers a summary of the process of judicial review prior to that ruling, making a similar survey on my part redundant. For more thorough summaries, see Matthew Lewans "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's LJ 59 at 64 – 74, or Paul Daly "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317 at 319 – 324, or William Shores and David Jardine "Theirs to Reason Why: A Synopsis of the Administrative Law Jurisprudence Relating to Reasons" (2012) 25 Can J Admin L & Prac 253 at 254 – 258.
[3] *Dunsmuir*, supra note 1 at para 30.
[4] *Ibid* at para 28.

legislative framework. In other words, a reviewing court had to begin by choosing the appropriate standard by which to assess the decision. Prior to *Dunsmuir*, there were three standards available to the courts when reviewing administrative decisions: correctness, reasonableness *simpliciter*, and patent unreasonableness.[5] Each was distinguished by reference to the unique degrees of deference they required from a reviewing court.[6]

2(a) Three Standards of Review

The first standard of review, correctness, demanded no deference, meaning a court was empowered to engage in its own *de novo* reasoning to articulate the correct view of the matter.[7] Courts did not need to respect the reasoning of the decisions they reviewed for correctness typically because decisions that prompted correctness review were outside the expertise of that body.[8] It follows that 'not showing deference' signalled an attitude reviewing courts were to take toward the reasons offered by the administrative

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[5] See for example *Ryan v. Law Society (New Brunswick)* 2003 SCC 20 at para 20 [*Ryan*] or *Dunsmuir*, *supra* note 1 at para 34.

[6] See *Ryan*, *supra* note 5 at para 45 and *Dunsmuir*, supra note 1 at para 34.

[7] See, for example, *ibid* at para 50: "When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question," or *Ryan*, *supra* note 5 at para 50: "When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct." See also deBeer, Drake, Hoole, McGraw, and Régimbald *Standards of Review of Federal Administrative Tribunals* 4th ed (Canada: LexisNexus, 2012) at 40: "Courts have spent little time attempting to explain what 'correctness' means since, unlike the other standards, it is a relatively intuitive term. Errors in this context are simply considered to be issues where the court concludes the tribunal was incorrect."

[8] The *Dunsmuir* majority lists four instances in which a review according to the correctness standard is appropriate: i. constitutional questions addressing the division of powers (at para 58), ii. "determinations of true questions of jurisdiction" (*supra* note 1 at para 59), iii. issues that are generally "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*ibid* at para 60), and iv. conflicts between the jurisdictions of distinct specialized tribunals (*ibid* at para 61). Note that all four can be plausibly interpreted as instances that would in most circumstances be thought to lie beyond the expertise of an administrative body, and fall squarely within the expertise of the courts.

body to support their decision. Specifically, a review for correctness allowed a court to ignore the reasons given and introduce their own to determine whether the administrative body achieved the uniquely correct result. The correctness standard was (and continues to be) the most 'interventionist' approach to administrative decisions precisely because courts can ignore the reasons offered.[9] When courts are not required to respect the justification of a decision, the chances that they will deem interference necessary increase.

The second available standard of review prior to *Dunsmuir* was patent unreasonableness, defined by its imposition of the highest degree of deference on a reviewing court. Dickson J (as he was then) introduced this standard in *New Brunswick Liquor Corp. v. CUPE, Local 963*. On his account, the decision of an administrative tribunal was patently unreasonable only when "its construction [could] not be rationally supported by the relevant legislation and [so] demand[ed] intervention by [a] court."[10] Courts engaged in a review according to this standard were required to refrain from introducing their own reasons, and could only interfere if the flaw in the reasons offered was evident on its face.[11] This standard represented the highest degree of deference a court could show by respecting any decision that did not suffer from an obviously significant defect. In other words, patent unreasonableness set out few circumstances in

[9] See, for example, Lewans, *supra* note 2 at 65 or deBeer et. al., *supra* note 7 at 40.
[10] *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, [1979] 2 SCR 227, at para 16
[11] *Canada (Director of Investigation & Research) v. Southam Inc.* [1997] 1 SCR 748 [*Southam*] at para 57: "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable."

which courts could interfere since the decisions being reviewed were to be regarded as *prima facie* legitimate exercises of statutorily delegated powers.[12]

The third pre-*Dunsmuir* standard of review introduced in *Southam*,[13] reasonableness *simpliciter*, created a degree of deference that stood between correctness and patent unreasonableness.[14] A mid-point was necessary because it would not always be possible for a reviewing court to neatly distinguish between questions of law (which would suggest the correctness standard) and questions of fact (which would point toward the patently unreasonable standard); sometimes the issue was a mixture of law and fact.[15] According to Iacobucci J, "[a]n unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."[16] A court was not, on this standard, permitted to engage in its own *de novo* reasoning, but it was permitted to engage in "significant searching or testing to find the defect..."[17] In *Ryan*, Iacobucci J attempted to clarify his earlier characterization:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.[18]

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[12] *Ibid* at para. 55: "The standard of patent unreasonableness [was] principally a jurisdictional test..." inasmuch as it was used to determine whether the administrative body had the power it claimed was conferred by its enabling legislation, an interpretation that required the courts grant the body under review a wide breadth of discretionary leeway with respect to that legislation.
[13] *Ibid* at para 58.
[14] *Ibid* at paras 54 and 55.
[15] *Ibid* at para 44.
[16] *Ibid* at para 56.
[17] *Ibid* at para 57. See also *Ryan, supra* note 5 at para 50.
[18] *Ibid* at para 55.

As a mid-point of deference between correctness and patent unreasonableness, reasonableness *simpliciter* required reviewing courts to be more deferential than when the correctness standard was applied; they were not permitted to introduce their own novel reasons. Courts applying reasonableness *simpliciter* were, however, also required to be less deferential than when using the patent unreasonableness standard since they were to engage in a 'somewhat probing examination' of the 'sufficiency' of the reasons to determine whether they were 'tenable'. A reviewing court would therefore be less likely to interfere when assessing according to the reasonableness *simpliciter* standard as compared to correctness, and be more likely to interfere than an assessment under the patent unreasonableness standard. In the words of Daly: "The standards of review formed something of a spectrum, ranging from correctness as the most interventionist point and patent unreasonableness as the most deferential."[19]

2(b) The Pragmatic and Functional Analysis

The pragmatic and functional analysis, introduced in *U.E.S., local 298 v. Bibeault,*[20] was used to determine which standard to apply prior to *Dunsmuir*. The specific elements of that analysis were most clearly elaborated by Bastarache J in *Pushpanathan v. Canada (Minister of Employment & Immigration).*[21] He identified four

[19] Daly *UTFS*, *supra* note 2 at 322.
[20] *U.E.S., local 298 v. Bibeault*, [1988] 2 SCR 1048 at para 123: "The formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis.... [wherein] the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."
[21] *Pushpanathan v. Canada (Minister of Employment & Immigration)* [1998] 1 SCR 982 [*Pushpanathan*] at paras 23 – 26.

factors that determined whether deference was owed, and if so which of the two reasonableness standards applied:

> (i) Courts needed to determine whether the enabling legislation contained a privative clause restricting judicial review, or whether it granted a full review.[22] If a privative clause existed, the level of deference owed would be higher, whereas it would be lower if the legislation included an explicit right to judicial review.
>
> (ii) The level of expertise of the members of the administrative body and how their expertise compared with the expertise of the reviewing court had to be assessed. If the administrative body held the greater degree of relative expertise, the deference owed by the court would be higher.[23]
>
> (iii) Courts needed to consider the purpose of the enabling legislation as a whole, as well as the provision upon which the administrative body relied as a basis for justifying their particular decision.[24] If, for example, the legislation involved "a large number of interlocking and interacting interests and considerations,"[25] then the degree of deference owed would be higher.
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> (iv) A reviewing court had to determine whether the issue was a question of law, fact, or mixed law and fact.[26] Questions of fact weighed in favour of greater deference (i.e., the patent unreasonableness standard), questions of law weighed in favour of less deference (i.e., the correctness standard), and mixed questions weighed in favour of a mid-point between the two standards (the reasonableness *simpliciter* standard).

The pragmatic and functional approach required that courts weigh four categories of factors, "none of which are alone dispositive, and each of which provides an indication falling on a spectrum of the proper level of deference to be shown the decision in question."[27] It served as the legal test upon which courts were to rely to determine which of the three available degrees of deference (none, some, or a lot) they were required to show an administrative decision by either ignoring, partially respecting, or nearly entirely

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[22] *Ibid* at paras 30 – 31.
[23] *Ibid* at paras 32 – 35.
[24] *Ibid* at para 36.
[25] *Ibid*.
[26] *Ibid* at para 37.
[27] *Ibid* at para 27.

respecting the reasons offered. As such this analysis determined the attitude courts had to adopt toward an impugned decision, an attitude which in turn determined the likelihood a reviewing court would need to interfere to preserve the rule of law.

Apart from articulating the connections between correctness, the two reasonableness standards, deference, and the likelihood of judicial interference, my summary in this section provides some insight into the need for the *Dunsmuir* majority's revisions; judicial review as it existed was both vague and complex. To appreciate this complexity, it is worth noting that I have only articulated how the three standards of review were relied upon to give meaning to the concept of 'judicial deference,' the indicator of the likelihood of judicial interference. I have not, by contrast, said much about the substance of the four categories, about how those categories were to be weighed against each other to choose the appropriate standard, or about the substance of the analyses judges needed to undertake once one of the three standards had been chosen. The rising discomfort with the complexity of the process of judicial review was expressed twice by Lebel J prior to the ruling in *Dunsmuir*.[28]

[28] See first *Chamberlain v. Surrey School District no 36*. 2002 SCC 86 at paras 188 – 215. Lebel J's opinion was primarily critical of the limited applicability of the four categories of the pragmatic and functional approach. Since the body under review was not appointed but was instead an elected school board neither the presence nor absence of a privative clause, nor the expertise of the board members, were believed by Lebel J to be relevant to deciding which standard of review applied (*ibid* at para 193). For that reason, he maintained, courts should not be required to "go through the same checklist of factors in every case, whether or not they are pertinent - a methodology which, I would suggest, is neither pragmatic nor functional" (*ibid* at para 195). He also briefly introduced concerns about distinguishing between the two distinct forms of reasonableness (*ibid* at paras 204 – 05). A year and a half later, in *Toronto (City) v. C.U.P.E., Local 79* 2003 SCC 63, at paras 60 – 134, Lebel J wrote another concurring minority opinion that explored in great detail the "growing criticism with the ways in which the standards of review currently available... are conceived of and applied" (*ibid* at para 63).

3. *Dunsmuir*: The Need for Clarity

In this section I outline the issues faced by the Court in *Dunsmuir*. First I review the changes made to the 'pragmatic and functional' approach, then I introduce those passages that define the single reasonableness standard. My goal is to first isolate the two aspects of a decision with which a court reviewing for reasonableness is to be concerned, i.e., reasons and outcomes. I then explain the priority of reasons over outcomes implied by the Court as a means of providing a partial justification for my exclusive focus on the assessment of reasons as the singular and defining feature of the reasonableness standard in Chapters 3 and 4.

The question before the Court was whether to uphold two lower court rulings overturning the decision of a labour arbitrator to reinstate the complainant, David Dunsmuir.[29] The full Court unanimously concurred in upholding that result, i.e., all agreed the reinstatement order was unreasonable.[30] The basis for the arbitral ruling was David Dunsmuir's grievance of a decision of the Deputy Minister of the Department of Justice for the Province of New Brunswick to dismiss him with pay in lieu of notice.[31]

The choice to use *Dunsmuir* as a venue to revise the process of judicial review was likely inspired by the conflicting ratios of the lower courts; both agreed in the result, but disagreed over the appropriate standard of review. The trial judge reviewed the adjudicator's interpretation of his statutory powers using the correctness standard,[32] the factual elements were reviewed using the patent unreasonableness standard, and the mixed fact and law elements were reviewed using the reasonableness *simpliciter*

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[29] *Dunsmuir*, supra note 1 at para 21.
[30] *Ibid* at paras 117 - 18 , 157, and 173.
[31] *Ibid* at paras 7 - 9 As opposed to dismissing Dunsmuir for cause.
[32] *Ibid* at para 18.

standard.[33] The Court of Appeal maintained that the privative clause weighed in favour of the reasonableness *simpliciter* standard for the adjudicator's interpretation of his statutory powers, while the correctness standard applied to the adjudicator's effort to interpret the case law.[34] So while there was no disagreement over the result, there was significant disagreement about how and when to apply the existing standards of review. The problem these discrepancies highlight is two-fold: (i) These competing applications of different standards to a single set of facts do not alter the outcome of either ruling, which (ii) Suggests that too much attention is devoted to drawing conceptual distinctions that have no effect on the result, detracting from the ability of courts and litigators to remain focused on the primary issues in the case at bar.

3(a) The Standard of Review Analysis

In *Dunsmuir*, Justices Bastarache and Lebel chose to make only those minimal changes to the pragmatic and functional approach that would satisfy the related goals of clarity and simplicity. They leave the defining elements largely untouched, explicating roughly the same 'four factors' detailed in *Pushpanathan*: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal."[35]

There are (at least) two substantive amendments made by the majority to the process of identifying which standard to apply in any given case. The first allows

[33] *Ibid* at para 20.
[34] *Ibid* at para 21.
[35] *Ibid* at para 64. See *Ryan, supra* note 5 at para 21 "there is no shortcut past the components of the pragmatic and functional approach."

reviewing courts to refrain from performing the analysis altogether if the applicable standard has been set out in the case law: "[C]ourts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."[36] The second change overturns a requirement set out in *Ryan*; "[i]n many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case."[37] The standard of review analysis is therefore simplified with the introduction of two shortcuts; the process can be avoided by an appeal to the case law, and all four factors need not be considered in each case.

3(b) The Single Reasonableness Standard

The primary means by which Bastarache and Lebel JJ simplified the process of judicial review in *Dunsmuir* was by reducing the number of standards of review. To demonstrate the need for simplification they considered examples in the case law showing the two reasonableness standards were the primary source of confusion.[38]

> [T]he analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.[39]

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[36] *Dunsmuir*, *supra* note 1 at para 62.
[37] *Ibid*.
[38] *Ibid* at paras 35 – 42.
[39] *Ibid* at para 44.

A single reasonableness test was necessary to avoid conceptual confusion, but also had to be defined in a manner that preserved the flexibility made available with the existence of a third standard of review.

The Court began its revision by noting that reasonableness would continue to be distinguished from correctness by demanding deference,[40] and that a deferential court would continue to be one that did not introduce novel reasons.[41] The majority then identified the two objects of concern of every review for reasonableness: (i) the process of reasoning, and (ii) the extent to which the result of that process fell within a family of reasonable outcomes.

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[42]

My immediate concern is to highlight the priority of reasons over outcomes implied by the last two sentences: 'reasonableness is concerned mostly with... But it is also concerned with...' There are two objects of concern, but most of a reviewing court's attention is to be directed at the reasons. In *NLNU v. Newfoundland & Labrador (Treasury Board)* Abella J made the priority of reasons over outcomes explicit: "I do not see *Dunsmuir* as... advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result. It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing

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[40] *Ibid* at para 45.
[41] *Ibid* at para 48: "deference imports respect for the decision-making process".
[42] *NLNU v. Newfoundland & Labrador (Treasury Board)* 2011 SCC 62 [*NLNU*] at para 47 [emphasis added].

whether the result falls within a range of possible outcomes."[43] The 'purpose' of the assessment of reasons is to 'show' that the outcome falls within the acceptable range. It follows that the assessment of reasons is the substantive component of an 'assessment' for reasonableness, and the product of that assessment answers the question: 'Does this outcome fall within the reasonable range?' The answer is: 'Only if and when the reasons satisfy the three criteria of reasonable reasons'.

The need for me to note the priority of reasons over outcomes is a result of the structure of my analysis. In Chapters 3 and 4 I rely on that priority by treating the phrase: 'reasonableness is concerned mostly with the existence of justification, transparency and intelligibility in the decision making process' as a complete expression of the substantive elements of a review for reasonableness. My goal in doing so is to develop a clear account of the circumstances under which interference owing to unreasonableness is necessary. Having articulated the substantive assessment a review for reasonableness entails, I devote Chapter 5 to articulating the role of outcomes in the context of reasonableness review. Before I can proceed to fulfill either goal, however, I have one more 'context-setting' task to complete; I need to briefly outline how the single reasonableness standard, and in particular its impact on the likelihood of judicial interference, has been understood by academics and practitioners.

4. The Scholarly Commentary

We saw in Chapter 1 that several commentators would be likely to reject my claim that the majority ruling in *Dunsmuir* introduces a clear and workable framework

[43] *Ibid* at para 14 [emphasis added].

for reasonableness review.[44] One particular source of confusion prompted by the new reasonableness standard is the uncertainty it causes in respect of judicial interference. This concern was first expressed by Binnie J's concurring but critical reasons in *Dunsmuir*. On his account, there is a danger in

> labelling the most "deferential" standard as "reasonableness"… it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts.[45]

Note that the concern in this passage is the confusion a single standard creates; with the least deferential standard (patent unreasonableness) eliminated, interference owing to unreasonableness could be wrongly taken to be necessary more often. The secondary literature inspired by this concern can be organized into three categories.

A plurality of those contemplating the effect of the single reasonableness standard immediately following *Dunsmuir* defended a more robust version of Binnie J's concern. Specifically, they argued the elimination of the patent unreasonableness standard does not merely imply judicial interference could be necessary more often, but demands interference occur more often. Goltz is one proponent of this view: "[I]f patent unreasonableness has been eliminated completely as a level of judicial deference, such an

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[44] Apart from David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117, Ron Goltz "Patent Unreasonableness is Dead. And We Have Killed It. A Critique of the Supreme Court of Canada Decision in *Dunsmuir*" (2008) 46 Alta L Rev 253, Paul Daly "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill 1 483 [Daly], and Lewans *supra* note 2, see also Dave Edwards "Judicial Review of Administrative Action" (2011) 24 Can J Admin L & Prac 151 for an argument maintaining the decision in *Dunsmuir* has confused rather than clarified the process of judicial review for Ontario courts in particular.

[45] *Dunsmuir*, *supra* note 1 at para 141.

outcome must necessarily result in increased intrusion by the courts."[46] His is the position that appears to have dominated the first attempts to understand the impact of the single reasonableness standard.[47] The second view, also well represented in the commentary, maintained that the amendments to reasonableness had no impact at all on the need for, or frequency of, interference.[48] The third group expressed the position that was least common initially, i.e., the single reasonableness standard has decreased the number of

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[46] Goltz, *supra* note 44 at 261.

[47] For an account of the fear of greater judicial interference with municipal decision making in particular see Jared Craig "Defending City Hall After *Dunsmuir*" (2008) 46 Alta L Rev 275 at para 41. For a case note maintaining that courts are more willing to interfere with the decisions of labour arbitrators following *Dunsmuir* see Piper Henderson "Supreme Court of Canada's New "Reasonableness" Standard of Review Applied in Recent Education Cases" (2008) 18 Educ & LJ 179 at 185. For a defence of the claim that practitioners representing those seeking to overturn the decisions of administrative tribunals have more to gain from the language of *Dunsmuir* than practitioners who defend administrative tribunals, see David E. Gruber "Judicial Review Advocacy in the Post-*Dunsmuir* Era" (2009) 22 Can J Admin L & Prac 303 at 313. For a brief expression of concern that the re-introduction of 'true jurisdictional questions' in *Dunsmuir* will lead to greater judicial interference with administrative bodies, see Hudson Janisch "Something Old, Something New" (2010) 23 Can J Admin L & Prac 219 at 223 – 24. For a defence of the claim that the single reasonableness standard did increase the circumstances in which judicial interference is necessary, see Shores and Jardine, *supra* note 2. For arguments claiming the effect of the application of reasonableness in *Dunsmuir* (rather than the revision of the reasonableness standard) represents a significant increase in judicial interference with administrative tribunals in particular, see Nicolas Lambert "*Dunsmuir v. New-Brunswick*: The Perceived Choice between Fairness and Flexibility in Public Service Employment" (2009) 59 UNBLJ 205 and Ron Ellis "*Dunsmuir* and the Independence of Adjudicative Tribunals" (2010) 23 Can J Admin L & Prac 203.

[48] As I noted in Chapter 1, this is the position that was explicitly defended by Justice Bastarache extra-judicially in "Modernizing Judicial Review" (2009) 22 Can J Admin L & Prac 227 at page 6 and implicitly by Justice Cromwell in "From the New Despotism to *Dunsmuir*: A Funny Thing Happened on the Way to the Apocalypse" (2011) 24 Can J Admin L & Prac 285. See also Mark G. Underhill "*Dunsmuir v. New Brunswick*: A Rose by Any Other Name" (2008) 21 Can J Admin L & Prac 247, or Alice Woolley "The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review" (2008) 21 Can J Admin L & Prac 259 where at 266 – 68, she enumerates four reasons for thinking the decision will have little impact on the frequency of judicial interference in Alberta. See also Gerald P. Heckman "Substantive Review in Appellate Courts since Dunsmuir" (2009) 47 Osgoode Hall LJ 751 at 784 – 85, or Basile Chiasson and André Daigle "New Brunswick Municipal Decision-Making Post *Dunsmuir*: Farewell to the Patent Unreasonableness Statutory Standard of Review?" (2010) 65 MPLR (4th) 279, or Allison Woolley and Shaun Fluker "What has Dunsmuir Taught?" (2010) 47 Alta L Rev 1017. Of course, none of these authors applaud the single reasonableness standard as establishing a new paradigm of clarity; they simply do not argue confusion arises from its impact on the frequency of judicial interference.

circumstances in which judicial interference is necessary.[49] My position in this project falls within this third category.

The most prominent voice among those who initially maintained the revised standard was designed to reduce the frequency of judicial interference was Mullan. While accepting Binnie J's concern that the elimination of patent unreasonableness might well lead to greater interference, he nonetheless recognized "that that was not the intention of the majority... there seems to be an implication that, even within the new unreasonableness standard, there should be great hesitation or caution in setting aside a decision."[50] More recent commentators agree that it was at least the goal of the majority to reduce the permissibility of judicial interference with the introduction of the single reasonableness standard. They also maintain, however, that the post-*Dunsmuir* Supreme Court case law has revealed an inability to develop a consistent application of that reduction.

Jennifer Klinck, for example, has argued that while the single reasonableness standard is conceptually coherent, its application in both *Dunsmuir* and *Khosa v. Canada (Minister of Citizenship & Immigration* fails to properly respect that coherence.[51] Similarly, Lewans' maintains the revised reasonableness standard holds the promise for

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[49] See, for example, Evan Fox-Decent "Democratizing Common Law Constitutionalism" (2010) 55 McGill LJ 511 at 532 – 33 who criticizes the Court's assessment of the facts in *Dunsmuir* on the grounds that the Court was being overly deferential. For a defence of the sense in which Ontario courts in particular are more deferential toward (and thereby less likely to interfere with) administrative tribunals following *Dunsmuir* see Dustin Kenall "De-Regulating the Regulatory Compact: The Legacy of *Dunsmuir* and the "Jurisdictional" Question Doctrine" (2011) 24 Can J Admin L & Prac 115 at 117: "regulatory agencies can expect greater leeway to devise novel, innovative mechanisms for fulfilling their statutory mandates, while regulatory targets can expect the courts to continue to be receptive to procedural fairness and constitutional questions, but not to questions concerning the substantive mechanisms or equities of regulation."

[50] Mullan, *supra* note 44 at 134.

[51] Jennifer A. Klinck "Reasonableness Review: Conceptualizing a Single Contextual Standard from Divergent Approaches in *Dunsmuir* and *Khosa*" (2011) 24 Can J Admin L & Prac 41.

fewer instances of judicial interference,[52] but his optimism is accompanied by a concern that "... the case law on reasonableness remains muddled."[53] The case law is 'muddled' precisely about whether, and the grounds upon which, courts ought to be willing to interfere with administrative decisions owing to unreasonableness. In *A.T.A. v. Alberta (Information & Privacy Commissioner)*[54]and *NLNU*, for example, the Court seemed to assert a commitment to the idea that reasonableness significantly restricts the circumstances in which interference will be necessary. In *Dunsmuir*, *British Columbia (Workers' Compensation Board) v Figiola*,[55]and *Canada (Attorney General) v Mowat*[56] by contrast, the Court overturned administrative decisions that were, for Lewans, undeniably supported by 'transparent and intelligible' reasons.[57] Daly suggests the inconsistencies in the case law are unlikely to ever be resolved because "different types of decisions attract different degrees of deference, and they do so on the basis of a factor or factors external to the elegant elucidation of reasonableness."[58]

Both Daly and Lewans maintain the criteria introduced in *Dunsmuir* represent a reduction to the need for judicial interference.[59] But they both also maintain reasonableness is confused because the 'standard of review analysis' is confused. The problem is its conflicting demands; courts must apply a set of four factors that vary

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[52] Lewans, *supra* note 2 at 63.
[53] *Ibid* at 82.
[54] *A.T.A. v. Alberta (Information & Privacy Commissioner)* 2011 SCC 61 at para 47.
[55] *British Columbia (Workers' Compensation Board) v Figliola*, [2011] 3 SCR 422.
[56] *Canada (Attorney General) v. Mowat* 2011 SCC 53.
[57] Lewans, *supra* note 2 at 92. There is, of course, not universal agreement on the effect of the single reasonableness standard. As I noted above, for example, Shores and Jardine, *supra* note 2 argue at 259 that the single reasonableness standard increased the likelihood of judicial interference "because courts were not required to show tribunals any deference related to the duty of fairness." It was only in *NLNU* that "... the Supreme Court stamped out the emerging heresy of reasons as a free standing ground of appeal or judicial review" at 264.
[58] Daly, *supra* note 44 at 488.
[59] Daly *UTFS*, *supra* note 2 at 352.

across each individual case, and must also determine whether a case 'fits' a pre-determined list of categories.[60] Each author maintains judicial review generally, and reasonableness review in particular, will only be clarified once the four factors are designated as the only considerations. For Daly, doing so will provide reviewing courts with a better ability to identify the contextual factors that guide the application of the three criteria.[61] For Lewans, clarity will be achieved when "review for reasonableness [is] reconceived as a tool for reconciling judicial respect for administrative decisions with a judicial concern for ensuring administrative decisions are legally acceptable in a particular regulatory setting."[62]

My analyses in the chapters that follow do not directly address Daly's or Lewans's shared concerns about confusion resulting from the standard of review analysis. There is no denying the standard of review analysis must be understood to properly understand the process of judicial review in Canada. But there is also no denying that reasonableness is an independent standard that can be distinguished and isolated from the process of determining whether correctness or reasonableness is to be used in any given case. To the extent that my analyses are able to narrowly capture the consistent conceptual foundation, application, and threshold point at which interference owing to unreasonableness is necessary according to the case law, they show that Daly's and Lewans's concern about a lack of clarity with respect to reasonableness in particular is, at the very least, overstated. Their focus on the impact of confusions in the means by which

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[60] Both attribute the introduction of the 'categorical approach' to Fish J's majority opinion in *Alliance Pipeline Ltd v. Smith* [2011] 1 SCR 160 at paras 25 and 26; see Daly, *supra* note 44 at 487 and Lewans, *supra* note 2 at 61.
[61] Daly *UTFS*, *supra* note 2 at 354.
[62] Lewans, *supra* note 2 at 94.

reasonableness is selected has led both to fail to recognize the clear and coherent features that define a reasonableness review.

5. Conclusions

Prior to *Dunsmuir*, the process of judicial review consisted in three standards courts used to determine when interference was necessary. The least deferential standard, correctness, would be most likely to demand interference by requiring courts to ignore any reasons offered by the administrative body and seek out, of their own accord, the uniquely correct result. Patent unreasonableness, by contrast, demanded judicial interference in the fewest number of cases, since it required courts to largely accept the reasons offered by the administrative body. Finally, the need for interference according to reasonableness *simpliciter* represented a mid-point between the two other standards since courts were required to respect the reasons offered, while simultaneously undertaking a more vigorous critical assessment.

Justices Bastarache and Lebel offer two sets of revisions intended to clarify the process of judicial review in *Dunsmuir*. The least dramatic are the shortcuts to the standard of review analysis; if the matter has been previously determined in the case law the question can be avoided altogether, or courts can avoid a consideration of all four factors if one or more is dispositive. The more significant revision is the unification of the two reasonableness standards, which continues to allow courts the flexibility to show varying degrees of deference. That flexibility will be directed toward the two aspects of each administrative decision with which a reviewing court is concerned, i.e., the reasons and the outcomes. More specifically, the assessment of reasons is the primary concern

which, following the opinion in *NLNU*, means that any outcome that can be supported by a set of reasons that satisfy the three criteria falls within the reasonable range.

Chapter 3: The Three Criteria of Reasonable Reasons Demand Courts Confirm that a Justification Exists, and Nothing More

1. Introduction

In this chapter I articulate the principled and coherent framework that defines the single reasonableness standard in the post-*Dunsmuir* Supreme Court case law. Following my brief analysis at the end of Chapter 2, I assume throughout that the claim "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process"[1] expresses in its entirety the substantive elements of reasonableness review. On my account, those three criteria demand courts confirm administrative decisions are justified, and nothing more. I begin by identifying the five distinct requirements the three criteria impose on administrative decision makers. I then turn to the case law to show the Court consistently follows the same pattern of analysis to ensure each of those requirements are satisfied, invoking the same ground for interference when they are not. The resultant framework of reasonableness is therefore clear in the sense that it relies on a cluster of familiar concepts, assessed according to the same process, always requiring interference for the same reason (when necessary).

2. The Prevalence of 'the Existence of Justification, Transparency, and Intelligibility in the Decision Making Process' in the Post-*Dunsmuir* Case Law

As noted toward the end of Chapter 2 the majority in *Dunsmuir* imply, and Abella J in *NLNU* explicitly asserts, that reasons take priority over outcomes when assessing for

[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*] at para 47. See *supra* at 29 – 30 for my account of the priority of reasons over outcomes.

reasonableness.[2] The centrality I attribute to the phrase 'the existence of justification, transparency and intelligibility' might nonetheless be thought to be overstated. After all, Bastarache and Lebel JJ only invoke those criteria when describing the single reasonableness standard, notably failing to invoke them again in their application to the facts in the case. So the primacy of the three criteria in a review for reasonableness is not set out explicitly by the majority in *Dunsmuir*. Nor is the exact meaning of the phrase 'the existence of justification, transparency and intelligibility' elaborated in their ratio.

The centrality of the three criteria arises in the post-*Dunsmuir* case law. The number of times a judicial reference has been made to the majority ruling is astonishing; almost seven thousand times a little more than seven years after its release.[3] With respect to the three criteria, the exact phrase 'the existence of justification, transparency and intelligibility in the decision making process' is cited in more than two thousand trial, appellate, and Supreme Court rulings. That search result notably does not include the many opinions in which the ordering of the phrase is amended, or the three criteria are paraphrased.[4] We can minimally infer from their prevalence that the criteria have, since

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[2] *NLNU v. Newfoundland & Labrador (Treasury Board)* 2011 SCC 62 [*NLNU*] at para 47.
[3] The total number of judicial considerations yielded by a LexisNexis Quicklaw 'QuickCITE' shows *Dunsmuir* has been at least mentioned in 6922 rulings as of August 31st, 2014. *Dunsmuir* is, based on my limited investigation, the most widely referenced judicial opinion in the history of the Canadian legal system (again, a mere six and a half years after having been handed down!).
[4] 2019 according to a QuickLaw search of the exact phrase on August 31st, 2014. Supreme Court opinions invoking the three criteria include *Khosa v. Canada (Minister of Citizenship & Immigration* [2009] 1 SCR 339 at para 59; *Canada (Attorney General) v. Mowat* 2011 SCC 53 [*Mowat*] at para 28; *A.T.A. v. Alberta (Information & Privacy Commissioner)* 2011 SCC 61 [*ATA*] at paras 52 and 72; *NLNU*, *supra* note 2 at paras 9, 11, and 13; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)* 2012 SCC 29 at para 44; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 at para 60; and *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2103 SCC 36 at para 89. A random sampling of appellate court decisions invoking the three criteria include: *Alberta Health Services (Calgary Area) v. Health Sciences Assn. of Alberta (Paramedical Professional/Technical Unit)* 2011 ABCA 306 at para 14; *Allsop v. Alberta (Appeals Commission for Alberta Workers' Compensation)* 2011 ABCA 323 at paras 20 and 35; *Amherst (Town) v.*

Dunsmuir, been interpreted to be an essential component of any reasonableness review. Of course, their prevalence says little about their substantive content.

A single phrase referenced more than two thousand times would normally be expected to be accompanied by a plurality of explicit judicial pronouncements unpacking its meaning. One remarkably consistent feature across the decisions invoking the criteria, however, is that courts most often behave as did the majority in *Dunsmuir*; the slogan is asserted as a means of characterizing reasonableness review, but precise definitions are not provided. When discussed explicitly by the Supreme Court in post-*Dunsmuir* rulings like *Khosa*, *ATA*, and *NLNU*, statements clarifying reasonableness do not normally

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Nova Scotia (Superintendent of Pensions) 2008 NSCA 74 at para 63; *Anderson v. Manitoba* 2010 MBCA 113 at para 106; *Backx v. Canada (Canadian Food Inspection Agency)* 2011 FCA 36 at para 6; *Bluebird Investments Ltd. v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 764* 2011 NLCA 78 at paras 14 and 19; *Boddy v. Nova Scotia Workers' Compensation Appeals Tribunal* 2012 NSCA 73 at para 18; *Boulos v. Public Service Alliance of Canada* 2012 FCA 193 at para 7; *Bowater Maritimes Inc. v. Communications, Energy and Paperworkers Union, Locals 117, 146, 164 and 263* 2011 NBCA 22 at paras 4, 24, and 25; *Brian Neil Friesen Dental Corp. v. Director of Companies Office (Manitoba)* 2011 MBCA 20 at paras 87 and 99; *BTC Properties II Ltd v. Calgary (City)* 2012 ABCA 13 at para 23; *Calgary (City) v. Alberta (Municipal Government Board)* 2012 ABCA 13 at para 23; *Calgary (City) v. Nortel Networks Corp.* 2008 ABCA 370 at para 33; *Canada (Border Services Agency) v. Miner* 2012 FCA 81 at para 11; *Canada Post Corp. v. Carroll* 2012 NBCA 18 at paras 62 and 71; *Canada Post Corp. v. Canadian Union of Postal Workers* 2011 FCA 24 at paras 22 and 27; *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)* 2009 NSCA 4 at paras 29 and 30 [*Casino Nova Scotia*]; *Communications, Energy and Paperworkers Union Local 707 v. Suncor Energy Inc.* 2011 ABCA 90 [*CEPU Local 707*] at paras 20 and 21; *Darcis v. Manitoba* 2012 MBCA 49 at paras 37 and 38; *Deschênes v. Canadian Imperial Bank of Commerce* 2011 FCA 216 at paras 42 and 43; *Friends of Davy Bay v. British Columbia* 2012 BCCA 293 at para 31; *Inter Pipeline Fund v. Alberta (Energy Resources Conservation Board)* 2012 ABCA 208 at paras 26 and 48; *Kane v. Canada (Attorney General)* 2011 FCA 19 at para 68; *Kelly v. Alberta (Energy Resources Conservation Board)* 2011 ABCA 325 at para 13; *Lines v. British Columbia (Securities Commission)* 2012 BCCA 316 at paras 26 and 32; *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520* 2009 NCSA 60 [*Maritime Paper Products*] at paras 22 – 23 and 36; *Mellor v. Saskatchewan (Workers' Compensation Board)* 2012 SKCA 10 at para 26; *New Brunswick Liquor Corp. v. Small* 2012 NBCA 53 at paras 10 and 30; *Pridgen v. University of Calgary* 2012 ABCA 139 at para 53; *Public Service Alliance of Canada v. Senate of Canada* 2011 FCA 214 at paras 31 and 38; *Regular v. Law Society of Newfoundland and Labrador* 2011 NLCA 54; *Saint John (City) v. Saint John Firefighter Assn.* 2011 NBCA 31 at paras 40 and 41; *Whelan v. Ontario (Racing Commission)* 2011 ONCA 299 at para 15.

articulate the meaning of the criteria. Instead, the Court focuses on questions about the relationship between the criteria, legislative context, the degree of deference courts owe administrative bodies, and how all these considerations relate to the idea of a 'range of possible, acceptable outcomes'. The failure to clarify the meaning of three criteria can be explained at least in part by the *Dunsmuir* majority ruling; a return to the distracting conceptual discussions of the pre-*Dunsmuir* era needs to be avoided. Since, however, my goal is to identify and elaborate the consistent application of those criteria in the case law, this aversion to abstract conceptual definitions complicates my analysis.

3. The Conceptual Framework Implied by the Three Criteria

My goal in this section is to explicate the five separate concepts implied by the three criteria of reasonable reasons. On my account, those criteria establish 'a justification exists' when (a) there are statements that (b) genuinely served as the considerations made while deliberating, (c) statements that satisfy basic linguistic requirements, (d) can be consistently combined, and (e) are relevant to that decision in light of the legislative framework. My ordering of these five elements proceeds intuitively from 'most basic' to 'most complex'; merely uttering a statement is the easiest requirement to satisfy, whereas showing the reasons uttered are relevant in the particular legal context is the most difficult.

One of the few early judicial attempts to articulate the meaning of the three criteria comes from the Nova Scotia Court of Appeal in *Casino Nova Scotia*[5]. The

[5] *Supra* note 4 at para 1 for a summary of the facts: The Nova Scotia Labour Relations Board "... certified a bargaining agent for a unit of security officers at a casino. The employer applied to quash the certification. The Supreme Court of Nova Scotia dismissed the application..." The unanimous Court denied the appeal and upheld the certification.

definition set out by Fichaud JA has been cited in a number of appellate court rulings in[6] and outside[7] Nova Scotia, and has also been invoked in at least one Supreme Court opinion[8]. On his account,

> [j]ustification, transparency and intelligibility relate to process. They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes.[9]

There are six separable concepts that reside within the criteria according to this sentence (two concepts per criterion), inferred from the common use of each term. I begin with the most general idea, i.e., 'a justification'. Its meaning is implied by the assertion that a reviewing court must be able to 'understand why' a particular decision was reached, and recognize that the 'reasons afford the raw material'. So 'a justification' refers to the presentation of a set of reasons in support of a decision.[10] The remaining concepts specify the substantive requirements that must be satisfied for any set of reasons to qualify as 'a justification'.[11]

One necessary but not sufficient requirement for any set of reasons to qualify as a justification, and the most important element of any assessment for reasonableness, is that the reasons be, at a minimum, relevant to the plausibility (or 'sufficiency' or 'strength')

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[6] See, for example, *Maritime Paper Products*, *supra* note 4 at paras 23 and 36.
[7] See, for example, *CEPU Local 707*, *supra* note 4 at para 21.
[8] *Montreal (City) v. Montreal Port Authority* [2010] 1 SCR 427, at para 38, [*Montreal Port Authority*].
[9] *Casino Nova Scotia*, *supra* note 4 at para 30 [emphasis added].
[10] According to the Oxford English Dictionary, 'a justification' consists in "3. a. The action of justifying or showing something to be just, right, or proper;" The means by which that action is performed requires the individual presenting the justification to "5.a. To make good (an argument, statement, or opinion); to confirm or support by attestation or evidence; to corroborate, prove, verify." OED 2nd ed. (1989); online version June 2012.
[11] Recalling from Chapter 1 that an obligation to provide reasons was established in *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 [*Baker*] at para 43.

of the decision they are intended to support. In other words, if a reason actually supports a particular decision then that reason matters to its plausibility. That a relevance requirement is implied by Justice Fichaud's definition of the criteria follows from his assertion that a court reviewing for reasonableness is trying to 'understand why' those reasons support that decision. It is not possible to understand the sense in which a set of reasons support a decision without being able to specify how they matter to the outcome.[12]

Determining that a set of reasons are 'relevant' demands a reviewing court establish the reasons presented are appropriate to the legal and factual context. It will be made clear in section 4 below that according to the Supreme Court, reasons matter to an administrative outcome when they accord with the legal framework that empowers the decision maker. So when reviewing courts are considering whether the reasons presented are consistent with an administrative body's enabling legislation, or the common law, or the Constitution, they are assessing for relevance. Accordingly, assessing a set of reasons for their 'relevance' is uniquely significant; following my discussion of the rule of law in Chapter 1, it is the final step toward ensuring that an exercise of state power is consistent with the agreed upon system of rules and is, in that sense, not arbitrary.

As the final step in confirming a decision is justified, relevance is the most important element of the criteria because it marks the threshold between an 'existent' and a 'non-existent' justification. In other words, the point at which a consistent set of genuine and meaningful statements are shown to be relevant to the plausibility of some decision is the point at which an otherwise random collection of claims are transformed

[12] The Oxford English Dictionary definition shows this meaning is consistent with common use; a reason is 'relevant' when it establishes a "2.a. connection with the subject or point at issue; [a] relation *to* the matter in hand" OED 2nd ed (1989); online version June 2015.

into ‘an existent justification’. It follows on my account that when a set of reasons are relevant to an outcome, judicial interference is prohibited because the rule of law is not in danger.

That relevance serves as the threshold between an existent and non-existent justification can be inferred from what is missing in Fichaud JA’s description; courts are required to understand how the reasons support the decision, but no mention is made of the possibility of assessing the relative strengths or weaknesses of those reasons as compared with alternatives. That omission reflects the introduction of the three criteria in *Dunsmuir*; according to Bastarache and Lebel JJ, a review for reasonableness is ‘concerned mostly with the existence of justification.’ The majority notably does not, by contrast, say that reasonableness is ‘concerned with the quality, strength, adequacy, sufficiency, or plausibility of the justificatory reasons presented’; the only concern is to ensure reasons that matter exist. Of course for a set of reasons to matter, there must first be reasons for a court to review.

For a set of reasons to be relevant, they must be intelligible. An administrative decision will normally be accompanied by more than one reason, so how they can consistently combine to support the particular decision must be decipherable.[13] This meaning is implied by Fichaud JA’s assertion that the reasons are the ‘raw material’ used to understand how the decision was reached; if the reasons contained, for example, obvious contradictions, no such understanding would be possible. A second sense of ‘intelligibility’ follows from the first; the possibility of reasons being able to be consistently combined presupposes words and sentences formulated in accord with the

[13] The ruling in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)* 2012 SCC 29 [*Halifax*], to be discussed in section 4 below, serves as a clear example of the Court determining that the reasons offered in support of a decision are inconsistent.

syntactic and semantic rules of English or French.[14] In other words, reasons do not exist when the utterances purportedly offered in support of some decision are gibberish.[15] This is implied by Fichaud JA's claim that reasons must allow a court be able to 'understand why' a particular decision was reached; understanding the sense in which reasons support a decision presupposes the reasons are able to be independently understood by an English or French reader/speaker.

Finally, the possibility of a set of intelligible reasons that matter to the decision they are intended to support suggests they must be 'transparent' in two senses. First, a set of reasons must be genuine, i.e., they must be the reasons that were actually used by the body under review to justify their decision. A reviewing court could not possibly understand why a decision follows from some set of reasons if those were not really those used in coming to that decision; if they were, for example, a façade intended to hide the 'true' reasons.[16] The second sense of 'transparent' is presupposed by the first: For a set of

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[14] Again, both senses of intelligibility are consistent with common usage; according to the OED, intelligible reasons i.e., possess "2. The quality or character of being intelligible; capability of being understood; comprehensibility." OED 2nd ed. (1989); online version June 2012.

[15] I have been unable to find a single judicial authority in which a court determined that a set of reasons were gibberish and so interfered on those grounds. The absence of such a ruling from the case law does not, however, detract from my conceptual claim that if a set of utterances that were gibberish had been presented as reasons in support of a decision, their unintelligibility would demand judicial interference. What it suggests instead is that, consistent with my claim that the five elements of the criteria proceed from least to most complicated, administrative bodies have not had difficulty developing reasons that consist in meaningful words strung together in the form of proper sentences.

[16] For an example of the Court at least suggesting that an administrative body made a decision for reasons other than those proffered, see *McGillivray v. Kimber* (1915) 52 SCR 146. At issue was whether McGillivray could recover damages in tort for a decision of the pilotage authority of the Port of Sydney to dismiss him for incapacity. The Court held the defendants liable because they did not have any legal basis to withhold a licence from the plaintiff without his incapacity having been "proved on oath before the pilotage authority" (at 1). The defendants maintained at trial they were not liable because they enjoyed an absolute authority with respect to licencing harbour pilots. The Appellate Court overturned the finding for the plaintiff at trial, ruling that the Board was fulfilling a quasi-judicial duty and so was immunized from liability without proof of malice. In his concurring judgment, Idington J maintained the testimony of the defendant at trial suggests

reasons to be assessed for either intelligibility or relevance, they must satisfy a minimal publicity requirement. That is, they must be presented either orally or in writing and cannot therefore merely reside in the mind of their purported author.[17] 'Transparent' reasons are those that have really led the administrative body to that decision and have therefore been made 'public' in the requisite manner.[18]

The five concepts extrapolated from the three criteria in this section are 'substantive' owing to the role they serve; they exhaust the grounds for judicial interference owing to unreasonableness. They require a reviewing court to overturn a decision for unreasonableness only when either (a) there are no reasons, or (b) those were not the reasons used reaching that decision, or (c) the actual reasons presented are not meaningful words and sentences, or (d) the actual meaningful words and sentences cannot be consistently combined in support of that decision, or finally (e) the genuine, meaningful, and consistent reasons are irrelevant to the conclusion reached in light of the

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the requisite degree of malice was present. Specifically Kimber's admission that his own reasoning was partly political, and his suggestion that "some of the Board seemed incidentally moved by considerations relative thereto. The surprising thing is that on the issues presented we should find accidentally disclosed so much evidence of those indirect motives of action which constitute malice… it is hard to understand how, unless moved by improper motives, any one in such a position… could have conceived it his right or duty to dismiss a man unheard" (at 7). So there was no hearing establishing the plaintiff was incapacitated, and there was evidence from the defence that the actual reasons of the Board had little to do with their legal rights and obligations to grant or withhold pilotage licences meaning the decision was, in the eyes of Idington J, tortious. A similar suspicion was raised but not explored in Anglin J's concurring opinion: "There is some evidence which indicates that the defendants' action in cancelling the plaintiff's licence was induced by motives other than zeal for the public welfare, and a finding of malice on their part would not entirely lack support. It is, however unnecessary to deal with this aspect of the case" (p. 19). For both Justices then, the presentation of non-genuine reasons would serve as ground for a successful action.

[17] Finally, the OED definition of 'transparent' supports these two implications: Reasons are 'transparent' when they are "2. a. Frank, open, candid, ingenuous. b. Easily seen through, recognized, understood, or detected; manifest, evident, obvious, clear."

[18] Though the requirement that the reasons be capable of being articulated does not entail that they be made explicit in each and every administrative decision subject to the obligation to present reasons set out in *Baker*; I clarify this subtlety in section 5 below.

legal framework. Any set of reasons that satisfy these requirements constitute an existent justification, meaning interference is not necessary to preserve the rule of law and is therefore prohibited. My task now is to both show that, and explain how, the Court determines these five elements are satisfied when assessing for reasonableness since *Dunsmuir*.

4. The Consistent Application of the Three Criteria by the Supreme Court

In this section I show the Court has developed a patterned approach to determining the five elements of the criteria are satisfied: (i) The Court summarizes the reasons offered in support of the impugned decision, ensuring the first four elements are satisfied (i.e., ensuring that a set of reasons exist); then (ii) the Court determines whether those reasons satisfy the final element, i.e., whether they are relevant given the particular legal context. My analyses therefore also establish the unique significance of the relevance requirement; it is the most difficult and final conceptual step in confirming that a justification exists, and so receives the most judicial attention. On my account, when the Court appeals to the 'legal framework' during an assessment for reasonableness they are attempting to establish whether the reasons offered are relevant. This characterization should help to allay the concerns of some commentators that those appeals are too vague to provide meaningful guidance for determining whether a decision is reasonable.[19]

[19] A concern first articulated by Binnie J in his concurring reasons in *Dunsmuir* at paras 150 – 155. Versions of that concern have subsequently been raised by David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117at 135, Ron Goltz "Patent Unreasonableness is Dead. And We Have Killed It. A Critique of the Supreme Court of Canada Decision in *Dunsmuir*" (2008) 46 Alta L Rev 253 at 259 and 261, Paul Daly "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317 at 352 – 355, and Matthew Lewans "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's LJ 59 at 94.

Given that my analyses are designed to identify the several bases upon which reasonableness requires reviewing courts to interfere with the decision of an administrative body and the plurality of decisions applying reasonableness, I have chosen to only discuss cases in which the Court determined interference was necessary. That choice is motivated by a simple observation: In those comparatively rare circumstances in which interference occurs, the Court devotes considerable effort to explaining the flaw with the administrative decision maker's reasoning.[20] My first analyses of *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)* in 4(a) and *Dunsmuir* in 4(b) are the most detailed. Once the pattern is clear, I will in 4(c) undertake accelerated analyses of post-*Dunsmuir* decisions in which judicial interference owing to unreasonableness is deemed to be necessary.

4(a) *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*

Federal government properties in Canada are constitutionally exempt from provincial and municipal taxation. In an effort to avoid undermining the taxation revenues of those bodies, Parliament adopted the *Payments in Lieu of Taxes Act*, R.S.C. 1985, c. M-13 (the *PILT Act*).[21] The *PILT Act* grants the Minister of Public Works and Government Services the discretion to decide the value of each payment in lieu of taxation according to "the value that in the opinion of the Minister would be attributable by an assessment authority to the property if it were taxable."[22] The City of Halifax

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[20] The rarity of interference on the part of the Court is significant: In a total of 42 cases explicitly engaging the single reasonableness standard heard since *Dunsmuir*, the Court has found the impugned decision to be unreasonable in only 7.
[21] *Halifax*, *supra* note 13 at para 2.
[22] *Ibid* at para 10.

objected to the Minister's valuation of the unoccupied 42 acres surrounding the Halifax Citadel National Historic Site at a nominal value of $10.[23] Writing for the unanimous full Court, Cromwell J found the Minister's valuation to be unreasonable and remitted the matter for redetermination.[24]

The primary explanation of the gulf between the municipality's and Minister's valuations was the significance attributed to the use restrictions arising from the historical site designation; Halifax gave them little significance, whereas that appeared to be the lone consideration upon which the Minister's valuation depended.[25] While the Minister is not bound by the *PILT Act* to simply accept a value determined by the local assessment authority,[26] he does not enjoy an unfettered discretion either; the valuation must be informed by the local tax system as though the federal property were taxable.[27] Since valuing land solely on the basis of land use restrictions is not an approach used by any recognized Canadian assessment authority and is inconsistent with the purpose of the *PILT Act* inasmuch as the *PILT Act* is intended to provide payments for national historic sites, the Minister's valuation was unreasonable.[28]

In his attempt to summarize the facts of the case, Justice Cromwell encounters the first problematic element; there were no clear reasons presented by the PILT Dispute

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[23] *Ibid* at para 4.
[24] *Ibid* at para 59.
[25] *Ibid* at para 48.
[26] *Ibid* at para 39 – 40.
[27] *Ibid* at paras 42 and 49. Justice Cromwell cites *Montreal Port Authority*, *supra* note 8 in support of the point that PILTs must use the existing municipal taxation system as a meaningful point of reference, rather than inventing their own system of taxation; see para 40: "calculations must be based on the tax system that actually exists at the place where the property in question is located. The *PILT Act* and the *Regulations* require that the tax rate be calculated as if the federal property were taxable property belonging to a private owner."
[28] *Halifax*, *supra* note 13 at para 48.

Advisory Panel to justify the $10 valuation.[29] The Court's analysis therefore begins by noting that the decision is problematic in part because (a) no clear reasons exist and (b) it is not obvious the reasons that do exist actually informed the Minister's valuation.[30] The failure to satisfy the two transparency requirements would constitute sufficient grounds for overturning the valuation had there been no possible reasons to review. Since, however, the reasons of the Minister's designated appraiser were available they could be treated as the basis for the valuation. That those reasons could be summarized by Cromwell J shows there was no issue with respect to the first intelligibility requirement, i.e., the reasons of Canada's appraiser were meaningful words and sentences of the English language. The remaining flaws were, however, determinative; the reasons given were both (d) inconsistent and (e) irrelevant.

According to the Court, the Minister's reasons contradicted the purposes of the *PILT Act*: "Parliament intended that the land on national historic sites of Canada be included in the PILT scheme. That being the case, it is inconsistent with this inclusion to reason in a categorical way, as the Minister did here, that such sites, *by virtue of that status*, have no value for assessment purposes and are therefore ineligible for PILTs under the scheme."[31] This is a clear example of reasons that are unintelligible because they cannot be consistently combined. To see how the contradiction renders the reasons unintelligible, we need to recognize Cromwell J's assumption that the first reason supporting any valuation is necessarily the legislative purpose; in this case to ensure municipal tax revenues are not adversely affected by federal properties. Given that purpose, to then argue that the federal properties whose use restrictions the *PILT Act* is

[29] *Ibid* at para 28.
[30] *Ibid* at paras 45 and 46.
[31] *Ibid* at para 54.

attempting to address are without value owing to those very use restrictions is a direct contradiction, and therefore makes no sense. The reasons that led to the decision (the purpose of the *PILT Act* to compensate for tax losses caused by federal historical properties conjoined with the assertion that the historical designation negated all value) could not be understood by the Court just because they were contradictory, i.e., not able to be consistently combined in support of a single conclusion.

The second basis for interference in *Halifax* is the failure of the appraiser's reasons to be relevant given the legal context. According to the Court, "there is no evidence... to suggest that, with regard to sites of this nature, *any* assessment authority anywhere in Canada applies the approach to valuation used by Canada's appraiser."[32] Since the assessment method is not used in Canada, the Minister's reasons are not within the limited boundaries set upon his discretion under the legislation. It follows that even if the method of assessment used has some foundation in economic theory (as claimed by the Minister's appraiser), its absence from any jurisdiction in Canada means the legal framework does not recognize those theoretical foundations for the purposes of PILT valuation. As such, that method of valuation was a legally irrelevant method; the reasons offered simply do not matter to the outcome, irrespective of their theoretical pedigree.

In *Halifax* the Court assessed the impugned decision according to all five elements of the three criteria. Cromwell J's approach to that task began with a summary of the available reasons, followed by a determination of the degree to which those reasons conformed to the legal context. The two grounds upon which he determined interference was warranted both rested on showing the Minister's reasons failed to

[32] *Ibid* at para 48.

conform to the discretion granted by the *PILT Act* and were in that sense irrelevant.[33] The ruling therefore helps to emphasize the extent to which reasonableness narrowly focuses a reviewing court's analysis; the question is not primarily whether the decision itself conforms to the legal framework, but whether the reasoning that led to that decision conforms. That narrow focus leads to a significant implication: If in this case it would have been possible to present a justification that did not contradict the purposes of the *PILT Act* and did appeal to a method of valuation relied upon by an existing assessment authority in Canada, the Court would have had no basis to interfere with the $10 valuation.

Consistent with my analysis in section 3 above, Cromwell J's ratio does not include any mention of the relative quality of the reasons produced as against available alternatives. Accepting that the $10 valuation could have been left to stand had the reasons presented not been irrelevant in the manner identified, his omission implies a threshold of judicial interference. Again, interference was necessary because the reasons given were inconsistent with the accepted rules and so irrelevant, not because the reasons were relevant but otherwise weak or inadequate. By implication, had the Minister presented reasons that were relevant, a justification would have been confirmed to exist. In that case, the reasons supporting the decision would have not been arbitrary, meaning no interference would be necessary to uphold the rule of law.

[33] I should clarify: Owing to the conceptual order I have maintained is implied by the five elements of the three criteria, contradictory reasons are by definition irrelevant reasons. That is, when reasons are unintelligible because they are inconsistent, they are also irrelevant. The assumption is that it would not be possible to present a set of reasons that are inconsistent but are somehow relevant to the outcome they are intended to support.

4(b) The Application of Reasonableness in *Dunsmuir*

My analysis of the application of reasonableness in *Dunsmuir* mimics my analysis of *Halifax*. First I identify the five elements of the framework and the pattern by which the analysis proceeds, then I explain how the legal context is used to establish that the reasons offered in support of the arbitrator's decision were irrelevant. I should also note explicitly that my limited goal in this section is to understand the Court's application of the five elements of the three criteria. I therefore offer no assessment of the extent to which the majority opinion qualifies (or does not) as a consistent application of the principles of employment law, a topic addressed in much of the scholarly commentary.[34]

That the arbitrator's ruling satisfied the two senses of transparency and the first sense of intelligibility is evident in the majority's summary of his reasons. In his preliminary ruling the arbitrator interpreted s. 97(2.1) of the *Public Service Labour Relations Act* (*PSLRA*) to grant him the power to "substitute another penalty for the discharge"[35] if he finds that the employee was in fact dismissed for cause. In his ruling on the merits, he decided that Dunsmuir was both a contract employee and an office holder 'at pleasure', the latter of which meant "the appellant was entitled to procedural fairness in the employer's decision to terminate his employment."[36] Owing to Dunsmuir not having been granted the procedural fairness to which he was entitled, the arbitrator ordered his reinstatement. So the arbitrator (a) presented reasons for the Court to

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[34] See for example Mullan, *supra* note 19, or Nicolas Lambert "*Dunsmuir v. New-Brunswick*: The Perceived Choice between Fairness and Flexibility in Public Service Employment" (2009) 59 UNBLJ 205, or Ron Ellis "*Dunsmuir* and the Independence of Adjudicative Tribunals" (2010) 23 Can J Admin L & Prac 203, or G. Van Harten, G. Heckman, and D. J. Mullan, *Administrative Law: cases, texts, and materials* 6th ed. (Toronto: Emond Montgomery Publications Ltd, 2010) at 869 – 870.

[35] *Dunsmuir*, *supra* note 1 at para 11.

[36] *Ibid* at para 15.

scrutinize, reasons accepted as (b) the genuine basis for the arbitrator's conclusion, reasons that (c) were expressed in meaningful sentences.

The majority's analysis of the arbitrator's finding that Dunsmuir was the holder of an office 'at pleasure' and was as such entitled to procedural fairness is the flaw that necessitates interference according to the Court.[37] The arbitrator's mistake in applying procedural fairness was a result of his understanding of the legal character of an employee in the public service.

> [W]hat matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law.[38]

It follows that "[t]he dismissal of a public employee should generally be viewed as a typical employment law dispute."[39] And since the arbitrator did not treat the dispute as a matter of employment law, the majority concluded that owing to the imposition of "procedural fairness requirements on the respondent over and above its contractual obligations and [on that basis] ordering the full 'reinstatement' of the appellant, the adjudicator erred in his application of the duty of fairness."[40]

The problem identified by Bastarache and Lebel JJ shows the reasons of the arbitrator also satisfied (d) the consistency requirement since there is "nothing problematic with a grievance adjudicator considering a public law duty of fairness issue

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[37] *Ibid* at para 76.
[38] *Ibid* at para 81, a claim they reiterate at para 112: "What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder."
[39] *Ibid* at para 115.
[40] *Ibid* at para 117.

where such a duty exists."[41] The problem was that no such duty existed in this instance. There are only two exceptional cases in which a duty of procedural fairness apply to the dismissal of a public employee.[42] Since Dunsmuir was not in one of the two categories, the arbitrator's line of reasoning was meaningful but (e) simply did not matter in the legal context. It began with a mistaken characterization of an office holder 'at pleasure' as one who is entitled to a duty of fairness beyond those found in the common law of contract, and was therefore not sensitive to the limited circumstances in which such an obligation exists. While everything that followed from that characterization might be internally consistent, it was irrelevant given the limited scope of the exceptional categories.

Like *Halifax*, the majority in *Dunsmuir* assessed the reasons presented in support of the arbitrator's decision according to same patterned approach; they first summarized the reasons, and doing so ensured the first four elements of the criteria were satisfied. They then turned their attention to articulating the appropriate legal context to determine whether the reasons as summarized were relevant. Also like *Halifax*, the failure to provide reasons that were relevant to the legal context served as the basis for interference. Unlike *Halifax*, the legal context was not set by a particular statute. Instead, the legal context in *Dunsmuir* was set by the common law duty of procedural fairness and the way in which it relates to the law of contract. But the nature of that flaw is the same in both cases: Had the arbitrator been able to provide reasons consistent with the scope of the public law duty of fairness and its effect on employment relations, the Court would have had no grounds upon which to interfere with a reinstatement order. So if a set of reasons

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[41] *Ibid* at para 84.

[42] See *ibid* at para 115: (i) "where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" and at para 116 (ii) "when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship."

do matter to a decision in the context set by the legal framework, the decision is not arbitrary, the rule of law is respected, and judicial interference is therefore prohibited.

I end by again emphasizing the sense in which the counter-factual implied by the relevance requirement as discussed in *Dunsmuir* suggests it is the minimum threshold, the 'tipping-point', for judicial interference under the single reasonableness standard. As noted, had the arbitrator's reasons conformed to the context, the Court would have had no basis upon which to interfere. In other words, all the arbitrator had to do, and what he failed to do, was establish that his reasoning mattered given the context. He did not have to also show that the reasons he presented were 'good' or 'better' or 'the best' among the possible alternatives. It follows that a reviewing court is required to interfere only when it can establish that no justification exists as defined by the three criteria, and is prohibited from interfering in all other cases.

4(c) Post-*Dunsmuir* Supreme Court Instances of Interference Owing to Unreasonableness

Having described how the Court ensures the five elements are satisfied with my analyses of *Halifax* and *Dunsmuir*, my goal in this section is to both bolster its plausibility and highlight the repeated pattern in the Court's subsequent applications of the single reasonableness standard. I accomplish that goal by undertaking analyses that are structurally similar to those developed in 4(a) and 4(b), focusing on four post-*Dunsmuir* rulings in which the Court deemed interference to be necessary. First the Court summarizes the reasons, establishing that they are transparent and intelligible, then they determine whether those reasons are relevant given the context, which serves as the repeated basis for interference.

The first decision in which the Court interfered with an administrative body for unreasonableness following *Dunsmuir* was *Montreal Port Authority*. The issue before the Court in that case was similar to the issue raised in *Halifax,* i.e., to determine whether the revised PILTs assessed by the Montreal Port Authority (MPA) and the CBC for the City of Montreal were reasonable. A series of amalgamations of municipalities into the City of Montreal began in 2000, a process which led to significant amendments in its property tax system. Both the MPA and the CBC offered PILT's under the new system that were considerably lower than the values deemed appropriate by the City. Writing for the unanimous full Court, Lebel J ruled that both bodies unreasonably exercised their discretion calculating their PILT amounts.[43]

After summarizing the bases for the MPA and CBC valuations, Justice Lebel noted explicitly that they fulfill the first two criteria: "Neither the transparency nor the intelligibility of the corporations' decisions is in issue. The respondents made management decisions and clearly explained the basis for those decisions to the City."[44] The Court thereby accepted that (a) there were reasons that (b) really were those relied upon by the MPA and the CBC in coming to their valuations, presented in the form of (c) meaningful sentences, and (d) able to be consistently combined. The problem was that neither Crown corporation was empowered to "base their calculations on a fictitious tax system they themselves have created arbitrarily. On the contrary, those calculations must be based on a tax system that actually exists at the place where the property in question is located."[45] By grounding their justifications in an amended version of the pre-amalgamation tax system, they failed to (e) exercise their discretion in a manner that was

[43] *Montreal Port Authority*, *supra* note 8 at para 50.
[44] *Ibid* at para 39.
[45] *Ibid* at para 40.

relevant given the specific provisions of the *PILT Act*. The decision was therefore unreasonable and interference necessary; allowing the assessments to stand would have allowed the MPA and CBC to arbitrarily devise their own tax systems, contrary to what the law permitted.

In *British Columbia (Worker's Compensation Board) v. Figliola,* Figlioa and two co-complainants suffered from chronic pain conditions they developed on the job that rendered them unable to work. Each sought compensation from the British Columbia Workers' Compensation Board (WCB), and all three were awarded the same flat rate of compensation in accord with WCB policy.[46] All three appealed to the Review Division of the WCB, arguing in part that a fixed award policy for chronic pain was discriminatory on the grounds of disability under s. 8 of the British Columbia *Human Rights Code* (the *Code*). The Review Officer concluded the policy was not discriminatory, and so rejected their appeal.[47] Instead of seeking judicial review, the complainants then submitted a substantively identical complaint to the British Columbia Human Rights Tribunal (the Tribunal). The WCB submitted a motion asking the Tribunal to dismiss the complaints, a motion the Tribunal rejected; the WCB sought judicial review. The Supreme Court was split 5 – 4 in their result. Abella J, writing for the majority, found the decision of the Tribunal unreasonable and dismissed the complaints.[48]

The Court's assessment for reasonableness in *Figliola* focuses on the Tribunal's response to the WCB motion. The Tribunal determined that the WCB appeals procedure was not appropriate, that the Review Officer did not properly interpret his mandate for

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[46] *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52 [*Figliola*] at para 6.
[47] *Ibid* at para 10.
[48] *Ibid* at paras 54 and 55.

addressing human rights complaints, that his decision was not final, and that he did not have the necessary expertise to interpret or apply the *Code*.[49] This summary shows the majority recognized (a) there were reasons that were (b) actually contemplated by the Tribunal in deciding to reject the submission of the WCB. Moreover, those reasons (c) were all meaningful sentences and (d) consistently combined in a manner such that the Court could articulate the nature of the support they provided.

The need for interference in *Figliola* followed from the failure of the reasons to (e) be relevant given the legislative framework. Specifically, they were insensitive to the lateral nature of the authority of the Tribunal as compared with the WCB. In the eyes of Abella J, the complainants were attempting to relitigate in a different forum "[r]ather than challenging the Review Officer's decision through the available review route of judicial review,"[50] and "[t]he Tribunal's analysis made it complicit in this attempt to collaterally appeal the merits of the Board's decision."[51] Since the WCB had the authority to hear and resolve human rights complaints, and the Tribunal has no power under the *Code* to hear appeals from decisions of the WCB, the reasons of the Tribunal relied on "predominantly irrelevant factors [that] ignored its true [legislative] mandate."[52] In other words, the reasons of the Tribunal simply did not matter to the outcome owing to the legislative context, so the decision was arbitrary and in that sense a threat to the rule of law.

One day after the ruling in *Figliola* the Court handed down a second decision in which it deemed interference owing to unreasonableness necessary, i.e., *Canada (Attorney General) v. Mowat*. Writing for the unanimous Court, Lebel and Cromwell JJ

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[49] *Ibid* at paras 49 – 53.
[50] *Ibid* at para 47.
[51] *Ibid* at para 48.
[52] *Ibid* at para 54.

found that the decision of the Canadian Human Rights Tribunal (the Tribunal) to award Ms. Mowat $47,000 for legal costs was unreasonable.[53] Ms. Mowat was a traffic technician for the Canadian Forces. Three years after leaving the Forces, she filed a human rights complaint "alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex."[54] The Tribunal found her complaint was partially substantiated and awarded her $4,000 for her suffering.[55] In a separate decision, the Tribunal awarded Ms. Mowat a partial reimbursement of her legal costs, proportioned according to the number of complaints that were found to be substantiated.[56]

The reasons for the Tribunal's costs award were focused on determining whether the powers conferred under ss. 53(2)(c) or (d) of the *Canadian Human Rights Act* (*CHRA*) to compensate "for any expenses incurred by the victim as a result of the discriminatory practice, permits an award of legal costs."[57] The Tribunal offered two reasons in support of their decision to award costs; the phrases 'any expenses incurred' includes legal costs, and denying that remedial power undermines "access to the human rights adjudication process."[58] These then are the (a) reasons presented by the Tribunal which the Court treats as the (b) reasons that actually led to the finding that they could award costs. That the Court was able to summarize those reasons entails they were both (c) meaningful sentences that were (d) able to be consistently combined. Interference is again therefore warranted in this case because the reasons fail to be (e) relevant in the

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[53] *Mowat*, *supra* note 4 at para 64.
[54] *Ibid* at para 6.
[55] *Ibid* at para 9.
[56] *Ibid* at para 10.
[57] *Ibid* at para 32.
[58] *Ibid* at para 34.

legal context. Specifically, the Tribunal's interpretation of 'any expenses' to include legal costs is insensitive to the bases for compensation listed in the *CHRA*,[59] to the meaning of 'legal costs' as a term of law,[60] to the legislative history of the *CHRA*,[61] and to parallel legislation in the provinces and territories.[62] So the reasons of the Tribunal were easily understood by the Court, they simply did not matter to the conclusion that the *CHRA* confers the authority to award costs and were in that sense arbitrary.

More recently, the Court deemed interference owing to unreasonableness necessary in *Loyola High School v. Quebec (Attorney General)*.[63] The case arose as a result of a decision by the Quebec Minister of Education, Recreation and Sports to deny Loyola High School, a private Catholic institution, an exemption from the Province's mandatory Ethics and Religious Culture program (ERC).[64] One of the primary features and requirements of the ERC is that the multiple religious and ethical views discussed be presented in a neutral manner to foster respect for the diversity of views in Canadian society.[65] The exemption from the ERC sought by Loyola required the school to provide an equivalent program, where assessing its 'equivalence' would be left to the Minister.[66] The Minister denied both of Loyola's requests for an exemption on the grounds that their proposed alternative was faith-based rather than cultural and was as such an alternative to the ERC, not an alternative means of delivering the same content in a neutral manner.[67]

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[59] *Ibid* at para 39.
[60] *Ibid* at para 40.
[61] *Ibid* at para 45.
[62] *Ibid* at paras 59.
[63] *Loyola High School v. Quebec (Attorney General)* 2015 SCC 12 [*Loyola*] at para 79.
[64] *Ibid* at para 1.
[65] *Ibid* at para 19.
[66] *Ibid* at para 23.
[67] *Ibid* at para 28.

Loyola sought judicial review, arguing the pluralism assumed by the ERC violated its right to freedom of religion under s. 2(a) of the *Charter*.[68]

That the first four elements of the framework are satisfied is again evidenced by the Court's summary of the Minister's reasons. The Minister denied an exemption owing to the religious nature of the alternative, maintaining that "a program that departs in any way from the ERC Program's posture of strict neutrality, even partially, cannot achieve the state's objectives of promoting respect for others and openness to diversity."[69] So this is (a) the reason that is (b) relied upon by the Minister to justify denying Loyola's request for an exemption from the ERC. That this reason is summarized shows it is (c) meaningful and, since it is only one reason, (d) internally consistent. It follows that the problem with the reason offered by the Minister is again a function of its (e) relevance within the legal context.

Since the issue in this case concerns a *Charter* value, establishing relevance requires the Court follow the approach set out in *Doré v. Quebec (Tribunals des professions)*[70]: "the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives."[71] In this instance, "the Minister's task was to arrive at a decision that proportionately balanced the realization of the ERC Program's objectives… with respect for *Charter*-protected religious freedom."[72] She failed to fulfill that task because her reason assumes "that engagement with an individual's own religion

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[68] *Ibid* at para 29.
[69] *Ibid* at para 57.
[70] *Doré v. Quebec (Tribunals des professions)* 2012 SCC 12.
[71] *Loyola, supra* note 63 at para 4.
[72] *Ibid* at para 56.

on his or her own terms can simply be presumed to impair respect for others."[73] So the Minister's reasoning was not relevant in the legal context because it failed to minimally impair freedom of religion. That failure was the product of an unsupported assumption about an inevitable negative impact, *viz*., non-neutral discussions of belief among members of the same faith lead to intolerance. In other words, her decision to deny the exemption was unreasonable because her justification made an assumption that was contrary to the goal of promoting mutual respect for diverse religious views, and therefore did not actually weigh in favour of the legitimacy of the Minister's position in that context.

I end this subsection by emphasizing what my analyses are not, i.e., they are not attempts to critically assess the Court's decision to interfere in these cases. I need to make this point explicit because several of these rulings have attracted critical responses. Recall from Chapter 2 that on Lewans's account, for example, both *Figliola* and *Mowat* represent inconsistencies in the development of the single reasonableness standard.[74] The Court's robust engagement with the reasons of the administrative bodies in these cases suggest that reasonableness is applied inconsistently.[75] I also noted that Daly argues the Court actually applied the correctness standard in *Mowat* under the guise of reasonableness; they ruled the Tribunal's decision was unreasonable owing to its failure

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[73] *Ibid* at para 69.
[74] *Supra* at 35 – 36.
[75] Lewans, *supra* note 19 at 92. Recall also that the two rulings with which Lewans claims *Figliola* and *Mowat* conflict are *ATA* and *NLNU*, both of which I will analyze in greater detail below. Respectfully, I think Lewans has mistakenly conflated 'rigour' with 'complexity' in his reading of these cases; the fact that the details in *Figliola* and *Mowat* are more complicated than those in *ATA* and *NLNU* explains the greater detail evident in the ratios of the latter pair over the former. The need for a more complex analysis does not, on its own, establish that the degree of deference the Court was willing to show was different as between these two pairs of cases.

to correctly interpret the home statute.[76] For both authors, the Court's decision to interfere in these cases are at least confusing. My analyses in this section, by contrast, have intentionally ignored the possibility of substantive inconsistencies in an effort to isolate the Court's consistent approach to reasonableness.

4(d) Conclusions – A Consistent Set of Concepts, Pattern of Analysis, and Basis for Interference

I have reviewed six rulings in which the Supreme Court decided it was necessary to interfere with an administrative decision on the grounds that it was unreasonable. My immediate goal has been to establish that the five elements implied by the three criteria reveal a pattern in the application of the reasonableness standard. The Court begins every reasonableness review by summarizing the reasons presented in support of the decision.[77] The act of summarizing reasons ensures the transparency and intelligibility requirements are satisfied; a summary establishes that there are reasons that (a) exist outside the mind of their author, (b) are actually used to support the result, (c) are meaningful, and (d) can be consistently combined. When a clear and consistent summary is not possible, as was the case in *Halifax*, the Court takes note of the problem. The second step of a reasonableness review is to determine whether the reasons as summarized conform to the legal context. That is, a reviewing court must determine whether (e) the reasons presented are actually relevant to the decision given the home statute, the common law, and the constitutional framework.

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[76] Paul Daly "*Dunsmuir's* Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483 at 499 - 500

[77] After, of course, having provided the requisite summary of the facts, relevant statutory provisions, judicial history, and having undertaken the standard of review analysis.

My analyses also show the relevance requirement occupies a uniquely important role, in two senses. First and most obviously, assessing for relevance demands the bulk of a reviewing court's intellectual efforts. Identifying the specific elements of the legal context that apply in a given case, then determining whether the reasons presented conform to that context in a manner that offers support for the selected outcome, is unavoidably an exercise in abstract reasoning. The case law provides guidance with respect to the structure of such analyses, but the sheer variety of, and potential dissimilarity between, legal and factual contexts ensures specific substantive guidance will rarely be available. While summarizing the reasons for a decision to confirm the first four elements have been satisfied will require interpretive effort on the part of a court, that kind of analysis is a comparatively more determinate, hence easier, task.

The second sense in which the relevance requirement is uniquely significant is that it is repeatedly the basis upon which the Court determines interference is necessary. In other words, when decisions are unreasonable they are unreasonable because they fail to satisfy the limits imposed on the set of possible, eligible reasons by the specific legislative context. This repeated basis for interference implies that relevance is the threshold criterion for a review for reasonableness; a justification has been confirmed to exist when a set of existent, genuine, meaningful, and consistent reasons are shown to matter to the plausibility of an outcome in that particular context. Alternatively, when an administrative body has presented reasons that fall within the identified contextual limits their decision is reasonable precisely because it is justified. And once it is established that a justification exists there is, by definition, no danger the impugned decision is arbitrary and so no sense in which the rule of law is threatened. In the absence of such a threat,

judicial interference is no longer necessary and is therefore prohibited out of respect for the foundational democratic principle. By extension, this limit on interference obtains even in those cases where superior justifications for alternative outcomes exist; the limited task of a reviewing court is to confirm the existence of a justification and is not, by contrast, to assess the relative merits of a justification that has been confirmed to exist.

5. Refining the Framework: Violating the Transparency Requirement is not automatically Grounds for Interference

Throughout sections 3 and 4 I have characterized the five elements of the three criteria as the substantive requirements the single reasonableness standard imposes on administrative decision makers. Accordingly, each marks a distinct concept which, when not satisfied, necessitates judicial interference. The cases I consider in this section show that characterization is imprecise. More specifically, they identify and explain one circumstance in which a failure to present any reasons at all will not, immediately, warrant interference: When reasons are missing but the decision taken implies a justification that would, if made explicit, conform to the requirements of the criteria. In other words, these cases show that a decision is reasonable and interference prohibited so long as it is justifiable by reference to the law, even if it has not actually been justified by the administrative body under review.

The shared issue between the two cases I analyze in this section, the issue that requires I refine my characterization of the three criteria is: In both instances, the administrative body was subject to the duty to justify their decision per *Baker*, an obligation that each failed to discharge. In *ATA*, the administrative body had no opportunity to present reasons in support of its position because the issue raised on

judicial review was not raised before that body. In *Maclean v. British Columbia (Securities Commission)*, the administrative body issued an order that was not accompanied by explicit reasons. In both cases the Court holds that interference is not appropriate even though the reasons necessary for a justification are missing. It follows that the absence of reasons does not always warrant judicial interference owing to unreasonableness, a result that is seemingly at odds with my claims in sections 3 and 4 that an absence of reasons does necessitate interference.

To show the rulings in *ATA* and *Maclean* do not undermine the importance I have attributed to the three criteria, I invoke the distinction between a decision that is justified and one that is justifiable, first introduced in Chapter 1.[78] As I noted then, starting with Dicey, a primary and necessary requirement for upholding the rule of law is that exercises of state authority be justifiable by reference to regular law. That is, all actions of the state could, in principle, be justified by reference to the law. Starting with *Baker* administrative bodies in Canada are, in most circumstances, obligated to ensure their actions are justifiable by actually being justified. What the rulings in both *ATA* and *Maclean* therefore clarify is the priority of the possibility of a justification. That is, they show that when there is an obvious sense in which the impugned decision could be justified by reference to the regular law, judicial interference is not necessary because the rule of law is not in danger. This result does not undermine my account of the significance of the three criteria; as we will see, if the decision is not obviously justifiable, the administrative body will be required to provide reasons for a court to review.

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[78] *Supra* at 13 – 14.

5(a) *A.T.A. v. Alberta (Information & Privacy Commissioner)*

Rothstein J makes one statement in *ATA* which, if accepted in isolation, directly contradicts my repeated assertion throughout this chapter that the five elements of the three criteria are the only substantive components of a review for reasonableness: "Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons."[79] Indeed, Lewans interprets this pronouncement to convey just that meaning: "Justice Rothstein's decision is striking because it asserts that the requirement of 'justification, transparency and intelligibility' is not a universal feature of reasonableness review."[80] My primary goal in this section is to show this statement does not actually alter the universal applicability of the criteria; I argue all that is being claimed is that the absence of reasons (and so the absence of any justification) does not automatically demand interference.

The Alberta Teacher's Association (the ATA) violated Alberta's privacy protection legislation, a finding made by an adjudicator appointed by the Information and Privacy Commissioner. The decision was completed twenty-nine months after the complaints were initially received. No explicit extension was made until twenty-two months after those complaints, contrary to the statutory provision requiring notification within 90 days.[81] The ATA sought judicial review to quash the adjudicator's decision

[79] *ATA*, *supra* note 4 at para 52.
[80] Lewans, *supra* note 19 at 85.
[81] *Supra* note 4 at para 2.

owing to the violation of the 90 day period.[82] In the result, the Court reversed the decisions of the two lower courts and reinstated the adjudicator's decision.[83]

The timelines issue was not raised in front of the adjudicator, meaning there were no reasons offered to rebut the ATA's claim that a failure to give notice of an extension within the 90 day period was a ground for ending the proceedings.[84] Rothstein J therefore articulated the way in which the single reasonableness standard is to be applied when reasons are missing: "If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere."[85] Reviewing courts can expect to have to engage in this activity "when only limited reasons are required, [in which case] it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review."[86] But the search for possible reasons is limited: "It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one."[87] So, when explicit reasons are absent courts can determine whether there exists an implied justification that satisfies the criteria. If the reviewing court determines the decision is indeed justifiable then it is reasonable, meaning interference is prohibited. If a court cannot identify a possible set of reasons, or if the postulated reasons do not satisfy the three criteria, the court must provide an opportunity for the administrative decision maker to justify their position.

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[82] *Ibid* at para 3.
[83] *Ibid* at para 77.
[84] *Ibid* at para 51.
[85] *Ibid* at para 53.
[86] *Ibid* at para 54 [emphasis added].
[87] *Ibid* at para 55.

That *ATA* does not weaken the universal applicability of the three criteria is clear when the Court assesses the adjudicator's implied reasons. "The Commissioner and his delegated adjudicators have considered the issue… on numerous occasions and have provided a consistent analysis."[88] Rothstein J provided a detailed assessment of the Commissioner's prior 'consistent analyses' in terms of the three criteria.[89] Following the pattern set out in section 4 above, he assessed similar prior rulings according to the three criteria. According to the ruling in *ATA* then, when a court is required to postulate implicit reasons, the three criteria are the standards those reasons must satisfy; they therefore remain a necessary component of any assessment for reasonableness.

The one change to the role of three criteria Justice Rothstein's majority ruling in *ATA* makes is that a violation of either or both the transparency requirements, i.e., that (a) there be reasons that (b) have actually been contemplated as the basis for coming to a particular decision, does not automatically necessitate interference. This 'interruption' to interference follows from the fact that the absence of reasons is not sufficient to establish that a justification could not be produced. The rule of law is at least not always in danger and interference is therefore not always warranted if a decision is justifiable by reference to the legal framework, even if it has not actually been justified. Following *ATA*, in those rare cases that reasons are not provided, courts have two options: Either (i) they can

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[88] *Ibid* at para 56.

[89] *Ibid* at para 72: "In my view, the Commissioner's reasoning in support of his conclusion that extending the period for completion of an inquiry after the expiry of 90 days does not result in the automatic termination of the inquiry under s. 69(6) *FOIPA* satisfies the values of justification, transparency and intelligibility in administrative decision making. The decision is carefully reasoned, systematically addressing: (i) the text of the provision, (ii) the purposes of *FOIPA* in general and of s. 69(6), in particular, and (iii) the practical realities of conducting inquiries drawn from the Commissioner's experience administering *FOIPA*. It was reasonable for the Commissioner's delegated adjudicator, in *Order P2008-005*, to adopt this detailed reasoning and apply it to s. 50(5) *PIPA*." [emphasis added]

decide that reasons implied by the decision satisfy the criteria, or (ii) they can remit the matter to the decision maker to produce a justification. In either case, the criteria need to be satisfied; genuine, intelligible, and relevant reasons will still need to be produced.

5(b) *Maclean v. British Columbia (Securities Commission)*

Moldaver J's majority opinion in *Maclean v. British Columbia (Securities Commission)* provides additional support for two separate points defended in this chapter. Most obviously, it upholds the treatment of implicit reasons set out in *ATA* and thereby preserves the primary claim of section 5, i.e., that the three criteria are, in all cases, the substantive requirements imposed on administrative bodies by reasonableness, even when explicit reasons are absent. It also provides support for a claim implied by my analyses in section 4, i.e., courts reviewing for reasonableness are to confirm that a justification exists, and nothing more. More specifically, the ruling in *Maclean* shows that the relative quality of a particular justification as compared to other reasonable alternatives is not an assessment reviewing courts are permitted to undertake, thereby bolstering my claim that the relevance requirement serves as the threshold for judicial interference.

Patricia Maclean entered a settlement agreement with the Ontario Securities Commission (the OSC) in September of 2008, accepting bans in Ontario from trading securities for five years and from serving as an officer or director of some registered entities for ten years.[90] The misconduct leading to these bans occurred in 2001 or earlier.[91] In 2010, the British Columbia Securities Commission (the Commission) commenced secondary proceedings under the British Columbia *Securities Act* (the *Act*)

[90] *Maclean v. British Columbia (Securities Commission)* 2013 SCC 67 at para 8 [*Maclean*].
[91] *Ibid* at para 5.

against Maclean on the basis of her settlement agreement with the OSC. Those proceedings yielded a reciprocal order, subjecting her to identical bans in the province of British Columbia.[92] She appealed, arguing the six year limitation period in the *Act* barred the Commission from issuing the order.[93] In the result, the Court found the order implied a reasonable interpretation of the limitation period, and so dismissed Maclean's appeal.[94]

The basis of Maclean's action was that the phrase 'the events', used in s. 159 of the *Act* to mark the start of the limitation period, referred to her underlying misconduct and not her agreement with the OSC.[95] Since her last alleged misconduct occurred in 2001, and the Commission did not commence proceedings until 2010, the six year period had expired. No reasons were initially offered to rebut Maclean's assertion; "instead, the Commission issued its order and, in doing so, impliedly decided that the proceeding was not time-barred."[96] Like the ruling in *ATA* however, the Court was nonetheless able to examine reasons supporting the interpretation of the Commission, *viz*., those presented to the Court.[97] And as occurred in *ATA*, Moldaver J summarizes the basis of that interpretation[98] then proceeds to determine it is consistent with the ordinary meaning of the phrase,[99] its context in the statute,[100] as well as the broader purposes of secondary proceedings[101] and limitations periods.[102] So again, the Court repeats the same patterned approach to reasonableness demonstrated in section 4 above, accompanied by one

[92] *Ibid* at para 14.
[93] *Ibid* at para 16.
[94] *Ibid* at para 73.
[95] *Ibid* at para 35.
[96] *Ibid* at para 71.
[97] *Ibid* at para 72.
[98] *Ibid* at para 36.
[99] *Ibid* at para 44.
[100] *Ibid* at para 49.
[101] *Ibid* at para 54.
[102] *Ibid* at para 69.

additional step. First they identified a set of reasons that could be attributed to the decision maker, followed by the normal summary and subsequent assessment of their relevance given the legal context.

There is a sense in which the rulings in *ATA* and *Maclean* actually strengthen my claims about the universal applicability of the three criteria; even when missing, reasons that satisfy the criteria will either need to be inferred or produced before a reviewing court can conclude that an impugned decision is reasonable. Maintaining the rule of law demands that the decisions of administrative bodies be justifiable, meaning they will need to actually be justified when disputes arise. As I have claimed repeatedly throughout this chapter, the minimum requirements for any justification (legal or otherwise) is that there be (a) written or oral reasons that (b) are genuinely contemplated, (c) meaningful, (d) able to be consistently combined, and (e) relevant to the outcome given the context in which they appear. Though *ATA* and *Maclean* both restrict reviewing courts from automatically interfering with a decision that is not accompanied by reasons because it could be justifiable, neither frees administrative decision makers from eventually having to satisfy the criteria.

I end by highlighting a second important point made in *Maclean,* one that supports my claim that relevance is the threshold criterion for interference, *viz.*, the Court's assertion that interference is only permitted when the decision subject to review has been shown to be unreasonable. One unique feature of the dispute in this case is that, according to Moldaver J, both the appellant's and respondent's independent interpretations of 'the events' in s. 159 of the *Act* are reasonable.[103] The fact that both positions are reasonable, however, makes no difference since "the Commission holds the

[103] *Ibid* at para 37.

interpretive upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative maker, *even if* other reasonable decisions may exist."[104] Once a court confirms a justification exists according to the three criteria, interference is prohibited. The existence of alternative justifications supporting competing but nonetheless reasonable decisions is therefore of no consequence from the perspective of a reviewing court; it is not within a court's power to decide which is 'better', only to determine that the available reasons matter, given the legal context.

6. Conclusions – The Substance and Structure of Reasonableness Review

My primary goal in this chapter has been to articulate the clear and coherent framework of reasonableness review that has evolved since *Dunsmuir*. Achieving that goal has consisted in explaining how reasonableness requires courts to confirm the existence of a justification, and nothing more, a confirmation made by assessing reasons according to the three criteria. I began by noting the prevalence of the criteria in the case law. I then described the five distinct concepts they imply which, when taken in combination, constitute an 'existent justification'. The Supreme Court's repeated attempts to ensure those elements have been satisfied in the post-*Dunsmuir* case law revealed the internal structure applied in each reasonableness review: First the Court summarizes the reasons for the decision, an action that ensures understandable reasons exist. Then the Court attempts to determine whether those reasons actually matter to the decision adopted given the legal context.

One of the primary elements of the single reasonableness standard my analyses have been intended to clarify are the circumstances in which it demands judicial

[104] *Ibid* at para 40 [original emphasis].

interference. A failure to satisfy any one element of the three criteria results in a failure to produce a justification. A decision that is not justified is arbitrary and in that sense undermines the rule of law. So violating any one of the five elements is, at least in principle, a sufficient basis to warrant interference. In practice, however, the first four elements are almost always satisfied and are easily assessed; so long as a court can summarize the reasons offered then genuine, meaningful, and consistent reasons exist. Establishing that those reasons matter to the specific decision made in light of the legal context, by contrast, is more difficult. The result is that a review for reasonableness will in almost all circumstances be devoted primarily to establishing the relevance of the reasons offered. Not surprisingly, a failure to produce relevant reasons will serve as the most common basis for judicial interference. And when reasons are relevant, interference is prohibited out of respect for the foundational democratic principle.

The single reasonableness standard introduced by the majority in *Dunsmuir* (i) relies on a cluster of five familiar concepts that have (ii) been repeatedly applied by the Court according to a coherent pattern of analysis, (iii) an analysis that always relies on the same threshold as a basis for judicial interference. Readers will recall from my review of the scholarly literature in both Chapters 1 and 2 that one of the most prominent criticisms of the single reasonableness standard is that it has failed to clarify the process of judicial review. I take myself to have, at this point, shown that criticism is at the very least overstated with respect to these three aspects of reasonableness.

Chapter 4: The Clear Impact of the Single Reasonable Standard on Judicial Interference – the Difference between 'Relevance' and 'Adequacy'

1. Introduction

Having articulated the coherent framework that defines reasonableness in the Supreme Court case law, I now bolster my case for clarity by using that framework to resolve one question arising in the scholarly commentary. Specifically, I use it to characterize the reduction to the circumstances in which judicial interference is necessary. To properly situate my analysis, I remind readers of the dispute that arose in respect of its impact on interference: The majority in *Dunsmuir*, and a significant number of scholarly commentators, maintained the revisions to reasonableness neither increased nor decreased the need for judicial interference.[1] In his concurring reasons in *Dunsmuir*, Binnie J argued that the elimination of patent unreasonableness would likely increase instances of judicial interference, a position also well represented in the secondary literature.[2] Finally, Mullan suggested the single reasonableness standard signalled a reduction to the need for judicial interference, a view that has risen to prominence more recently.[3] My position falls in the last of these three groups; on my account, the single reasonableness standard has decreased the circumstances in which interference is necessary to uphold the rule of law.

My primary goal in this chapter is not to argue that the need for judicial interference has been reduced, since that position is well-defended. Instead my goal is to

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[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*] at para 48. See also *supra* at 31 for my sketch of this view.
[2] *Ibid* at para 141. *Supra* at 30 – 31 for my sketch of this view.
[3] David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117. *Supra* at 32 – 35 for my sketch of this view.

clearly characterize that reduction; using the framework, and in particular the relevance requirement, I explain why a reduction was unavoidable. According to the reasonableness *simpliciter* standard, courts were required to interfere with an administrative decision when the reasons failed to provide adequate support for the outcome in some circumstances. What I show is that the possibility of interference owing to inadequacy qualifies as a sixth basis for interference in addition to the five elements implied by the three criteria. So courts were not limited to merely confirming that a justification exists but were, in some cases, required to interfere on the grounds of unreasonableness when the reasons offered were insufficient to support the decision.

As I argued in Chapter 3, my account of relevance as the threshold criterion for interference was most clearly supported by Moldaver J's assertion in *Maclean* that courts must not interfere when reasonable alternatives exist, but only when the selected alternative has been shown to be independently unreasonable.[4] What is notably missing from my analyses, however, is an explicit statement prohibiting interference when the relevance requirement is satisfied but the decision is nonetheless weak. That pronouncement was made by Abella J in *NLNU v. Newfoundland & Labrador (Treasury Board)*: "Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the 'adequacy' of reasons is a stand-alone basis for quashing a decision..."[5] Justice Abella's assertion that adequacy is not a basis for interference, combined with my account of the

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[4] *Maclean v. British Columbia (Securities Commission)* 2013 SCC 67 [*Maclean*] at para 40.
[5] *NLNU v. Newfoundland & Labrador (Treasury Board)* 2011 SCC 62 [*NLNU*] at para 14. For a discussion of the significance of this statement see William Shores and David Jardine "Theirs to Reason Why: A Synopsis of the Administrative Law Jurisprudence Relating to Reasons" (2012) 25 Can J Admin L & Prac 253 who maintain at 264 – 67 that it is this assertion by Abella J, not the introduction of the single reasonableness standard in *Dunsmuir*, that restricts the permissibility of judicial interference. In response, I note merely that at least for Abella J, the inspiration for prohibiting adequacy as a basis for interference is explicitly found in *Dunsmuir*.

sense in which relevance is the threshold requirement for interference, set my primary task in this chapter; to clearly explicate the difference between an assessment of relevance and adequacy as a means of characterizing with precision the change to the circumstances in which interference is necessary.

In section 2 I articulate the distinction as it is normally understood. In section 3 I explain how *Dunsmuir* introduced a change by analyzing Iacobucci J's descriptions of the reasonableness *simpliciter* standard in *Southam*[6] and *Ryan*.[7] Finally, in section 4 I argue that there exists a clear explanation of this change, *viz*., interference owing to inadequacy cannot be allowed because inadequate reasons are not arbitrary reasons, meaning they present no threat to the rule of law. Interference on such grounds would therefore unnecessarily undermine the foundational democratic principle.

2. 'Relevance,' 'Adequacy,' and the Permissibility of Judicial Interference

In this section I present the distinction between 'relevance' and 'adequacy' to explain why an assessment for relevance implies fewer grounds for judicial interference. I rely on a textbook often used in first year Critical Thinking courses on Canadian university campuses, i.e., *Critical Thinking: An Introduction to the Basic Skills* (CTB).[8] The value of this text is its intended breadth: The authors strive to elaborate those aspects of human reasoning that are intuitively familiar to all. In other words, they attempt to identify and clarify relationships that obtain between familiar concepts easily expressed in natural language.

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[6] *Canada (Director of Investigation & Research) v. Southam Inc.* [1997] 1 SCR 748, [*Southam*].
[7] *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 [*Ryan*].
[8] William Hughes and Jonathan Lavery *Critical Thinking: An Introduction to the Basic Skills* 5th ed. (Peterborough, On: Broadview Press, 2008) ['CTB'].

The authors of CTB offer a clear summary statement of the distinction: "if the premises are irrelevant, then they give us no reason to think that the conclusion is true. But if the premises are inadequate, they provide some support for the conclusion, although this support may be too weak or inadequate to make the conclusion acceptable."[9] In other words, irrelevant reasons simply do not matter to the acceptability of a conclusion, whereas inadequate reasons matter but do not provide enough support to establish its acceptability. Accordingly, relevance is conceptually prior to adequacy: If a set of reasons are irrelevant to an outcome, they are by definition inadequate. If, by contrast, a set of reasons are relevant to an outcome, they may or may not be inadequate.

Establishing relevance according to CTB requires showing the reasons matter given the context in which they are presented.[10] To highlight the significance of context when assessing for relevance, the authors list common examples of irrelevant premises. These include reasons that depend exclusively on sympathy, or coercive threats, or popular opinion, or celebrity endorsements, or negative personal characteristics. When these sorts of reasons do not matter to the outcome they are intended to support it is because they are unsuitable to the context in which they appear.[11] One context in which each member of this particular list is irrelevant is when they are offered as part of an 'objective' justification. Since an appeal to emotion (sympathy, fear), or other people's beliefs (popular opinion, celebrity endorsements) is an appeal to individual and therefore subjective states of mind, such appeals are irrelevant to establishing an 'objective' truth (e.g., my feelings about global warming are irrelevant to the truth of global warming).

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[9] *Ibid* at 139.
[10] *Ibid* at 126.
[11] *Ibid* at 127 – 130.

That this account of relevance matches my analyses of the post-*Dunsmuir* case law in Chapter 3 seems obvious. As we saw then, after summarizing reasons subject to review the Court devotes the bulk of its efforts to articulating the legal context in which the decision has been made, in an effort to determine whether the reasons matter to the decision given that context. In the words of Mullan: "Issues of relevancy… normally boil down to questions of statutory interpretation."[12] Assuming that when courts appeal to the legal framework they are setting a context to assess for relevance is accurate, the practice of the Court matches the definition of relevance presented in CTB.

An inquiry into adequacy, by contrast, is concerned to establish that the strength of the conclusion and the strength of the reasons presented match. If, for example, it is claimed a set of reasons establish a conclusion 'with certainty' all the reasons must be 'true as a matter of certainty' to provide adequate support for that claim. Similarly, if the argument attempts to establish that the conclusion is 'more likely to be true than not', the reasons presented need to each be true on the balance of probabilities.[13] Some of the common examples of inadequate reasons discussed in CTB include mistaken appeals to authority, mistaken appeals to the absence of contrary evidence, fallaciously accepting slippery slope arguments, and mistaken assessments of causal relationships.[14] In each of these examples, the reasons do matter to the outcome; the problem is that they do not matter enough to provide the support the conclusion demands.

The only ruling discussed in Chapter 3 I can rely upon to connect this account of adequacy to my discussion is *Maclean*, specifically the complainant's position. Recall

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[12] David J. Mullan, *Administrative Law: cases, texts, and materials* 5th ed. (Toronto: Emond Montgomery Publications Ltd, 2003) [Mullan, 2003] at 905.
[13] CTB, *supra* note 8 at 140.
[14] *Ibid* at 142 – 150.

that the Court had to address the existence of two incompatible but nonetheless reasonable interpretations of the same legislative provision.[15] The appellant maintained hers was the better of the two; the support for her interpretation was stronger than the relative support available for the Commission's interpretation. In other words, she maintained that her reasons better supported her conclusion than the support provided by the Commission's reasons for its conclusions; in that sense her reasons were 'more adequate' than those of the Commission. We can extrapolate an account of an assessment for adequacy in a reasonableness review: A court assessing for adequacy must determine whether the reasons offered are among the set of better reasons that have already been shown to be relevant.

That inadequacy demands interference in a greater number of circumstances follows from the conceptual priority of relevance over adequacy. Reasons assessed for adequacy must have already been shown to be relevant, by definition. In this sense, an assessment for adequacy constitutes a sixth substantive requirement beyond the five implied by the three criteria and is therefore one more test that could serve as a ground for interference. Further, that particular addition would require courts to invoke qualities that define a 'good' justification as compared to alternative possible justifications. Whatever standards are devised, they will of necessity be an additional set of tests beyond those implied by the three criteria. So trying to determine whether a set of genuine, meaningful, and consistent reasons matter given a particular legislative context implies judicial interference will be necessary in fewer circumstances than if an additional assessment of the quality of those reasons was also required.

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[15] *Maclean*, *supra* note 4 at para 37.

3. The (Limited) Pre-*Dunsmuir* Possibility of Judicial Interference Owing to Inadequacy

This section explicates the limited sense in which inadequacy was a basis for interference according to the reasonableness *simpliciter* standard as defined in *Southam* and *Ryan*. By doing so, I draw the clear comparison with the post-*Dunsmuir* reasonableness framework. I show, in particular, that reasonableness *simpliciter* implied all five elements of the three criteria[16] and added a sixth ground for judicial interference, i.e., inadequacy.[17] I should note, however, that the limited possibility of interference owing to inadequacy was not actually realized in either decision. That is, the Court decided in both *Southam*[18] and *Ryan*[19] that the impugned administrative decision was reasonable. These results do not undermine my analyses in this chapter since I am only trying to characterize the possibility of interference on the grounds of inadequacy under

[16] Even though the three criteria were not explicitly introduced until *Dunsmuir*, their implicit components are, we will see, evident in Iabobucci J's descriptions of reasonableness *simpliciter*.
[17] That 'inadequacy' served as one basis for interference under reasonableness *simpliciter* seems to have been an evident feature of that standard; see, for example, Mullan, 2003 *supra* note 12 at 470: "A duty to give reasons means adequate reasons must be given;" and at 482: "The trend in the more recent case law is that a decision that is not accompanied by adequate reasons may be set aside as erroneous in law". Mullan also suggests that the introduction of reasonableness *simpliciter* in *Southam* increased the chances of interference owing to inadequacy when compared to the prior existence of only correctness and patent unreasonableness at 823: "it may be that we are presently in the middle of another swing of the pendulum back to greater interventionism". The suggestion that the reasonableness *simpliciter* standard provided more grounds for interference than the single reasonableness standard is made by G. Van Harten, G. Heckman, and D. J. Mullan, *Administrative Law: cases, texts, and materials* 6th ed. (Toronto: Emond Montgomery Publications Ltd, 2010) at 861 – 62: "The pre-*Dunsmuir* decision[s] of the Supreme Court [like *Southam* and *Ryan*]… revealed that a court, while deferring, may also need to review carefully the key evidence before a decision-maker in order to work out whether the decision-maker's conclusions were reasonable… the Court's definition of reasonableness… has changed with *Dunsmuir*." In other words, reviewing courts had been in some cases been required to interfere owing to the weakness of reasons, a requirement that does not appear to apply post-*Dunsmuir*.
[18] *Southam*, *supra* note 6 at para 63.
[19] *Ryan*, *supra* note 7 at para 59.

reasonableness *simpliciter*. I offer no discussion of the frequency with which reviewing courts actually used inadequacy as a basis to interfere in practice.[20]

Recall from Chapter 2 that reasonableness *simpliciter* served as a 'mid-point' between patent unreasonableness and correctness.[21] As I noted then Iacobucci J defined "[a]n unreasonable decision [as] one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination."[22] He expanded on what it would mean for a set of reasons to 'stand up to a somewhat probing examination' shortly thereafter:

> The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.[23]

We can infer from this passage that if courts are to assess the evidence or logical process of an administrative decision, it is necessary first that (a) there be a set of evidentiary and justificatory statements that are (b) actually treated by the body under review as support for their decision. Such an assessment also presupposes those reasons (c) can be understood by an English speaker. We need not merely infer that (d) the reasons offered need to be able to be consistently combined, since one of Iacobucci J's

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[20] The need to make this point explicit arises at least in part from Van Harten et al's choice to present the ruling in *Southam* as an example of a decision in which consistency with respect to the need for interference is preserved between the pre and post-*Dunsmuir* era, owing to the Court's finding that interference is not warranted: "*Southam* offers an example of deference doctrine in its most genuine form: an instance in which the court, out of respect for legislative choices about administrative decision making, disciplines itself by declining to interfere with a decision about which it holds significant reservations" (at 885).
[21] *Supra* at 22 – 23.
[22] *Supra* note 6 at para 56.
[23] *Ibid* [emphasis added].

two examples of an assessment of 'logical process' involves determining that the premises are not contradictory. We do, however, have to infer that an assessment of 'logical process' includes determining the reasons offered (e) matter to the plausibility of the outcome given the legal context. Inasmuch as an assessment of the validity of an argument is an assessment of adequacy, and an assessment of relevance is conceptually prior to an assessment of adequacy, relevance is presupposed.

I need to clarify my claim that Iacobucci J's reference to the validity of an inference is a reference to an assessment of adequacy. The 'inference' in any argument is the rational step from the premises to the conclusion;[24] in the case of an administrative decision, the move from the reasons to the outcome. If that inference is characterized as 'valid', then the claim being made is that the rational leap from those premises to that conclusion is a strong, or plausible, or good move; that is, the reasons offer enough support for the decision such that the decision actually is supported by those reasons. Inasmuch as the reasonableness *simpliciter* standard permitted courts to inquire into the adequacy of a set of reasons after having established that they are transparent, intelligible, and relevant, 'a somewhat probing examination' provided an additional ground for judicial interference above and beyond the three criteria.

Of course, the clearest statement that reasonableness *simpliciter* required interference owing to inadequacy in some circumstances comes in *Ryan*:

> At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.[25]

[24] See, for example, CTB, *supra* note 8 at 17.
[25] *Ryan*, *supra* note 7 at para 56 [emphasis added].

Apart from asserting the need for courts to assess the adequacy of the reasons presented, this passage also identifies two significant limits on interference owing to inadequacy. First, the administrative body's reasoning had to be assessed 'as a whole'; courts were not permitted to interfere owing to the inadequacy of a single (and/or set of minor) detail(s). Second, the reviewing court had to show they appreciated that 'the issue under review does not compel one specific result'. Even if the reasons were insufficient in some manner, courts nonetheless had to acknowledge the plurality of possibly reasonable outcomes; a weaker set of reasons would not always be unreasonable, in particular, if their 'weakness' entailed that only one possible alternative outcome remained. This limit arises because "there will often be no single right answer to the questions that are under review against the standard of reasonableness." [26]

The reduction that occurs to the need for judicial interference with the single reasonableness standard can, therefore, be characterized with a relatively high degree of precision simply by invoking the familiar distinction between 'relevance' and 'adequacy'. Remember the majority's locution when first setting out the three criteria: "reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility in the decision making process."[27] As explained, a primary concern with the 'existence' of a justification is importantly not a concern with the adequacy of that justification. Of course, the circumstances warranting interference prior to *Dunsmuir* were still limited. Specifically, reviewing courts were prohibited from interfering when the three criteria were satisfied and when, taken as a whole, the reasons were minimally

[26] *Ibid* at para 5.
[27] *Dunsmuir*, *supra* note 1 at para 47 [emphasis added].

adequate in the sense that they plausibly supported one of several reasonable outcomes. Following *Dunsmuir*, courts are limited to confirming the existence of a justification only; a court will need to interfere when and only when no justification exists, irrespective of whether it is minimally adequate in this sense.

4. Conclusions – Adequacy is Not Necessary to Ensure a Decision is Not Arbitrary, Not Necessary to Preserve the Rule of Law, Hence Not a Ground for Interference under the Single Reasonableness Standard

I begin my concluding remarks by making a concession; the reduction I have characterized in this chapter is probably not empirically noteworthy, i.e., I suspect a close analysis would show there has been no dramatic decrease in the instances of interference owing to unreasonableness since the ruling in *Dunsmuir*. Since no clear reduction to judicial interference as a result of the single reasonableness standard is evident, the change that I have characterized is primarily conceptual in nature. Given the Court's tendency since *Dunsmuir* to prefer "on-the-ground guidance"[28] over distracting conceptual investigations, the need for my analysis might not be obvious; if the revisions to reasonableness have not actually had a discernable practical impact on the frequency with which judicial interference is necessary, why does it matter that the change can be precisely characterized using the distinction between relevance and adequacy?

As I noted at the outset, the primary goal of characterizing the reduction to interference brought about in *Dunsmuir* is to support my specific argument in Chapter 3 and broader argument throughout this project, *viz*., that the framework of the single reasonableness standard is clear and coherent. The three criteria, and in particular the

[28] *Dunsmuir*, *supra* note 1 at para 43.

Court's focus on determining that the reasons under review are relevant to the outcome given the particular legal context, serve as the foundation for understanding the nature of the change as elaborated. When the elements of the single reasonableness standard are recognized as components of the reasonableness *simpliciter* standard, they (i) reveal the continuity of reasonableness review pre and post-*Dunsmuir* and (ii) explicate the sense in which interference owing to inadequacy served specifically as a limited additional basis for interference. So the charge in the scholarly commentary that the single reasonableness standard is unclear is overstated in yet another sense; the clarity of the framework implied by the three criteria provides a means of articulating with precision the conceptual character of the change to the need for interference those criteria have brought about.

More importantly, understanding the reduction to interference brought about by the single reasonableness standard in terms of the difference between relevance and adequacy, when considered in combination with my analyses in earlier chapters, points toward an explanatory principle: Interference owing to inadequacy is prohibited because it is not necessary to uphold the rule of law, and would therefore unnecessarily undermine the foundational democratic principle. To show this explanation emerges from my prior analyses, I retrace my steps.

First the rule of law and the courts. Recall from Chapter 1 that one of the primary features of a state in which the rule of law obtains is that any exercise of state authority is justifiable by reference to the pre-established rules. This requirement ensures actions of the state are not merely a function of the individual whims of those in positions of power, i.e., that no such actions are arbitrary. It is primarily and ultimately the role of the courts

to ensure that state actions are justifiable in this manner.[29] That the Supreme Court of Canada understands the rule of law as a requirement prohibiting arbitrary state action, respect for which is maintained by the courts, is apparent as far back as Rand J's concurring opinion in *Roncarelli v. Duplessis.*[30] That the Court considers a review for reasonableness in particular a means by which to ensure administrative decisions are not arbitrary was set out, in a preliminary way, by the requirement in *Baker v. Canada (Minister of Citizenship & Immigration)* that those decisions would, in most circumstances, need to be accompanied by reasons.[31]

One means by which I showed the single reasonableness standard is clear in Chapter 3 was by articulating the narrow circumstances in which interference owing to unreasonableness is necessary to preserve the rule of law. Specifically, only when there are no reasons, or those that do exist are not genuine, meaningful, consistent, or relevant to the outcome given the legal context will interference be warranted, because it is only in those circumstances that the rule of law is in danger. My analyses in this chapter have shown that reasonableness *simpliciter* contained an additional basis for interference, a basis that has since been subtracted explicitly from reasonableness review by Abella J in *NLNU, viz*., interference owing to the inadequacy of a set of reasons. This subtraction suggests that in the eyes of the Court, avoiding an arbitrary exercise of state power does not require determining which of the set of possible justifications for competing reasonable decisions is among the 'best'.

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[29] *Supra* at 10 – 14 for my summary of some of the dominant views in the scholarly literature on the rule of law.
[30] *Roncarelli v. Duplessis* [1959] SCR 121 at para 44. *Supra* at 15.
[31] *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 at para 43. *Supra* at 16.

The plausibility of this explanation can be increased by identifying the intuition upon which it is based; a decision that is poorly justified is, nevertheless, justified. As we saw in the post-*Dunsmuir* case law, a justification exists when the decision maker has presented reasons that satisfy the criteria. Any decision supported by reasons that satisfy the criteria is, by definition, not merely a product of the subjective and arbitrary whims of the decision maker. It follows that requiring a decision maker to ensure transparent, intelligible, and relevant reasons are also adequate, i.e., among the set of better available reasons, is not necessary to produce a justification. Any requirement that a reasonable justification be 'one of the better ones,' by comparison, demands both that the decision not be arbitrary and that it invoke a strong justification. While it may well be desirable to require administrative decision makers to select 'better' justifications for their decisions, satisfying that requirement is not necessary to ensure their decisions are not arbitrary, hence not necessary to uphold the rule of law. And since the Court maintains that the rule of law is to be sustained in a manner that minimizes interference with the foundational democratic principle, allowing interference on grounds that exceed what is necessary would be 'undue'.[32]

At the outset of this project I asserted a primary sense in which the framework of reasonableness that has emerged in the case law since *Dunsmuir* is coherent was the single balancing principle it sought to implement: Judicial interference with an administrative decision owing to unreasonableness should occur only when interference is necessary to preserve the rule of law; in all other cases, interference should be prohibited. The change I have articulated in this chapter, when combined with my

[32] *Dunsmuir*, *supra* note 1 at para 27; *Supra* at 1.

analyses of the three criteria in Chapter 3, shows this principle is a plausible explanation of that change. The Court has come to recognize that even a limited assessment of adequacy is not necessary to uphold the rule of law and should therefore not be included as a possible basis for interference owing to unreasonableness out of respect for the wishes of Parliament and the provincial legislatures, as expressed by administrative bodies.

Chapter 5: The Three Criteria Determine the Range of Reasonable Outcomes

1. Introduction

To complete my account of the sense in which the framework of the single reasonableness standard is clear and coherent I must explicate the relationship between the three criteria and the second 'concern' of a review for reasonableness, i.e., the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."[1] The characterization I defend was implied by my arguments in Chapters 3 and 4:

> Any set of reasons that satisfy the five elements of the three criteria justify an outcome that falls within the reasonable range; a set of reasonable reasons always produce a reasonable outcome, necessarily.

In Chapter 2 I appealed to the *Dunsmuir* majority and Abella J's ruling in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*[2] to show that the three criteria are conceptually prior to the range of reasonable outcomes. My position in this chapter is stronger; I argue the three criteria ought to be understood as the lone elements of a review for reasonableness and therefore determine in its entirety the possible scope of the reasonable range.

The need to defend an account of (rather than simply describe) the relationship between the criteria and the range of reasonable outcomes is not merely, or even primarily, a result of my desire to provide a complete analysis of the reasonableness standard. It is, instead, a product of the locution used by the majority in *Dunsmuir* when first describing reasonableness. Specifically, the Court refers to the three criteria and the reasonable range as the two contrasting, and so seemingly distinct, 'concerns' of a review

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[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*] at para 47.
[2] *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)* 2011 SCC 62, [*NLNU*].

for reasonableness. The sense in which that locution is confusing was first described by Mullan:

> [I]t is not clear whether... [a reviewing] court must [after an assessment according to the three criteria] go on and ask the further question whether, in isolation from the reasons provided, the outcome can be justified as reasonable in the sense of coming within what the reviewing court regards as an acceptable range of results by reference to its own assessment of the matter.[3]

By contrasting the three criteria and the reasonable range, Bastarache and Lebel JJ could be understood to have characterized reasonableness as a two-step test, or not. If reasonableness is indeed a standard that includes two separate grounds for assessment, then the second step is vague; no means of identifying the limits of that range are suggested apart from a reviewing court's 'own assessment of the matter'.

The characterization of reasonableness by the Nova Scotia Court of Appeal in *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)*, discussed in Chapter 3,[4] explicitly interpreted the *Dunsmuir* majority to mean that the standard invokes two separate assessments. According to Fichaud JA, "the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes."[5] This 'two-step' interpretation of reasonableness was, shortly thereafter, rejected by Binnie J in *Khosa v. Canada (Minister of Citizenship & Immigration)*.[6] It was again rejected by Abella J in *NLNU*: "the reasons must be read together with the outcome and serve the purpose of

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[3] David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117 at 136.
[4] *Casino Nova Scotia v. Nova Scotia (Labour Relations Board)* 2009 NSCA 4 Supra at 40 – 45.
[5] *Ibid* at para 30 [emphasis added].
[6] *Khosa v. Canada (Minister of Citizenship & Immigration)* [2009] 1 SCR 339 [*Khosa*] at para 59.

showing whether the result falls within a range of possible outcomes."[7] In respect of the relationship between the three criteria and the reasonable range, Abella J eliminated the confusion most explicitly; satisfying the criteria shows the supported outcome falls within the range. There is only one test, and a set of reasons that pass that test yield a reasonable outcome necessarily.

In *Catalyst v. North Cowichan,* the ambiguity that had seemingly been resolved in *NLNU* is reintroduced. The Court needed to assess the reasonableness of a municipal bylaw. While describing the application of reasonableness McLachlin CJ, writing for the unanimous court, abruptly severs the three criteria from the reasonable range:

> Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws. To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the Council Chamber.[8]

Unlike the rulings in *ATA* [9]and *Maclean*,[10] applying reasonableness to municipal policy decisions is problematic owing not to missing reasons, but to the democratic and deliberative character of municipal bodies. Since elected municipal policy-makers cannot be required to produce reasons for their policy decisions, there will never be reasons (implicit or otherwise) to scrutinize with the criteria. The Court therefore applies the reasonableness standard by relying on the range of reasonable outcomes only.[11] This application entails that not only does reasonableness include two separate elements, but the three criteria are not universally applicable. Relying on the understanding set out in

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[7] *Supra* note 2 at para 14.
[8] *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2 [*Catalyst*] at para 29.
[9] *A.T.A. v. Alberta (Information & Privacy Commissioner)* 2011 SCC 61 [*ATA*].
[10] *Maclean v. British Columbia (Securities Commission)* 2013 SCC 67 [*Maclean*].
[11] *Supra* note 8 at para 32.

Catalyst, the range of reasonable outcomes has been treated as a second separate standard of assessment by both the Court[12] and at least one recent scholarly commentator.[13]

I have, over the course of Chapters 3 and 4, argued reasonableness is clear in four particular senses: It (i) invokes a cluster of familiar concepts, (ii) applied according to a consistent pattern of analysis, that (iii) relies on the same conceptual threshold as a basis for interference. Finally (iv) the need for interference to preserve the rule of law is reduced when compared to how that need was defined by the pre-*Dunsmuir* standard of reasonableness *simpliciter* by eliminating the possibility of interference owing to inadequacy. If, however, the range of reasonable outcomes is a separate standard as McLachlin CJ's ratio in *Catalyst* maintains, the substance of the reasonableness standard is not very clear at all, since it cannot merely consist in the five elements of the three criteria. And if the three criteria are not the only substantive elements of reasonableness review, my claim that relevance is the threshold for interference is false. It is also likely my claim in Chapter 4 that the single reasonableness standard reduces the permissible instances of judicial interference is similarly false. At the very least, whatever reduction occurs can no longer be characterized merely by reference to the distinction between 'relevance' and 'adequacy'.

I therefore complete my characterization of the clarity of reasonableness since *Dunsmuir* by first setting out the initially coherent account of the relationship between

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[12] See, for example, *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36 at para 90.

[13] See Paul Daly "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 213 – 248 [Daly *CBAL*] at para 76: "A decision that falls into one of the reasonableness categories can be reviewed deferentially. Here too there are safeguards. The Court has emphasized that a deferential standard of review permits judicial intervention where the administrative decision lacks "justification, intelligibility and transparency" or falls outside the "range" of acceptable outcomes" [emphasis added].

reasons and outcomes, then rescuing my arguments from the confusion of *Catalyst*. In section 2 I argue a careful interpretation of the introduction to the reasonableness standard does not support the two-standard reading. In section 3 I analyze the rulings in *Khosa* and *NLNU* to highlight the post-*Dunsmuir* characterization of reasonableness as an assessment focused exclusively on determining whether the criteria are satisfied.

In section 4 I engage the ruling in *Catalyst*. I argue that the Court does not actually apply the reasonableness standard, for two reasons: First, the application does not match the characterizations of reasonableness outlined in Chapter 3. Second, the application of reasonableness does resemble another standard for judicial review developed in the seven years leading up to *Dunsmuir*, i.e., the 'broad and purposive approach' to correctness.[14] By showing the Court actually relied upon correctness, I preserve my account of the role of the criteria because they were not 'severed' from the reasonable range. I end by arguing, relying on Jared Craig's predictions about the impact of the single reasonableness standard on municipal law, that a 'two-standard' account of reasonableness is undesirable because it undermines the goal of a single reasonableness standard. Specifically, it admits the possibility that reviewing courts will interfere when a decision is not arbitrary and thereby unnecessarily undermine the foundational democratic principle.

2. The Criteria and the Range of Reasonable Outcomes in *Dunsmuir*

In this section I argue the *Dunsmuir* majority's choice to invoke the 'range of reasonable outcomes' as a contrast against the three criteria does not introduce a second

[14] First introduced in *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 [*Rascal Trucking*] at para 18.

separate standard of assessment. In 2(a) I show the contrast drawn by the majority can be plausibly construed as an attempt to distinguish the conceptual role of the reasonable range; it is produced and therefore limited by the set of possible reasons that could satisfy the criteria. I then explain what that distinct role was likely meant to highlight in 2(b), *viz.*, that decisions subject to a review for reasonableness do not admit a uniquely correct outcome.

2(a) 'But it is also...'

In the sentence immediately following the introduction of the three criteria the *Dunsmuir* majority invoked the idea of a range of reasonable outcomes to complete their description: "<u>But it is also</u> concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."[15] An interpretation of this sentence focused only on the phrase 'but it is also' suggests it establishes the conceptual independence of the reasonable range from the three criteria. Those four words seem to clearly indicate a reviewing court is not merely concerned with confirming the existence of genuine, meaningful, and consistent reasons that are relevant given the legal context, but that they are also, and therefore independently, concerned to determine whether the outcome falls in the reasonable range. The problem with that interpretation is its narrow focus. Specifically, it fails to recognize the way in which the contrast is qualified by the last clause, i.e., that any member of the acceptable range must be 'defensible in respect of the facts and the law'.

[15] *Dunsmuir*, *supra* note 1 at para 47.

Consider first the meaning of the word ‘defensible’. In the absence of any indicators of a qualified definition, it is a synonym for ‘justifiable’. So requiring that an outcome be ‘defensible’ just is to require there be reasons that either have been or could be presented to justify (i.e., defend) the selected outcome. Since, following my analyses of the post-*Dunsmuir* case law in Chapter 3, a set of reasons only ‘justify’ when they satisfy the criteria, any outcome falling within the ‘range of outcomes that are defensible’ is justified, by definition. To suggest otherwise would imply there are unidentified grounds for determining ‘the defensibility’ of an outcome apart from the three criteria, and nothing in the majority opinion suggests that that is the case. Instead, this consistent emphasis on the importance of reasons as the focus of reasonableness review merely asserts that defensible reasons yield defensible outcomes; decisions within the reasonable range are produced by reasonable reasons.

This interpretation of ‘defensible’ is further supported by the final portion of the qualifier, i.e., that the justification be made by an appeal to ‘the facts and the law’. To require an appeal to the facts and the law in the context of a reasonableness review is, as I established in my survey of the case law in Chapter 3, to require that that outcome follows from reasons that are relevant in the context of the case. The facts determine which elements of the legal framework define the sorts of considerations the administrative body must make, which in turn identify the sorts of reasons that would qualify as relevant. Once those legal elements have been identified, the task before the reviewing court is to determine that the reasons offered do indeed conform. So again, any outcome supported by relevant reasons will ‘fall within the range of acceptable, possible reasons’.

As a final point of support for interpreting the reasonable range as the product of any set of reasons that could satisfy the three criteria, consider Justice Bastarache's extra-judicial response to the 'confusion' attributed to that sentence by Mullan above:

> I find it difficult to contemplate a situation where rational and coherent reasons could somehow arrive at a conclusion that is not within the range of acceptable outcomes. Certainly, where only one outcome is preferred, such as on a correctness standard, this would be possible. But such is not the case on a reasonable standard, where deference necessarily permits a number of possible, reasonable conclusions.[16]

So the range of reasonable outcomes is not a second standard of assessment since, according to Bastarache J, it is not possible for a set of reasons to satisfy the three criteria and somehow not fall within the reasonable range. The possibility of reasons that satisfy the criteria and nonetheless warrant judicial interference exists only in the context of a review for correctness, wherein 'only one outcome is preferred'. The 'but it is also...' locution does distinguish the three criteria from the reasonable range. But that distinction is between the process of assessing reasons and the result of that process, not two separate bases of assessment.

2(b) 'The Reasonable Range' Emphasizes the Plurality of Possibly Acceptable Outcomes

If the qualifier 'defensible in respect of the facts and the law' as applied to the range of reasonable outcomes simply invokes the three criteria, it would appear that the Court is being redundant; it is not obvious what feature of decisions subject to review for reasonableness the term is meant to clarify. What I offer in this section is an explanation of the purpose of 'the range of reasonable outcomes'; it emphasizes the plurality of

[16] The Honourable Michel Bastarache "Modernizing Judicial Review" (2009) 22 Can J Admin L & Prac 227 at 236.

possible outcomes courts should expect, and are required to accept, when undertaking a reasonableness review. The means by which reviewing courts accept that plurality is by restricting their assessment to determining whether the reasons offered satisfy the three criteria.

Throughout their opinion in *Dunsmuir*, Bastarache and Lebel JJ repeatedly emphasized that a given reasonable outcome is only ever one among many. So, for example, the earlier distinction between patent unreasonableness and reasonableness *simpliciter* was difficult to articulate in part because "both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported."[17] Immediately preceding the introduction of the three criteria the majority reiterates a similar idea: "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions."[18] In describing reasonableness then, the Court consistently returned to the notion that the existence of a set of discretionary options are open to bodies subject to reasonableness review, a feature they referred to as a 'reasonable range'.

The idea that reviewing courts must recognize the existence of a plurality of possibly reasonable outcomes did not, of course, begin in *Dunsmuir*. As I noted during my discussion of the limits on interference owing to inadequacy in Chapter 4 for example, Iacobucci J's characterization of reasonableness *simpliciter* in *Ryan v. Law*

[17] *Supra* note 1 at para 41.
[18] *Ibid* at para 47.

Society (New Brunswick) also emphasized the pluralism inherent in decisions subject to reasonableness review:

> There is a further reason that courts testing for unreasonableness must avoid asking the question of whether the decision is correct. Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.[19]

The decision in *Ryan* also explained how courts were to respect the plurality of options: "How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal."[20] So owing to the pluralistic character of decisions subject to a review for reasonableness and the need for reviewing courts to respect that plurality, they had to restrict their assessment to the reasons offered in support of a particular outcome. A focus on reasons minimizes the chance that a reviewing court will, by assessing the reasonableness of the outcome independently, fail to recognize that plurality and impose their preferred outcome without regard for the reasons given.

Assuming the *Dunsmuir* majority's several references to 'a range of acceptable outcomes' is not simply a redundant second reference to the three criteria, it is most plausibly intended to emphasize the pluralistic nature of decisions subject to a review for reasonableness. Courts are to refrain from seeking a singularly best outcome because doing so is not within their power; it is not the kind of assessment needed to uphold the rule of law because any decision that satisfies the criteria is justified and so is not arbitrary, by definition. Following the suggestion of Iacobucci J in *Ryan*, the means by

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[19] *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20 [*Ryan*] at para 51.
[20] *Ibid* at para 54.

which courts accomplish that task is by remaining exclusively focused on the reasons offered in support of the decision subject to review.

Note that this explanation is consistent with my analyses of the post-*Dunsmuir* case law. As I showed in Chapter 3, the Court is only willing to interfere when the reasons supporting the decision fail to be relevant in light of the legislative context. It follows that the two 'concerns' of a review for reasonableness distinguished by the majority in *Dunsmuir* are, and have for the most part been interpreted as, the process by which the assessment is conducted and the expected results of that process. A set of reasons that satisfy the three criteria always and necessarily produce a decision that falls within the range of acceptable outcomes.

3. The Criteria and the Range of Reasonable Outcomes in *Khosa* and *NLNU*

I now show the opinions in both *Khosa* and *NLNU* offer clear support for my interpretation of the relationship between the three criteria and the reasonable range as defined by the majority in *Dunsmuir*. According to both rulings, any outcome that falls within the reasonable range is, by definition, the product of a set of reasons that satisfy the three criteria. In both decisions, references to the 'range of reasonable outcomes' are most plausibly understood as an effort to emphasize the importance of courts refraining from interference just because the decision does not match a preferred outcome. Finally, both rulings hold that courts respect the plurality of possible outcomes when they remain exclusively focused on confirming that a justification exists, i.e., by only assessing the reasons provided according to the three criteria.

3(a) *Khosa*

The issue before the Court in *Khosa* concerned the respondent's request for special relief against a valid removal order on humanitarian and compassionate grounds. That request was denied by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, a decision that was overturned by the Federal Court of Appeal.[21] In their result, the majority conclude the ruling of the IAD was reasonable and restore their decision.[22]

That Justice Binnie sees the three criteria as the only standards of assessment in a reasonableness review, standards which when satisfied necessarily produce a reasonable outcome, is most clearly indicated by his summary of the *Dunsmuir* majority's introduction to the single reasonableness standard:

> Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law.' There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.[23]

A reviewing court must 'determine' whether an outcome falls within the reasonable range, and they make that determination by ensuring 'the process and outcome fit comfortably with' the three criteria. The criteria are therefore the standards used to assess the reasons and when the reasons presented satisfy those standards, the resultant decision just is a member of the set of reasonable outcomes. "*Dunsmuir* thus reinforces… the

[21] *Supra* note 6 at para 2.
[22] *Ibid* at para 4 and para 68.
[23] *Ibid* at para 59.

importance of reasons, which constitute the primary form of accountability of the decision maker to the applicant, to the public and to a reviewing court."[24]

That a decision falls within the reasonable range when and because it satisfies all five elements of the three criteria is further evidenced by Binnie J's application of reasonableness. Consistent with the pattern of analysis I articulated in Chapter 3, he first summarizes the reasons of both the majority and minority decisions of the IAD panel.[25] He then sets out the relevant legislative provisions, which demand the IAD determine "whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so."[26] In the eyes of the majority, "this is [just] the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts."[27] So the IAD made a decision based on its best assessment of the available evidence, as required by its enabling legislation. Having done so, it simply follows for the Court that the IAD decision falls within the range of reasonable outcomes; the necessary consequence of confirming that a justification exists in that legislative context.[28]

That Binnie J appreciates the sense in which a 'range' entails a possible plurality of acceptable outcomes is most evident in his finding that the majority and dissent of the IAD panel successfully justify their respective positions. "[B]oth the majority and

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[24] *Ibid* at para 63.
[25] *Ibid* at paras 8 and 9.
[26] *Ibid* at para 66.
[27] *Ibid* at para 64.
[28] *Ibid* at para 67.

dissenting reasons of the IAD disclose with clarity the considerations in support of both points of view, and the reasons for the disagreement as to outcome."[29] By characterizing the minority position of the IAD as reasonable, Binnie J makes a point similar to the point made by the Court earlier in *Ryan* and later in *Maclean*; since reasonableness does not require a uniquely correct outcome, the existence of a plurality of such outcomes is to be expected. It follows by implication that the mere existence of an alternative reasonable outcome cannot serve as grounds for interference; only when the reasons for the impugned decision cannot satisfy the criteria is the decision independently unreasonable, hence not a member of the range of reasonable outcomes.

I end my analysis of *Khosa* by noting the sense in which the majority opinion implicitly relies on a point made most clearly by Iacobucci J in *Ryan*; the means by which reviewing courts demonstrate the requisite sensitivity to the possibility of a plurality of reasonable outcomes is by strictly limiting their assessment to the reasons offered in support of the decision made. That narrow focus helps courts resist the temptation to choose according to their preferences, a temptation that will likely be more pronounced when competing but otherwise reasonable alternatives exist. In this case, the reasons offered by both the majority and minority of the IAD qualify as an existent justification. Since the three criteria do not, however, allow for the possibility of interference owing to inadequacy, the presence of reasonable (and even objectively better) alternatives makes no difference to a determination of reasonableness. Again, the only concern is the reasons offered in support of the decision made.

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[29] *Ibid*.

3(b) *NLNU*

In *NLNU* the Court had to determine the reasonableness of a labour arbitrator's finding that time as a casual employee did not count when calculating vacation benefits for those casual employees that had subsequently been hired on a permanent basis.[30] The court of first instance accepted the position of the union and overturned the arbitrator's decision on the grounds that the reasons needed to both conform to the three criteria (which the chambers judge determined they did) and needed to be minimally adequate (which he determined they were not).[31] The Court of Appeal overturned the decision of the lower court, acknowledging that while stronger reasoning might have been available, the reasons offered nonetheless satisfied the three criteria and therefore did not require interference.[32] In the result, Abella J dismisses the union's appeal and upholds the finding of the tribunal.[33]

One of the primary questions of law before the Court in this case is exactly the issue I am addressing in this chapter, i.e., whether the criteria and reasonable range are two separate standards of assessment. The chambers judge undertook two separate assessments. The problem with that approach, according to Abella J, is that it fails to properly capture the role of the three criteria in establishing reasonableness: "[T]he reasons [of administrative decision makers] must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[34] Consistent with the rulings in *Dunsmuir* and *Khosa*, Abella J interprets the

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[30] *Supra* note 2 at para 5.
[31] *Ibid* at para 8.
[32] *Ibid* at para 9.
[33] *Ibid* at para 26.
[34] *Ibid* at para 14.

three criteria as the only means of determining reasonableness, criteria which when satisfied yield an outcome within the reasonable range.

Justice Abella's reference to the reasonable range, as in *Dunsmuir* and *Khosa*, emphasized the need for reviewing courts to be cognizant, and sensitive to the possibility of, a plurality of acceptable outcomes:

> The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.[35]

In other words, reviewing courts must recognize that reasonable alternative options will exist, but their mere existence will not be sufficient to show the option selected is unreasonable. Following the majority in *Khosa*, the Court implies that the temptation to interfere in favour of a preferred outcome is avoided by remaining focused on the assessment of reasons. By paying 'respectful attention' to the reasons offered as opposed to the possibility of alternative reasonable outcomes, reviewing courts minimize the chance they will give in to the temptation to satisfy their individual preferences.

I have, over the course of sections 2 and 3, established that reference to the range of reasonable outcomes by the Court in and shortly after *Dunsmuir* is not plausibly interpreted as a second, independent standard of assessment within reasonableness. It is, instead, best understood as the product of any set of reasons that satisfy the three criteria; any outcome supported by such reasons is justified and so is by definition reasonable. The purpose of that description is to tailor the expectations of courts engaged in a review for reasonableness; they ought to expect that the reasons and outcome they are

[35] *Ibid* at para 17.

scrutinizing are only one among many possibly reasonable outcomes. Creating that expectation is important because it helps to emphasize the sense in which, when competing reasons that satisfy the criteria and their concomitant outcomes are presented by a party seeking judicial review, courts should not rely on their mere existence as a basis for interference. The consistently implied means by which courts avoid the temptation to interfere in favour of a reasonable outcome they find preferable is to remain narrowly focused on the reasons provided, without regard for the possible alternatives.

4. An Assessment of Reasonableness by Reference to the Range of Reasonable Outcomes Only: A Critical Analysis of *Catalyst v. North Cowichan (District)*

Chief Justice McLachlin's ruling in *Catalyst* upsets this clear account of the relationship between reasons and outcomes. The confusion returns owing to her pronouncement that *intra vires* municipal policy decisions need not be accompanied by reasons, but are nonetheless subject to reasonableness review. That claim represents a sharp amendment to my account of the single reasonableness standard; satisfying the three criteria cannot be the lone means by which to establish the reasonableness of an outcome if there are, and can be, no reasons to assess. Moreover, the only remaining element of the reasonableness standard once the three criteria are abandoned, *viz*., the range of reasonable outcomes, must provide some basis for assessment that is independent of those provided by the criteria. Preserving my account of reasonableness in this project therefore demands I show either that it can accommodate the elimination of the three criteria, or that the Court in *Catalyst* made some sort of error.

I argue in this section that the test used to assess an *intra vires* municipal policy decision in *Catalyst* is not reasonableness, notwithstanding the Court's explicit assertion to the contrary. The test applied is, instead, the 'broad and purposive approach to correctness' developed in the years leading up to *Dunsmuir*. In 4(a) I review the ruling in *Catalyst*, emphasizing the way in which the Court's reliance on legislation differs from the appeals normally made to the legal framework in a reasonableness review. In 4(b) I outline the broad and purposive approach to correctness and articulate the way in which it resembles the standard described in *Catalyst*. I end in 4(c) by arguing that allowing municipal policy decisions to be subject to reasonableness review would actually thwart the goal of restricting judicial interference to those circumstances in which it is necessary to prevent arbitrary decision making, and therefore unnecessarily threatens the foundational democratic principle.

To provide some preliminary support for my argument, I outline some of the prior discussion among commentators about the implication of the majority ruling in *Dunsmuir* on the treatment of municipal bodies. The possibility that the single reasonableness standard might not be able to accommodate the large variety of administrative bodies subject to judicial review, and municipal bodies in particular, has loomed since its introduction. The concern was first raised in Binnie J's minority opinion in *Dunsmuir*, wherein he noted that part of the value of two reasonableness standards was that they helped reviewing courts recognize "that different administrative decisions command different degrees of deference, depending on who is deciding what."[36] The concern that the revised reasonableness standard might not be able to accommodate municipal

[36] *Dunsmuir*, *supra* note 1 at para 136.

decision makers in particular was partially explored by Basile Chiasson. He argued the single reasonableness standard will require a recalibration of the judicial review of municipal decisions which will in turn "sew a new standard of review [uniquely tailored to] municipal decision making."[37] In other words, the character of municipal bodies will ultimately lead to the re-introduction of a third standard of review.

The stronger claim that the judicial review of municipal decisions actually demands a third standard of review is defended by Jared Craig.[38] On his account, the majority ruling in *Dunsmuir* implies that municipal decisions will be assessed for reasonableness because municipal decisions demand deference.[39] He proceeds to argue that this result is a problem because reasonableness cannot be respectful of the status of municipal bodies as democratic institutions.[40] He maintains a jurisdictional 'threshold test' would be more likely to provide that respect, owing to the limited question courts would be permitted to ask:

> Whether government action is authorized would be a jurisdictional question, construed narrowly. Was the municipal action within the general scope of what the legislature contemplated when it granted power to the municipality? Is a municipality clearly acting beyond its powers or for a clearly improper purpose?[41]

As will become clear in 4(b), the 'threshold test' Craig describes is nearly identical to the test the Court actually conducts, i.e., the broad and purposive approach to correctness.

I am not the first to maintain that the Court in *Catalyst* failed to accurately identify the standard of judicial review it applied. According to Daly, the ruling in

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[37] Basile Chiasson "*Dunsmuir v. New Brunswick*: Municipal Implications of the Changing Landscape – Small Tremors, or Big Earthquakes" delivered at the International Municipal Lawyers Association 73rd Annual Conference, Las Vegas, Nevada, 2008 at 26.
[38] Jared Craig "Defending City Hall After *Dunsmuir*" (2008) 46 Alta L Rev 275.
[39] *Ibid* at para 30.
[40] *Ibid* at para 42.
[41] *Ibid* at para 52.

Catalyst reintroduces patent unreasonableness.[42] In a manner that vindicates Chiasson's and Craig's respective predictions, Daly maintains the ruling shows a "third standard is necessary… the spectrum of factors in *Catalyst* cried out for a highly deferential approach,"[43] a degree of deference simply not available under the single reasonableness standard. So while no commentator maintains the ruling in *Catalyst* invokes the broad and purposive approach to correctness, at least three acknowledge the single reasonableness standard cannot accommodate municipal bodies, and one argues that ruling in particular does not rely on the reasonableness standard set out in *Dunsmuir*.

4(a) The Ratio in *Catalyst*: A Uniquely Uncharacteristic Description of 'Reasonableness'

My goal in this section is to highlight the differences between the descriptions of reasonableness review presented in *Catalyst* as compared with the descriptions of that standard considered in Chapter 3. Toward that end, I begin with a sketch of the facts in the case and the ratio. I then identify and articulate what I take to be the most significant difference in the Court's attempt to describe reasonableness without reference to the three criteria, *viz.*, the role of legal context. Rather than using legislation as a means of establishing the relevance of a set of reasons without regard for the outcome those reasons support, legislation is used as the means by which to determine which outcomes are acceptable. For reasons that will be clear by the end of 4(b), the contrast between *Catalyst* and the rulings from the case law reviewed in Chapter 3 is so significant it suggests the Court did not assess for reasonableness at all.

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[42] Paul Daly "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill 1 483 at 501.
[43] *Ibid* at 504.

Catalyst Corporation had, since its formation in 2001, been paying a comparatively high rate of property taxes on its holdings in the province of British Columbia. In 2007, for example, Catalyst's municipal tax bill amounted to one sixth of all the Class 4 (Major Industry) property taxes collected in the province that year.[44] Their burden became more difficult to accommodate as their financial fortunes took a turn for the worse; "In the five year period from 2004-2008 Catalyst posted an after-tax net loss of $186 million. During that same period Catalyst paid $157 million in municipal taxes in British Columbia."[45] Owing to the inability of Catalyst's repeated lobbying efforts to convince the District of North Cowichan (among others) to reduce the property tax rate of Class 4 properties,[46] they sought a judicial declaration that the North Cowichan *Tax Rates Bylaw 2009,* Bylaw No. 3385 was unreasonable. The bylaw was upheld as reasonable at trial and on appeal.[47] In their result, the Court accepted the two lower court rulings.[48]

One of the primary issues of law in this case was similar to an issue that arose in *Khosa* before and *Maclean* later, i.e., the availability of a potentially reasonable alternative outcome. Catalyst maintained that the introduction of the three criteria in *Dunsmuir* changed the character of a review of the reasonableness of a municipal decision. In their view, the single reasonableness standard entails "that all municipal decisions, including bylaws, must meet the test of demonstrable rationality in terms of process and outcome… the municipality should [therefore] confine itself to objective factors, such as those set forth in Catalyst's 'Municipal Sustainability Model', in fixing

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[44] *Catalyst Paper Corp v. North Cowichan (District)* 2009 BCSC 1420 at para 7.
[45] *Ibid* at para 11.
[46] *Catalyst, supra* note 8 at paras 5 and 6.
[47] *Ibid* at para 8.
[48] *Ibid* at paras 9 and 36 – 37.

the property tax rates."[49] Since the appellant had devised a method for establishing tax rates that was grounded in an objective appeal to consumption of municipal services, they maintained that justification satisfied the requirements of the three criteria in a manner the tax rate chosen by North Cowichan did not.

Chief Justice McLachlin's rejection of Catalyst's interpretation of reasonableness focused on the limited set of factors for consideration their interpretation allowed. On her account, the appropriate view of municipal bodies recognizes they are empowered, and required, to consider a wide range of factors when making policy choices. As a result, "[t]he applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside."[50] According to the Court, the only limits implied by this test will be found either in the enabling legislation,[51] or in the procedural requirements that need to be fulfilled in passing bylaws.[52] Since Catalyst made no suggestion that North Cowichan violated voting procedures or acted in bad faith, and "municipal councils are not required to give formal reasons or lay out a rational basis for bylaws,"[53] there exists no procedural grounds for judicial interference. And since the enabling legislation grants "a broad and virtually unfettered legislative discretion to establish property tax rates in respect of each of the property classes in the municipality,"[54] the choice to impose a disproportionately high percentage of the

[49] *Ibid* at para 22.
[50] *Ibid* at para 24.
[51] *Ibid* at para 25.
[52] *Ibid* at para 28.
[53] *Ibid* at para 33.
[54] *Ibid* at para 26.

municipal tax burden on Class 4 property was not an unreasonable exercise of that discretion.[55]

The most significant and obvious difference between the Court's description and application of the single reasonableness standard as compared with the remainder of the post-*Dunsmuir* case law is the pronouncement that there can be no legal obligation requiring municipal policy decisions to be accompanied by reasons, meaning the three criteria are not applicable. The only possible remaining "question is whether the taxation bylaw falls within a reasonable range of outcomes."[56] McLachlin CJ's description of reasonableness by reference to outcomes alone brings to light the unique character of the 'reasonableness' standard she applies, specifically the role played by the legal framework. As I argued in Chapter 3, the law is normally used to establish that reasons subject to review for reasonableness are relevant. In *Catalyst*, by contrast, the legal framework is used to circumscribe the scope of possibly acceptable outcomes. Since the central concern can no longer be the relevance of the reasons presented, it shifts to ensuring the impugned bylaw is an exercise of the power granted by legislation. So described, this version of reasonableness focuses a reviewing courts' attention on the outcome of a municipal decision, contrary to the Court's repeated and consistent warnings against doing so since their ruling in *Ryan*.

Articulating the way in which legislation limits the scope of the reasonable range of municipal bylaws is a task to which the bulk of the Chief Justice McLachlin's reasoning in *Catalyst* is devoted. It begins with a general account of the role played by legislation in the context of any judicial review of a municipal body:

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[55] *Ibid* at para 35.
[56] *Ibid* at para 32.

> [M]unicipal acts may be set aside because they fall outside the scope of what the empowering legislative scheme contemplated. This substantive review is premised on the fundamental assumption derived from the rule of law that a legislature does not intend the power it delegates to be exercised unreasonably, or in some cases, incorrectly.[57]

It follows that when "passing delegated legislation, a municipality must make policy choices that fall reasonably within the scope of the authority the legislature has granted it."[58] Indeed, "[t]he rule of law insists on judicial review to ensure that delegated legislation complies with the rationale and purview of the statutory scheme under which it is adopted."[59]So the "fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation."[60] According to the case law, a "review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation."[61] In other words, "[r]easonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw."[62]

Chief Justice McLachlin's description of the role of enabling legislation in a review for reasonableness differs markedly from similar descriptions in non-municipal decisions like *Dunsmuir*, *Khosa*, *Montreal Port Authority, Figliola*, *Mowat, ATA, NLNU, Halifax,* and *Maclean.* As I have shown, in each of those decisions the appeal to the legislative context was used to establish the relevance of the reasons offered, irrespective

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[57] *Ibid* at para 12.
[58] *Ibid* at para 14.
[59] *Ibid* at para 15.
[60] *Ibid* at para 18.
[61] *Ibid* at para 19.
[62] *Ibid* at para 25.

of the particular outcome reached, i.e., it provided the legal standard to determine whether the reasons qualify as a justification of the decision. As I argued in sections 2 and 3 above, the primary purpose of that focus is to minimize the possibility that a court will interfere on the basis that some alternative outcome they prefer is also reasonable. The descriptive contrast with the ruling in *Catalyst* is stark; in that case, the legal framework is applied directly to the outcome reached. Rather than helping reviewing courts resist the temptation to engage directly with the selected outcome, this variant of 'reasonableness' requires just that type of direct engagement, a requirement fulfilled by ensuring municipal actions do not 'fall outside the scope' of their home legislation

The reasonableness standard applied in *Catalyst* is, at the very least, not identical with 'reasonableness' in the post-*Dunsmuir* case law. Most obviously, the three criteria have been eliminated as necessary elements of a reasonable decision. Owing to the elimination of the criteria, the role of enabling legislation is recast; now it will serve to guide courts in assessing the substance of, and procedures followed when adopting, a specific bylaw. As a result, reviewing courts are not discouraged from engaging with discretionary outcomes, but are instead required to do so. Of course, the nature of the engagement with municipal outcomes described in *Catalyst* is highly deferential; so much so that it bears a striking resemblance to the jurisdictional test Craig had recommend four years earlier, i.e., 'Was the municipal action within the general scope of what the legislature contemplated when it granted power to the municipality?'

4(b) The 'Broad and Purposive Approach' to Correctness and *Catalyst*

In this section I argue the version of reasonableness relied upon by Chief Justice McLachlin in *Catalyst* is identical to a standard of judicial review that existed prior to *Dunsmuir*, *viz.*, the broad and purposive approach to correctness. I begin with an analysis of the ruling in which this variant of correctness is first presented, i.e., *Nanaimo (City) v. Rascal Trucking*, followed by a sketch of the four subsequent rulings in which it is elaborated.[63] I then articulate the way in which its three primary features are evident in *Catalyst*. Specifically, the broad and purposive approach (i) ensures municipal actions are within the scope of their enabling legislation, in a manner that is nonetheless (ii) sensitive to the status of municipal actors as democratically elected representatives. The most significant similarity is what this standard, as a variant of correctness, entails; like McLachlin CJ's revised account of reasonableness, the broad and purposive approach (iii) does not require reasons in support of a municipal bylaw.

In *Rascal Trucking* the City of Nanaimo, prompted by complaints from local residents about noise and dust, decided that 15,000 cubic yards of soil on private land leased by Rascal Trucking Ltd. was a nuisance and ordered its removal under their enabling legislation.[64] In the court of first instance, Nanaimo's resolution that the pile was a nuisance was upheld, then quashed on appeal.[65] In their result, the Court concluded both that the City was correct in determining it had the power to declare the pile a

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[63] Specifically *Pacific National Investments Ltd. V. Victoria (City*) 2000 SCC 64 [*PNI*]; *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 [*Spray-Tech*]; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)* 2004 SCC 19 [*United Taxi*]; and *London (City) v. RSJ Holdings* 2007 SCC 29 [*RSJ Holdings*].
[64] *Rascal Trucking*, *supra* note 14 at paras 2 – 5.
[65] *Ibid* at paras 6 – 8.

nuisance,[66] and that the subsequent removal order was a reasonable exercise of that power.[67]

Taking a cue from Justice McLachlin's (as she was then) dissenting opinion in *Shell Canada Products Ltd. v. Vancouver (City)*[68], Major J introduces the broad and purposive approach as a preliminary guide to his interpretation of the relevant legislative provision: "The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach."[69] On his account, that means that a statute is to be "construed purposively in [its] entire context and in light of the scheme of the Act as a whole with a view toward ascertaining the legislature's true intent."[70]

Justice Major elaborates the two elements of this approach with his interpretation of the legislative provision: It is 'broad' owing to his willingness to acknowledge that since "a pile of soil does not materialize on its own, [it] must at least be erected presumably by piling or dumping,"[71] meaning Rascal's pile can be plausibly understood to fall within the domain of a 'building, structure, or erection of any kind'. The Court's interpretation is 'purposive' inasmuch as Major J reads the phrase 'or other matter or

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[66] *Ibid* at para 26.
[67] *Ibid* at para 39.
[68] *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR 231 [*Shell Products*] Justice McLachlin endorses a 'benevolent construction' of municipal powers (at para 59) primarily because "the elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality's exercise of its powers is clearly *ultra vires*" (at para 69).
[69] *Supra* note 14 at para 18.
[70] *Ibid* at para 20.
[71] *Ibid* at para 24.

thing' as extending the list of possible physical structures and watercourses that can be declared nuisances beyond those explicitly listed in the provision. Since the purpose of this particular power is to permit municipal bodies to remove any object within town limits that it 'believes is so dilapidated or unclean as to be offensive to the community', excluding Rascal's pile because the list does not explicitly include 'piles of soil' would contravene that purpose.

That the broad and purposive approach informs an assessment of the correctness of Nanaimo's resolution is a point made while Major J is trying to determine which standard of review ought to be applied. He notes that municipal authority is subordinate to the provinces, and that councillors are not selected owing to their expertise in either municipal law or municipal planning, meaning their being elected "does not give [them] any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness."[72] In other words, statutory construction is not an activity for which municipal councillors must be experts and their being elected representatives does not provide them that expertise. Courts therefore owe no deference to the reasons offered by municipalities in support of an assertion of some statutory power. Again, however, courts are to interpret such assertions charitably by reading the enabling legislation in a broad and purposive manner.

Over the course of seven years following the ruling in *Rascal Trucking* and preceding *Dunsmuir*, the Court affirms and refines the broad and purposive approach four times. It repeatedly asserts the combined ideas that while deference is not owed to

[72] *Ibid* at paras 31 – 33

municipal bodies as experts in statutory construction, reviewing courts are nonetheless required to interpret municipal powers in a manner respects their status as democratic institutions. So, for example, in *PNI* Lebel J, writing for the majority, notes that "our Court has adopted such principles as the one that ambiguities in municipal government statutes are to be interpreted so as to favour the citizens and their ability to undertake a path of shared self-governance."[73] The broad and purposive approach therefore implies a presumption in favour of assertions of municipal powers because on their face, those assertions reflect the interests of citizens as expressed by their elected representatives. Lebel J reiterates a similar explanation of the need for the broad and purposive approach less than a year later in his concurring opinion in *Spray-Tech*: "A tradition of strong local government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens... a grant of power must [therefore] be construed reasonably and generously."[74]

Three years later in *United Taxi* Bastarache J reaffirms the broad and purposive approach as an assessment of correctness, meaning no deference is owed to the reasons of municipal decision makers: "Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness."[75] Nonetheless, he notes there has

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[73] *PNI*, *supra* note 63 at para 71. It is worth noting that this statement is a reversal of the Court's earlier stated position as set out by the majority in *Shell Products* at para 30: "Any [legislative] ambiguity or doubt is to be resolved in favour of the [individual] citizen especially when the grant of power contended for is out of the 'usual range.'"

[74] *Spray-Tech*, *supra* at 63 at para 49.

[75] *United Taxi*, *supra* note 63 at para 5. For an account of the sense in which the focus on purposes allows courts applying the broad and purposive approach to ensure municipal actions

been a shift in the drafting of municipal legislation whereby municipal bodies are most often intentionally granted "broad authority over generally defined matters… [an authority that] reflects the true purpose of modern municipalities which require greater flexibility in fulfilling their statutory purposes."[76] It follows that a court determining the scope of municipal powers needs to assess such claims using a standard that better reflects this flexibility. Finally, in *RSJ Holdings* the Court decides judicial interference with a municipal bylaw is warranted owing to the failure of the municipal body to fulfill its democratic obligations. According to Charron J, "The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision."[77]

The broad and purposive approach is a version of the correctness standard inasmuch as it does not require reviewing courts to show deference to the reasons offered by municipal bodies in support of their policy choices. It is, nonetheless, a variant of that standard inasmuch as it demands a type of deference from reviewing courts; specifically, it demands a presumption in favour of an assertion of power implicit within any given decision. Every time a municipal bylaw is passed, a municipal body is implicitly and necessarily maintaining that the power the bylaw invokes is a power they enjoy under their enabling legislation. While courts are free to ignore any justification of power from a municipality, their own *de novo* justification is not unfettered; courts must construe the

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contribute to the public good, see Hoi Kong, "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48 Osgoode Hall LJ at para 28.

[76] *Supra* note 63 at para 6.

[77] *RSJ Holdings*, *supra* note 63 at para 38.

enabling statute charitably out of respect for the character of municipal bodies as democratic institutions. Courts are therefore required to 'defer' to municipal bylaws when engaged in a review for correctness according to the broad and purposive approach by presuming the powers municipal bodies implicitly assert therein are powers they enjoy, and interpreting the enabling statute accordingly.[78]

That the standard of review applied in *Catalyst* more closely resembles the broad and purposive approach than reasonableness is not difficult to establish. As I noted in 4(a) above, a review of a municipal bylaw according to the Court ultimately attempts to (i) establish the impugned bylaw is within the scope of the powers conferred by the enabling legislation, in a manner that properly (ii) "reflects the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation"[79] owing to their character as democratic institutions. In other words, a review of municipal bylaws is an exercise in statutory construction that occurs (iii) without regard for any of the reasons offered, an exercise that is nonetheless guided by the unique democratic but subordinate legislative role of municipalities in the Canadian constitutional order.

Consider also how the ratio in *Catalyst* could have easily been framed as an exercise in statutory construction. The question was whether it lie within the power of the municipality to impose property tax rates that include a large imbalance between separate classes. The difference between Class 1 (Residential) and Class 4 (Major Industry) set

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[78] Thankfully, my argument in this section does not require me to determine whether the broad and purposive approach is most plausibly understood as a third standard of judicial review, or merely an application of correctness that is modified to reflect the unique circumstances of municipal policy choices. Resolving this question is, however, likely important for the purposes of producing a complete account of the process of judicial review.

[79] *Catalyst*, *supra* note 8 at para 19.

under the Bylaw amounted to a ratio of 1:20.4, or $2.14 per $1,000 for Class 1 property as compared to $43.35 per $1,000 for Class 4 property.[80] So do ss. 197 and 199(b) of the *Community Charter* grant North Cowichan the power to perpetuate this type of inequity? Since s. 197 requires the imposition of a regulation under s.199(b) to mandate a specific inequality in tax rates, and no such regulation has existed since 1985, it follows that there is nothing to "detract from the broad power of British Columbia municipalities to vary rates between different classes of property."[81] As in cases like *Rascal Trucking*, *Spray-Tech*, and *United Taxi*, the enabling legislation failed to explicitly confer the power implied by the municipal action. The resolution of that omission adopted by the Court is, as it was in those cases, an interpretation that presumed the interests of citizens as expressed by their democratically elected representatives were, on their face, within the scope of the powers contemplated by the enabling legislation.

My analyses in section 4(a), when considered in combination with my description of the broad and purposive approach, weigh heavily in favour of the view that the standard described and applied in *Catalyst* is not, in fact, reasonableness. Instead, the standard invoked bears the defining features of correctness. Most obviously, the broad and purposive approach to correctness does not require courts defer to the reasons of municipal bodies in support of their assertions of power. For the Court in *Catalyst*, municipal bodies are under no obligation to present reasons in support of those assertions. Instead, judicial review of municipal bylaws focuses on determining whether the implicit assertion of power made by each bylaw is within the scope of the power implied by the enabling legislation. That determination is made by presuming the assertion of power is

[80] *Ibid* at para 3.
[81] *Ibid* at para 26.

consistent with the enabling legislation, a unique species of 'deference toward assertions of power' intended to ensure courts respect the status of municipal bodies as legitimate democratic institutions. What most clearly distinguishes this approach from the single reasonableness standard is that it is not incumbent upon (because it is not possible for) municipal bodies to justify the powers their bylaws imply, meaning the responsibility for showing any given bylaw is *intra vires* rests exclusively with the courts.

4(c) Conclusions – Why Municipal Policy Decisions are not Suitable for Reasonableness Review

I summarize my analyses of the ruling in *Catalyst* by articulating the genuine conceptual dilemma they identify. This case was the first (and remains the only) municipal decision of the post-*Dunsmuir* era. On the one hand, the pre-*Dunsmuir* Supreme Court case law on municipal bodies had, owing to a genuine lack of expertise on the part of elected municipal officials, deemed correctness to be the appropriate standard of review.[82] Nonetheless, courts reviewing municipal policies for correctness were to show a great deal of leeway, i.e., a type of 'curial deference in statutory construction' owing to those policy decisions being made in a legitimate democratic institution. In *Dunsmuir*, however, the sharp line between correctness and reasonableness on the basis of deference was reaffirmed; the former required none, the latter required whatever amount was appropriate given the factual and legal context. If the defining distinction between those two standards as set out in *Dunsmuir* was to be maintained, the

[82] A view that was notably (and in light of *Catalyst* confusingly) upheld by the majority in *Dunsmuir*, *supra* note 1 at para 59, wherein they cite their earlier municipal law decision in *United Taxi*, *supra* note 63 as a paradigmatic example of a case that addressed a 'true question of jurisdiction or vires', meaning it is an exemplar of a case in which correctness is the appropriate standard of review.

Court in *Catalyst* was barred from invoking correctness, since a municipal policy choice must be entitled to deference. The alternative, the option chosen by the Court, was to abandon the relationship between reasons and outcomes as the respective object and product of a reasonableness review. The result was a description of reasonableness unlike any earlier description, relying only on the range of reasonable outcomes.

Whether Chief Justice McLachlin decided to rely on correctness or reasonableness in *Catalyst*, the Court was faced with a genuine quandary; either the clear distinction between correctness and reasonableness based on deference, or the clear understanding of reasonableness understood as an analysis of reasons by reference to the three criteria only, would need to be abandoned. This dilemma suggests Binnie J's concern that the single reasonableness standard introduced in *Dunsmuir* would not be sufficiently flexible to accommodate every administrative body was well-founded. Chiasson's and Craig's respective predictions that that lack of flexibility would become apparent in the context of a municipal policy decision have been vindicated. And Daly's claim that the Court did not rely on the single reasonableness standard is compelling, even if his claim that they reintroduced patent unreasonableness is not.

My last step in this section is to provide two reasons for thinking it is preferable to understand the Court's ratio in *Catalyst* as an application of the broad and purposive approach to correctness, rather than accepting Daly's contention that it reintroduces the patent unreasonableness standard. My first reason is the clarity in the structure of judicial review my account preserves, specifically in the distinction between correctness and reasonableness. I note first that the distinction between these standards has two separate components. Most obviously, reasonableness demands deference to reasons, whereas

correctness demands none. But the distinction also identifies two separate objects of a court's focus; since no deference to reasons is owed on a review for correctness, the only possible objects of review are either the existence of a delegated power implied by an outcome, or the outcome itself. In the context of a review for reasonableness by contrast, the only object of review is the reasons offered. If the broad and purposive approach is the appropriate standard of review for municipal policy choices because they need not be supported by reasons, then correctness remains exclusively concerned to review outcomes or the legislative foundation for the powers those outcomes imply, not reasons.

Of course, my account does not completely retain the clarity provided by using deference and non-deference as a rigid point marking the distinction between reasonableness and correctness. Had the Court explicitly chosen to apply the broad and purposive approach in *Catalyst*, doing so would endorse a variant of correctness that requires courts show deference, undermining the *Dunsmuir* characterization of correctness as a 'non-deferential' standard.[83] That having been said, the distinction would be at least partially retained; it would remain the case that reviewing courts are to refrain from showing deference to reasons in particular. The only change would be that curial deference needs to be shown to the defining object of a correctness review, i.e., the outcome reached. Adopting the broad and purposive approach would not distinguish correctness from reasonableness by appealing to deference alone then; instead, it would distinguish the two by reference to their respective objects of deference. The broad and

[83] And herein lies the confusion created by the *Dunsmuir* majority's appeal to *United Taxi*; presumably that appeal qualifies as a tacit endorsement of the broad and purposive approach as a legitimate but uniquely 'deferential' standard of correctness.

purposive approach requires deference toward outcomes and statutory powers, whereas reasonableness continues to require deference toward reasons only.

Were we to accept that the Court in *Catalyst* did, by comparison, reintroduce the patent unreasonableness standard, the differences between the standards of judicial review are considerably more confusing. Most obviously, reasonableness no longer requires reviewing courts to remain exclusively focused on the reasons offered in support of an outcome. Instead, they would be required to focus on outcomes, in a manner that has not been previously articulated. And since the correctness standard (unmodified by the broad and purposive approach) also requires reviewing courts to focus on outcomes (and the delegated power every outcome implies), the manner by which that focus would differ in the context of a review for reasonableness in particular would need to be clarified. The cost to clarity is therefore less if the Court in *Catalyst* is taken to have relied on the broad and purposive approach rather than patent unreasonableness.

The second reason the broad and purposive approach is preferable is that it better respects the status of municipal bodies as legitimate democratic institutions than patent unreasonableness. That a reasonableness review is generally not well-suited to assessing municipal policy decisions is a point made by Craig: "Is there compelling justification for a reasonableness review of constitutional, *intra vires* municipal bylaws? Federal legislation cannot be challenged on the grounds that it is unreasonable. Provincial legislation cannot be challenged on the grounds that it is unreasonable. Why is a court entitled to quash constitutional municipal legislation where it sees that legislation as unreasonable?"[84] So long as a decision is being made in a manner consistent with the idea

[84] Craig *supra* note 38 at para 57.

of ‘responsible democracy’, the resulting decision should not then be subjected to the further question of whether it is ‘reasonable’.[85]

Craig’s concern is exacerbated if the ruling in *Catalyst* is understood to have applied patent unreasonableness. In sections 2 and 3 we saw that the purpose of requiring reviewing courts to remain narrowly focused on reasons was so they would not be tempted to interfere with an outcome based on a potentially idiosyncratic understanding of ‘reasonable’. In the context of a democratic body, concerns about idiosyncratic understandings are heightened since interference with the decision of a democratic institution is at least in principle interference with the will of the majority. If the standard used in *Catalyst* was patent unreasonableness however, then the possibility of interference increased since a reviewing court is focused on the ‘reasonableness’ of the outcome itself, a concept that by definition cannot be grounded in the determinacy provided by the three criteria.

Though McLachlin CJ relied on a highly deferential standard in *Catalyst*, understanding that standard as a variant of ‘reasonableness’ admits the possibility that a court could interfere with an *intra vires* municipal policy decision on the grounds that it is unreasonable. The broad and purposive approach is, by contrast, a jurisdictional test only; it is left entirely to the courts to determine whether the power claimed is justifiable by reference to the legislative grant, a determination that begins with the presumption the power is justified. Once a municipal policy decision is determined to be *intra vires* according to this standard, the rule of law is preserved and the possibility of judicial interference on any further grounds is therefore extinguished.

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[85] *Ibid* at para 54.

5. Conclusions: A Clear Account of the Relationship between Reasons and Outcomes

This chapter completes my account of the sense in which the framework of the single reasonableness standard is clear and coherent. For my purposes, the most important result is the foundation in law my analyses provide for the assumption upon which my arguments in Chapters 3 and 4 depended, i.e., that the five elements of the three criteria are the only standards by which to assess the reasonableness of an administrative decision. The means by which I articulated that support involved defending an account of how the Court understood the relationship between reasons and outcomes in *Dunsmuir*. Specifically, the majority held the range of reasonable outcomes are the product of any reasons that satisfy the three criteria, not a separate standard of assessment; the function of that concept is, instead, to denote the unavoidable plurality of possibly reasonable outcomes. This understanding of the reasonable range was affirmed and elaborated by the Court in both *Khosa* and *NLNU*.

Of course, since the Supreme Court of Canada is the final and conclusive authority on all matters of Canadian law,[86] one misstatement can upset an otherwise coherent legal standard. The misstatement in respect of the single reasonableness standard was made in *Catalyst*. The cost to clarity presented by that ruling is significant; accepted on its face, the Court severs the necessary connection between reasons and outcomes, and abandons the universal applicability of the three criteria as a basis for determining whether a decision is justified. The result is that there is no well-established set of criteria to serve as a basis for determining whether the decision subject to review is unreasonable, and therefore no clear means by which to establish whether the rule of law

[86] The *Supreme Court Act*, RSC 1985 c S-26, s. 52

is in jeopardy and interference is necessary. The clarity of reasonableness in the post-*Dunsmuir* case law is significantly undermined by this one ruling.

Rescuing reasonableness from the ruling in *Catalyst* relied on articulating the Court's mischaracterization; first I identified the way in which the standard applied by McLachlin CJ differed from the consistent description in the case law, then how that standard incorporated the defining features of the broad and purposive approach to correctness. The success of that argument preserves the notion of reasonableness as an assessment that can only be conducted on a decision subject to the obligation to present reason set out in *Baker*.[87] But my analysis of *Catalyst* has also served to bolster my case for the clarity of reasonableness by serving a role similar to the comparative argument I made in Chapter 4. That is, it shows the framework defended in Chapter 3 is coherent inasmuch as it can be used to identify and at least partially resolve confusions arising in the case law.

My account of reasonableness by reference to the three criteria helped to identify and resolve the confusion of *Catalyst* first by pointing toward the two unique features of the description of reasonableness, i.e., (i) Municipal bodies are under no obligation to justify their policy choices with reasons, meaning (ii) The legal framework is not used to establish the context by which to determine the relevance of reasons. My account also provided a more precise foundation for articulating the difference between the broad and purposive approach to correctness and reasonableness, *viz*., by reference to the objects of assessment toward which deference is to be shown. There are two further but as yet

[87] *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817 at para 43.

unstated senses in which my attempt to identify and resolve the confusion introduced in *Catalyst* contributes to the clarity of the framework of reasonableness.

First, my analyses provide a means by which to recast the distinction between correctness and reasonableness, in terms of the roles each assign a reviewing court and administrative decision maker. A decision subject to reasonableness review is one in which it is, following *Baker*, incumbent upon the decision maker to establish that their decision is justified. By presenting a justification, the decision maker shows their decision is not merely a function of their arbitrary whims but is, instead, at least supported by reasons that are relevant given the legal context. The task of a reviewing court in those circumstances is merely to confirm that justification exists. Decisions assessed for correctness, by contrast, place no justificatory demand on the decision maker. The burden of showing the decision and/or the assertion of power implied by the decision is justified within the legal framework rests with the reviewing court. So the role of a court engaged in reasonableness review is to ensure the administrative body fulfilled their justificatory burden. In a review for correctness, that burden rests with the court.

There is a second unavoidable and undeniably clear implication of my claim that the only substantive components of reasonableness are the five elements of the three criteria. Accepting that municipal bodies are not subject to the obligation to present reasons in support of their policy decisions, it follows that municipal policy decisions are immune from reasonableness review. Indeed, the implication is broader; any administrative decision not subject to the obligation to present reasons is immune from a review for reasonableness. And since it is not possible for an administrative body to be free from the scrutiny of the courts if the rule of law is to obtain, any species of decision

immunized from reasonableness review in this manner must be subject to review for correctness. In other words, if the administrative body has no obligation to show the impugned decision is justified, the task of providing that justification falls to the courts.

I cannot deny that the ruling in *Catalyst* confuses the single reasonableness standard. Even if my critical analysis is accepted in its entirety, questions remain. If my analysis is compelling however, those questions are thankfully directed toward the broad and purposive approach to correctness, and the usefulness of the concept of deference as a means of distinguishing between the two standards. Specifically, is the broad and purposive approach a third standard of judicial review, or is it merely a unique application of the existing correctness standard to municipal bodies? And since the broad and purposive approach demands a 'deference in statutory construction' by incorporating a presumption in favour of an assertion of power, how useful is 'deference' as a means of distinguishing between reasonableness and correctness? While both of these questions are in need of answers to properly understand the process of judicial review in Canada, neither affects the clarity of reasonableness, my narrow focus throughout.

Chapter 6: Conclusions – Reasonableness, Judicial Interference, the Rule of Law, and Canadian Democracy

1. The Clarity of Reasonableness: A Single, Coherent Balancing Principle

The primary goal of these concluding remarks is to explain how the defining features of the single reasonableness standard, presented in and clarified since *Dunsmuir*,[1] are all unified by the single balancing principle I identified at the outset, i.e.: Judicial interference owing to unreasonableness needs to occur when the impugned decision is arbitrary in the sense that it is not justifiable within the legal context; and it needs to be prohibited in all other cases out of respect for the foundational democratic principle. The coherent unity is a result of the features of reasonableness I have identified throughout pointing toward this single end; arbitrary administrative decisions are the necessary grounds for, and the simultaneous limit on the possible grounds for, judicial interference owing to unreasonableness.

To connect the features of the single reasonableness standard I have identified, I first remind readers of each. I began by showing that

> (i) A review for reasonableness relies on a clear conceptual foundation, *viz*., the five elements implied by the three criteria. Those elements are substantively clear, and also imply an intuitive conceptual hierarchy.

I used the order implied by the five elements of the three criteria to identify the threshold criterion for judicial interference:

> (ii) Relevance is the threshold criterion which, when satisfied, ensures that a justification exists. This follows from the fact that relevance cannot be established until there exists a set of public, genuine, meaningful, and consistent sentences.

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[1] *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*].

What came to light from my analyses of the conceptual features of reasonableness in the post-*Dunsmuir* case law was evidence of the Court's consistent pattern of application:

> (iii) The reasons supporting the impugned decision are summarized by the Court, the aspects of the legal framework that bear on the case are identified, and finally the reasons are tested for relevance given that legal context.

By isolating the threshold for interference, and the pattern evident in every application of reasonableness, I was able to generate a clear point of contrast. In Chapter 4 I was therefore able to precisely characterize the substantive change to the circumstances in which judicial interference is necessary on reasonableness review:

> (iv) The adoption of relevance as the threshold criterion of the reasonableness standard entails that interference owing to inadequacy is not necessary to preserve the rule of law, and is therefore prohibited.

Finally, I was able explain in Chapter 5 the relationship between, owing to the respective roles of, the two 'objects of concern' of any court undertaking a review for reasonableness:

> (v) The three criteria serve as the lone standard by which decisions are assessed for reasonableness, while an outcome within the reasonable range is the product of any reasons that satisfy that standard.

To highlight the unifying conceptual thread running throughout these features of reasonableness, I begin by reminding readers of the balancing act that is the process of judicial review: Courts are required to preserve the rule of law while simultaneously respecting the foundational democratic principle.[2] I briefly discussed, in Chapter 1, how the 'the rule of law' is understood by the Supreme Court of Canada as a prohibition on arbitrary state action, drawing in particular on Rand J's concurring opinion in *Roncarelli*[3]

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[2] *Ibid* at para 27.
[3] *Roncarelli v. Duplessis* (1959) SCR 121.

and the majority in *Baker*.[4] Consistent with the views of scholars like Dicey,[5] Hayek,[6] Fuller,[7] and Raz,[8] an action of the state is 'arbitrary' and so offends the rule of law in Canada when it cannot be justified by reference to the existing legal framework. Since at least *Baker*, courts ensure the decisions of administrative bodies in particular are justifiable in the legal context and so not arbitrary by requiring that, for the most part, those decisions actually be justified by reasons. Understood as an attempt to preserve the rule of law by preventing arbitrary administrative action only, reasonableness restricts interference to a single point. Specifically, judicial interference with administrative action owing to unreasonableness occurs only when it is necessary to maintain the rule of law. In all other circumstances, reviewing courts are obligated to accept the administrative decision out of respect for the foundational democratic principle.

The precise meaning of 'a justification', and so the precise meaning of an action that is 'not arbitrary' is, on my account, provided exclusively by the five concepts of the three criteria. That those five concepts reflect an effort to restrict judicial interference to the absolute minimum necessary to preserve the rule of law is evidenced in part by the relative ease with which their requirements can be satisfied. If a reviewing court can confirm the existence of genuine, meaningful, and consistent reasons that matter to an outcome the decision is not arbitrary by definition, so interference is prohibited. This narrow limit on the possibility of interference precludes the possibility of courts

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[4] *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817.
[5] A.V. Dicey *Introduction to the Study of the Law of the Constitution*, 8th ed (Indianapolis: Liberty Fund, 1982) at 153.
[6] F.A. Hayek *The Road to Serfdom* (New York: Routledge Classics, 2006) at 75 – 76.
[7] Lon Fuller *The Morality of Law* (New Haven, Connecticut: Yale University, 1969) at 214.
[8] Joseph Raz "The Rule of Law and its Virtue" in *The Authority of Law* (Oxford: Oxford University Press, 1979) 210 at 220.

demanding that reasons that are relevant also be 'good' or 'better than other sets of relevant reasons'. So the framework of reasonableness entails that interference can only occur when no justification exists, meaning the relative quality of competing justifications is not a matter for a reviewing court to consider.

The conceptual order implied by the five elements of three criteria isolate the relevance criterion in particular as the threshold for judicial interference. That precise threshold significantly bolsters the strength of my claim that the single reasonableness standard demands interference only when a decision is arbitrary, and prohibits interference in all other cases. When a set of reasons simply do not matter to an outcome, they are undeniably arbitrary; the set of possible reasons that could be cited in support of, but do not actually matter to some decision are infinite. And since, as was noted in Chapter 3, the assessment for relevance occupies the bulk of a court's efforts during a reasonableness review, the narrow focus of any such review is the 'tipping-point' between an arbitrary action and one that is justified. This narrow assessment, as I established in Chapter 4, reduced the circumstances in which judicial interference is necessary by prohibiting the possibility of interference owing to inadequacy.

I have argued throughout this project that a court undertaking a review for reasonableness is assessing reasons only, meaning they are to have little or no regard for the particular decision selected. My most explicit defence of that claim appeared in Chapter 5, wherein I articulated the relationship between reasons and outcomes. I then used that account to identify and set-aside the problems to that characterization presented by the ruling in *Catalyst*.[9] Specifically, since the 'range of reasonable outcomes' refers to

[9] *Catalyst Paper Corp. v. North Cowichan (District),* 2012 SCC 2 [*Catalyst*].

the product of any set reasons that could satisfy the three criteria only, it contains no standard for assessment by which to determine whether a particular outcome is arbitrary and is therefore a threat to the rule of law. If the standard applied in *Catalyst* is reasonableness, then the possibility of judicial interference with a justifiable decision, and therefore the possibility of undue interference with the foundational democratic principle, has been reintroduced, contrary to the otherwise consistent prohibition in the case law.

Each clear feature of reasonableness my analyses have identified coheres with every other by reference to a single general principle. That principle is most evident in the consistent narrative the evolution of reasonableness in the Supreme Court case law has allowed me to develop. With the exception of the decision in *Catalyst*, none of the refinements or clarifications made to the single reasonableness standard in the post-*Dunsmuir* case law are dramatic or surprizing. Instead, each is the sort of refinement that should be expected if judicial interference is to occur only when the rule of law is jeopardized by an arbitrary decision, and is prohibited in all other cases out of respect for democracy.

2. The Relative Degrees of, and Limited Expectations for, the Possibility of Clarity in the Process of Judicial Review

On my account, the defining features of reasonableness since *Dunsmuir* are clear and coherently united by a single general principle. Of course, as I noted in Chapters 1 and 2, that conclusion is not widely endorsed in the academic commentary. My goal in this section is to briefly offer a speculative explanation of how commentators like

Mullan,[10] Goltz,[11] Daly,[12] and Lewans[13] could have reached a conclusion that is, in at least one sense, diametrically opposed to my own. I will suggest that the difference in our results is a function of our distinct approaches. Specifically, all four were seeking out sources of confusion, primarily in the form of inconsistencies in the case law. I by contrast have been driven to identify point of structural clarity that are a result of a consistent pattern of similarities throughout the case law.

Mullan's and Goltz's claims that the single reasonableness standard is lacking in clarity appeared immediately after its introduction in *Dunsmuir*, so I will focus on the more recent criticisms of Daly and Lewans. At the end of Chapter 2 I noted that both authors maintain that the primary confusion arising in the post-*Dunsmuir* case law is an inconsistent account of the standard of review analysis prompted by Fish J's majority opinion in *Alliance Pipeline*.[14] I discussed their concerns about reasonableness in both Chapters 2 and 3; both Daly and Lewans argue the decision in *Mowat*[15] is not a consistent application of the reasonableness standard. Lewans levels the same charge against the ruling in *Figliola*,[16] and as we saw in Chapter 5 Daly argues that the opinion in *Catalyst* is also inconsistent.[17] As I noted, my analyses do not speak directly to any of their concerns, meaning each may qualify as a genuine inconsistency in the application of

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[10] David Mullan "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can J Admin L & Prac 117 at 150.
[11] Ron Goltz "Patent Unreasonableness is Dead. And We Have Killed It. A Critique of the Supreme Court of Canada Decision in *Dunsmuir*" (2008) 46 Alta L Rev 253.
[12] Paul Daly "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 1 483 at 485.
[13] Matthew Lewans "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's LJ 59 at 63.
[14] *Supra* at 36 – 37. See also *Alliance Pipeline Ltd v. Smith* [2011] 1 SCR 160 at paras 25 and 26.
[15] *Supra* at 64. See also *Canada (Attorney General) v. Mowat* 2011 SCC 53.
[16] *British Columbia (Workers' Compensation Board) v. Figliola* 2011 SCC 52.
[17] *Supra* at 112 – 113.

reasonableness. The important point for my purposes is the approach Daly and Lewans share; each is looking to articulate ways in which the case law defining reasonableness strays from, or highlights a confusion inherent within, the original definition set out in *Dunsmuir*.

With the exception of my analysis of the ruling in *Catalyst*, my analyses in this project have, in contrast with Daly's and Lewans's, sought to highlight the broad similarities that persist in the post-*Dunsmuir* case law on reasonableness. That approach has revealed a clear conceptual foundation, a precise threshold for interference, a consistent procedure for conducting a reasonableness review, a precise characterization of the changes to the circumstances in which judicial interference is necessary, and a clear account of the relationship between reasons and outcomes. Because clarity is a relative term however, it remains possible the charges of Daly and Lewans do not actually oppose my account. Only if they are maintaining the isolated inconsistencies they identify in the case law show there are significant structural problems with the reasonableness standard would I disagree, since my arguments imply that no such structural problems exist. Otherwise, it remains entirely possible that the single reasonableness standard is both structurally clear, and has suffered from several particular confusions in its application.

There is, however, one shortcoming of any attempt to articulate isolated inconsistencies in the case law, a shortcoming that is pronounced in the context of administrative law, a shortcoming from which my choice to emphasize structural similarities does not suffer. The problem is the scope of the process of judicial review; there are a vast and disparate set of delegated decision makers to whom these standards

apply. To criticize the clarity of principles that are so general by pinpointing isolated inconsistencies in the case law unrealistically implies a 'clear' account of those principles ought to prevent such inconsistencies from occurring. Given the many types of administrative body that can be subject to reasonableness review in particular, the possibility of a standard that provides courts and practitioners determinate case by case guidance simply does not exist. If those criticizing the clarity of the evolution of reasonableness in the post-*Dunsmuir* case law mean to have these expectations fulfilled, I respectfully submit that their hopes are the problem, not the clarity of reasonableness.

It is for this reason that I maintain the approach I have adopted in this project, and the results that approach has yielded, represent (close to) the highest degree of clarity that could be expected from any general legal standard. By elaborating the consistent themes expressed in the Supreme Court case law I have constructed a clear account of a standard that is designed to apply to a wide variety of administrative bodies. While much of that construct is a result of my own interpretive efforts, my interpretations were nonetheless grounded in the clear structural similarities that appeared every time a decision was assessed for reasonableness. Given that the Canadian legal system is shaped by fallible, finite, and well-meaning humans, particular inconsistencies in the application of that standard will inevitably occur. What I have shown is that no particular inconsistencies that threaten the structural clarity and coherence of reasonableness have emerged in the post-*Dunsmuir* case law (apart from the ruling in *Catalyst*).

Of course, clarity in the structure of a set of general standards is limited. There is one legitimate and significant confusion in the structure of the reasonableness standard that is, in a practical sense, unresolved. Irrespective of my attempt to show in Chapter 5

that the Court in *Catalyst* relied on the broad and purposive approach to correctness, the reality is that McLachlin CJ explicitly maintains the appropriate standard for reviewing municipal policy decisions is reasonableness. If that position is left to stand, then Daly's concern that the Court reintroduced patent unreasonableness needs to be addressed. If, by contrast, my claim that the Court relied on the broad and purposive approach to correctness is accepted, confusion persists. Is this a third standard of review, or simply a unique application of the traditional correctness standard? And if correctness was the standard used, how is the notion of curial deference meant to serve as a clear point of distinction between reasonableness and correctness, given the seemingly deferential character of the broad and purposive approach? Unfortunately, these confusions will have to remain topics for future investigation. I end simply by noting that so long as my claim that the Court applied the broad and purposive approach in *Catalyst* is compelling, these confusions do not directly impact the clarity of the single reasonableness standard.

3. Recommendations for Practitioners of Administrative Law in Canada

One final test of my claim that the single reasonableness standard is clear; it must be able to provide guidance to those engaged in the practice of administrative law. There are four related recommendations for practitioners that follow from my analyses. All are directed primarily toward those representing parties seeking to challenge administrative decisions on the grounds that they are unreasonable, because their chances for success are most directly affected my discussion. The first recommendation is general; clients should be generally discouraged from seeking judicial interference owing to unreasonableness,

because reasonableness warrants interference in fewer cases than prior to *Dunsmuir*.[18] More specifically, there are no longer any circumstances in which interference owing to inadequacy will warrant interference. In the abstract, challenging an administrative decision on the grounds of unreasonableness is now more of an uphill battle at the outset than it had previously been.

The second recommendation follows from the first, but provides a more specific strategic warning; presenting an alternative outcome that is also reasonable will never be sufficient to justify interference. In the case law, this rule is set out most clearly in *Maclean*. But of course, this rule is required as a matter of consistency; since the burden on an administrative body is merely to show that the reasons they present in support of a decision are relevant given the legal context, presenting an alternate set of reasons and outcome cannot show the decision maker has failed to discharge that burden. It follows that the only strategy with any chance of prompting a reviewing court to interfere on the basis of unreasonableness will be one that is exclusively concerned to establish that the reasons supporting the decision fail to satisfy the requirements set out by the three criteria.

A third recommendation follows from the second; the bulk of a court's review for reasonableness will be dedicated to establishing that the reasons presented are relevant given the legal context. Practitioners who succeed in showing judicial interference is

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[18] It is important to note that the chances of successfully challenging the decision of an administrative body were already low. See, for example, G. Van Harten, G. Heckman, and D. J. Mullan, *Administrative Law: cases, texts, and materials* 6th ed. (Toronto: Emond Montgomery Publications Ltd, 2010) at 21: "[P]ublic law litigation is generally a remedy of last resort; the cost of taking the administration to court is high; the prospect of success in court is limited; and even when a favourable judicial decision is obtained, the possibility remains that, having corrected the legal error, the administration may not change the substance of the decision that generated the complaint."

necessary will therefore be those who prepare a case focused on articulating the way in which the impugned outcome is not supported by reasons that are relevant in that context.

My last recommendation is specifically directed to those seeking to challenge a municipal policy decision. Owing to the status of municipal bodies as democratic institutions, the Court in *Catalyst* imposed an exceedingly high burden on complainants seeking judicial relief (irrespective of whether that burden assumes the form of a review for correctness or reasonableness). Municipalities need not support their decisions with reasons, and there exists a presumption in favour of the assertions of municipal powers every bylaw implies. A challenge to a municipal policy decision therefore cannot succeed on the ground that the bylaw fails to satisfy the three criteria. Instead, the only chance of success lies in showing that the decision does not fall within the scope of the powers contemplated by provincial legislators. It follows that an inability to show the impugned action is clearly *ultra vires* means practitioners should not expect to successfully challenge a municipal decision. There is no meaningful sense in which a complainant can expect to succeed when challenging the reasonableness of a municipal policy decision.

4. Final Thoughts – Causes for Concern and Optimism

There is, I believe, one genuine cause for concern that emerges from my analyses of the post-*Dunsmuir* case law. More specifically, there is one way in which the reforms to the single reasonableness standard introduce the possibility that the need for reasons, and the role of reviewing courts in assessing those reasons, might become significantly confused. My concern arises from the Court's treatment of implicit reasons as set out in

ATA[19] and *Maclean*.[20] More specifically, I am concerned by these repeated attempts to prioritize the justifiability of an administrative decision over its actually being justified. According to those two rulings, the mere absence of a justification is not an independent basis for interference. As I argued in Chapter 3, this approach is entirely consistent with my account of reasonableness as an attempt to prevent arbitrary decisions; if reasons that satisfy the three criteria are available in the sense that they are obvious to a reviewing court, the rule of law is upheld because the decision is justifiable, meaning interference is prohibited.[21] The problem is the possibility for abuse this priority introduces.

If courts are obligated to seek out implicit reasons, it is at least possible that administrative decision makers could cease to present reasons; the justifiability of their decisions will be, if and when necessary, determined by the courts. Since the statistical likelihood that reviewing courts will not interfere owing to unreasonableness is high, most complainants would be unlikely to pursue judicial review merely to ensure the decision to which they object was indeed justifiable. If decisions that are not accompanied by reasons are not challenged, the chances those decisions will in some cases not be justifiable and so arbitrary increases, undermining the rule of law. So the willingness of the Court to seek out and accept implicit reasons needs to be clearly constrained, and no obvious basis for constraint presents itself.[22]

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[19] *A.T.A. v. Alberta (Information & Privacy Commissioner)* 2011 SCC 61.
[20] *Maclean v. British Columbia (Securities Commission)* 2013 SCC 67.
[21] *Supra* at 66 – 74.
[22] I am not the first to raise a version of this concern. See, for example, Van Harten et al *supra* note 18 at 437: "[I]f a tribunal gives reasons that do not reveal some legal error in its approach to the legislation but are unduly vague or ambiguous, can a court nonetheless… allow the appeal or set the decision aside as being wrong in law, even though in a substantive sense the decision was one that the tribunal could properly reach?"

I end by articulating the sense in which my claim that there are no longer any circumstances under which a reviewing court will declare an objectively less desirable but justified decision unreasonable is a cause for optimism. During the evolution of judicial review over the course of the twentieth century, "there were aspects of the courts' practice… that were the equivalent of a war between the courts and the legislature."[23] In other words, courts struggled to strike the appropriate balance between the role of the court upholding the rule of law and the powers of democratically elected representatives to confer delegated authority. What my analyses throughout this project suggest is that, at least in respect of reasonableness, that struggle has come to an end. It has ended because the reasonableness standard clearly identifies an appropriately narrow set of circumstances in which interference owing to unreasonableness is necessary to preserve the rule of law. Specifically, interference is necessary only when a delegated decision maker decides arbitrarily as defined by the three criteria. When, by contrast, the reasons in support of a decision satisfy the criteria, irrespective of the relative shortcomings of the outcome, courts will refrain from intervention out of respect for the foundational democratic principle.

[23] *Ibid* at 674.

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