A PRACTITIONER'S INNOVATIVE RESPONSE TO ABELLA'S CALL TO REFORM JUDICIAL REVIEW

Twila Reid, Amanda Whitehead, and Jessica Habet*

Introduction

A decade ago, the Supreme Court of Canada significantly changed the law on substantive review of administrative decision-making in Canada.[1] The standards of reasonableness *simpliciter* and patent unreasonableness were collapsed into one standard of reasonableness. Three standards of review became two: reasonableness and correctness. The goal of *Dunsmuir* in reducing the standards from three to two was to simplify the standard of review analysis and reduce the time and resources spent on judicial review. There is broad consensus that this objective has not been achieved. As noted by Paul Daly, "*Dunsmuir* is cited roughly one hundred times a month, twenty-five times a week, five times a (working) day."[2] From *Southam's*[3] three to *Dunsmuir's* two, reducing the standards of review has done nothing to remedy the problems litigants experience with administrative law generally, and judicial review in particular.

The only remaining judge on the Supreme Court of Canada who partook in *Dunsmuir* is Justice Abella, and she has urged for revision. In *Wilson v Atomic Energy of Canada Ltd,*[4] Justice Abella explained that *Dunsmuir* "sought to provide 'a principled framework that is more coherent and workable'"[5] but "collapsing three into two has not proven to be the runway to simplicity the Court had hoped it would be."[6]

Chief Justice McLachlin (as she then was) made the following remarks on her time on the bench and the development of administrative law:

> I lived through the *Southam* era of three standards of review — correctness, reasonableness, and patent unreasonability, and saw it narrowed to two standards in *Dunsmuir*. In recent years, I have seen this solidify into a

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* Twila E Reid is a partner at Stewart McKelvey practicing primarily in labour/employment and administrative law in St. John's, NL. She is a Director of the national Canadian Bar Association, a Director of the Newfoundland and Labrador Employers' Council and a member of the federal Judicial Advisory Committee for NL.

[1] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

[2] Paul Daly, "Struggling towards Coherence in Canadian Administrative Law: Recent Cases on Standard of Review and Reasonableness" (2016) 62:2 McGill LJ 527 at 529 [Daly, "Struggling towards Coherence"].

[3] *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Southam*].

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

[5] *Ibid* at para 25, citing *Dunsmuir*, *supra* note 1 at para 32.

[6] *Ibid* at para 25.

> presumption of deference toward the decisions of tribunals interpreting their home statutes. The next focus may be exploration of reasonableness itself.[7]

She advocated for "a generous and flexible approach" to the reasonableness standard, with the "presumption of reasonableness reflect[ing] the deference that is due to the person or body which the legislature has appointed as decision-maker."[8] The correctness standard ought to be utilized for "rare questions of statutory interpretation where there can and must be only one answer".[9] Many commentators agree, suggesting the path to reform must lead to one standard of review: reasonableness.[10]

Ultimately, it was hoped that changes to the standard of review would improve administrative law's ability to deliver access to justice. However, the problems with standard of review are only one indicator of judicial review's infirmities. Judicial review, as it is currently formulated, is a barrier to access to justice. It is not an effective remedy for administrative law litigants. This paper provides a case study to illustrate how resources are tied up in procedural wrangling rather than giving litigants the means to have their disputes determined on the merits. Enormous amount of resources are still spent debating the standard of review. The practice of remitting the matter to the first instance decision-maker following a successful judicial review unnecessarily increases the resources required to conclude the matter. The parties are taken from point A and returned to point A, having invested significant time, energy, and money.

Ten years after *Dunsmuir*, the Supreme Court of Canada has declared its intent to revisit this seminal decision. The Supreme Court has granted leave to appeal in three cases, and, remarkably, they have told us why: "The Court is of the view that these appeals provided an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v New Brunswick* … and subsequent cases."[11] The Court has specifically invited the parties to devote a substantial part of their submissions to the question of standard of review.

This paper explains why judicial review, as an important component of administrative law, is broken, and why modification of the standard of review is not the solution. Specifically, the authors describe the inherent problems with having only one standard of reasonableness. First, *Dunsmuir*'s expansion of the reasonableness standard has done nothing to simplify judicial review. *Dunsmuir* has not achieved the desired clarity in interpreting reasonableness; many courts simply do not engage in a

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[7] Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016) 29:2 Can J Admin L & Prac 127 at 134.

[8] *Ibid* at 133.

[9] *Ibid* at 133.

[10] Jonathan Coady advocates for a single standard of review for reasonableness in his article. See Jonathan Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017) 68 UNBLJ 87.

[11] Applications for Leave, *Bell Canada, et al v Attorney General of Canada*, case number 37896, 10 May 2018 [*Leave Decision*], online: <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/17083/index.do>

standard of review analysis. Second, one standard of reasonableness ignores legislative intent, which should be the cornerstone of judicial review. Third, one standard of reasonableness does not further the rule of law. The rule of law should, at its core, make the law predictable. Reasonableness, by its very nature, does nothing to promote predictability because implicit in the notion of reasonableness is that there can be more than one reasonable outcome. Fourthly, reform to judicial review must respect the constitutional role of judges. One standard of review ignores both the presence (or absence) of a privative clause, and the legitimate constitutional reason as to why the courts established the correctness standard in the first place – namely, that judges have a critical constitutional role in deciding issues of law. Finally, the most recent decisions of the Supreme Court illustrate that in their efforts to come closer to one standard of reasonableness, what they are practically doing is undertaking a correctness analysis vaguely disguised as reasonableness.

Ultimately, this paper agrees with Justice Abella and Chief Justice McLachlin (as she then was) that judicial review needs reform. However, given the judiciary's constitutionally-protected role in determining questions of law, the confusion in applying reasonableness, and the current epidemic of access to justice in judicial review generally, one standard of reasonableness is not a workable fix. The authors instead offer an innovative alternative by examining the already established process for overturning decisions: appeals. This paper suggests a return to standards that have been proven workable and understandable: "palpable and overriding error" for questions of fact and "error" for issues of law. These standards maintain the principles underlying *Dunsmuir* and put an end to the turmoil facing tribunals, courtrooms and classrooms. Appeals using these standards promote the rule of law, respect legislative intent, and protect the constitutional role of judges by granting deference to issues of fact but not to issues of law.

In *Dunsmuir,* Justice Binnie (as he then was) articulated that "[e]very hour of a lawyer's preparation and court time devoted to unproductive 'lawyer's talk' poses a significant cost to the applicant."[12] The standard of review for Mr. David Dunsmuir himself was the least important issue.[13] Access to justice means access to a hearing on the merits. Eliminating the standard of review promotes access to justice by reducing arguments over process and, consequently, hearing the merits of a dispute more quickly.

Judicial Review in Its Current Form is a Barrier to Access to Justice: A Case Study

The problems with administrative law are not limited to the standard of review. The complexity surrounding the standard of review is only one symptom of administrative

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[12] *Dunsmuir, supra* note 1 at para 133.

[13] Clarence Bennett, "David Dunsmuir – An Unlikely Administrative Law Celebrity," Paul Daly, *Administrative Law Matters*, online: <http://www.administrativelawmatters.com/blog/2018/02/23/david-dunsmuir-an-unlikely-administrative-law-celebrity-clarence-bennett/>

law's affliction. Judicial review as a remedy has failed to achieve its intended objective – to offer faster and simpler avenues of redress to persons whose interests are affected.

The following case study demonstrates some inefficiencies of the current administrative system. The practical reality of many administrative law hearings is that they are more time and resource-intensive than any ordinary court trial. Justice Cromwell identified access to justice as the most important issue facing the legal system and called the system "too complex, too slow, and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the people it is meant to serve."[14]

NARL Refining Limited Partnership ("NARL") operates a refinery in Newfoundland and Labrador. In December 2015, two employees exercised their statutory right to refuse work they believed to be unsafe. Specifically, they refused to be present for a scheduled shift during which no specific task had yet been assigned to them. One employee refused to work on the basis that he was not adequately trained. The other employee refused to work on the basis that his co-worker was not adequately trained.

This led to an investigation by the Occupational Health and Safety Division ("OHS"). About six months later, OHS issued four directives. The first directive involved training pursuant to a process management code of practice. NARL had a fundamental disagreement with the applicability of the process management code. The directives themselves indicated to NARL that they could appeal to the Assistant Deputy Minister ("ADM"). NARL filed an appeal to the ADM. In September 2016, the ADM dismissed the appeal and indicated that NARL could appeal further to the Labour Relations Board (the "Board"). In October 2016, NARL filed an appeal to the Board.

The Board has no rules of procedure which govern appeals of OHS directives. There was thus a procedural debate before the Board about what the proper process should be. The Board had previously considered an appeal concerning an occupational health and safety issue, and that matter had proceeded on the basis of a trial *de novo*. As a result, NARL expected a trial *de novo*. However, despite its earlier decision, the Board decided it was proper to proceed with a review of the matter on the record before the ADM. OHS attended the hearing but made no submissions. At the conclusion of the hearing in May 2017, the Board simply declared that it did not have jurisdiction over the dispute. As of May 2018, the Board has still not released its reasons for that decision.

NARL accepted the finding that the Board lacked jurisdiction and, in November 2017, NARL applied to the Supreme Court of Newfoundland and Labrador for judicial review of the ADM's decision. In January 2018, the parties appeared before the Supreme Court to set a date for a hearing on NARL's application. At the

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[14] Honourable Justice Thomas Cromwell, "Access to Civil and Family Justice: A Roadmap for Change", *Action Committee on Access to Justice in Civil and Family Matters* (October 2013) at 1, online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

application hearing, OHS indicated that it would likely be filing an application for judicial review of the Board's finding that the Board did not have jurisdiction, despite the fact that OHS did not take any position on jurisdiction at the hearing before the Board. Further, OHS was of the view that its anticipated application should be scheduled in advance of NARL's because if the application was successful, it would be requesting that the matter be remitted to the Board. Last, OHS advised that it may ask the Board to reconsider its decision declining jurisdiction before even applying for judicial review, adding yet another layer of process over merits.

Arguably, if the matter were remitted or reconsidered by the Board, the Board could decide that it, in fact, does have jurisdiction. Further complicating the issue is that many of the members appointed to the Board have changed in the intervening time, including the Board Chair. If the Board decides that it does have jurisdiction, and proceeds to deal with the matter on a review basis, then the Board could, in theory, decide to remit the matter to the ADM which would have the effect of restarting the entire process.

The procedural wrangling is not unique to this case. The incident occurred in December 2015, and as of May 2018, no decision-maker has heard the actual merits of the case. This is not access to justice.

There are Inherent Problems with Reasonableness that remain unsolved since *Dunsmuir*

I. Reasonableness has not simplified judicial review

Chief Justice McLachlin (as she then was) explained that it is the role of judicial review to ensure that "the decisions of Ministers, agencies are within their powers and reasonable."[15] Judicial review, she remarked, preserves the rule of law.[16] Administrative law was supposed to be a quicker and easier way for parties to resolve their issues where specialized tribunals composed of experts would adjudicate the matter before them. The courts, on the other hand, were to serve an important oversight role to ensure that administrative decision-makers, created by statute, stay within the confines of their statutory authority.

Honourable Justice David Stratas calls administrative law "the body of law that tells us when the judiciary can legitimately interfere with decision making by the executive".[17] "Resting at its heart", he proclaims, "is the standard of review."[18] The

[15] McLachlin CJ, *supra* note 7 at 133.

[16] McLachlin CJ, *supra note* 7.

[17] Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27 at 30.

[18] *Ibid.*

role of judicial review is "fundamental to democratic order and good governance," and as such, it requires "objectivity, consistency and predictability".[19]

If standard of review is the heart of administrative law, then a trip to the cardiologist is in order. Modern administrative law is not achieving objectivity, consistency, or predictability. Administrative boards and tribunals have failed to deliver a faster dispute resolution process. In the words of the then Chief Justice McLachlin, "[t]he central issue in judicial review is determining when it is appropriate to overrule the decision of an administrative decision-maker."[20] Yet the courts spend more time battling over the appropriate standard of review instead of addressing the heart of the matter. Litigants who simply want their issues determined on the merits are left unsatisfied.

Robert Danay undertook an empirical analysis to determine whether there has been any measurable difference in how deferential the Supreme Court of Canada has been since *Dunsmuir*.[21] He examined every case in which the Supreme Court reviewed an administrative decision on substantive grounds, beginning with *Pushpanathan v Canada*[22] and ending with *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*.[23] He then compared pre-*Dunsmuir* and post-*Dunsmuir* cases. Danay argued "that the most objective way to test the hypothesis that the *Dunsmuir* framework leads to less deference being shown to administrative decision makers is to examine the rates at which judges have identified a deferential standard of review and overturned the decision before and after *Dunsmuir*."[24]

Danay's findings show that while the Court as a whole overturned administrative decisions at a significantly lower rate under the *Dunsmuir* framework than under the pragmatic and functional approach, members of the Court either upheld or overturned a decision "without identifying a standard of review approximately one third of the time both before and after *Dunsmuir*."[25] In approximately one-third of all of the Court's decisions over two decades, the Supreme Court has not even mentioned the standard of review in its decision. Danay explains that the Court showed very little deference when it did not identify a standard of review,[26] effectively applying the correctness standard.

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[19] *Ibid.*

[20] McLachlin CJ, *supra* note 7 at 133.

[21] Robert Danay, "Quantifying *Dunsmuir*: An empirical analysis of the Supreme Court of Canada's jurisprudence on standard of review" (2016) 66:4 U Toronto LJ 555.

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

[23] *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval,* 2016 SCC 8, [2016] 1 SCR 29 [*Commission scolaire de Laval*].

[24] Danay, *supra* note 21 at 567.

[25] Danay, *supra* note 21 at 576.

[26] Danay, *supra* note 21 at 580.

Judicial review as a concept was not created by the legislature. Instead, it was a creature of the courts designed to address legislative actions which were not compliant with the Constitution. At the apex of our judicial system is the Supreme Court of Canada. It is responsible for guarding the Constitution and supervising the laws of Canada. In relation to administrative agencies, the Supreme Court of Canada "alone supervises the functioning of intermediate appellate and reviewing courts to ensure that they conduct appeals as intended and that they do not trench upon the proper role of trial courts and administrative agencies."[27]

When the highest court of the land does not identify a standard of review, it chooses not to provide any justification for upholding or rejecting decisions made by administrative bodies.[28] By remaining silent on the standard of review, both before and after *Dunsmuir*, the Court acts against its own jurisprudence. That the Court continued to ignore the standard of review post-*Dunsmuir* is surprising, considering the Court's clearly articulated stance in *Dunsmuir*.

Ginn and Lahey et al conducted a series of studies to understand the implications of *Dunsmuir*.[29] They ultimately concluded that Dunsmuir has simplified the law without reintroducing interventionist tendencies back into the law. Their studies are important because they demonstrate that the outcome a court arrives at does not depend on its standard of review analysis, but instead on the courts' absorption of the *Dunsmuir* demand for deference. While the four factors that were used in the former pragmatic and functional approach are still relevant to the standard of review analysis,[30] the studies showed that the nature of the question at issue was a core aspect of determining the standard of review.[31] They cite Justice Deschamps in *Dunsmuir,* who explains that "'[a]ny review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little

[27] Donald JM Brown, QC, *Civil Appeals* (Toronto: Carswell, 2009) (loose-leaf supplement 2017), 1:0222 [*Civil Appeals*].

[28] In his empirical study, Danay identified cases where no standard of review was specified. One such case is *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services),* 2001 SCC 41, [2001] 2 SCR 281.

[29] Ginn & Lahey, et al ''How Has *Dunsmuir* Worked? A Legal-Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir* v. *New Brunswick*: Findings from the Federal Courts" (2017) 30 Can J Admin L & Prac 51 [Ginn & Lahey, Part 1]; "How Has *Dunsmuir* Worked? A Legal Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the British Columbia Courts" (2017) 30 Can J Admin L & Prac 173 [Ginn & Lahey, Part 2]; "How Has *Dunsmuir* Worked? A Legal Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the Courts of Nova Scotia, Quebec, Ontario and Alberta" (2017) 30 Can J Admin L & Prac 317 [Ginn & Lahey, Part 3]. Please note that Part 2 of the series is not relied on because British Columbia has legislated standards of review for judicial review for many administrators through its *Administrative Tribunals Act*. Parts 1 and 3 of the series are referenced in this paper.

[30] *Dunsmuir*, *supra* note 1 at para 64. The four factors are (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.

[31] Lahey et al, *supra* note 29 at 336.

else needs to be done in order to determine whether deference needs to be shown to an administrative body.'"[32]

Ginn and Lahey et al expected to find the *Dunsmuir* description for reasonableness referenced in every decision where the court undertook a reasonableness review.[33] As defined in *Dunsmuir*, a reasonable decision has two parts: it must be transparent, justifiable, and intelligible, and the result must fall within a reasonable range of outcomes, taking account of the law and the facts.[34] They found that the *Dunsmuir* formulation of what reasonableness looks like was explicitly used to accept or reject the administrative decision-maker's reasons and outcomes for less than 60% of decisions under review.[35] They also found significant variation in the conduct of the standard of review analysis – the brevity of the analysis and the factors analyzed. As demonstrated in the cases below, an outcome-based approach does not simplify administrative law, but continues to muddy it. The concern post-*Dunsmuir* was that courts would undergo a correctness review, disguised as a reasonableness review. It is no less concerning, however, that a court may take a deferential approach when it should be applying a correctness review.

Others have noted the inconsistent post-*Dunsmuir* jurisprudence. Honourable Justice Joseph T. Robertson, formerly of the Federal Court of Appeal and the New Brunswick Court of Appeal, delivered a speech in which he acknowledges that the "post-*Dunsmuir* jurisprudence is incompatible with [his] understanding of what was decided in *Dunsmuir*."[36] Paul Daly has also criticized the Court's recent jurisprudence:

> While academics, practitioners and lower-court judges try to establish coherent frameworks to understand the general principles of judicial review, the Court has been resolving cases one by one without, with respect, any serious attempt to explain how they fit into its existing body of administrative law jurisprudence.[37]

He argues that there has been such confusion in administrative law that it is now necessary to distinguish between the signal and the noise – between cases that actually "modify administrative law doctrine and those cases that simply deal with a particular substantive area of law."[38] With this paper, Daly adds another voice to the mounting confusion and frustration directed at the current state of administrative law.

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[32] *Ibid* at 336, citing Dunsmuir, *supra* note 1 at para 158.

[33] Lahey et al, *supra* note 29.

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

[35] Ginn & Lahey, Part 3, *supra* note 29 at 204.

[36] Honourable Joseph T Robertson, QC, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017) 68 UNBLJ 145 at 154.

[37] Paul Daly, "The Signal and the Noise in Administrative Law" (2017) 68 UNBLJ 68 at 68.

[38] *Ibid*.

II. The Role of Legislative Intent

Dunsmuir has resulted in neither simplification nor increased deference to decision-makers. The studies would suggest that courts are effectively (if not expressly) ignoring the standard of review. They were doing it before *Dunsmuir*, and they continue to do it after *Dunsmuir*. In doing so, the Supreme Court acts against its own jurisprudence and drifts further away from an approach that reflects legislative intent.

The concept of judicial review originated in the Court's desire to manifest the legislature's intention, which was to delegate certain decisions to statutory decision-makers while at the same time preserving the supervisory role of judges, as contemplated by the Constitution. The first factor to be considered in the standard of review analysis, as outlined in *Pushpanathan*, was the presence (or absence) of a privative clause. The Supreme Court of Canada in *Dunsmuir* rebuked non-deferential and intrusive behaviour of courts which interfered with legislative intent. The Court specifically cautioned that respect for legislative intent must be maintained.

In 2012, Daly lamented the apparent demise of the standard of review analysis. He proclaimed that the "barriers between a decision maker and a non-deferential court erected by the standard of review analysis have been torn down by *Dunsmuir* and the Court's subsequent decisions."[39] Daly longingly referred to the Canadian history of prioritizing legislative intent. The authors echo his concerns:

> the standard of review analysis largely respects the traditional view of courts as agents of the legislature, with a duty to give effect to legislative intent (while at the same time ensuring that the legislature had remained within its constitutional boundaries). […] But one of the great advances made by Canadian courts in developing the standard of review analysis was to take legislative enactments seriously. No longer was "legislative intent" treated as a purely formalistic incantation, an empty vessel into which courts could pour their desired judicial review doctrine. Rather it was treated as providing guidance to courts as to how best to shape the law of judicial review.[40]

In cases post-*Dunsmuir*, the Supreme Court of Canada appears to give little weight to legislative intent, and instead favours a more formalistic, categorical approach. For example, in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*,[41] the Supreme Court again disagrees on the applicable standard of review, and seems to disregard their own warnings. In this case, a taxpayer company filed a complaint with the local assessment review board. Accepting the city's assertion that the taxes were too low, the Board decided to increase the assessment. The taxpayer company applied for leave to appeal to the Court on a question of law or jurisdiction,

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[39] Paul Daly "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50:2 Osgoode Hall LJ 317 at 357.

[40] *Ibid* at 356.

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

pursuant to the statute. The statute explicitly included a statutory appeal on questions of law and jurisdiction. The issue was whether a local assessment review board was permitted to increase an assessment after a taxpayer appeals its municipal tax assessment or whether it was limited to lowering or confirming the assessment. The Court of Queen's Bench identified the issue as a question of jurisdiction and applied the correctness standard.[42] That Court found that the board did not have the jurisdiction to increase the assessment and sent the matter back to the board for a new hearing.[43] The matter was then appealed to the Court of Appeal.

At the Court of Appeal, Justice Slatter declared, "[t]he day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day."[44] After a contextual analysis, he applied the correctness standard and dismissed the City's appeal. He disagreed with the lower court that the issue on appeal was a true question of jurisdiction. He determined that the nature of the statutory regime, the presence of a statutory right of appeal, the nature of the issue in question (a question of law that did not fall within the board's expertise) and that the interpretation of the statute would be applicable throughout the province, were all factors that required a correctness review.

The Supreme Court of Canada disagreed. Justice Karakatsanis, writing for the majority with Justices Abella, Cromwell, Wagner, and Gascon concurring, quashed Justice Slatter's decision, and his wishes, by responding, "[t]hat day has not come, but it may be approaching."[45] They found that the standard of review was presumed to be reasonableness because the issue involved interpreting the board's home statute.[46] They also held that the board had the authority to increase the assessment.

Echoing *Dunsmuir*, the majority explained that the two competing principles of legislative supremacy and rule of law "require the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body",[47] and that the courts have the "last word on whether an administrative body has acted within the scope of its lawful authority".[48] Justices Côté and Brown dissented, with Chief Justice McLachlin (as she then was) and Justice Moldaver concurring in dissent. They applied a correctness standard of review, explaining

> The legislature of Alberta created a municipal assessment complaints regime that allows certain questions squarely within the expertise of an

[42] *Ibid* at para 16.

[43] *Ibid* at para 17.

[44] *Edmonton (City) v Edmonton East (Capilano),* 2015 ABCA 85 at para 11, [2015] 5 WWR 547.

[45] *Edmonton East*, *supra* note 41 at para 20.

[46] *Ibid* at para 23.

[47] *Ibid* at para 21.

[48] *Ibid*.

> assessment review board to be reviewed on a deferential standard through the ordinary mechanism of judicial review. ***The legislature, however, also designated certain questions of law and jurisdiction*** — for which standardized answers are necessary across the province — ***to be the subject of an appeal to the Court of Queen's Bench.*** Where the court quashes a decision, its answers to these questions are binding on the Board. ***This leads to the unavoidable conclusion that the legislature intended correctness review to be applied to these questions***.[49]

We agree with the dissent. The dissent explained that "[t]he 'overall aim' of the standard of review analysis has always been 'to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law'"[50] and cited Justice Binnie who noted that the standard of review analysis "'is necessarily flexible' as it seeks 'the polar star of legislative intent'".[51]

Even if there was a presumption of deference for the Board's interpretation, the dissenting judges noted that the presumption of deference was rebutted by "clear signals of legislative intent."[52] One clear signal was a statutory right of appeal. The dissent explained, citing Justice Binnie, that this was "'an important indicator of legislative intent'" and, depending on its wording, it 'may be at ease with [judicial intervention]'".[53] The statutory right of appeal coupled with the legislative scheme were clear signals used by the legislature to rebut the presumption of deference. Still, the majority did not heed these signals.

The dissent continued that the "legislature must have known that judicial review is available for any question not covered by a limited right of appeal [...], given that the legislature is presumed to know the law"[54] and quoted Justice Bastarache of *Pushpanathan*:

> The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" .... The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. ***Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board?*** Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which

[49] *Ibid* at para 63 [emphasis added].

[50] *Ibid* at para 65, citing *Dr. Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 26, [2003] 1 SCR 226.

[51] *Ibid* at para 65, citing *CUPE v Ontario (Minister of Labour),* 2003 SCC 29 at para 149, [2003] 1 SCR 539, Binnie J [*CUPE*].

[52] *Ibid* at para 66.

[53] *Ibid* at para 73, citing *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12 at para 55, [2009] 1 SCR 339, Binnie J.

[54] *Ibid* at para 78.

> are wrong in law […]. The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal […] is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.[55]

If the presence of a statutory right of appeal and the constellation of factors present in *Edmonton East* do not call for a standard of correctness, in what situations can the courts ever have the ultimate word on the law? How does a legislature indicate that it intends the ordinary rules of an appeal to apply?

The majority explained that, in their view, the presumption of deference on judicial review

> respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.[56]

It is difficult to understand how the Court's application of the reasonableness standard in *Edmonton East* achieves any of these objectives. In reversing two decisions below it (the Court of Appeal being unanimous), the Supreme Court muddles the state of administrative law, and the importance of legislative intent is lost in the fog.

III. The Rule of Law

In *Dunsmuir*, the Supreme Court thoroughly explained the concept of judicial review as one "intimately connected with the preservation of the rule of law."[57] The preservation of the rule of law is the "constitutional foundation which explains the purpose of judicial review and guides its function and operation."[58] Judicial review's purpose is 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."[59] To respect legislative intent, courts 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 by Parliament and legislatures."[60]

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[55] *Ibid* at para 78, citing *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 at para 43, 160 DLR (4th) 193 [underlined emphasis original; italicized emphasis added].

[56] *Ibid* at para 22.

[57] *Dunsmuir*, *supra* note 1 at para 27.

[58] *Ibid*.

[59] *Ibid*.

[60] *Ibid*.

Inherent in "reasonableness" is the notion that there can be a range of reasonable outcomes. This, by its very nature, means no predictability among decision-makers hearing a similar issue. *Dunsmuir* defined reasonableness as follows:

> 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. [61]

This means that on the same facts, one adjudicator can decide an outcome that is opposite to that of another adjudicator, but both can still fall within this "range of possible acceptable outcomes".[62] "Reasonableness" by its very nature implicitly lacks predictability, objectivity, and finality and is therefore a threat to the rule of law.

The problem of adjudicators reaching opposing decisions on the same issue does not just arise in theory. The issue of the correct application of severance for part-time nurses is a real-world example.[63] A part-time nurse claimed that she had been denied severance pay in contravention of the collective agreement. To receive severance pay benefits, an employee had to work for nine or more years of continuous service. Both the union and the employer agreed that the nurse was employed for nine years. The dispute was whether or not the part-time nurse achieved the eligibility requirement of continuous service. Though the circumstances were the same and the provisions in dispute were identical, two different arbitrators arrived at opposite conclusions. In one decision, the majority of the arbitration board sided with the union and upheld the grievance.[64] In the second decision, most of the majority's decision focused on the interpretation of defined terms in the collective agreement, and dismissed the grievance, siding with the employer.[65] These decisions have not undergone judicial review. It is likely that both decisions would meet the reasonableness test, leaving the employer and union with no guidance. There is no consistency, predictability, or finality. This simply encourages the parties to go to arbitration each time this issue arises and "arbitrator shop" for the one who decided the issue in their favour.

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

[62] *Ibid.*

[63] *Newfoundland and Labrador Nurses' Union v St. Clare's Hospital* (Alcock) June 26, 1983 (unreported) [Alcock] & *Newfoundland Association of Public Employees v Newfoundland Hospital Association-Channel Hospital* (Thistle) April 1, 1980 (unreported) [Thistle].

[64] Alcock, *supra* note 63.

[65] Thistle, *supra* note 63.

IV. One Unified Standard of Reasonableness Ignores the Constitutional Role of Judges in Deciding Issues of Law

Justice Stratas' characterization of the Court's goal being legitimate interference exemplifies what Chief Justice McLachlin called the "tension-ridden borderland"[66] between the executive branch and the judicial branch. It is the "combination of two fundamental values — the rule of law on the one hand and effective governance on the other — [that] condemn[s] administrative decision makers and the courts to a difficult relationship from which neither can escape."[67]

A survey of post-*Dunsmuir* decisions shows that the Supreme Court of Canada has overwhelmingly used the reasonableness standard when the decisions do not involve a legislated standard of review or a constitutional question.[68] Justice Abella endorses the ascendancy of the reasonableness standard, proposing the elimination of the correctness standard. In *Wilson*, Justice Abella makes the noteworthy comment:

> Nothing *Dunsmuir* says about the rule of law suggests that constitutional compliance dictates how many standards of review are required. The only requirement, in fact, is that there be judicial review in order to ensure, in particular, that decision-makers do not exercise authority they do not have.[69]

Administrative bodies were primarily created for access to justice. Specialized expertise was also cited as a reason, although, practically, the actual expertise of the administrative decision-makers varies immensely between provinces and types of administrative decision-makers. Specialized experience should not automatically be presumed.

Parliament rightly recognized that courts could not hear every proceeding in the land. To ensure that people's matters were being heard, and fairly, Parliament and legislatures began creating these specialized tribunals. In *Crevier v Quebec (Attorney General),*[70] the Supreme Court for the first time "declared unequivocally that a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions".[71] If the correctness standard was completely eliminated, the Court's theme of balancing the rule of law and legislative supremacy no longer makes sense. It is simply not constitutional to eliminate correctness as a standard of review.

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[66] McLachlin CJ, *supra* note 7 at 128.

[67] McLachlin CJ, *supra* note 7 at 129.

[68] Lauren J Wihak, "Wither the correctness standard of review? *Dunsmuir*, Six Years Later" (2014) 27:2 Can J Admin L & Prac 173 at 182.

[69] *Wilson*, *supra* note 4 at paras 31–33 [emphasis in original].

[70] *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220, 127 DLR (3d) 1 [*Crevier*].

[71] *Ibid* at 236.

The recent Supreme Court decision in *Delta Air Lines Inc v Lukács*[72] illustrates the confusion with respect to applying standard of review analysis to issues which were traditionally considered questions of law. The decision was split 6-3, with all parties agreeing that the standard was reasonableness at both levels of court. In this case, Dr. Lukács filed a complaint with the Canadian Transportation Agency alleging that Delta Air Lines applied discriminatory practices in relation to the transportation of obese passengers. The complaint was filed on August 24, 2014. On November 25, 2014, the Agency dismissed the complaint on the basis that Dr. Lukács failed to meet the tests for private interest and public interest standing as developed by and for the courts of civil jurisdiction. It found that Dr. Lukács lacked private interest standing because he himself was not obese and so he could not claim to be aggrieved or have some other sufficient interest. It also determined that he lacked public interest standing because his complaint did not challenge the constitutionality of legislation or the illegal exercise of an administrative authority. Under its legislation, the Agency has discretion to determine whether it will hear a complaint.

Dr. Lukács appealed to the Federal Court of Appeal. The Court of Appeal found that a strict application of the law of standing as applied in the courts was inconsistent with the Agency's enabling legislation, and that it was contrary to the Agency's objective to refuse to examine a complaint based only on whether the complainant had been directly affected or had public interest standing. The Court of Appeal found that "the Agency unreasonably fettered its discretion"[73] and directed that the matter be returned to the Agency to "determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint."[74]

The issue at the Supreme Court of Canada was whether or not the Agency's decision was reasonable. Chief Justice McLachlin (as she then was), writing for the majority, found that the Agency did not reasonably exercise its discretion to dismiss Dr. Lukács' complaint, and remitted the matter to the Agency to reconsider whether it would hear the complaint. The Court found that the decision did not satisfy the requirements of justification, transparency, and intelligibility, as required by the *Dunsmuir* definition of reasonableness, for two reasons.

As the Court noted, "[f]irst, the Agency presumed that public interest standing [was] available and applied a test that could never be met."[75] The Court later explained that "[a]ny valid complaint against an air carrier would impugn the terms and conditions established by a private company", and that "[a] complaint regarding [those] terms and conditions can never, by its very nature, be a challenge to the constitutionality of legislation or the illegality of administrative action."[76] From this reasoning, the Court found that the "imposition of a test that can never be met could

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[72] *Delta Air Lines v* Lukács, 2018 SCC 2, 416 DLR (4th) 579 [*Delta Air Lines*].

[73] *Delta Air Lines Inc v Lukács*, 2016 FCA 220 at para 30, 408 DLR (4th) 760.

[74] *Ibid* at para 32.

[75] *Delta Air Lines*, *supra* note 72 at para 13.

[76] *Ibid* at para 17.

not be what Parliament intended when it conferred a broad discretion on this administrative body to decide whether to hear complaints."[77] The Court also found that, "[s]econd, the total denial of the public interest standing [was] inconsistent with a reasonable interpretation of the Agency's legislative scheme."[78] The Court found that the way the Agency applied the tests "would preclude any public interest group […] from ever having standing before the Agency".[79] The Court found that this was "contrary to the scheme" of the Agency's enabling legislation under which "Parliament […] grant[ed] the Agency broad remedial authority."[80] In its decision, the Court explained why "this was not a case where merely supplementing reasons [could] render the [Agency's] decision reasonable",[81] writing that "[i]t would be ironic to allow the appeal in the name of deference and then stipulate how the Agency should determine when to hear a complaint".[82]

The dissent, delivered by Justice Abella, explained that nothing in the Agency's governing statute prevented it from applying the same standing rules used by the courts. The dissent also found that the Agency's decision was not unreasonable. The dissent identified Parliament's intention to give the Agency "the authority to interpret and apply its wide-ranging governing statute dealing with national transportation issues, address policy, and balance the multiple competing interests before it".[83] They found that there was "nothing in the Agency's mandate that circumscribes its ability to determine how it will decide what cases to hear."[84]

In this case, there was no discussion about whether the Court should apply a correctness or reasonableness standard. Yet, the issue before the Court involved questions of law, specifically whether the enabling legislation gave the Agency discretion to apply the public interest and private interest standing test. There were no factual disputes in the case. The majority essentially undertook a correctness analysis of a question of law, vaguely disguised as a deferential reasonableness analysis.

V. Reasonableness Disguised as Correctness

Pretending that one is giving deference to an administrative decision maker by using the word "reasonableness" may currently be in fashion, but it is not helping practitioners understand what reasonableness means, nor is it helping the rule of law

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[77] *Ibid*.

[78] *Ibid* at para 13.

[79] *Ibid* at para 19.

[80] *Ibid* at para 20.

[81] *Ibid* at para 25.

[82] *Ibid* at para 28.

[83] *Ibid* at para 44.

[84] *Ibid*.

or access to justice. It appears somewhat intellectually dishonest for a court to decide that the standard is reasonableness but that in any given case there is only one reasonable outcome – this is actually correctness. As administrative law expert David Jones asserts in his commentary on *Wilson*, "[t]he Court sometimes used the reasonableness standard of review to find something unreasonable when it really meant it was incorrect."[85]

The most recent decision from the Supreme Court addressing standard of review is *Groia v Law Society of Upper Canada.*[86] The Supreme Court in *Groia* followed *Delta Air Lines* in purporting to apply a reasonableness standard but arguably undertaking a correctness analysis. What makes *Groia* unique is that the dissenting reasons specifically acknowledge this issue.

Mr. Groia is a lawyer who was found by the Law Society Hearing Panel to have engaged in professional misconduct based on uncivil behaviour during a trial.[87] The Law Society Appeal Panel confirmed the finding of professional misconduct.[88] The Divisional Court found that the Appeal Panel's decision was reasonable.[89] The majority Court of Appeal also identified reasonableness as the appropriate standard of review and found the decision reasonable.[90] The dissent indicated that matters which took place in court were reviewable on the standard of correctness.[91]

The Supreme Court of Canada decision involved three sets of reasons. The majority (Chief Justice McLachlin and Justices Abella, Moldaver, Wagner and Brown) found that the standard of review was reasonableness.[92] Further, they determined that the approach and test adopted by the Appeal Panel was appropriate.[93] Yet, they found that somehow the Appeal Panel's application of the facts to the stated test was unreasonable, and allowed the appeal, substituting their view that Groia did not engage in professional misconduct primarily because Groia had a sincerely held but mistaken belief on the law regarding abuse of process.[94]

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[85] David Phillip Jones, "From Coast to Coast: The Year in Review in Administrative Law" (Paper delivered at the CBA Administrative Law, Labour and Employment Law Conference, 17-18 November 2017), online: <http://sagecounsel.com/wp-content/uploads/2017/12/2017-Recent-Developments-Admin-Law-DPJones.pdf>.

[86] *Groia v Law Society of Upper Canada, 2018 SCC 27, 2018 CarswellOnt 8701 [Groia].*

[87] *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2012 ONLSHP 94 (CanLII).

[88] *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2013 ONLSAP 0041 (CanLII).

[89] *Groia v Law Society of Upper Canada*, 2015 ONSC 686 at para 142, 124 OR (3d) 1.

[90] *Groia v Law Society of Upper Canada*, 2016 ONCA 471 at para 241, 131 OR (3d) 1.

[91] *Ibid* at para 256.

[92] *Groia*, *supra* note 86 at para 57.

[93] *Ibid* at para 62.

[94] *Ibid* at paras 122–125.

Justice Côté, agreed in the result, also finding that the appeal should be allowed. However, she found that the standard was correctness as the conduct occurred in a courtroom. Therefore, her analysis did not involve any deference to the Appeal Panel.[95]

The dissenting jurists (Justices Karakatasanis, Gascon, and Rowe) agreed with the majority that the applicable standard is reasonableness.[96] However, they found the decision was reasonable.[97] They outlined that the majority substituted its own judgment for that of the legislature's chosen decision maker which is not in accordance with a proper interpretation of reasonableness or deference. As explained in the dissent:

> We also have a number of concerns about Justice Moldaver's application of the reasonableness standard. Respectfully, we are of the view that he fundamentally misstates the Appeal Panel's approach to professional misconduct, and reweighs the evidence to reach a different result. This is inconsistent with reasonableness review as it substitutes this Court's judgment for that of the legislature's chosen decision maker
> …
> Finally, we note that all of the adjudicators and judges who reviewed this decision on the standard of reasonableness also concluded that the Appeal Panel's ultimate finding of misconduct was reasonable. The only person to conclude that Mr. Groia's conduct did not amount to misconduct was the dissenting judge at the Ontario Court of Appeal, who applied a correctness standard of review. This Court should resist the temptation to substitute its view on what the Appeal Panel should have done.[98]

With respect to the Supreme Court of Canada, it is difficult to understand how the majority analysis of the Appeal Panel's decision constituted reasonable deference. What the majority appeared to do is provide deference to the Appeal Panel's findings of fact, but then underwent what was essentially a correctness analysis in how those facts applied to the legal test as stated. Of course, this is the approach that an appellate court would normally take on an appeal. However, as articulated by the dissent, it's not reasonableness as that term had been traditionally used and applied in administrative law.

The Appeal of Appeals

The 2018 decisions in Delta Air Lines and *Groia* follow the earlier decisions in *Edmonton East* and *Wilson* in a string of jurisprudence from the Supreme Court that adds to the confusion concerning standard of review and confusion concerning the meaning of "reasonableness". The presumed application of the reasonableness

[95] *Ibid* at para 162.

[96] *Ibid* at para 175.

[97] *Ibid* at para 218.

[98] *Groia*, *supra* note 86 at paras 177, 218.

standard to a decision-maker's home statute is questionable. Judges are presumed to be experts in law, and, as such, a correctness standard presumption applied to cases involving home statutes is more logical. Even more confusing was the Court's adoption of reasonableness for the tests of standing, which were common law concepts. A court's ability to decide issues of law is fundamental to the rule of law and democracy. Issues of law clearly include, and go beyond, strict questions of statutory interpretation. Under our Constitution, it seems unlikely that one standard of review of reasonableness is (or, at least, should be) permissible.

This paper suggests that administrative law legislation should either specify an appeal in accordance with the normal appellate standards or specify a trial *de novo*. Appellate courts perform three functions: "[f]irst, they supervise the workings of trials and other adjudicative decision-makers to ensure due process. Second, they correct substantive errors by the initial adjudicator. And third, [they] carry primary responsibility for the development of the common law and other jurisprudence within their jurisdictions."[99]

In *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*,[100] the Supreme Court of Canada explained:

> The law of standard of review — including the distinction between questions of law and those of mixed fact and law — seeks to achieve an appropriate division of labour between trial and appellate courts in accordance with their respective roles. The main function of trial courts is to resolve the particular disputes before them […]. Appellate courts, however, "operate at a higher level of generality" […].They ensure that "the same legal rules are applied in similar situations", as the rule of law demands […]. Appellate courts also have a law-making function, which requires them to "delineate and refine legal rules".
>
> These particular functions of appellate courts — ensuring consistency in the law and reforming the law — justify reviewing pure questions of law on the standard of correctness. By contrast, appellate courts defer to findings of fact in part because they can discharge their mandate without second-guessing trial courts' factual determinations […]. For questions of mixed fact and law, the correctness standard applies to extricable errors of law (such as the application of an incorrect principle) because, again, a review on the standard of correctness is necessary to allow appellate courts to fulfill their role. However, where it is "difficult to extricate the legal questions from the factual", appellate courts defer on questions of mixed fact and law.[101]

Using appeals to monitor decisions of tribunals maintains the principles articulated in *Dunsmuir*. Participants do not need to be introduced to a new system. Lawyers are familiar with appellate courts, and litigants will be able to have their cases

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[99] *Civil Appeals*, *supra* note 27 at 1:0210.

[100] *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37, [2016] 2 SCR 23.

[101] *Ibid* at paras 35–36 [citations omitted].

heard on the merits. Unlike *Dunsmuir,* which has been cited thousands of times, the leading case on standards of appellate review, *Housen v Nikolaisen*,[102] has been cited significantly less, though it was decided six years before *Dunsmuir*.[103] *Housen* clarified the applicable standards of review for appellate courts in a way that *Dunsmuir* did not.

Furthermore, the use of appeals supports Justice Stratas' plea for doctrinal coherence and consistency. One correct outcome is more helpful to the rule of law than the range of outcomes that a unified reasonableness standard would offer. The continuing and increased use of the reasonableness standard implies that there are multiple reasonable outcomes. This results in diminished predictability of the outcome in any given matter and, ultimately, increases use of mechanisms like arbitration given the possibility of opposite outcomes on the same facts.

Appeals also provide more satisfying outcomes than those that arise from judicial review. When an appellate court determines that a lower court has made an error, it ordinarily substitutes its own decision. A party receiving a decision has typically had its rights adjudicated. Parties are spared the time and expense of a rehearing before the administrative decision-maker.

The remedies available to a successful applicant of judicial review are largely unsatisfactory. In a judicial review, the court's powers are limited; they can only quash a decision. This is because a court does not have statutory authority to exercise the discretion conferred on the tribunal, except to correct unintended mistakes made by the tribunal. This means that the court will simply refer the matter back to a tribunal. They will not supervise the tribunal's reconsideration. The same tribunal members are able to conduct the rehearing if the matter is remitted. Under this current system, the person whose interests are at stake is taken from point A all the way back to point A again, often after having invested significant resources. It is very difficult to explain to judicial review litigants that getting the matter returned for a rehearing is "success".

Specifically with respect to resources, there seems to be a misconception that a reasonableness standard of judicial review is somehow more efficient and saves judicial and court resources. The authors have yet to review any evidence which supports such a notion. On the contrary, engaging in constant standard of review analyses frequently doubles the number of issues to be decided (and therefore the time) of any judicial review hearing. Further, the idea of remitting the issue to the original decision-maker (essentially providing a "do-over") is resource-intensive. Giving a court the ability to issue a final determination on a matter is the best and most efficient use of resources, as demonstrated by the above noted case study. Lastly, the rule of law is the most important principle in a free and democratic society. The Supreme Court of Canada in *R v Jordan*[104] quite rightly placed an accused's (and victim's) right to a timely trial ahead of scarce court resources. Similar considerations apply here –

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[102] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*].

[103] *Daly*, "Struggling towards Coherence", *supra* note 2 at 529.

[104] *R v Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

the rule of law must be given the highest priority and litigants deserve timely hearings that decide issues on the merits.

Legislatures can direct that matters are either subject to appeals (with ordinary appeal standards) or to a trial *de novo*. This will not overburden the court system. As an example, one of the newer forms of administrative statutory decision-makers are privacy commissioners. Privacy legislation across Canada typically provides for a trial *de novo*, meaning that there is no deference provided to the commissioner, even on issues of fact. As of yet, privacy matters have not overburdened the court system, and the matters that have been before the courts have been dealt with expeditiously.

Conclusion

Judicial review started with changes to legislation which gave statutory decision-makers the "final" say in certain matters. This can be fixed by clearly stating in the legislation that the decision of the statutory decision-maker is appealable using the standard of palpable and overriding error for questions of fact and correctness for questions of law. If judicial review is not reformed, the current state of administrative law will continue to deny access to justice and put the administration of justice into disrepute. It will create more uncertain jurisprudence or, as termed by Daly, *noise*. It will stifle the rule of law, and erode the constitutional role of judges.

Appellate standards, on the other hand, provide a known avenue that can cure the infirmities of the current standards of review. *Housen* has proven successful and ought to be followed and used in administrative law. Justice Binnie explained that the standard of review had to be "necessarily flexible [to] see[k] the polar star of legislative intent".[105] An increasing access to justice crisis in Canada demands that we reconfigure judicial review into a system that does not create procedural uncertainty, which provides finality by not remitting the matter to the original decision-maker, that promotes the rule of law, and that protects the constitutional role of judges. Appeals do just that.

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[105] *Edmonton East*, *supra note* 41 at para 65, citing *CUPE, supra* note 51 at para 149 per Binnie J.