THE TIME HAS COME: STANDARD OF REVIEW IN CANADIAN ADMINISTRATIVE LAW

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> "The time has come," the Walrus said,
> "To talk of many things:
> Of shoes – and ships – and sealing-wax –
> Of cabbages – and kings –
> And why the sea is boiling hot –
> And whether pigs have wings."[2]

The Walrus was right. The time has come in Canadian administrative law to revisit, once again, the issue that has bedevilled – and sometimes bewildered – lawyers, judges, and academics alike: standard of review. Pleas for coherence have been issued.[3] Calls for submissions have been made.[4] And with the complexion of our highest court now almost completely different since the last revision,[5] it appears that the next chapter in this story may be a deceptively simple one. A single standard of review for reasonableness would not only bring consistency to the judicial review of administrative decisions, but also strike a sound doctrinal balance between legislative supremacy and the rule of law. But, before doing so, we must first – as the Walrus said – talk of many things.

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[2] Lewis Carroll, *Through the Looking-Glass and What Alice Found There* (London: MacMillan and Co, 1872) at 75.

[3] Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27. See also David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013) 42 Adv Q 1; and Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law: Reasonableness, the Rule of Law and Democracy" McGill LJ [forthcoming in 2017], online: <https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2821099> [Daly, "Struggling Towards Coherence"].

[4] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 19, [2016] 1 SCR 770 [*Wilson*].

[5] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]. As of this article, only two judges remain from this groundbreaking panel: Chief Justice McLachlin and Justice Abella.

Introduction

This article will not be a definitive account of the way forward. Its author is neither "the dean"[6] of Canadian administrative law nor "a rising member"[7] of the academy. In fact, he is not even in that company. Rather, this article will represent an attempt to contribute the perspective of a lawyer – just a plain old lawyer from a small town who is trying to help clients navigate this labyrinth of fundamental principles and basic practicalities. It will be one more answer to the call; nothing more and nothing less.

Part I will review the organizing principles distilled by the Supreme Court of Canada in *Dunsmuir*. There is soundness in these principles, and they remain useful in the judicial review process. Part II will examine some of the cases decided after *Dunsmuir* that have plagued and perplexed practitioners in this field. Common threads will be drawn from this sample of work by our highest court. Part III will consider how our understanding of legislative supremacy and the rule of law – the seemingly omnipresent source of tension in this area of law – has matured over time. Each now recognizes a legitimate role for both administrative decision-makers and courts. And finally, Part IV will explore how a contextual standard of review for reasonableness could operate in a principled yet practical way.

Part I: The Basic Soundness of *Dunsmuir*

Administrative law has been the great Canadian re-write. As Daly has unfortunately noted, "major recalibrations" have occurred every ten years or so.[8] Cases like *CUPE*, *Bibeault*, *Southam*, and *Dunsmuir* will all echo in the ears of lawyers, judges, and academics working in this area. And with no real restatement of the law since 2008, it appears that we are due. Recent cases suggest that even the Supreme Court of Canada thinks there is still work to be done.[9] An epilogue to *Dunsmuir* seems to be inevitable.

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[6] David Mullan. A title deservedly bestowed by Justice Stratas. See Stratas, *supra* note 3 at 28.

[7] Paul Daly. Again, a well-earned compliment from Justice Stratas. See Stratas, *supra* note 3 at 28. However, one may compellingly argue that Professor Daly is not just a rising member of the academy, but a rising star. See e.g. *Wilson*, *supra* note 4 at para 27, and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at paras 72 and 89, [2016] 2 SCR 293 [*Edmonton East*].

[8] Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799 at 827 [Daly, "Meaning of Reasonableness"]. In support of this thesis, Professor Daly points to the following cases: *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417 [*CUPE*]; *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 95 NR 161 [*Bibeault*]; *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1 [*Southam*]; and *Dunsmuir*, *supra* note 5.

[9] See *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 170, [2015] 1 SCR 161 [*Tervita*]. See also *Wilson*, *supra* note 4 at paras 19–38.

When that time comes, our highest court will be tasked, once again, with making the judicial review process even "simpler" and even "more workable."[10] The question for this new panel must be whether the law of standard of review – once described as a juggling act with three seemingly transparent objects[11] – requires only revision or "fundamental re-thinking."[12] Now, for this practitioner at least, the decision in *Dunsmuir* provides a solid foundation for any future "recalibration."[13]

A. Principles of Legislative Supremacy and the Rule of Law

The Supreme Court of Canada in *Dunsmuir* helpfully identified and described the basic legal principles that animate judicial review: legislative supremacy and the rule of law.[14] It is important to emphasize, however, that these principles do not just explain the purpose of judicial review. They also guide "its function and operation."[15] These principles provide the doctrinal bases for two other operational rules, namely the deference extended to administrative decision-makers operating at first instance and the supervisory function assigned to courts conducting independent review. And while courts will have "the last word" on some questions of general law, they no longer "have a monopoly on deciding all questions of law."[16] Standard of review must balance both of these foundational principles.

B. Principle of Deference

In *Dunsmuir*, the Supreme Court of Canada also embraced the principle of deference in substantive review.[17] But deference is not just an attitude that must be assumed by the court. It is also "a requirement of the law of judicial review."[18] In its attitudinal sense, deference is unhelpfully described by what it is not. It does not require a court

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[10] *Dunsmuir*, *supra* note 5 at paras 32, 43.

[11] *Miller v Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld & PEIR 52 at para 27, 2 Admin LR (3d) 178 (SC (TD)).

[12] *Wilson*, *supra* note 4 at para 72.

[13] Daly, "Meaning of Reasonableness", *supra* note 8 at 827. Interestingly, this language of "recalibration" from Professor Daly found its way into the reasons of Justice Karakatsanis in *Edmonton East*, *supra* note 7 at para 20.

[14] *Dunsmuir*, *supra* note 5 at paras 31–37.

[15] *Ibid* at para 27.

[16] *Ibid* at para 30.

[17] *Ibid* at paras 48–50. This is not to say that the principle of deference was new. Its historical roots may be traced to *CUPE*, *supra* note 8 at 236, where Justice Dickson (as he then was), writing on behalf of the Supreme Court of Canada, emphasized the need for "judicial restraint" when considering interpretive questions falling within "the specialized jurisdiction" of an administrative decision-maker.

[18] *Ibid* at para 48.

to be "subservient" or to show "blind reverence."[19] And it is neither "lip service" nor "submission."[20] Rather, it is said to be "respectful attention" for the reasons supporting an administrative decision.[21] The legal requirement of deference, however, is often obscured by this type of descriptive language.[22] The obligation arises from the expression of legislative choice; that is, from the "governmental decisions to create administrative bodies with delegated powers."[23] At its core, deference is respect for that exercise of legislative authority. It is "not a gift conferred by the court."[24] Standard of review must therefore recognize deference as a legal obligation and not simply a mindset.

As noted in *Dunsmuir*, the role of the court is a supervisory one.[25] The "triumph"[26] of reasonableness "[did] not pave the way for a more intrusive review."[27] Rather, judges were directed to inquire into the reasons offered – and the outcome reached – by the decision-maker under review.[28] Even in the apparent absence of deference, a reviewing court was still told to ask "whether *the tribunal's* decision was correct" and to "decide whether it agree[d] with the determination *of the decision-maker*."[29] In other words, while the last word on certain legal questions was reserved for the court, *Dunsmuir* emphasized that the court no longer had the *only* word. Standard of review must always allow for judicial scrutiny. But the priority of the administrative decision-maker must now be acknowledged.

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[19] *Ibid*.

[20] *Ibid*.

[21] *Ibid*, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 278 at 286 [Dyzenhaus, "Politics of Deference"]. See also *Ryan v Law Society (New Brunswick)*, 2003 SCC 20 at para 49, [2003] 1 SCR 247 [*Ryan*].

[22] See generally Paul Daly, "The Language of Administrative Law" Can Bar Rev [forthcoming] at 21, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2646706>.

[23] *Dunsmuir*, *supra* note 5 at para 48, citing *Canada (AG) v Mossop*, [1993] 1 SCR 554 at 596, 100 DLR (4th) 658.

[24] Right Honourable Chief Justice Beverley McLachlin, "'Administrative Law Is Not for Sissies': Finding a Path through the Thicket" (2016) 29 Can J Admin L & Prac 127 at 133 [McLachlin, "Finding a Path"].

[25] *Dunsmuir*, *supra* note 5 at para 28.

[26] Honourable Justice John Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27 Can J Admin L & Prac 101.

[27] *Dunsmuir*, *supra* note 5 at para 48.

[28] *Ibid* at para 47.

[29] *Ibid* at para 50 [emphasis added].

C. Principle of Contextual Review

Finally, the Supreme Court of Canada recognized in *Dunsmuir* that judicial review is a "contextual" exercise.[30] It was said that context "always" informs the interpretation of the law.[31] For that reason, an administrative decision has to be considered not only in light of the "legal context" in which the decision-maker is operating, but also "the context of the legislative wording."[32] In short, the relevant context will vary "with the relevant circumstances."[33] However, this contextual exercise is also intended to yield "a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[34] Intervention by the court is to be limited to situations "where justice requires it, but not otherwise."[35] Standard of review must therefore not just have the capacity to operate in a variety of administrative environments. It must also have the ability to reveal justifiable outcomes within each of those fields.

There is a basic soundness in these principles from *Dunsmuir*. And they provide a solid foundation for any future revision. By focusing on them, instead of the categories created in *Dunsmuir* for sorting administrative decisions, substantive review has the potential to be simplified even further.

Part II: The Story Since *Dunsmuir*

In the cases since *Dunsmuir*, it has become, as Justice Abella noted in *Tervita*, "increasingly difficult to discern the demarcations between a reasonableness and correctness analysis."[36] This difficulty arises, in part, from the practical reality that, if a reviewing court wishes to intervene, it is capable of finding a way to do so – regardless of the standard of review. Even the Supreme Court of Canada itself has struggled with coherence. For lawyers and litigants, it has felt at times that the

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[30] *Ibid* at para 64. While perhaps most overt in *Dunsmuir*, context has long been relied upon by the Supreme Court of Canada during the substantive review process. See e.g. *Bibeault*, *supra* note 8 at paras 120, 141, 161, and 185, where Justice Beetz embraced the view that "context" was a necessary consideration in the judicial review of administrative action. See also *CUPE*, *supra* note 8 at 240.

[31] *Dunsmuir*, *supra* note 5 at para 74.

[32] *Ibid* at paras 74, 76.

[33] *Ibid* at para 150.

[34] *Ibid* at para 47.

[35] *Ibid* at para 43.

[36] *Tervita*, *supra* note 9 at para 170. See e.g. *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 SCR 29 [*Laval*], where the Supreme Court of Canada, sitting as a panel of seven judges, unanimously agreed to dismiss the appeal but divided sharply on the applicable standard of review. Writing on behalf of the three judges who preferred the correctness standard, Justice Côté ultimately conceded at paragraph 86 that "the result is the same regardless of whether the applicable standard is correctness or reasonableness."

juggling act has continued. And the only thing that has changed is the number of objects in the air.

On the particular subject of standard of review, the cases decided by the Supreme Court of Canada after *Dunsmuir* have given rise to at least three practical complaints. First, the Court has sometimes failed to mention[37] or even decide[38] the applicable standard of review. Second, the Court, having chosen one standard of review, has appeared to apply another.[39] Third, having directed parties to focus on the merits, the Court itself has become deeply divided on the preliminary question of standard of review.[40] The result has been needless confusion for litigants, lawyers, and reviewing courts. What was intended to be a "more coherent and workable"[41] framework for substantive review has become a "labyrinth."[42] But, before proposing to simplify the entry to judicial review, it is important to understand what we must try to avoid. With that objective in mind, a sample of this "imperfect"[43] work from our highest court is examined below.

In *Bombardier*,[44] the Supreme Court of Canada considered a decision by the Quebec Human Rights Tribunal which found that the aerospace company had discriminated against a pilot by refusing to allow him to participate in a flight training program. That refusal was rooted in an earlier decision by American authorities on grounds of national security. After investigation, the complaint proceeded before the Tribunal and damages were ordered. An appeal to the Quebec Court of Appeal was successful, and the decision by the Tribunal was set aside. At the Supreme Court of Canada, the appeal was dismissed. In a judgment delivered on behalf of the Court, however, Justices Wagner and Côté provided no reasons on the subjects of deference or standard of review. Instead, the Court embarked on its own review of the evidence in the record and, ultimately, it concluded that the decision was unsupported and therefore unreasonable. These types of omissions have done nothing to advance the predictability or clarity of the substantive review process.

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[37] See e.g. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier*]. See also *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431.

[38] See e.g. *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010*].

[39] See e.g. *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*]. See also *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 SCR 546.

[40] See e.g. *Edmonton East*, *supra* note 7. See also *Laval*, *supra* note 36.

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

[42] *Wilson*, *supra* note 4 at para 19.

[43] To borrow a word from Jocelyn Stacey & Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016) 74 SCLR (2d) 211 at 2, online: <https://ssrn.com/abstract=2772221>, who have observed that the administrative law jurisprudence from the Supreme Court of Canada "remains imperfect."

[44] *Supra* note 37.

In *Mowat*,[45] the Supreme Court of Canada considered whether the Canadian Human Rights Tribunal had the authority to award legal costs. The Tribunal itself had concluded that it did and granted an award. That award was upheld by the Federal Court but set aside by the Federal Court of Appeal, which found that the Tribunal had no such authority. At the Supreme Court of Canada, the reasonableness standard of review was found to be applicable and deference due. However, immediately after making those findings, Justices LeBel and Cromwell, writing on behalf of the Court, proceeded to interpret the enabling legislation, including its history and surrounding context, without any mention of the reasons why the Tribunal reached the outcome that it did. This seeming disregard for the justification offered by the delegate with "primary responsibility"[46] for making the decision under review has only contributed to confusion about how the reasonableness standard is to be applied in practice.

Finally, in *Edmonton East*,[47] the Supreme Court of Canada considered whether a local assessment review board had the statutory ability to increase – and not just lower or confirm – a tax assessment under review. Following a statutory appeal, the Alberta Court of Queen's Bench set aside the decision of the local board. That judgment was later affirmed by the Alberta Court of Appeal. At the Supreme Court of Canada, the appeal was allowed and the decision of the local board reinstated. However, the Court was a fractured one. Justice Karakatsanis, writing on behalf of five judges, concluded that the proper standard of review was reasonableness. Not less than twenty-one paragraphs were devoted to that preliminary issue. Justices Côté and Brown, on the other hand, concluded on behalf of four judges that the standard of review was correctness and explained the grounds for that position over the course of twenty-six paragraphs. Such division on a subject other than the merits of the administrative decision has only served to reinforce – unhelpfully – for litigants and lawyers that "[t]he disposition of the case may [still] well turn on the choice of standard of review."[48]

In summary, there is work to do. While there is no doubt that some of these decisions can be usefully distinguished as "noise,"[49] there must be a simpler way forward. However, in addition to being principled, any new framework must also be practical. It must be capable of being stated and understood quickly, it must avoid unnecessary discussion about preliminary matters that are secondary to the merits, and it must focus litigants, lawyers, and judges on explaining why a particular result

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[45] *Supra* note 39.

[46] *Ryan*, *supra* note 21 at para 50.

[47] *Supra* note 7.

[48] *Dunsmuir*, *supra* note 5 at para 133.

[49] Paul Daly, "The Signal and the Noise in Administrative Law" (Paper delivered at the Law Society of Upper Canada's Annual Immigration Law Summit, 23 November 2016), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874310> [Daly, "Signal and Noise"].

is justified or not. The order is a tall one. But, as the late Justice Scalia once said, "[a]dministrative law is not for sissies."[50]

Part III: Revisiting Our Understanding of Legislative Supremacy and the Rule of Law

Moving forward, the temptation to juxtapose the rule of law and legislative supremacy must be resisted. Both foundational principles recognize a legitimate function for courts and administrative decision-makers in our system of justice. Any tension that may exist – in theory or in practice – can be resolved by a standard of review that insists upon respect for the reasons offered by administrative decision-makers and upon justifications from reviewing courts when they depart from them. But this insistence upon "justifiability"[51] from both courts and administrative decision-makers would not just strike a sound balance between the rule of law and legislative supremacy. It would also recognize that the task of interpreting and applying the law is now a shared one.

A. Rule of Law

The rule of law is no longer the monopoly of courts. The "war" between administrative decision-makers and courts has ended.[52] And the rule of law – once thought to be the very "opposite"[53] of administrative law – has matured to recognize that judging is a pluralist exercise in a modern state like Canada. While this is not to say that no tension remains, it is clear that the court has moved from being "a brute guardian" of the rule of law to "a partner" in its construction and protection.[54] It is now recognized that "administrative tribunals have an integral role in the maintenance of our legal order."[55] Whether this is the result of more sophistication,

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[50] Honourable Justice Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) 3 Duke LJ 511 at 511. For a recent discussion of this pronouncement in the context of Canadian administrative law, see McLachlin, "Finding a Path," *supra* note 24 at 127–134.

[51] Honourable Justice Louis LeBel, "Some Properly Deferential Thoughts on Deference" (2008) 21 Can J Admin L & Prac 1 at 18. David Dyzenhaus has also described justification as a requirement of deference. See David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012) 17 Rev Const Stud 87 at 109–114 [Dyzenhaus, "Culture of Justification"].

[52] Robert Reid, "Hot Buttons: An Overview of Recent Developments in Administrative Law" in Philip Anisman and Robert Reid, eds, *Administrative Law: Issues and Practice* (Toronto: Carswell, 1995) 1 at 8.

[53] Right Honourable Lord Hewart, *The New Despotism* (London: Ernest Benn Ltd, 1929) at 37.

[54] Right Honourable Chief Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999) 12 Can J Admin L & Prac 171 at 175 [McLachlin, "Rule of Law"]. See also Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 39 at 82, where Professor Liston has observed that "[a]ll parts of … the state participate in the creation and maintenance of the rule of law."

[55] *Ibid* at 173.

additional context, or just plain necessity is not known,[56] but it is certain that both – courts and administrative decision-makers – are here to stay.

What courts and administrative decision-makers do share is a commitment to reasoned justifications for the exercise of their respective powers. In a modern democratic society like ours, any legitimate exercise of public authority must be capable of justification. This expectation, according to Dyzenhaus, is the sign of a mature rule of law.[57] It is also expected that arbitrary or irrational decisions will be subject to independent scrutiny.[58] These common threads run through all institutions operating under the rule of law and, over time, they have been stitched together to create a culture or "ethos of justification."[59] In short, the rule of law "can speak in several voices."[60] And for most individuals, it does not matter whether that voice is an administrative or judicial one. The outcome is the same.

Standard of review must reflect this theoretical evolution of the rule of law as well as its practical reality. There is a role for both courts and administrative decision-makers.[61] Each is also grounded in the same foundational principle: there must be a reasoned justification for any exercise of their legal authority. And while the source of that authority is different, it is no less legitimate or credible.[62]

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[56] For a recent account of the origins of the Canadian administrative state, see Colleen M Flood & Jennifer Dolling, "An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 1 at 3–23.

[57] Dyzenhaus, "Politics of Deference", *supra* note 21 at 278–307.

[58] H Wade MacLauchlan, "Reconciling Curial Deference with a Functional Approach in Substantive and Procedural Judicial Review" (1993) 7 Can J Admin L & Prac 1 at 4–6.

[59] McLachlin, "Rule of Law", *supra* note 54 at 174. See also Stacey & Woolley, *supra* note 43 at 11, where Professors Stacey and Woolley note that "public decisions gain their democratic and legal authority through a process of public justification in which all public decision-makers offer reasons that justify their decisions."

[60] *Ibid* at 175.

[61] Professors Stacey and Woolley have described the roles of courts and administrative decision-makers as "complimentary and, to a significant extent, co-extensive." See Stacey & Woolley, *supra* note 43 at 9. See also LeBel, *supra* note 51 at 18 and 20, where Justice LeBel observed that courts and administrative decision-makers "share a responsibility to maintain the rule of law" and that "both … have roles to play in preserving the rule of law."

[62] See e.g. *Rasanen v Rosemount Instruments Ltd* (1994), 17 OR (3d) 267 at 279–280, 112 DLR (4th) 683 (CA), where Justice Abella recognized that administrative decision-makers were designed to "resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly."

B. Legislative Supremacy

Legislative supremacy is hardly supreme. An administrative decision-maker exercising delegated authority is limited by its enabling statute, its common law duty of fairness, and its constitutional boundaries. In our modern state, no authority – legislative, administrative, or judicial – is absolute.[63] Only the Constitution is "the supreme law of Canada."[64] And anchored within that "fundamental law"[65] – to borrow a dated phrase from Dicey – is not just protection for, but a guarantee of, judicial review.[66] When considered in this contemporary light, it is clear that legislative authority is not boundless and there is a necessary, albeit supervisory, role for courts to review the work of legislated delegates.

The democratic principle has, in a word, matured. Neither Parliament nor the provincial legislatures intend their delegates to exercise authority in a manner that usurps the role of legislators themselves. They also do not intend to vest those administrative decision-makers with authority to infringe the rights of citizens or to act outside the boundaries of their delegated powers.[67] Such conduct is objectionable and, if alleged, "courts have no choice but to hear ... and decide whether the administrative board or tribunal has in fact exceeded the powers granted to it by its constating statute."[68] Judges are therefore recognized as having an independent function. As Justice Rand observed in *Roncarelli*, "there is always a perspective within which a statute is intended to operate."[69] That perspective is tempered, however, with respect for the choice made by the legislator to designate someone other than the court as the "primary" decision-maker.[70]

Standard of review must reflect not just the authority of legislators to delegate the task of decision-making to administrative actors, but also the role of

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[63] See generally Dyzenhaus, "Culture of Justification", *supra* note 51 at 105–106. Professor Liston has described the relationship between the court and other branches of government as "a joint effort in governance." See Liston, *supra* note 54 at 66.

[64] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 52(1). As our highest court so often reminds, the system of government in Canada is one of "constitutional supremacy." See e.g. *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 at para 89, [2014] 1 SCR 433.

[65] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 3rd ed (London: MacMillan, 1889) at 4.

[66] *Dunsmuir*, *supra* note 5 at para 31.

[67] See *Dunsmuir*, *supra* note 5 at para 131.

[68] McLachlin, "Rule of Law", *supra* note 54 at 178.

[69] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR (2d) 689 [*Roncarelli*].

[70] *Ryan*, *supra* note 21 at para 50. As David Mullan has observed, the role of the court is not "micromanaging." Its function is one of general oversight. See David Mullan, "Section 7 and Administrative Law Deference: No Room at the Inn?" (2006) 34 SCLR (2d) 227 at 236. See also LeBel, *supra* note 51 at 16–17.

courts to supervise those decisions. Each has a constitutional function, and neither one is supreme or absolute. Both, however, are legitimate.

Part IV: A Single Standard of Review for Reasonableness

A single standard of review for reasonableness would bring new predictability and clarity to the substantive review of administrative decisions. Our highest court could easily trace its doctrinal roots to *Dunsmuir* and strike a defensible balance between legislative supremacy and the rule of law. But most importantly for the individuals who are actually impacted by these decisions, the "obstacle course"[71] that is standard of review would be replaced with a clear "runway"[72] to the merits of them. Unproductive "lawyer's talk" would be significantly reduced.[73]

A. Meaning of Reasonableness

Reasonableness, as conceived in *Dunsmuir*, examines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law."[74] In short, it reviews the reasons provided by a decision-maker for a justifiable explanation of the result. In *Newfoundland Nurses*, the Supreme Court of Canada helpfully clarified that this process does not require "two discrete analyses."[75] Rather, the exercise is an "organic" one where "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."[76] Embracing this outcome-oriented conception of reasonableness would, as Justice Abella observed in *Wilson*, allow our highest court to capture "the animating principles of both former categories of judicial review."[77]

Notwithstanding the rare and exceptional nature of questions said to require a "correct" answer, there will be concern that a single standard of review for reasonableness could prevent a reviewing court from properly safeguarding the rule of law or – even worse – result in the court abdicating its constitutional duty of judicial review.[78] However, *Dunsmuir* itself recognized that this duty only requires

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[71] *Wilson*, *supra* note 4 at para 20.

[72] *Ibid* at para 25.

[73] *Dunsmuir*, *supra* note 5 at para 133.

[74] *Ibid* at para 47.

[75] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, [2011] 3 SCR 708 [*Newfoundland Nurses*].

[76] *Ibid.*

[77] *Wilson*, *supra* note 4 at para 33.

the court to have "the last word" on the legal boundaries of administrative decision-making.[79] It does not require the court to have the *only* word. In the years since *Dunsmuir*, the Supreme Court of Canada has refined the reasonableness standard to recognize that there will be occasions when only one defensible outcome exists.[80] It is this capacity to recognize a single result that now answers any constitutional concern for the rule of law.

It must also be recognized that the task of interpreting and applying the law is a shared one.[81] In this current culture of justification, it is not clear why the reasoning of an administrative decision-maker would be ignored when a court is reviewing the answers to certain questions – but not others.[82] Regardless of how they are labelled on judicial review, all of the questions were before the "primary" decision-maker for consideration.[83] As Justice Abella has observed, nothing in *Dunsmuir* "precludes the adoption of a single standard of review, so long as it accommodates the ability to continue to protect both deference *and* the possibility of a single answer where the rule of law requires it."[84] In other words, a contextualized review for reasonableness will still provide a final, judicial answer to "the four categories [of questions] singled out for correctness review in *Dunsmuir*."[85] And if deference is truly mutual respect, then it means "jettisoning the correctness standard"[86] for even these types of questions where the administrative decision-maker has provided a reasoned justification at first instance. As the judges of our highest court have come to find, notwithstanding their disagreement about the applicable standard of review, the outcome at the end of the day is often the same.[87]

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[78] See e.g. Lauren J Wihak, "Whither the Correctness Standard of Review? *Dunsmuir*, Six Years Later" (2014) 27 Can J Admin L & Prac 173.

[79] *Dunsmuir*, *supra* note 5 at para 30.

[80] See *Mowat*, *supra* note 39. See also *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 38, [2013] 3 SCR 895 [*McLean*], where Justice Moldaver, writing for a majority of six judges, reasoned that there will be cases where the range of reasonable outcomes "will necessarily be limited to a single reasonable interpretation – and the administrative decision maker must adopt it."

[81] See McLachlin, "Rule of Law", *supra* note 54 at 185–189. See also LeBel, *supra* note 51 at 18–19. This legal pluralism was also recognized in *Dunsmuir*, *supra* note 5 at para 30, where the Supreme Court of Canada cautioned against a "court-centric conception of the rule of law" and acknowledged that "courts do not have a monopoly on deciding all questions of law."

[82] Sheila Wildeman has made a similar query. See Sheila Wildeman, "Pas de Deux: Deference and Non-Deference in Action" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery, 2013) 323 at 334.

[83] *Ryan*, *supra* note 21 at para 50.

[84] *Wilson*, *supra* note 4 at para 31 [emphasis in original].

[85] *Ibid.*

[86] See Dyzenhaus, "Culture of Justification", *supra* note 51 at 109. See also David Dyzenhaus, "David Mullan's Theory of the Rule of (Common Law)" in Grant Huscroft & Michael Taggart, eds, *Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan* (Toronto: University of Toronto Press, 2006) 448 at 462, 475.

This practical consequence must not be lost in a theoretical debate about the approach to judicial review.

Admittedly, substantive review on a reasonableness standard is a deceptively simple innovation in the direction of judicial review. As Justice Binnie colourfully cautioned in the last revision, this type of traffic engineering may do nothing more than "shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense."[88] And while there is a benefit to ending the "terminological battles"[89] and "rhetorical debates,"[90] the real prize for litigants, lawyers, and judges continues to be that stated in *Dunsmuir* itself: "a principled framework that is more coherent and workable."[91] With that objective in mind, this article proposes a single, contextual standard of review.

If properly anchored, a single standard of review for reasonableness has the potential to operate in a principled and practical way that is focused on the merits of the administrative decision under review. While the exact number of those anchors is a matter for decision by our highest court, it seems to this practitioner that the following could provide "real guidance"[92] and "get the parties ... back to arguing about the substantive merits of their case":[93] (i) deference; (ii) reasons; and (iii) context.

B. Requirement for Deference

Deference must be a requirement of substantive review. Litigants, lawyers, and judges would all begin their analyses by recognizing that the outcome reached by the administrative decision-maker (and the reasons for it) are entitled to – and not just deserving of – respect. While much emphasis has been placed on the proper "attitude" to be adopted by reviewing courts, returning focus to the reality that deference is "a requirement of the law of judicial review"[94] would serve to reinforce

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[87] See e.g. *Laval*, *supra* note 36, where the Supreme Court of Canada divided sharply on the applicable standard of review, but ultimately agreed on the outcome. See also *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555, where a majority of the Supreme Court of Canada applied the correctness standard. Justice Abella, writing partially concurring reasons, reached the same outcome as the majority, but applied the reasonableness standard of review. For additional support, see *Tervita*, *supra* note 9, where Justice Abella concurred in the final result, but did so using a different standard of review.

[88] *Dunsmuir*, *supra* note 5 at para 139.

[89] *Wilson*, *supra* note 4 at para 25.

[90] *Ibid* at para 24.

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

[92] *Ibid* at para 1.

[93] *Ibid* at para 145.

[94] *Ibid* at para 48.

that a single standard of review is not "carte blanche"[95] for intervention by the court. A reviewing judge would be required to examine whether there is a justifiable explanation for the outcome reached by the administrative decision-maker and, if so, respect it.[96] As the Supreme Court of Canada has found, reasonableness review will generate a single outcome in exceptional cases when context requires it.[97] But deference, which arises from the governmental choice to create the administrative decision-maker, must be part of the entire review process. It is an obligation – not a gift.[98]

Moving to a single standard for the judicial review of administrative decisions will no doubt give rise to some temptation to relegate deference in the analysis. After all, the standard would now have to guard against "incorrect" answers to questions in a number of law-laden areas.[99] However, as was the case in *Dunsmuir*, our highest court must remain committed to the view that reasonableness "does not pave the way for a more intrusive review by courts"[100] and "should not be seen by potential litigants as a lowering of the bar to judicial intervention."[101] Regardless of how the question was previously sorted for the purpose of substantive review, that question was always one assigned to a decision-maker other than the court. And that legislative choice remains entitled to deference or, in the words of Justice Fichaud, "a dose of judicial humility."[102]

Now, given the spectrum of administrative decision-makers, there has always been some question whether there must also be varying degrees of deference. The Federal Court of Appeal thought so.[103] And even in *Dunsmuir*, Justice Binnie suggested that, by collapsing deferential review into a single reasonableness standard, a reviewing court would sometimes be required to act "more deferentially"

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[95] *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 24, [2012] 1 SCR 5 [*Catalyst Paper*].

[96] Dyzenhaus, "Culture of Justification", *supra* note 51 at 113. See also Stacey & Woolley, *supra* note 43 at 13.

[97] See *Mowat*, *supra* note 39. See also *McLean*, *supra* note 80 at para 38.

[98] McLachlin, "Finding a Path", *supra* note 24 at 133.

[99] See *Dunsmuir*, *supra* note 5 at paras 58–61. See also *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 26, [2011] 1 SCR 160. However, now that the Supreme Court of Canada has refined the reasonableness analysis so that it is capable of generating a single defensible outcome, it is worth asking, as Justice Abella did in *Wilson*, *supra* note 4 at para 24, whether the historical label of "correct" has any real meaning: "Are we not saying essentially the same thing when we conclude that there is only a single 'reasonable' answer available and when we say it is 'correct'?"

[100] *Dunsmuir*, *supra* note 5 at para 48.

[101] *Ibid* at para 155.

[102] Honourable Justice Joel Fichaud, "Between a Rock and a Hard Place: Deference, Consistency and Transparency in Administrative Decision-making" (Remarks delivered at the Canadian Bar Association's National Administrative Law, Labour and Employment Law Conference, 18 November 2016).

[103] See e.g. *Wilson*, *supra* note 4 at para 18.

and, in other cases, "less deferentially."[104] Most recently, however, the Supreme Court of Canada has endeavoured to draw a distinction between deference and the context within which an administrative decision is made. Some members of the Court have even gone so far as to expressly reject the potential for an "indeterminate number of varying degrees of deference."[105] For litigants and their lawyers, cementing this position would be a welcome development by our highest court.

Deference as a singular obligation, absent any conception of a spectrum of degrees or a sliding scale, would rightly direct parties to the merits of the administrative decision being reviewed. That, after all, is the very purpose of substantive review. Deference would be grounded in respect for the legislative choice that has been made rather than the nature or expertise of any particular decision-maker.[106] This is not to say that the latter factors are irrelevant. But, in the interest of creating a framework that is simpler and more workable for parties, those factors would be better considered as part of the context surrounding the outcome under judicial review. As discussed below, those factors and others could assist lawyers, litigants, and reviewing courts in discerning the range of defensible results. Adopting this contextual approach would also be, to borrow the words of Justice Abella in *Wilson*, "a principled way to simplify the path to reviewing the merits."[107] One more potential obstacle would be removed from the course.

C. Insistence Upon Reasons

Reasons must be the starting point for – and remain the focus of – substantive review. The analyses of litigants, lawyers, and judges would all examine what was said by the decision-maker who was delegated the authority to make the decision in the first place. As Dyzenhaus has noted, deference requires not just that an administrative decision-maker justify its conclusion.[108] It also requires a reviewing court to examine that justification[109] and resist the temptation to "undertake its own analysis of the question."[110] This commitment to the primacy of reasons not only serves to reinforce the legislative choice that has been made, but it also contributes to the rule of law by forcing the court to justify any departure from the reasons offered

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[104] *Dunsmuir*, *supra* note 5 at para 152.

[105] *Wilson*, *supra* note 4 at paras 18, 73.

[106] As Professor Liston has observed, "courts are conscious of the separation of powers and … are themselves under rule-of-law constraints to respect legislative and executive branches." See Liston, *supra* note 54 at 65. This constitutional principle alone is a sound doctrinal basis for deference.

[107] *Wilson*, *supra* note 4 at para 20.

[108] Dyzenhaus, "Culture of Justification", *supra* note 51 at 113.

[109] *Ibid.*

[110] *Dunsmuir*, *supra* note 5 at para 50.

by the administrative decision-maker.[111] In short, it answers the question that matters most to parties: why?

This attention on reasons is not new. In *Southam*, an unreasonable decision was described as "one that … is not supported by any reasons that can stand up to a somewhat probing examination."[112] Later, in *Ryan*, an outcome was said to be unreasonable when "there are no lines of reasoning supporting the decision which could reasonably lead [the] tribunal to reach the decision it did."[113] In *Dunsmuir*, the Supreme Court of Canada went on to explain that reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."[114] Finally, in *Newfoundland Nurses*, reviewing courts were instructed to examine the outcome "in the context of the evidence, the parties' submissions and the process."[115] In summary, any administrative decision must be reviewed in light of the whole record before the decision-maker and any intervention by the court explained from within that record.

Much of the confusion that has arisen since *Dunsmuir* has resulted from cases where the Supreme Court of Canada has commenced102 substantive review with its own analysis and not that of the administrative decision-maker. Respectful attention sometimes looks and feels like careless disregard. By insisting that litigants, lawyers, and judges examine the work done by the delegate under review, all would be required to provide explanations for departing from the line of reasons chosen by the decision-maker who was actually granted the authority to make the decision. The justification for any departure by a reviewing court would therefore come from within the administrative decision – not from without. This requirement would not just be consistent with the ethic of justification that animates the rule of law. It would also reflect the proper role of courts, who are charged with supervising only the "outer boundaries" of legislative supremacy.[116]

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[111] See generally Liston, *supra* note 54 at 76. Professor Liston has noted that reasons have "the potential to advance both restraint and respect." Reasons from an administrative decision-maker provide an opportunity to illustrate competence and expertise. Judicial recognition of those reasons then constrains the ability of a reviewing court to re-weigh the original factors, but still allows the court to confirm specific instances of reasonable decision-making.

[112] *Southam*, *supra* note 8 at para 56.

[113] *Ryan*, *supra* note 21 at para 53.

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

[115] *Newfoundland Nurses*, *supra* note 75 para 18. See also *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3, [2012] 3 SCR 405, where the Supreme Court of Canada directed reviewing courts to ask "whether the decision, viewed as a whole in the context of the record, is reasonable."

[116] *Dunsmuir*, *supra* note 5 at para 141.

D. Context in Operation

Context must become the essence of substantive review. Having been directed immediately to the nodes contained in the administrative reasoning process, all parties would be called upon to answer – and quickly – the question at the heart of judicial review: whether that reasoning leads to a result that is defensible in fact and law. Or, in other words, an outcome that is reasonable. As Justice Binnie observed in *Dunsmuir*, "[a] driving speed that is 'reasonable' when motoring along a four-lane interprovincial highway is not 'reasonable' when driving along an inner city street."[117] Context therefore "always matters."[118] And the range of what is reasonable "will necessarily vary."[119] In short, it is here that the heavy lifting will have to be done by litigants, lawyers, and reviewing courts.

In *Dunsmuir*, the Supreme Court of Canada recognized that "the law does not operate in a vacuum"[120] and, when called upon to consider the underlying decision "as a whole,"[121] it concluded that the interpretation offered by the arbitrator was "unreasonable in the context of the legislative wording and the larger labour context in which it [was] embedded."[122] In a later decision, Chief Justice McLachlin explained that reasonableness "must be assessed in the context of the particular type of decision making involved and all relevant factors."[123] Reasonableness, it was said, "takes its colour from the context."[124] Context can therefore be used by parties to demonstrate the number of defensible outcomes available and, in some exceptional cases, yield the only reasonable result.

Of course, determining the content of that context will be the most difficult passage in any future revision by our highest court.[125] Yet another "threshold test"[126] would do little, however, to refocus parties on the substantive result under review. Daly, for his part, has helpfully suggested that the range of defensible outcomes "be determined by reference to contextual factors drawn from the rule of law and democratic principles."[127] While those factors, which would expand or contract the

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[117] *Ibid* at para 150.

[118] *Edmonton East*, *supra* note 7 at para 73, Côté and Brown JJ, dissenting.

[119] *Wilson*, *supra* note 4 at para 22.

[120] *Dunsmuir*, *supra* note 5 at para 74.

[121] *Ibid* at para 72.

[122] *Ibid* at para 76.

[123] *Catalyst Paper*, *supra* note 95 at para 18.

[124] *Ibid*, citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339.

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

[126] *Dunsmuir*, *supra* note 5 at para 154.

[127] Daly, "Struggling Towards Coherence", *supra* note 3 at 29.

range of outcomes in each case,[128] will obviously have to vary from decision to decision, *Dunsmuir* and subsequent cases already appear to provide some workable factors that are known to – and understood by – even lawyers:

i. The nature of the administrative decision-maker may be relevant.[129] A delegate applying guidelines issued by the Minister does not enjoy the same range of outcomes as the Minister herself, who is charged with providing general direction on public policy. As the Supreme Court of Canada has historically said, "[t]he very nature of the body must be taken into account in assessing the technique of review."[130]

ii. The type of question or issue may be relevant.[131] An administrative decision-maker exercising discretion in the "national interest"[132] has a wider choice of defensible outcomes than one deciding a matter of constitutional law. As Justice Binnie observed in *Dunsmuir*, the issue to be decided "helps to define the range of reasonable outcomes within which the administrator is authorized to choose."[133]

iii. The content of the statutory scheme may be relevant.[134] This could include the purpose or rationale of the statute, its text and legislative history, and whether the statute includes a privative clause or right of appeal. Notwithstanding the breadth of any grant of statutory authority, "legislators do not intend results that depart from reasonable standards."[135] And the range of defensible outcomes does not include a result that "fundamentally contradicts" the object or purpose of an enabling statute.[136]

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[128] *Ibid*.

[129] See e.g. *Catalyst Paper*, *supra* note 95 at para 23.

[130] *Inuit Tapirisat of Canada v Canada (AG)*, [1980] 2 SCR 735 at 753, 115 DLR (3d) 1, cited in *Dunsmuir*, *supra* note 5 at para 136.

[131] See e.g. *Catalyst Paper*, *supra* note 95 at paras 19, 32.

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

[133] *Dunsmuir*, *supra* note 5 at para 138.

[134] See e.g. *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47 at paras 26–41, [2015] 3 SCR 300. See also *Catalyst Paper*, *supra* note 95 at para 25; *McLean*, *supra* note 80 at paras 42–50; and *Mowat*, *supra* note 39 at paras 43–52.

[135] *Dunsmuir*, *supra* note 5 at para 131.

[136] *Halifax (Regional Municipality) v Canada (Public Works and Government Services)*, 2012 SCC 29 at para 54, [2012] 2 SCR 108.

iv. The relative expertise of the decision-maker may be relevant.[137] In *Dunsmuir*, the Supreme Court of Canada cautiously guarded certain legal questions falling outside an administrative decision-maker's "specialized area of expertise."[138] This was contrasted with cases where the decision-maker had "particular familiarity" with the legal questions at issue.[139] Stated in other terms, the number of defensible outcomes will be increased in areas of administrative speciality and decreased in areas falling within the traditional expertise of the court.

Obviously, one cannot exhaustively define context for the purpose of substantive review.[140] In fact, we must resist any temptation to do so. If the vice of formalism is to be avoided, there must be room for flexibility in future cases "about whose composition we remain ignorant."[141]

Deference and context, however, ought to be conceptually distinct.[142] Deference is aimed at ensuring that the required attitude, discipline, or humility is exercised by litigants, lawyers, and reviewing courts. It engenders respect. Context, on the other hand, is aimed at the decision itself and the field within which the administrative decision-maker operates. It defines a range. Collapsing the two concepts has tended to result in "needless complexity"[143] about varying degrees of judicial intrusiveness. Reasonableness must be a single, contextual standard of review. And while complaints about the uncertainty of context will remain,[144] the reality, as Daly has pointed out, is that "context simply cannot be eliminated from

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[137] See e.g. *Laval*, *supra* note 36 at para 38. See also *McLean*, *supra* note 80 at paras 30–31.

[138] *Dunsmuir*, *supra* note 5 at paras 55, 60.

[139] *Ibid* at para 54.

[140] For example, in some cases, context may include consideration of constitutional values. See e.g. *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613. In other cases, it may involve consideration of prior interpretations or decisions. See e.g. *Mowat*, *supra* note 39 at paras 53–56. In still other cases, it may require consideration of international obligations. See e.g. *B010*, *supra* note 38 at paras 47–66.

[141] HLA Hart, *The Concept of Law*, 3rd ed (Oxford: Oxford University Press, 2012) at 129–130, cited in *Edmonton East*, *supra* note 6 at para 70, Côté and Brown JJ, dissenting. For a classic discussion of formalism in the administrative context, see H Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36:4 UTLJ 343.

[142] A distinction drawn by Justice Deschamps in *Dunsmuir*, *supra* note 5 at para 167.

[143] *Dunsmuir*, *supra* note 5 at para 128.

[144] This would not, however, be the first time that a contextual approach was used by the Supreme Court of Canada to arrive at an objective outcome. See e.g. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193. The content of procedural fairness varies with the surrounding context, but it does not appear to suffer from the same uncertainty that presently surrounds substantive review. See generally Matthew Lewans, "Deference and Reasonableness Since *Dunsmuir*" (2012) 38:1 Queen's LJ 59.

judicial review."[145] If nothing else, these contextual factors – already known to lawyers and judges – give us a place to start.

Conclusion

As noted at the outset, this article is, by no means, a complete answer. It is open to criticism. For example, one may reasonably complain that the proposed framework simply moves all of the "real" work to the end – as opposed to the beginning – of the judicial review process. But, one may also reasonably ask whether that is a bad thing? By doing so, the proposal gives effect to the objective resting at the heart of *Dunsmuir*: it "get[s] the parties ... back to arguing about the substantive merits of their case."[146] Even after almost a decade, "we still find the merits waiting in the wings for their chance to be seen and reviewed."[147] The time has come to simplify the entry to judicial review.

Admittedly, a single standard of review for reasonableness will not end debate. As our highest court has found, even within that standard, there is room for disagreement.[148] However, instead of those debates focusing on the preliminary issue of what standard of review to apply to the administrative decision, litigants, lawyers and judges will all be focused on the question of why that decision is reasonable or unreasonable. This new emphasis on the outcome has always been the goal of substantive review and, for those affected by the decisions in question, the only thing that really matters.

By removing an artificial barrier to judicial review, cases will be decided on the reasonableness of their result and not on the choice of standard of review. With just one option available, lawyers will now be able to predict "with confidence" what standard will be applied.[149] Litigants will have an accessible "runway"[150] to independent review of the merits. And, over time, the case law will provide "real guidance"[151] as to what defects are commonly found in unreasonable decisions and what markers are usually found in reasonable ones. Lawyers may even become bold,

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[145] Daly, "Struggling Towards Coherence", *supra* note 3 at 16.

[146] *Dunsmuir*, *supra* note 5 at para 145.

[147] *Wilson*, *supra* note 4 at para 25.

[148] See e.g. *MM v United States of America*, 2015 SCC 62, [2015] 3 SCR 973; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909; *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44, [2015] 3 SCR 147; and *Canada (AG) v Igloo Vikski Inc*, 2016 SCC 38, [2016] 2 SCR 80.

[149] See *Dunsmuir*, *supra* 5 at para 133, where Justice Binnie made the practical observation that "[l]itigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied."

[150] *Wilson*, *supra* note 4 at para 25.

[151] *Dunsmuir*, *supra* note 5 at para 1.

predicting not just the standard of review but also the likelihood of a reasonable outcome. And all of this would be done without creating unnecessary "noise"[152] about which standard of review should have applied or whether one standard of review was actually applied under the guise of another.[153] It would be a "simpler test."[154]

Now this article is not to say that the next chapter written by our highest court will be free of complexity. Complexity is inherent in any legal process that must accommodate a range of actors and a variety of issues.[155] But there is comfort for litigants, lawyers, and reviewing courts. First, our judges are a capable group. As Justice Binnie observed in *Dunsmuir*, they are often called upon to "juggle a number of variables that are necessarily to be considered together."[156] Second, our case law continues to be useful. The Supreme Court of Canada has already provided – and will continue to provide – examples "to show when it is (or it is not) appropriate for a court to intervene in the outcome of an administrative decision."[157] Third, reasonableness is a legal concept that we commonly use and generally understand. As Justice Deschamps observed in *Dunsmuir*, "neither the concept of reasonableness nor that of deference is particular to the field of administrative law."[158] In summary, a single standard of review for reasonableness, which is anchored in the context surrounding the administrative decision-maker itself, has the potential to operate in a principled yet practical way.

> The Walrus and the Carpenter
> Were walking close at hand;
> They wept like anything to see
> Such quantities of sand:
> "If this were only cleared away,"
> They said, "it would be grand!"[159]

The Carpenter, of course, expressed his doubt whether the sand could ever be cleared away – even with seven mops.[160] Lewis Carroll does not, however, tell us what two more could do. The Supreme Court of Canada, with its new group of nine, appears to be waiting for the right opportunity to revisit the standard of review in

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[152] Daly, "Signal and Noise", *supra* note 49.

[153] See generally Mullan, *supra* note 3 at 76–81.

[154] To borrow the phrase used by the Supreme Court of Canada in *Dunsmuir*, *supra* 5 at para 43, where it concluded matter-of-factly: "A simpler test is needed."

[155] *Dunsmuir*, *supra* note 5 at para 132. See also *Dunsmuir*, *supra* note 5 at para 167.

[156] *Ibid* at para 153.

[157] *Ibid* at para 154.

[158] *Ibid* at para 167.

[159] Carroll, *supra* note 2 at 73.

[160] *Ibid*.

administrative law. The day may yet come when it is possible to advise a client or argue a case without a lengthy discussion about the standard of review.[161] And that, said the lawyer, would be grand indeed.

[161] Borrowing from the colourful reasons of Justice Slatter who, writing for the Alberta Court of Appeal, remarked: "The 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." See *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2015 ABCA 85 at para 11, [2015] 5 WWR 547.