IDENTIFYING THE REVIEW STANDARD: ADMINISTRATIVE DEFERENCE IN A NUTSHELL

The Hon. Joseph T. Robertson, Q.C.*

Overview

The volume of Supreme Court jurisprudence dealing with the review of decisions rendered by administrative decision-makers and the application of the deference doctrine is overwhelming. While *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*[1] and *Dunsmuir v New Brunswick*[2] are often regarded as lead decisions, there are close to 200 precedents, spanning six decades, underscoring the doctrine's evolution. Most were rendered over the last 35 years and most proved not to be of long-term precedential significance. They simply demonstrate the proper application of the deference doctrine, as it stood at the time the case was decided, while affirming the Court's error-correcting role.[3] Regrettably, the doctrine has been unable to escape criticism.

Professor Paul Daly writes of the Court's struggle to achieve "coherence" in Canadian administrative law. Justice David Stratas, writing in his personal capacity, has concluded that: "Doctrinal incoherence and inconsistency plague the Canadian law of judicial review."[4] Prior to those observations, it was David Mullan who isolated fifteen issues that remained outstanding following the release of *Dunsmuir*.[5] Such commentaries suggest that the prospect of accurately distilling the tenets of the

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* Formerly of the Federal Court of Appeal (1992-2000) and the New Brunswick Court of Appeal (2000-2014) and presently Jurist-in-Residence, Faculty of Law, University of New Brunswick. The subject matter of this paper was originally presented at the Mid-Winter meeting of the Canadian Bar Association, NB Branch, February 6, 2016, and has been revised in both content and style in order to reflect the jurisprudence of the Supreme Court as of January 1, 2017. My gratitude to Christopher Pelkey (Class of 2018) for his assistance and patience.

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

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

[3] For a historical account of the Supreme Court's deference jurisprudence see: JT Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" in Joseph Robertson, Peter A Gall & Paul Daly, eds, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Toronto: LexisNexis, 2014) 1 [Robertson, "Judicial Deference"]. This book was also published as (2014) 66 SCLR (2d) 1.

[4] David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (20 February 2016), online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751>.

[5] See David Mullan, "Unresolved Issues On Standard of Review In Canadian Judicial Review Of Administrative Action – The Top Fifteen!" (2013) 42 Adv Q 1; Paul Daly, *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com>; and Stratas, *ibid*.

deference doctrine into a nutshell format is misguided. Thankfully, the administrative lawyer, in search of go-to answers, knows of the risks inherent in any presentation that oversimplifies the law.

Neither the volume of litigation nor academic commentary surrounding administrative deference detracts from the need for an analytical framework that enables reviewing courts to address two essential questions. The first is whether the decision is owed deference on the review standard of reasonableness. Otherwise, the correctness standard applies. Second, assuming the deferential standard applies, there is an obvious need to know how reviewing courts are to assess the reasonableness of an administrative decision.

Due to time restraints, this presentation focuses on only the first question. Admittedly, the task of providing a go-to answer for the second question is riddled with difficulty from both a practical and theoretical perspective. In particular, the application of the deferential standard of review to decisions that involve the interpretation of the decision-maker's enabling legislation has been largely ignored. However, it was agreed that today's presentation would focus on standard of review issues.

This presentation draws a bright-line distinction drawn between the decisions of specialized tribunals (*e.g.*, labour boards) and those made by other statutory delegates (*e.g.*, Ministers and officers of the Crown). Admittedly, when it comes to those falling within the residual category, the analysis is as argumentative as it is descriptive. Regardless, the distinction is important if only because it draws attention to what some regard as a design flaw in the deference doctrine. This topic warrants separate consideration and is addressed in the latter portion of my presentation.

Stripped to its essentials, my underlying thesis is neither complicated nor controversial. *Dunsmuir* left us with a two-step framework for identifying the proper review standard. The first embraces the categorical approach. The second is labeled the contextual approach or what is often referred to as contextualism. *Dunsmuir* anticipated the categorical approach could prove "unfruitful" and, therefore, reviewing courts would have to move to the contextual one. However, the post-*Dunsmuir* jurisprudence reveals that contextualism is no more. The Supreme Court has consistently applied the categorical approach and expressly rejected the contextual one.

In short, under the categorical approach, the deferential standard of review applies unless the issue at hand falls within of the four correctness categories first identified in *Dunsmuir*. Moreover, as the correctness categories are narrow in scope, there is little room for the application of the non-deferential standard of review. Better still, it matters not whether the administrative decision-maker is a specialized tribunal. So too have other statutory delegates have been brought under the deference umbrella. Nor does it matter that the statutory delegate lacks relative expertise with

respect to the issue at hand (e.g., statutory interpretation). This is deference in a nutshell, at least when it comes to identifying the proper review standard.

The Demise of Contextualism

Recall that prior to *Dunsmuir*, the analytical framework for isolating the proper standard of review was labeled the "pragmatic and functional approach" as articulated in *Pushpanathan v Canada (Minister of Citizenship and Immigration)*.[6] Also, recall that the object of the exercise was to isolate the intent of the legislature or Parliament as to whether the tribunal decision would be owed deference. The framework involved consideration of four contextual factors: (1) the presence or absence of a privative clause in the tribunal's home statute; (2) the purpose of the statute; (3) the expertise of the tribunal; and (4) the nature of the issue. Finally, recall that the law provided for two deferential standards of review as a result of the Supreme Court's decision in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*[7] (patent unreasonableness and reasonableness *simpliciter*).

Only the legal historian ever asks why the Court felt compelled to promote two distinct deferential standards of review. What really mattered was how the reviewing court would justify its decision to select one of the deferential standards over the other, once the correctness standard had been eliminated from the mix. And for nearly a decade, reviewing courts went about their business imagining that a valid distinction could be drawn between the two deferential standards.

Dunsmuir dispensed with the pragmatic and functional label and replaced it with another: "standard of review analysis." Substantively, however, nothing changed with respect to the essential elements of the deference doctrine, save for the all-important reduction in the number of deferential standards of review. Thankfully, *Dunsmuir* left us with only one: reasonableness. It also left us with a simplified analytical framework for identifying the proper review standard. And for the record, *Dunsmuir* did not abandon the understanding that the search for the proper review standard was a search for legislative intent.[8] The abandonment occurred post-*Dunsmuir*.

Dunsmuir was the Court's response to the doctrinal uncertainties that had accumulated over the years. Bastarache and LeBel JJ, writing for the majority of five, consolidated the doctrine's tenets under one umbrella. It is a two-step framework for assessing whether a tribunal decision is owed deference:

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

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

[8] *Dunsmuir*, *supra* note 2 at paras 31 and 52.

> First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.[9]

In short, the first step relieves reviewing courts of the obligation to conduct an exhaustive review under the second step. Fortunately, *Dunsmuir* provides us with a list of issues for which the proper review standard had already been identified in the earlier Supreme Court jurisprudence. In fact, there are two lists. One contains questions/issues for which the deferential standard of review applies. The other sets out those questions/issues for which correctness is automatically the proper review standard. The person in search of the proper review standard simply looks to the two lists to see where the issue at hand falls. This is labeled the categorical approach.

The *Dunsmuir* list for review on the standard of reasonableness embraces questions of fact, mixed law and fact, and decisions involving the application of policy or the exercise of discretion. We are also told that deference will "usually" result where a tribunal is interpreting its home statute or those statutes closely connected to the tribunal's functions and with which it will have particular familiarity. Parenthetically, the Court would subsequently replace the word "usually" with the word "presumptively.[10]

As to the other list, *Dunsmuir* established that correctness is automatically the proper review standard for the following: constitutional questions; questions of general law that are of central importance to the legal system as a whole and outside the tribunal's field of expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and, finally, true questions of jurisdiction.

Note, that although *Dunsmuir* made no specific reference to the correctness standard applying to alleged breaches of the fairness duty (*e.g.*, bias), the Supreme Court has yet to declare otherwise; a matter discussed below.[11] Note also, that under the first step, the Supreme Court has on occasion turned to earlier case law, involving the same tribunal and home statute, in order to isolate the proper review standard with respect to a particular issue.[12] The Court of Appeal of New Brunswick has done likewise. In this way, reviewing courts are relieved of the obligation to conduct an exhaustive review required under the second step of the standard of review analysis.

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[9] *Ibid* at para 61.

[10] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22, [2016] 2 SCR 293 [*Edmonton East*].

[11] See discussion, *infra* note 30.

[12] See *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 [*Tervita*], discussed *infra* 27.

For example, historically, the Court of Appeal has reviewed the decisions of the Appeals Tribunal of the Workplace Health, Safety and Compensation Commission, involving a question of law, on the standard of correctness.[13] Invariably, the question of law involves the interpretation of the applicable legislation. The justification for not according deference to this specialized tribunal is embedded in the reality that, save perhaps for the Chair of the tribunal, members come to the Appeals Tribunal without legal training. However, there is a caveat: to the extent the relevant legislation has been amended to reflect the appointment of legally trained persons to the appeals tribunal, it may well be that the Court will be asked to reconsider whether that non-deferential standard of review applied to questions of law (*e.g.*, the interpretation of the tribunal's home statute) should remain in place. As well, some of the post-*Dunsmuir* decisions of the Supreme Court, to be discussed momentarily, suggest that the earlier New Brunswick jurisprudence should be revisited.

Should the first step of the standard of review analysis prove unproductive, *Dunsmuir* anticipated that reviewing courts would move to the second. The second step requires the examination of four contextual factors. As noted, this has been labeled the contextual approach or simply contextualism. The stated objective is to identify the intent of Parliament or the legislature with respect to whether the tribunal decision warranted deference. However, no one factor was determinative of the standard of review issue.

In theory, and prior to November 4, 2016, a reviewing court might have found it necessary to move to *Dunsmuir's* second step of contextualism in order to identify the proper standard of review. In practice, however, it should not have been necessary to do so. Why? Save for two cases under consideration at the time *Dunsmuir* was decided, the Supreme Court had not expressed the need or expressed an interest in moving to the second step.[14] Over a period of eight years, the Supreme Court had consistently identified the proper standard of review by reference to the one applied in earlier jurisprudence or, alternatively, by deciding whether the issue at hand falls within one of the categories for which the correctness standard automatically applies. If the issue did not fall within one of the exceptional categories, the tribunal's decision was accorded deference.

On November 4, 2016, the Supreme Court released its decision in *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*.[15] But for that decision, one could have spent considerable time trying to isolate the rationale underscoring the demise of contextualism. The case is one in which the majority affirmed the application of the categorical approach before rejecting the contextual

[13] See *Keddy v New Brunswick Workplace Health, Safety and Compensation Commission*, 2002 NBCA 24, (2002) 247 NBR (2d) 284 (leave to appeal to SCC refused).

[14] The two cases are *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, and *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678.

[15] *Edmonton East*, note 10, but see the dissenting opinion which sought to retain the contextual approach.

one. The majority's rationale for the rejection was brutally short and clear: "The contextual approach can generate uncertainty and endless litigation concerning the standard of review."[16] While *Dunsmuir* had left the door to contextualism open, the post-*Dunsmuir* jurisprudence closed it. Admittedly, the Court was deeply divided (5/4).

The fact that *Dunsmuir*'s contextual approach was laid to rest was unexpected. The fact the deferential review standard of reasonableness remains the go-to standard was not. Indeed, it was Binnie J, in *Dunsmuir*,[17] who prophetically observed that most decisions and rulings of specialized tribunals are owed deference. Of the approximately 60 deference cases decided by the Supreme Court, post-*Dunsmuir*, the deferential standard of review was chosen in all but six. As to the exceptional cases, none came as a surprise.

In one case, the British Columbia *Administrative Tribunals Act* required correctness of the decision at hand.[18] In another, the Court was dealing with the decision of a human rights tribunal and a question of law tied to the concepts of state neutrality, religious freedom and freedom of conscience.[19] In another, the Supreme Court had been applying a correctness standard with respect to questions of law decided by a federal tribunal since *Southam* was decided.[20] In two other cases, the Court applied the correctness standard because the tribunal in question and the federal court possessed overlapping jurisdiction to decide matters under the same federal statute.[21] Finally, the Court recently concluded that the matter of solicitor-client privilege fell within of the four categories for which correctness is automatically the proper review standard.[22]

In brief, contextualism is no more. Consequently, the search for the proper review standard is no longer a search for legislative intent. Indeed, not since *Dunsmuir* has the Supreme Court alluded to that principle. The categorical approach is the only option for identifying the proper review standard and that approach hinges on two presumptions: a presumption of deference to the tribunal's decisions and a presumption that the tribunal possesses a relative expertise regarding the issue at hand. Admittedly, ten years prior to *Dunsmuir*, the Supreme Court set out an analytical framework for assessing the relative expertise of a tribunal. The pertinent

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[16] *Ibid* at para 35.

[17] *Dunsmuir*, *supra* note 2 at para 146.

[18] *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 SCR 108.

[19] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*].

[20] *Tervita*, *supra* note 12.

[21] *Rogers Communication Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 and *Canada Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 [*Canada Broadcasting*].

[22] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, 403 DLR (4th) 1 [*University of Calgary*].

decision is *Pushpanathan*.[23] However, it is no longer necessary to ask whether the tribunal possesses a relative expertise. Today, the twin presumptions of deference and expertise stand unless the issue falls within one of *Dunsmuir*'s four correctness categories. This is what is meant by freestanding expertise.

Unfortunately, too many commentators fail to appreciate that the concept of freestanding expertise is a theoretical construct based on a false premise: namely, all tribunals are composed of experts who are experts on all matters. In point of fact, not all tribunals are created equal, yet our deference doctrine perpetuates the understanding that one-size-fits-all; a thesis I must leave for another day.

As the law presently stands, it makes no difference whether you are dealing with the decisions of our national regulators or underfunded provincial tribunals that depend heavily on lay members who are appointed for reasons unrelated to the work of the tribunal. The decisions of both are treated no differently when it comes to the application of the deference doctrine. Reasonableness is the go-to standard unless the issue at hand falls within of one *Dunsmuir's* correctness categories. What matters in law is that a specialized tribunal has been established to deal with issues for which reviewing courts are deemed to lack a relative expertise. And that is why freestanding expertise has replaced legislative intent as the cornerstone of administrative deference. All of this adds another dimension to a doctrine that, at times, represents a challenge to conventional understandings of the rule of law.[24]

The Demise of the Right of Appeal

Despite the demise of contextualism, some continue to ask whether the law continues to draw a substantive distinction between the privative clause and the right of appeal. Typically, one or the other will be found lodged within the tribunal's enabling (home) statute. However, it matters not whether the legislation contains either provision or none. The deference obligation operates independently of the tribunal's enabling statute now that contextual approach has been formally abandoned.

In brief, there was a time in Canadian law when the distinction between judicial and appellate review truly made a difference when it came to isolating the proper standard of review. A right of appeal automatically signaled that correctness was the proper standard of review with respect to questions of law and, in particular, those involving the interpretation of the tribunal's home statute. On the other hand, a privative clause automatically signaled the need for curial deference. This was the law according to *New Brunswick Liquor*. Eventually, however, Canadian law would hold that neither a privative clause nor a right of appeal were determinative of the

[23] *Pushpanathan*, *supra* note 6 at para 32.

[24] See Peter Gall, "Problems with a Faith-Based Approach to Judicial Review" in Robertson, Gall & Daly, *supra* note 3 at 183.

legislature's intent regarding the issue of deference.[25] That was the law at the time *Dunsmuir* was decided. Today, under the post-*Dunsmuir* jurisprudence, both provisions remain an irrelevancy when it comes to isolating the proper review standard. The following case law supports that understanding of the law.

Three post-*Dunsmuir* decisions speak to the significance of a statutory right of appeal lodged within the tribunal's enabling legislation. All three asked whether the statutory right, together with other contextual factors such as tribunal expertise, warranted application of the correctness standard with respect to questions of law. In all three cases, the Supreme Court effectively answered "no."

In *Mouvement laïque québécois v Saguenay (City)*,[26] the Supreme Court remained true to its earlier precedents and bluntly answered "no." In *Edmonton (City)*; the majority of the Court was emphatic in declaring that a statutory right of appeal is not a "new" category of correctness that should be added to the list set out in *Dunsmuir*. The third decision is admittedly problematic: *Tervita Corp v Canada (Commissioner of Competition)*.[27] In that case, the majority held that, as the decisions of the Competition Tribunal on questions of law are appealable to the Federal Court of Appeal as if they were "a judgement of the Federal Court," the proper review standard had to be correctness.[28] The dissenting opinion refused to attach any significance to the wording of the appeal clause and insisted that the deferential standard of reasonable applied. In response, the majority noted that the Federal Court of Appeal had consistently applied the correctness standard to questions of law decided by the Competition Tribunal.

Curiously, the Court in *Tervita* failed to acknowledge the relevance of an earlier and significant precedent involving a decision of the Competition Tribunal: *Southam*. Another forgotten precedent, but one that would have supported the Supreme Court's decision to apply the correctness standard regarding the Tribunal's rulings on questions of law. In short, the Court has consistently applied the correctness standard to questions of law decided by the Competition Tribunal. This approach is in keeping with the first-step of Dunsmuir's two-step framework for identifying the proper review standard.

In brief, those who believe that the standard of review issue hinges on either the privative clause or the right of appeal will be disappointed. Neither is of any moment when it comes to isolating the proper review standard. The post-*Dunsmuir* jurisprudence confirms that understanding.

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[25] The leading Supreme Court decision is *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226.

[26] *Saguenay*, *supra* note 19.

[27] *Tervita*, *supra* note 12.

[28] See *Competition Tribunal Act*, RSC 1985, c 19, ss 12 and 13.

Little Room for Correctness Review

It is not difficult to show the categorical approach leaves little room for the application of the correctness standard of review. Two reasons underscore that observation. First, *Dunsmuir* identified a limited number of correctness categories and second, those categories are narrow in scope. As to the first reason, I admit that the correctness categories are under-inclusive. As mentioned earlier, *Dunsmuir* made no mention of those cases in which one of the parties alleges a breach of the fairness duty.

One should think of the fairness duty as an organizing principle – one that embraces those applicable to matters such as bias and procedural fairness, and any other matters recognized at law as sufficient grounds for setting aside a tribunal decision but that do not go to the merits of the underlying decision. Within this context, it is difficult to find recent Supreme Court jurisprudence dealing with the standard of review issue. There is an obvious reason for the omission. The law has remained constant before and after *New Brunswick Liquor*. A breach of the duty of procedural fairness (the old rules of natural justice) including freedom from a biased decision-maker, was always treated as a jurisdictional error (excess of jurisdiction).[29] That is why it is generally safe to proceed on the understanding that the presumption of tribunal expertise dissipates when it comes to alleged breaches of the fairness duty. However, there is an exception to this exceptional category.

One should not presume that correctness will always be the proper review standard when it comes to breaches of the fairness duty. In cases where the tribunal is statutorily mandated to establish rules and policies with respect to the procedures to be followed in fulfilling its adjudicative mandate, the standard of review may revert to reasonableness. Room for the exceptional case was recognized in *Baker v Canada*,[30] *Council of Canadians with Disabilities v VIA Rail Canada Inc*,[31] and *Mission Institution v Khela*.[32] Parenthetically, however, there is an ongoing debate as to whether reviewing courts should accord deference to all tribunal rulings involving procedural fairness issues.[33]

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[29] See generally *Toronto Newspaper Guild, Local 87 v Globe Printing Company*, [1953] 2 SCR 18, [1953] 3 DLR 561; *Saltfleet (Township) Board of Health v Knapman*, [1956] SCR 877, 6 DLR (2d) 81.

[30] *Baker v Canada*, [1999] 2 SCR 817 at para 27, 174 DLR (4th) 193 [*Baker*].

[31] *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15 at para 231, [2007] 1 SCR 650.

[32] *Mission Institution v Khela*, 2014 SCC 24 at paras 79 and 89, [2014] 1 SCR 502.

[33] See Paul Daly, "Canada's Bi-Polar Administrative Law: Time for Fusion" (2014) 40(1) Queen's LJ 213; and Christopher D Bredt & Alice Melkov "Procedural Fairness in Administrative Decision-Making: A Principled Approach to the Standard of Review" (2015) 28 Can J Admin L & Prac 1; and compare with John M Evans, "Fair's Fair: Judging Administrative Procedures" (2015) 28 Can J Admin L & Prac 111.

At this point, it is necessary to look to the actual scope of the four correctness categories identified in *Dunsmuir*. The most problematic of the categories is the one reserved for questions of law that are of central importance to the legal system as a whole and outside the tribunal's field of expertise. A careful reading of *Dunsmuir* reveals that the Court was referring to the application of common law and equitable principles. That understanding is compatible with the pre-*Dunsmuir* jurisprudence and the case law cited in that case.[34] However, *Dunsmuir* acknowledged room for the exception - those cases where the tribunal has developed a particular expertise in the application of a particular principle.

All of that said, the post-*Dunsmuir* jurisprudence is incompatible with my understanding of what was decided in *Dunsmuir*. Cases such as *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*[35] are on point. That was a case in which the Court held that the equitable remedy of estoppel did not qualify as a question of central importance to the law. The Court also held that labour tribunals are no longer bound to apply the common law and equitable principles in the same manner as superior courts as they have a "different mission".[36] Presumably, the same does not hold true with respect to other specialized tribunals.

Several Supreme Court cases have sought to provide guidance on how to identify questions that are of central importance to the legal system. None speak to the need for deference in the context of applying common law and equitable principles. Some of the cases may be perceived as more helpful than others.

The first in time is *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*.[37] Therein, the Court acknowledged that questions involving human rights concepts should continue to attract a correctness standard (e.g., "family status" and "discrimination"). However, that observation is consistent with the fact that the decisions of human rights tribunals involving such issues, and that qualify as a question of law, have always been reviewed on the correctness standard.[38] At the same time, the Court held that the issue of whether the tribunal could award "costs" to the successful party under a provision that allowed for reimbursement for "expenses" did not qualify as a question of central importance to the legal system.

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[34] See *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77; *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487, 144 DLR (4th) 385.

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

[36] *Ibid* at para 5. Query: How does a labour arbitrator's "mission" differ from that any of any other decision-maker who is called upon to act in accordance with the rule of law?

[37] *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471 [*Canadian Human Rights Commission*].

[38] See discussion below *infra* at note 76.

The Supreme Court's decision in *Mouvement laïque québécois v Saguenay (City)*[39] also involved a decision of a human rights tribunal, only this time the Court did identify a question that was of central importance to the legal system. The issue was whether a municipal council's decision to recite a Christian prayer before the commencement of each meeting constituted a breach of the state's duty of neutrality and interfered with applicant's freedom of conscience and religion under the Quebec *Charter*. The majority of the Court ruled that the presumption of deference had been rebutted. That issue qualified as one of central importance and understandably so, regardless of how one casts the threshold test.

A more helpful insight or test for identifying questions of central importance to the legal system is found in *Canadian National Railway Co v Canada (Attorney General)*.[40] In *obiter*, the Court held that, if the tribunal's interpretation of its home statute was of precedential significance, outside the ambit of the statutory scheme under consideration, the interpretative issue could qualify as one of central importance to the law.

Another relevant decision, and one that offers a more restrictive approach, is *Commission scolaire de Laval v Syndicat de l'enseignment de la region de Laval*[41] Therein, the Court held that: "Questions of [central importance] are rare and tend to be limited to situations that are detrimental to 'consistency in the country's fundamental legal order of our country."[42] The majority held the arbitrator's decision, requiring three members of the employer's executive committee be examined with respect to the reasons underlying the committee's in-camera decision to dismiss an employee, was to be assessed on the standard of reasonableness. Simply put, the majority declared that the procedural and evidentiary issues at stake (deliberative secrecy) did not qualify as questions of central importance to the law. Frankly, the chances of identifying questions that are detrimental to consistency in Canada's legal order seem remote and, for the person who seeks go-to answers, unrealistic.

Most recently, in *Alberta (Information and Privacy Commissioner) v University of Calgary*,[43] the *obiter* in *Canadian National Railway Co v Canada (AG)* was adopted. The majority of the Court held that the question of whether s. 56(3) of the *Freedom of Information and Protection of Privacy Act (Alberta)* allows for the review of documents, over which solicitor-client privilege has been claimed, qualifies as a question of central importance to the legal system. The question of what statutory language is sufficient to authorize administrative tribunals to infringe

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[39] *Saguenay*, *supra* note 19.

[40] *Canadian National Railway Co v Canada (AG)*, 2014 SCC 40 at para 60, [2014] 2 SCR 135 [*Canadian National Railway*].

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

[42] *Ibid* at para 34.

[43] *University of Calgary*, *supra* note 22.

solicitor-client privilege was held to be one that has potentially wide implications on other statutes. moment. At the same time, one cannot help but observe that the Supreme Court could have achieved the same result had it held the common law principles governing solicitor-client privilege attract review for correctness.

Cases in which a provincial court of appeal has identified a question of central importance to the legal sAystem have not met with success in the Supreme Court. Two decisions warrant consideration. The first is *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*.[44] Therein, both the majority and minority rejected the Court of Appeal's attempt to apply the correctness standard having regard to the public importance of the case. The subtle distinction between issues of central importance to the legal order and those that are of public importance or of importance in a particular area of the law is worth briefly exploring.[45]

Irving Pulp & Paper was a case in which the employer had exercised its rule-making authority under the collective agreement to require random alcohol testing of employees who held safety-sensitive positions within a kraft paper mill. Everyone agreed the mill qualified as a "dangerous workplace." At the same time, the employer's policy limited testing to 34 random samplings in a calendar year. The majority of the arbitration panel declared the employer rule to be unreasonable on the ground the employer was unable to establish a "significant problem" with respect to alcohol-related impairment performance at the plant. The failure to meet that threshold meant that the employer was unable to justify the infringement of an employee's privacy rights.

By the time *Irving Pulp & Paper* was heard in the Supreme Court, intervener status had been granted to 22 interested groups from across the country. There were those representing the major transportation companies, including Canada's two national railways, as well as employee associations and representatives of the oil and mining industries throughout Canada, yet the majority of the Supreme Court was unequivocal in its summary rejection of the correctness standard applying to the issue of random alcohol testing in dangerous work environments.

The majority's reasoning in *Irving Pulp & Paper* is blunt and unambiguous: "It cannot be seriously challenged, particularly since *Dunsmuir v New Brunswick* that the applicable standard of review for reviewing the decision of a labour arbitrator is reasonableness."[46] The minority agreed: "This dispute has little *legal* consequence outside the sphere of labour law and that, not its potential real-world

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[44] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458, (reversing 2011 NBCA 58, 375 NBR (2d) 92) [*Irving Pulp & Paper*].

[45] Parenthetically, and for the record, the Court of Appeal (Robertson JA) held that, in the alternative, the tribunal decision also failed to meet the deferential threshold of reasonableness.

[46] *Dunsmuir, supra* note 2 at para 7.

consequences, determines the applicable standard of review."[47] In short, the Supreme Court held, that while the issue of random alcohol testing may be of utmost importance (interest) in the context of labour relations, the issue was not of central importance to the legal system.

Martin v Alberta (Workers' Compensation Board)[48] is another Supreme Court decision that adopted a narrow approach to questions of central importance to the legal system. In that case, the issue centered on the interpretation of federal legislation governing federal employees who are eligible to apply for workers' compensation benefits under the various provincial schemes. The issue was whether a federal employee had to meet the provincial eligibility requirements of the province in which the employee was injured or whether the eligibility requirements were to be fixed under the federal legislation such that the requirements were uniform throughout the country.

The Supreme Court held that the interpretation which the Alberta tribunal placed on the federal legislation was owed deference. The federal statute qualified as a "home" or "constituent" statute for which reasonableness was the presumptive standard of review. More importantly, the question of law to be decided was held not to be of central importance to the legal system and squarely within the specialized functions of such tribunals. This was held to be so even though the Supreme Court's ruling meant that it was possible for the provincial tribunals to adopt competing interpretations of the federal legislation. That possibility bears on what many believe to be a glaring deficiency in the law of deference. The Supreme Court has held that inconsistency in tribunal decisions is not an independent ground for moving to review for correctness. This point is worth exploring.

Take the case where a tribunal panel interprets a provision of its home statute in one manner, and the next panel adopts a conflicting interpretation of the same provision. Assume also that only the second panel decision is subjected to judicial review. Does the reviewing court owe deference to the second panel's interpretation or is the court free to resolve the conflict by adopting the review standard of correctness? The short answer is that the deferential review standard must be applied to the second tribunal decision. A brief explanation is warranted.

In *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*,[49] a unanimous Supreme Court, recognized that, although the requirement of consistency in the law was a valid objective, it could not be separated from the autonomy, expertise, and effectiveness of specialized tribunals. Prior to *Domtar*, academic commentators believed otherwise. However, the Court consciously chose a different path. As Professor Hawkins observed: "L'Heureux-

[47] *Ibid* at para 66.

[48] *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] 1 SCR 546.

[49] *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, 105 DLR (4th) 385.

Dubé J. was not prepared to compromise the principle of deference even given the argument that a 'primary purpose of judicial review was to prevent arbitrariness.'"[50]

For those troubled by the understanding that inconsistent tribunal decision-making is not a sufficient ground for moving to the correctness standard of review, it is worth revisiting two other Supreme Court decisions: *UES, Local 298 v Bibeault*,[51] and *Ivanhoe Inc v United Food and Commercial Workers' Local 500*.[52] Those decisions reveal that, on occasion, the Supreme Court has skirted the *Domtar* ruling.[53]

The next category for which correctness has been deemed the proper standard of review embraces constitutional rulings. No one quibbles with the requirement that such rulings, including those requiring the application of the *Charter of Rights and Freedoms*, must fall outside the deference obligation. Intuitively, the rule of law, however formulated, dictates that correctness must be the proper review standard. However, if one carefully sifts through the Supreme Court jurisprudence, it is possible to isolate the anomalous case.

In *Doré v Barreau du Québec*,[54] the Court accorded deference to a disciplinary decision that impacted on a lawyer's right to freedom of speech under the *Charter*. This was the case in which Maître Doré had sent an insulting letter, to the presiding judge, immediately following a court hearing. The lawyer was disciplined notwithstanding his plea that the letter fell within his right to freedom of speech. The Supreme Court held the disciplinary committee was no longer under an obligation to apply the *Oakes* test when dealing with s. 1 of the *Charter* (for which correctness would have been the proper review standard). The "new" administrative law approach requires the tribunal to balance the severity of the interference with the *Charter* protected right and the objectives of the tribunal's home statute. As well, the Court held the committee's ultimate ruling was owed deference. In so holding, the Court effectively overruled *Slaight Communications Inc v Davidson*,[55] and *Multani v Commission scolaire Marguerite-Bourgeoys*.[56]

The next category for which correctness has been deemed the proper standard of review embraces the "who-gets-to-decide" cases. These are the ones in

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[50] RE Hawkins, "Whither Judicial Review?" (2009) 88 Can Bar Rev 603 at 631.

[51] *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 35 Admin LR 153 [*Bibeault*].

[52] *Ivanhoe Inc v United Food and Commercial Workers' Local 500*, 2001 SCC 47, [2001] 2 SCR 565.

[53] With respect to tribunal inconsistency in decision making in New Brunswick, see *Jones' Masonry Ltd v Labourers' International Union of North America, Local 900*, 2013 NBCA 50, 364 DLR (4th) 4 (leave to appeal refused, [2013] SCCA No 356, 469 NR 396) and compare the majority and dissenting opinions.

[54] *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

[55] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416.

[56] *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.

which the reviewing court is asked to decide who has the jurisdiction to decide a particular issue. The jurisdiction may rest exclusively with the tribunal, a superior court or another tribunal. Correlatively, concurrency in jurisdiction may exist. For example, it has been asked whether an arbitrator possesses the jurisdiction to rule on the issue of employer discrimination or whether the jurisdiction rests with a human rights tribunal. Alternatively, the jurisdiction may be concurrent.[57]

There are also cases in which a tribunal has been asked to determine whether it possesses the jurisdiction to rule on the constitutional validity of a provision of its home statute. A negative response means the issue must be referred to the Court of Queen's Bench. In fact, the Supreme Court has provided a qualified response. A tribunal may address the constitutional issue provided it has either the express or implied right to decide questions of law. However, and as explained earlier, even if the tribunal possesses the jurisdiction to decide the issue, the constitutional ruling must be reviewed on the standard of correctness.[58]

Finally, it must be acknowledged that, in those cases where two tribunals possess the concurrent jurisdiction to decide an issue and one of those tribunals has already made a determination, the second tribunal will be forced to deal with the matter of issue estoppel. In other words, the second tribunal will be forced to defer to the ruling of the first tribunal, unless the tenets of the estoppel doctrine dictate otherwise.

This leaves us with the final category for which correctness has been deemed to be the proper review standard: the true jurisdictional question. It was 1983 when Professor MacLauchlan (now Premier of PEI) made an incisive observation about the law surrounding the concept of jurisdiction: "I currently favour likening thinking about jurisdiction to attempting to extract oneself from fly-paper; once you get started with the exercise it is virtually impossible to break free."[59] Admittedly, too much ink has been spilled since *New Brunswick Liquor* in trying to articulate a

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[57] See generally *Dunsmuir*, *supra* note 2 at para 61; *Regina Police Assn Inc v Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 SCR 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (AG)*, 2004 SCC 39, [2004] 2 SCR 185; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513 [*Tranchemontage*]; *Syndicat des professeurs du Cégep de Sainte-Foy v Beaulieu (AG)*, 2010 SCC 29, [2010] 2 SCR 123; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers' Association*]; and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422.

[58] See *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th) 456; *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54, [2003] 2 SCR 504; *Tranchemontagne*, *supra* note 57, and *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765.

[59] Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 UTLJ 343 at note 3. Curiously, the Supreme Court no longer characterizes the "who gets to decide cases," just discussed, as falling within this category. Fortunately, the oversight, if it is such, has no substantive impact on the deference doctrine. Above all, the oversight should not detract from the following analysis.

legal framework for isolating the true jurisdictional question from the non-jurisdictional one.

At one time, administrative law embraced what was labeled the "preliminary and collateral approach" to defining jurisdictional questions. Applying that approach, it was all too easy to declare the issue at hand qualified as a true jurisdictional question and, therefore, correctness was the proper review standard. Take, for example, those cases where the tribunal had to decide whether an applicant had filed its review application within the time prescribed by the enabling statute. As neither the interpretative nor factual issue went to the merits of the underlying case, those issues were classified as preliminary questions and, therefore, correctness was the proper review standard.

Better still, take the case where a labour board must decide whether the affected person is an employee or an independent contractor under the enabling legislation. Of course, independent contractors fall outside the protections of the legislation. However, as the issue involved a preliminary determination that did not go to the underlying merits of the case, it would have been treated as a true jurisdictional question under the preliminary and collateral framework.

The habit of isolating preliminary questions was also adopted regarding collateral questions. Such questions were collateral in the sense that the tribunal was being asked to rule on whether it possessed the jurisdiction to grant certain relief to the successful party or to impose certain sanctions against the unsuccessful one. For example, a tribunal may have concluded that one of the parties was in breach of its statutory obligations and, therefore, the successful party was entitled to relief, but a disagreement as to whether the tribunal possessed the jurisdiction to grant the relief contemplated. This type of disagreement would have been classified as collateral to the underlying dispute and, therefore, would have qualified as a true jurisdictional question under the "preliminary and collateral" framework.

Too many cases involving preliminary and collateral questions made their way to the Supreme Court. This is true even though the Supreme Court formally abandoned that approach, in 1988, with the release of *UES, Local 298 v Bibeault*.[60] In that case, the Court adopted the "pragmatic and functional approach" to identifying jurisdictional questions. (Parenthetically, ten years later the Court would adopt that approach for purposes of identifying the proper standard of review regarding all issues.) Regrettably, the jurisprudence continued to produce conflicting decisions on whether the remedial powers of a tribunal fell within the true jurisdictional category, even with the application of the pragmatic and functional approach. Fortunately, the Court's more recent jurisprudence brings certainty to the law.

[60] *Bibeault*, *supra* note 51.

In *Canada (Canadian Human Rights) v Canada (Attorney General)*,[61] the Supreme Court held the authority of a human rights tribunal to award costs to the successful party was not a true jurisdictional question and, therefore, the tribunal's decision was owed deference. And in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[62] the Court was unanimous in holding that a question of law dealing with the interpretation and application of a provision governing a limitation period did not qualify as a true jurisdictional question.

It should not be forgotten that the precedential significance of *Alberta Teachers' Association* is greater than the narrow issue decided therein. A divided Supreme Court left unanswered whether there is a need to retain the category of true jurisdictional question. The majority could not identify a workable definition for the concept and, therefore, questioned the need for its retention. The minority argued for its preservation on historical grounds, and so a compromise of sorts was reached. In the future, there would be a presumption of deference to a tribunal's interpretative rulings with respect to its home statute and those with which it has familiarity.

Those arguing that a tribunal's interpretative ruling qualifies as a true jurisdictional question will now have to rebut the presumption of deference. How is that accomplished? With great difficulty unless the issue just happens to fall within one of the other correctness categories identified in *Dunsmuir*. While the pragmatist might allege circuitous reasoning on my part, we are left with a stark reality. There is little, if any, room left in administrative law for the concept of the true jurisdictional question. Arguably, the only true jurisdictional questions are those raising a constitutional issue or, correlatively, those requiring the reviewing court to determine which of two or more tribunals possesses the authority to decide a particular issue.[63]

In summary, the go-to standard of review is the deferential one. Unless the issue falls within one of the four (five) correctness categories, the presumptive standard of reasonableness applies. Pragmatically speaking, there is little hope of anyone identifying a true jurisdictional question so long as the deferential standard of review presumptively applies to the tribunal's interpretations of its enabling statute and the only practical way of doing that is to how that the issue falls within one of the correctness categories identified in *Dunsmuir*. However, the administrative lawyer and reviewing court will encounter difficulty in identifying questions that are of central importance to the legal system and in assessing whether the issue falls outside the tribunal's relative expertise. The tests the Supreme Court has articulated are not easy to apply and unlikely to promote consistency in the law.

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[61] *Canadian Human Rights Commission*, *supra* note 37.

[62] *Alberta Teachers' Association*, *supra* note 57.

[63] This is dealt with in Robertson, *supra* note 3 at 38.

The Segmentation Issue

To this point, the presentation might leave the impression that a tribunal's decision is subject to only one standard of review. But this is not so. For example, the tribunal may make several factual rulings, together with a ruling on a procedural matter, followed by an interpretation of one the provisions of the tribunal's enabling (home) statute. Collectively, those rulings support the tribunal's ultimate disposition. What matters is that "segmentation" or "disaggregation" of a tribunal decision may result in the reasonableness standard applying to some issues while the correctness standard applies to others.

Parenthetically, segmentation of a tribunal decision has its antagonists. In the Supreme Court, Abella J has consistently maintained that a tribunal decision should be subjected to only one review standard. While the weight of Supreme Court jurisprudence does not embrace that view, it would be remiss not to acknowledge the existence of two conflicting decisions, released within a day of one another, dealing with the segmentation issue: *Council of Canadians with Disabilities v VIA Rail Canada Inc*,[64] and *Lévis (City) v Fraternité des policiers de Lévis Inc*.[65] The first decision rejected outright the notion of segmentation. The second embraced it wholeheartedly. However, the Supreme Court jurisprudence predating both decisions is consistent with the understanding that segmentation is permissible.[66]

In any event, there are two more recent decisions of the Supreme Court that expressly reject Abella J's insistence that segmentation of a tribunal decision be proscribed: *Mouvement Laïque Québécois v Saguenay (City)*,[67] and *Canada Broadcasting Corp v SODRAC 2003 Inc*.[68] In the latter case, Abella J, in dissent, conveniently and succinctly expressed her reasons underscoring her opposition to segmentation in the following manner: "Breaking down a decision into each of its component parts also increases the risk that a reviewing court will find an error to justify interfering in the tribunal's decision, and may well be seen as a thinly veiled attempt to allow reviewing courts wider discretion to intervene in administrative decisions."[69]

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[64] *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650.

[65] *Lévis (City) v Fraternitié des policiers de Lévis Inc*, 2007 SCC 14, [2007] 1 SCR 591.

[66] As to the earlier jurisprudence, see *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc*, 2001 SCC 36 at para 39, [2001] 2 SCR 100; *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 41, [2003] 1 SCR 247. It also bears noting that Abella J continues to insist that segmentation of tribunal decisions should not be permitted. In *Irving Pulp & Paper*, *supra* note 44 at para 54, she emphasized that a tribunal's decision should be approached as "an organic whole" and "without a line-by-line treasure hunt for error."

[67] *Saguenay*, *supra* note 19.

[68] *Canada Broadcasting*, *supra* note 21.

[69] *Ibid* at para 191. A response to Abella J's objections to segmentation can be found in Robertson, *supra* note 3.

The "Palpable & Overriding Error" Threshold

Putting aside the issue of segmentation, there remains another pressing question. Accepting that questions of fact and questions of mixed law and fact are owed deference on the review standard of "reasonableness", one cannot help but ask whether that deferential standard is equivalent to the "palpable and overriding error" standard being applied in the context of civil appeals under the principles articulated in *Housen v Nikolaisen*,[70] and *HL v Canada (Attorney General)*.[71] The short answer is "no".

In *Agraira v Canada (Public Safety and Emergency Preparedness)*,[72] the Supreme Court cautioned that the appellate standards of "correctness" and "palpable and overriding error" and the administrative law standards of "correctness" and "reasonableness" are not interchangeable. More recently *Mouvement Laïque Québécois v Saguenay (City)*,[73] the Court held that the palpable and overriding test had no application in the context of administrative appeals. That being so, it should follow that the threshold test for setting aside a finding of fact, or a finding of mixed law and fact, is different in the context of civil appeals (palpable and overriding error) than it is in the context of judicial review by way of appeal (reasonableness). However, one is at a loss to explain how in practical terms the two deferential standards differ.

Other Statutory Delegates

This presentation does not account for those cases in which the tribunal is chaired by a sitting judge.[74] Nor does it take into account the unique treatment which the Supreme Court has accorded to the decisions of human rights tribunals. Historically, the Court has consistently applied the correctness standard to tribunal rulings that qualify as questions of law and, in particular, those involving, for example, the definition of discrimination in one of its various manifestations.[75] This

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

[71] *HL v Canada (AG)*, 2005 SCC 25, [2005] 1 SCR 401.

[72] *Agraira v Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36 at para 45 [*Agraira*].

[73] *Saguenay*, *supra* note 19.

[74] See generally Robertson, *supra* note 3 at 90.

[75] As to the pre-*Saguenay* jurisprudence, see *Canadian Human Rights Commission*, *supra* note 37 and the earlier jurisprudence beginning with *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 171 NBR (2d) 321, which deals with a question of fact, and cases such as *Gould v Yukon Order of Pioneers*, [1996] 1 SCR 5571, 18 BCLR (3d) 1, which consolidates the earlier precedents including *University of British Columbia v Berg*, [1993] 2 SCR 353, 79 BCLR (2d) 273; *Dickason v University of Alberta*, [1992] 2 SCR 1103, 95 DLR (4th) 439; *Zurich Insurance Co v Ontario (Human Rights Commission), [1992] 2 SCR 321*, 9 OR (3d) 224; *and Canada (AG) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658.

understanding, however, is difficult to reconcile with the Court's recent decision in *Mouvement laïque québécois v Saguenay (City)*.[76]

As noted earlier, in *Saguenay (City)*, the Court was dealing with a decision of the Quebec's Human Rights Tribunal involving the state's duty of "religious neutrality" that flows from freedom of conscience and religion. Therein, the Court accepted that the proper standard of review regarding that issue was correctness,[77] but it did so on the basis that the issue was of central importance to the legal system. No reference was made to the substantial body of earlier Supreme Court jurisprudence holding that correctness is the proper review standard for questions of law that are decided by a human rights tribunal. Despite that omission it seems as though the Court is moving to a deference doctrine in which human rights tribunals are to be placed on the same dais as other specialized tribunals.[78]

To this point, the presentation has focused on the application of the deference doctrine with respect to the adjudicative decisions of specialized tribunals. This leaves for consideration the doctrine's application in the context of administrative decisions made by other statutory delegates. The list includes delegates such as government Ministers, civil servants that act as sub-delegates, and those who hold office under a statutory regime (*e.g.*, Registrar of Land Titles).

This part of my presentation is important to those practicing administrative law in New Brunswick. This is because there is recent Supreme Court jurisprudence that effectively overrules three earlier precedents of the New Brunswick Court of Appeal. *O'Dell v New Brunswick (Minister of the Environment and Local Government)*;[79] *Greenisle Environmental Inc. v New Brunswick (Minister of the Environment and Local Government)*;[80] *Carter Brothers Ltd v New Brunswick (Registrar of Motor Vehicles)*.[81] Parenthetically, in *Hovey v Registrar General of Land Titles*,[82] Walsh J noted the potential conflict between the decisions of the Court of Appeal and the three Supreme

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[76] *Saguenay*, *supra* note 19.

[77] *Ibid* at para 49.

[78] See *Canadian Human Rights Commission*, *supra* note 37, and *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467.

[79] *O'Dell v New Brunswick (Minister of the Environment and Local Government)*, 2005 NBCA 58, 286 NBR (2d) 115.

[80] *Greenisle Environmental Inc v New Brunswick (Minister of the Environment and Local Government)*, 2007 NBCA 9, 311 NBR (2d) 161.

[81] *Carter Brothers Ltd v New Brunswick (Registrar of Motor Vehicles)*, 2011 NBCA 81, 377 NBR (2d) 29. In the same vein, see *Takeda Canada Inc v Canada (Minister of Health*), 2013 FCA 13, [2014] 3 FCR 70 (Stratas JA in dissent); and *Prescient Foundation v Canada (Minister of National Revenue)*, 2013 FCA 120 at para 13, 358 DLR (4th) 541.

[82] *Hovey v Registrar General of Land Titles*, 2014 NBQB 118, 420 NBR (2d) 201.

Court cases to be discussed. However, on the facts, he was not required to address the issue.

Between 2005 and 2011, the New Brunswick Court of Appeal had consistently held that a statutory delegate, such as a Minister of the Crown, is owed no deference when it comes to the interpretation of his or her home statute. Correlatively, the Court was not prepared to grant deference to the interpretative decisions rendered by government officers such as the Registrar of Motor Vehicles and the Registrar of Land Titles. Otherwise, the Court would be granting deference to government lawyers who provide legal advice to statutory delegates under the guise of "institutional expertise." However, if the decision under review involved, for example, the exercise of Ministerial discretion, deference is required in accordance with the Supreme Court's decision in *Baker v Canada*.[83] Leaving aside that type of case, there are four recent Supreme Court cases which support the contention that the New Brunswick jurisprudence has been overtaken. The Supreme Court precedents were released between 2013 and 2016.

In *Agraira v Canada (Public Safety and Emergency Preparedness)*,[84] the Federal Court of Appeal had reviewed the federal Minister's interpretation of the term "national interest" on the standard of correctness, while according deference to the Minister's application of that interpretation to the facts of the case (a question of mixed law and fact). On further appeal, the Supreme Court applied the first step of the *Dunsmuir* framework to hold that the Minister's interpretation was to be assessed on the deferential standard of reasonableness. Why? The Court answered: […] because such a decision involves the interpretation of the term "national interest" in s. 34(2), it may be said that it involves a decision maker "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."[85]

In *Canadian National Railway Co. v Canada (Attorney General)*,[86] one of the issues was whether s. 40 of the *Canadian Transportation Act* vested the Governor in Council with authority to vary or rescind a decision of the Canadian Transportation Agency on a point of law. The Governor in Council (federal cabinet) had so concluded. In upholding that interpretative decision, the Supreme Court held the standard of review analysis set out in *Dunsmuir* applies to the interpretative decisions of Cabinet. The Court's reasoning is oracular in nature: "Dunsmuir is not limited to judicial review of tribunal decisions".[87] The decision of the Federal Court of Appeal in *Public Mobile Inc v Canada (Attorney General)*,[88] was the only

[83] *Baker*, *supra* note 30.

[84] *Agraira*, *supra* note 72.

[85] Quoting *Dunsmuir*, *supra* note 2 at para 54.

[86] *Canadian National Railway*, *supra* note 40.

[87] *Ibid* at para 53.

decision cited in support of that proposition.[89] The Supreme Court went on to hold that, as the interpretative issue did not fall within one of the categories for which correctness is automatically the proper review standard, the Council's interpretative decision had to be assessed on the standard of reasonableness.

The Supreme Court's decision in *Wilson v British Columbia (Superintendent of Motor Vehicles)*[90] is consistent with the Court's two earlier rulings. In that case, the Court upheld the interpretation which the Superintendent of Motor Vehicles had placed on a provision of the *Motor Vehicle Act*. Curiously, the deferential standard of review was chosen by analogy to the standard of review applicable to specialized tribunals when interpreting the provisions of their enabling legislation.

Collectively, the rulings in *Agraira*, *Canadian National Railway* and *Wilson* recognize that the deference doctrine has been extended to embrace all administrative decision-makers and not just those falling within the category of specialized tribunals. The difficulty I have is that the extension is based on a false premise: namely, all statutory delegates possess a relative expertise when it comes to interpreting statutes. Indeed, no one has been as critical of this aspect of the deference doctrine than Professor Daly. His influential administrative law blog offers an incisive analysis with respect to a Federal Court of Appeal decision in which the review standard of reasonableness was applied to the decision made by a frontline immigration officer with no legal training: *MPSEP v Tran*.[91]

The Federal Court decision involved the interpretation of the *Immigration and Refugee Protection Act*, a pure question of law, by those with no apparent legal training.[92] While Professor Daly's comment merits reading in its entirety, one need only reproduce his closing observations to reinforce the understanding that the Supreme Court precedents mentioned earlier are, to say the least, troubling decisions:

> But if *Tran* is right, then deference is due to decision-makers who have no legal expertise, who do not address relevant arguments expressly in their reasons, and who may reasonably come to diametrically opposed conclusions as to similarly situated individuals. And the courts cannot intervene to resolve the issues authoritatively even though there is a strong

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[88] *Public Mobile Inc v Canada (AG)*, 2011 FCA 194, [2011] 3 FCR 344.

[89] Parenthetically, and with respect, I do not read that decision as establishing that the interpretative decisions of the Governor in Council are owed deference.

[90] *Wilson v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 SCR 300.

[91] *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, 392 DLR (4th) 351.

[92] Professor Daly's case comment is instructive: Paul Daly, "A Snapshot of What's Wrong with Canadian Administrative Law: *MPSEP v Tran* 2015 FCA 237" (13 November 2015), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/11/13/a-snapshot-of-whats-wrong-with-canadian-administrative-law-mpsep-v-tran-2015-fca-237/>.

> indication that parliament intended for them to do so. Somewhere along the line, something has gone rather badly wrong.[93]

However, shorty after the release of the Federal Court's decision in *Tran*, the Supreme Court released yet another decision that affirms the understanding that the interpretative decisions of all statutory delegates are owed deference. This is true even though the delegate may have no expertise in legal matters. The decision is *Kanthasamy v Canada (Citizenship and Immigration)*.[94]

In *Kanthasamy*, the majority adopted the deferential review standard of reasonableness with respect to an issue of law involving s. 25(1) of the *Immigration and Refugee Protection Act* as interpreted by the Minister and a front-line immigration officer. This is so despite the fact that an earlier Supreme Court decision had adopted the standard of correctness in similar circumstances: *Pushpanathan v Canada (Minister of Citizenship and Immigration)*.[95] Regrettably, that decision did not make its way into the majority opinion, but there was something else that did not make its way into the reasons for judgment. Professor Daly notes that, during oral argument before the Supreme Court, counsel emphasized the lack of legal expertise of front-line immigration officers, yet there is no mention in the Court's reasons of that argument. Professor Daly laments: "Another week, another underwhelming standard-of-review from the Supreme Court of Canada…" The social media views of others are even less kind![96]

I end this presentation with three unvarnished questions: (1) what policy reasons justify deference to a civil servant's interpretation of enabling legislation in circumstances where the delegate obviously lacks legal training; (2) why should legal counsel within the office of the Attorney General or other departmental lawyers be entitled to raise the plea of institutional expertise; (3) whatever happened to the understanding that citizens are entitled to independent and impartial decision-makers?

Of course the administrative lawyer, in search of go-to answers, knows there is no need to search for nutshell answers to my questions. They are irrelevant now that contextualism has been abandoned. The same person also knows that the New Brunswick jurisprudence, identified above, is no longer binding.

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[93] *Ibid*.

[94] *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909.

[95] *Pushpanathan*, *supra* note 6.

[96] See Paul Daly, "Can This Be Correct? Kanthasamy v. Canada (Citizenship and Immigration) 2015 SCC 61" (11 December 2015), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanthasamy-v-canada-citizenship-and-immigration-2015-scc-61/>.

Conclusion

Accepting that *New Brunswick Liquor* represents the genesis of Canada's modern deference doctrine, it has taken our Supreme Court nearly forty years to craft a doctrine that others say is infused with incoherence and inconsistency. Fortunately, for the administrative lawyer and reviewing court in search of go-to answers, the evolution of the doctrine is not disappointing when it comes to identifying the proper review standard. It resonates with simplicity. In a nutshell: the decisions of statutory delegates are owed deference unless the issue falls within one of the correctness categories identified in *Dunsmuir* or unless the issue involves a breach of the fairness duty.

Even inconsistency in tribunal decision-making is not a valid reason for moving to review for correctness. Better still, the deference obligation no longer hinges on what the legislature may have intended and, hence, the presence of a privative clause or a right of appeal within the enabling or home legislation is no longer of any moment. The same holds true regarding whether the administrative decision-maker possesses a relative expertise with respect to the issue at hand. Ironically, persons sitting as lay experts on a specialized tribunal are entitled to deference when it comes to assessing their interpretative decisions. Those realties flow naturally from the death of contextualism.

The administrative lawyer in search of go-to answers knows that there is little chance of identifying a true jurisdictional question now that deference is required of interpretative decisions. And those who go searching for questions of central importance to the legal system will struggle with the Supreme Court's threshold tests. Perhaps time is better spent on the question not addressed during this presentation: What renders a tribunal decision unreasonable? Till the next time.