SOME INITIAL THOUGHTS ON *WILSON V. ATOMIC ENERGY OF CANADA LTD* AND *EDMONTON (CITY) V. EDMONTON EAST (CAPILANO) SHOPPING CENTRES LTD*

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Part I: Introduction

Administrative law focusses on the way in which, and the extent to which, courts should oversee the exercise of administrative authority. The law on substantive review of administrative decision-making has changed drastically over the last several decades, particularly around choice of standard of review. In the words of the Honorable John M Evans, courts have returned to this issue "with almost monotonous regularity over the last 30 years".[1] Two Supreme Court of Canada decisions from 2016, *Wilson v Atomic Energy of Canada Ltd*[2] and *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*,[3] have regenerated discussion about standard of review in relation to questions of law. No less an authority than the Honourable Justice David Stratas has suggested that the Court may be "about to embark on one of its once-a-decade, wholesale revisions to the law of judicial review".[4]

To assess how *Wilson* and *Capilano* relate to the Supreme Court's last wholesale revision of the law on substantive review in *Dunsmuir v New Brunswick*,[5] this article: a) considers Justice Abella's suggestion in *Wilson* that a separate standard of correctness review is no longer needed; b) assesses the trend, developing pre-*Capilano* and implicitly accepted by the majority in that decision, of limiting correctness review to the four categories of legal questions identified in *Dunsmuir*; and c) discusses the difficulties of applying the *Dunsmuir* understanding of reasonableness where there are only two possible interpretations of the legislative provision in dispute (*Wilson* and *Capilano*), or where the administrative decision-maker has not provided reasons on an issue under review (*Capilano*).

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[1] The Honorable John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27 Can J Admin L & Prac 101 at 101.

[2] 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*].

[3] 2016 SCC 47, [2016] 2 SCR 293 [*Capilano*].

[4] Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 41.

[5] 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

Before moving to an analysis of these three themes, the current law on standard of review is placed in context, followed by a brief overview of *Wilson* and *Capilano*.

Part II: Background Context

Under an earlier iteration of substantive review of administrative decision-making, questions of law decided by an administrative body were automatically subject to correctness review whenever the matter came before the courts by way of appeal, or on judicial review where the original decision was not protected by a privative clause.[6] The correctness standard was also applied if the enabling legislation included a privative clause, and the matter in contention was judged to be an issue of jurisdiction. The deferential standard of patently unreasonable was reserved for questions of law where an administrative decision maker protected by a privative clause was deciding on an issue within its jurisdiction.[7] Questions of fact were treated with significant deference; courts would intervene only if the administrative decision-maker's findings were capricious or made without reference to the evidence before it.[8] Where the exercise of discretion was challenged, courts refrained from reviewing the outcome and instead confined themselves to asking specific questions about how the decision maker went about its tasks: Courts would ask whether irrelevant considerations had been taken into account, or relevant ones ignored, whether the decision maker had acted for an improper purpose, or whether the decision maker had fettered its statutorily-delegated powers.[9] Thus, in this earlier era, substantive review of an administrative decision could be understood as involving a number of different silos, and placement in a particular silo depended on the nature of the question under review, and the route by which the matter came before the courts (appeal, judicial review without a privative clause, judicial review with a privative clause). Each of these silos attracted a specific test for judicial intervention. For issues of fact and the review of discretion, judicial intervention was applied sparingly. Not so with questions of law; such issues were reviewed on a correctness standard unless two criteria were in place: presence of a privative clause and identification of the issue as falling within the administrator's jurisdiction.[10]

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[6] Gus Van Harten et al, *Administrative Law: Cases, Text, and Materials*, 7th ed (Toronto: Emond Publishing, 2015) at 629–630 [Van Harten et al]. See also David Jones, "Administrative Law In 2016: Update On Caselaw, Recent Trends and Related Developments" (Paper delivered at Newfoundland and Labrador Continuing Legal Education Seminar, 26 September 2016) at 11, online: <sagecounsel.com/wp-content/uploads/2016/09/2016-Recent-Developments-DPJ-final-2.pdf> [Jones, "Administrative Law In 2016"].

[7] Van Harten et al, *supra* note 6 at 630. See also David Jones & Anne de Villars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 517. Relevant cases include: *National Corn Growers Assn v Canada (Canadian Import Tribunal)*, [1990] 2 SCR 1324, 74 DLR (4th) 449 & *Lester (WW) (1978) Ltd v United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 SCR 644, 88 Nfld & PEIR 15.

[8] Van Harten et al, *supra* note 6 at 629.

[9] *Baker v Canada*, [1999] 2 SCR 817, [1999] 174 DLR (4th) 193 [*Baker*].

[10] *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 25 NBR (2d) 237 [*CUPE* 1979].

The Supreme Court of Canada's last major reworking of substantive review occurred in 2008, with *Dunsmuir v New Brunswick*.[11] In the decade preceding *Dunsmuir*, the Supreme Court had already made significant changes to the scheme described above. The possibility of deference on appeal was recognized and a middle standard between correctness and patent unreasonableness created;[12] a unified approach to determining standard of review was developed, which applied regardless of whether the issue under review was characterized as a question of law, a question of fact or an exercise of discretion and regardless of whether the case involved judicial review or an appeal;[13] a four-part pragmatic and functional analysis was established for the purpose of discerning whether the legislature intended the decisions of particular administrative entities to be treated with deference or not;[14] and the concept of jurisdiction was largely relegated to the sidelines.[15]

In *Dunsmuir*, on judicial review of a decision by a labour adjudicator appointed under the *Public Service Labour Relations Act*,[16] the Court applied a reasonableness standard, but overturned the adjudicator's decision as unreasonable. The Court also took the opportunity to "develop a principled framework [of substantive review] that is more coherent and workable,"[17] reassessing the approach which it had crafted less than a decade earlier in cases such as *Pushpanathan* and *Baker*. At the heart of this new framework was a desire to simplify the approach to determining standard of review. Besides melding the two deferential standards into one, *Dunsmuir* also: emphasized the role of precedent in establishing standards of review; identified four categories of questions of law to which correctness applies automatically (these being constitutional issues, jurisdictional issues, issues relating to the jurisdictional boundary between two specialized tribunals, and general

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[11] *Dunsmuir*, *supra* note 5.

[12] A third, intermediate standard of review, reasonableness *simpliciter*, was identified in *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1. Even before that, the possibility of deference on an appeal was starting to be accepted in decisions such as *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, 92 BCLR (2d) 145 [*Pezim*].

[13] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193 [*Pushpanathan]*; *Baker*, *supra* note 9.

[14] *Ibid*. In order to discern legislative intent, reviewing courts were instructed to consider the purpose of the legislation and the specific provision; the nature of the question under review, the relative expertise of the administrative decision maker and the courts regarding that issue, and the presence or absence of a privative clause.

[15] *Pushpanathan*, *supra* note 13 at 1005. According to Justice Bastarache, "it should be understood that a question which 'goes to jurisdiction' is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, 'jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown."

[16] RSNB 1973, c P-25.

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

questions of law of central importance to the legal system as a whole and beyond the expertise of the administrative decision maker); stated that deference may apply to legal questions, such as interpretation of the decision maker's home or related statutes; and identified deference as almost always the appropriate standard for questions of fact, and discretionary decision making. Where the appropriate standard of review is not immediately obvious, *Dunsmuir* directed reviewing courts to consider some or all of the four elements of the standard of review analysis (a renamed pragmatic and functional analysis) to determine the legislature's intention in this regard.

The law on substantive review did not stand still after *Dunsmuir*. For instance, the relevance of *Dunsmuir* to judicial review of federal administrative decision makers was confirmed;[18] certain types of constitutional analysis were carved out of the automatic-correctness classification;[19] the relationship between the two arms of *Dunsmuir*'s description of reasonableness was explained;[20] and, as discussed further below, the four categories of correctness came frequently to be treated as exhaustive. Not only was the *Dunsmuir* framework refined in a number of ways, but the oversight of administrative action is necessarily nuanced (or vague, depending on one's point of view), so subsequent courts on occasion wrestled with applying various aspects of *Dunsmuir*. However, most commentators would probably have agreed with Justice Evans' 2013 statement that the law on standard of review was "reasonably well settled".[21] That sense of stability was at least partially disrupted by *Capilano* and *Wilson*.

Part III: Overview of *Wilson* and *Capilano*

A. Wilson v. Atomic Energy of Canada Ltd

Wilson raised the question of whether amendments to the *Canada Labour Code*[22] protect non-unionized employees from termination absent just cause. In the decades since these amendments were introduced, labour adjudicators across Canada had been at odds on this issue.[23] The adjudicator in *Wilson* had ruled that under the *Labour Code*, non-unionized employees could not be dismissed on the provision of reasonable notice or payment in lieu – just cause was required.

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[18] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*].

[19] *Doré v Barreau du Québec (Tribunal des professions)*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

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

[21] Evans, *supra* note 1 at 101.

[22] RSC 1985, c L-2.

[23] Jones, "Administrative Law In 2016", *supra* note 6 at 27.

On judicial review, the majority of the Supreme Court applied the reasonableness standard and upheld the adjudicator's interpretation of the *Code* as reasonable. Had the discussion of standard of review stopped there, *Wilson* might not have attracted much notice beyond labour law practitioners. However, Justice Abella took the opportunity to provide "some general comments about standard of review"[24] with the aim of "simplify[ing] the standard of review labyrinth we currently find ourselves in."[25] Acknowledging that her comments in this regard would be *obiter*, Justice Abella offered her proposals "as an option only, for purposes of starting the conversation about the way forward."[26] Her first, and primary, proposal was that the standard of correctness be mothballed, and all substantive review of administrative action be approached from a deferential stance. As a back-up proposal, in case "there prove[d] to be little appetite for collapsing the two remaining standards of review,"[27] Justice Abella proposed limiting the scope of correctness review, such that a "residual 'correctness' standard" would be available "only in those four circumstances *Dunsmuir* articulated."[28]

Four other members of the majority (Chief Justice McLachlin, and Justices Karakatsanis, Wagner and Gascon) agreed with Abella J that the labour adjudicator's decision deserved deference and that he had in fact arrived at a reasonable conclusion. On her broader comments, they thanked Justice Abella for her "efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability,"[29] but declined to "endorse any particular proposal to redraw our current standard of review framework at this time."[30] Justice Cromwell, also in the majority as to choice of standard of review and outcome, was even more forthright in his view that *Dunsmuir*

> sets out the appropriate framework for addressing the standard of judicial review. No doubt, that framework can and will be refined so that the applicable standard of review may be identified more easily and more consistently. But the basic *Dunsmuir* framework is sound and does not require fundamental re-thinking.[31]

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[24] *Wilson*, *supra* note 2 at para 19.

[25] *Ibid*.

[26] *Ibid*.

[27] *Ibid* at para 38.

[28] *Ibid.*

[29] *Ibid* at para 70.

[30] *Ibid*.

[31] *Ibid* at para 72.

In dissent, Justices Côté and Brown, writing for themselves and Justice Moldaver, referred appreciatively to the "constructive spirit"[32] in which Justice Abella offered her *obiter* comments, but admitted to "harbour[ing] concerns about their merits,"[33] and refused to engage in further speculation regarding "what is already the subject of a peripatetic body of jurisprudence."[34] The dissent would have held "the narrow and distilled legal issue"[35] under review to the standard of correctness, on the grounds that rule of law principles of consistency and the "promise of orderly governance"[36] required the Court to provide a definitive interpretation of the provision in question, after decades of conflicting interpretations from labour arbitrators. Further, the dissent held that the adjudicator in this case had interpreted the statute incorrectly. In their view, employers bound by the *Canada Labour Code* may terminate non-unionized employees without cause, so long as the employee is provided reasonable notice or pay in lieu thereof.[37]

B. Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd

The dispute in *Capilano* centred on the authority given to local assessment review boards hearing taxpayer appeals under the Alberta *Municipal Government Act.*[38] Specifically, when a taxpayer appeals a municipal tax assessment, can the board raise the assessment, or is it limited to either confirming or lowering the assessment? In this case, the board concluded that it did indeed have the authority to increase the tax assessment, and proceeded to do so. Edmonton East (Capilano) Shopping Centres Ltd challenged the decision under a section of the *Municipal Government Act* which provided for appeals on "a question of law or jurisdiction of sufficient importance to merit an appeal".[39]

Justice Karakatsanis, writing for Justices Abella, Cromwell, Wagner and Gascon held that the board's decision should be judged against the standard of reasonableness. Further, in the majority's view, the board's interpretation of its enabling legislation was reasonable. The relevant section, which referred to the board choosing to "change" the assessment or "decid[ing] that no change is required",[40] could reasonably be understood as allowing an increase in the challenged

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[32] *Ibid* at para 78.

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid* at para 91.

[36] *Ibid* at para 84.

[37] *Ibid* at para 149.

[38] *Capilano*, *supra* note 3 at para 76.

[39] *Ibid* at para 11.

[40] RSA 2000, c M-26, s 467(1).

assessment. The majority chose not to revisit of standard of review analysis, as suggested by Justice Abella in *Wilson.* According to Justice Karakatsanis,

> [t]he majority appreciated Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. In my view, the principles in *Dunsmuir* should provide the foundation for any future direction. However, any recalibration of our jurisprudence should await full submissions. This appeal was argued on the basis of our current jurisprudence and I proceed accordingly.[41]

Justice Karakatsanis then set out her understanding of the *Dunsmuir* principles. Where, as on this appeal, the standard of review is not established by precedent, and the question under review relates to the administrative decision maker's home statute, "the standard of review is presumed to be reasonableness."[42] The presumption of reasonableness was described as "grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing."[43] Justice Karakatsanis noted that this expertise could result from "specialization of functions",[44] "a habitual familiarity"[45] with one's home statute, or from provisions in that statute requiring "that members of a given tribunal possess certain qualifications."[46] However, in gauging the expertise of the assessment review board to interpret its enabling legislation, the majority in *Capilano* did not search for the enumerated indicators of the board's expertise. Instead, the majority assumed expertise on the part of the board, based on the fact that the board had been created and given statutory authority in the first place, and the fact that it was interpreting its home statute. A statement from *Dunsmuir* to the effect that adjudicators under the *Public Service Labour Relations Act* could be presumed to have expertise in their home and related statutes was broadened to apply to administrative decision-makers more generally.[47]

Justice Karakatsanis stated that the presumption of reasonableness review could be rebutted if the issue in dispute fell into one of the four *Dunsmuir* categories

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[41] *Capilano*, *supra* note 3 at para 20.

[42] *Ibid* at para 22, citing *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46, [2015] 2 SCR 3 [*Saguenay*]. See also *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 39, [2011] 3 SCR 654 [*Alberta Teachers' Association*]. There is also recent authority for the proposition that the onus lies with the party wishing to rebut the presumption of deference, see *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 40–41, [2013] 3 SCR 67.

[43] *Capliano*, *supra* note 3 at para 33.

[44] *Ibid*.

[45] *Ibid*.

[46] *Ibid*.

[47] *Dunsmuir*, *supra* note 5 at para 68.

which automatically attract the correctness standard. Of these, the only potentially applicable category identified by the Court was jurisdiction, and the majority dismissed this possibility quickly, saying that "[n]o true question of jurisdiction arises."[48]

Edmonton East had argued that the wording of the appeal section indicated a legislative intention for correctness review on "a question of law or jurisdiction of sufficient importance to merit an appeal",[49] and deference otherwise. The majority at the Supreme Court largely treated this as an argument that statutory rights of appeal should be seen as creating a new category of automatic correctness - a contention that was rejected as "go[ing] against strong jurisprudence from this Court."[50] The majority also concluded that no further contextual analysis was needed, both because of a long line of past jurisprudence applying the reasonableness standard to statutory appeals, and because the result would be the same in any case.[51] More generally, the majority warned that delving into context has inherent dangers since "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review."[52]

Four members of the Court dissented in *Capilano*. Justices Côté and Brown, writing for themselves, Chief Justice McLachlin and Justice Moldaver, held that the board's decision should be measured against a correctness standard, and that the board was incorrect in concluding it had the authority on a taxpayer appeal to raise the municipal assessment. To justify their choice of the correctness standard, the dissent pointed out that a right of appeal was provided for only certain matters, and in their view these matters "transcend[ed] the particular context of a disputed assessment".[53] They continued:

> The legislature of Alberta created a municipal assessment complaints regime that allows certain questions squarely within the expertise of an assessment review board to be reviewed on a deferential standard through the ordinary mechanism of judicial review. The legislature, however, also

[48] *Capilano*, *supra* note 3 at para 26. The finding that the question before the assessment board did not fit within one the four *Dunsmuir* categories that attract automatic correctness seems sensible. No category except jurisdiction was potentially relevant. And if one accepts current-day understandings of jurisdiction as involving the authority (or not) to enter into the very question before the administrative decision maker (an understanding set out in *Dunsmuir*, *supra* note 5 at para 61), there was nothing of this nature before the assessment review board in *Capilano*. Of course, the Supreme Court's treatment of jurisdictional issues leaves the question of what kinds of specific question might in fact be accepted as jurisdictional, but that is not the focus of this article. Thus, my criticism of the majority decision in *Capilano* is not its failure to classify the issue before it as falling within one of the four *Dunsmuir* categories of mandatory correctness review. Instead, my criticism, expanded upon within, relates to the majority's treatment of the *Dunsmuir* categories as exhaustive.

[49] *Ibid* at para 11. See also *supra* note 40, ss 470(1), (5).

[50] *Capilano*, *supra* note 3 at para 28.

[51] *Ibid* at para 34.

[52] *Ibid* at para 35.

[53] *Ibid* at para 78.

> designated certain questions of law and jurisdiction — for which standardized answers are necessary across the province — to be the subject of an appeal to the Court of Queen's Bench. Where the court quashes a decision, its answers to these questions are binding on the Board. This leads to the unavoidable conclusion that the legislature intended correctness review to be applied to these questions.[54]

Further, the dissent disagreed with the majority's assessment of the board's expertise and this too, in their view, supported correctness review. Given that administrative expertise is to be judged in relation to a particular issue and in comparison to the expertise of the court, and given the "vast array of municipal government issues"[55] dealt with in the *Municipal Government Act*, the dissent argued it would be unrealistic to assume that the assessment review board possessed greater expertise than the courts on all such issues, including statutory interpretation.[56] Justices Côté and Brown also justified strict scrutiny because of the need for consistency:

> Because each assessment review board is a distinct entity, there is no overarching institutional body capable of promoting consistency in the interpretation and application of the Act between them. …. Consistency in the understanding and application of these legal questions is necessary, and only courts can provide such consistency.[57]

Thus, in the dissent's view, all indicators of legislative intent pointed to correctness review for the question of whether the assessment review board was authorized to raise a tax assessment in the context of a taxpayer appealing to have it lowered.

More generally, the dissent in *Capilano* took issue with the majority's attempt to limit correctness review to the four categories identified in *Dunsmuir*, stating that "[a]n approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review".[58] Justices Côté and Brown were at pains to emphasize they were not advocating a new category, such that all statutory appeals would attract the correctness standard; however, they also emphasized that the existence and wording of a particular appeal right could not be treated as irrelevant. Instead, "[a] statutory right of appeal, like a privative clause, 'is an

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[54] *Ibid* at para 63.

[55] *Ibid* at para 86.

[56] This exchange between the majority and dissent on expertise has led Shaun Fluker to comment, "A fissure is developing at the Supreme Court over standard of review, and I suggest it is forming around this notion of relative expertise." See Sean Fluker, "The Supreme Court of Canada (By a Slim Majority) Confirms the Presumption of Deference in Alberta" (8 November 2016), *ABlawg: The University of Calgary Faculty of Law Blog*, online: <ablawg.ca/2016/11/08/scc-by-a-slim-majority-confirms-the-presumption-of-deference-in-alberta/>.

[57] *Capilano*, *supra* note 3 at para 80.

[58] *Ibid* at para 70.

important indicator of legislative intent' and, depending on its wording, it 'may be at ease with judicial intervention'".[59]

Part IV: Analysis

Having provided background on the evolution of the standard of review analysis, and a synopsis of *Wilson* and *Capilano*, I now turn to the three themes outlined in the introduction: the merits of maintaining the correctness standard of review; the scope of correctness review and particularly, whether the four categories of automatic correctness review enumerated in *Dunsmuir* should be treated as exhaustive; and whether the challenges of applying the *Dunsmuir* understanding of reasonableness in certain situations will inevitably result in judicial reasoning that looks very much like correctness review.

A. Maintaining the Availability of Correctness Review

The standard of review discussion in *Wilson* captured attention primarily because of Justice Abella's suggestion that it is once again time for a significant revision to administrative law, and in particular that correctness review should disappear entirely. Of course, Justice Abella is not alone in this suggestion;[60] in *Wilson* she called the elimination of the correctness standard the "most obvious and frequently proposed reform of the current system".[61] Further, the desire for one deferential standard of review is not new. Jones and de Villars note that after the landmark 1979 decision in *CUPE v NB Liquor Corporation*,[62] the "euphoric (but ultimately incorrect) reaction by many administrative law observers … was that the 'patent unreasonableness' test should be applied in *all* circumstances… to protect *all* decisions of *all* statutory delegates from *all* forms of judicial review."[63]

While Justice Abella's comments certainly engaged attention, none of the other members of the Supreme Court were interested in following up on her proposals, and the dissenting judges in both *Wilson* and *Capilano* applied the correctness standard. Further, in *Information and Privacy Commissioner of Alberta v Board of Governors of University of Calgary*,[64] released very shortly after *Capilano*,

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[59] *Ibid* at para 73, citing *Khosa*, *supra* note 18 at para 55.

[60] See e.g. *supra* note 1.

[61] *Wilson*, *supra* note 2 para 28.

[62] *Supra* note 10.

[63] Jones & de Villars, *supra* note 7 at 522 [emphasis in original]. Ultimately, the Supreme Court, in decisions such as *National Corn Growers* and *Lester* "clearly recognized that this was not an accurate statement of either the law or the court's own constitutional role" (at 523). Since, at the time, only two standards existed – patent unreasonableness and correctness – the Court's rejection of universal application of the former meant a reaffirmation of the continuing role of correctness review.

[64] 2016 SCC 53, [2016] 2 SCR 555.

five of the seven judges identified correctness as the appropriate standard of review for a decision made by a provincial Information and Privacy Commissioner, and a sixth was willing to assume the same, without deciding. Therefore, the standard of correctness does not seem to be in immediate danger of disappearing. However, proposals for a single deferential standard of review are also unlikely to vanish, so it is worth assessing the principled and pragmatic arguments for either retaining or jettisoning the possibility of correctness review on some questions of law.[65]

Considerations of Principle

The notion that there are some constitutional limits on the scope of administrative power runs as a recurrent theme through administrative law jurisprudence and commentary. In the famous words of Justice Rand in *Roncarelli v Duplessis*, "[i]n public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'".[66] As Guy Régimbald explains, judicial review of administrative decision-making is a core component of constitutional law:

> Judicial review is the procedure allowing superior courts to look at a decision of a public body, and determine if the decision is within the scope of its powers as delegated by the legislature. Judicial review is rooted in the basic tenets of constitutional law as a consequence of the relationship between the principles of Parliamentary sovereignty, the rule of law, and the inherent power of the courts to review the legality of actions in order to maintain an adequate balance between these two principles.[67]

Traditionally, the concept of jurisdiction was seen as a way to maintain this balance. Thus, on judicial review, legislative supremacy is protected through the understanding that so long as legislatures and Parliament do not act in unconstitutional ways, they are empowered "to create various administrative bodies and endow them with broad powers."[68] Further, they are free to signal strongly, via finality or privative clauses, their intention that courts are to be deferential to those entities' decisions. However, as articulated in *Crevier v Quebec (Attorney General)*, legislatures cannot completely block judicial review, at least on matters of jurisdiction, as this would be inimical to that strand of the rule of law which allows

[65] Those who argue that correctness still plays a useful role in the judicial oversight of administrative action are not suggesting that findings of fact, or true discretionary decision making should be subjected to strict scrutiny, and there would likely be little appetite for such a suggestion among judges themselves. As Justice Evans notes, "[b]y and large, judges have little difficulty in upholding tribunals' findings of fact or exercises of discretion, even when they believe that they might have reached different conclusions, had they been the original decision-makers" (*supra* note 1 at 107).

[66] [1959] SCR 121, 16 DLR (2d) 689.

[67] Guy Régimbald, *Canadian Administrative Law*, 2nd ed (Markham: LexisNexis, 2015) at 27.

[68] *Ibid*. See also *Dunsmuir*, *supra* note 5 at para 27.

individuals access to the courts when their rights are affected.[69] Outside the protection of a privative clause, incorrect decisions on matters of law were traditionally seen as depriving an administrative decision-maker of jurisdiction. Thus both deference and strict scrutiny were seen as necessary elements in acknowledging legislative intent, but keeping administrative action within constitutional bounds.

While the importance attributed to the concept of jurisdiction is greatly diminished in today's law on standard of review, the "basic tenets" and the balance outlined by Régimbald above are still routinely referred to by commentators,[70] and underlie the *Dunsmuir* approach to substantive review. In *Dunsmuir*, Justices Bastarache and LeBel started their re-evaluation of the law regarding choice of standard of review by referencing the twin pillars of rule of law and respect for legislative intent:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.[71]

Arguably, removing the possibility of correctness review would strike at the Court's consistently-articulated conception of the foundational basis for judicial review. It is certainly true that, as Justice Abella pointed out in *Wilson*,[72] neither *Crevier* nor *Dunsmuir* explicitly tied arguments about the constitutionality of administrative action to the continued existence of a correctness standard. However,

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[69] [1981] 2 SCR 220, 127 DLR (3d) 1. With a provincial administrative decision maker, there would be the additional concern that the province was attempting to create a section 96 court, something that falls within federal jurisdiction.

[70] See, for instance, Sara Blake:

> The purpose of determining which standard of review to apply in each case is to respect the constitutional roles of the court, the legislature and the executive. In keeping with its role to uphold the rule of law, the court exercises its power of review so as to ensure that the tribunal does not overstep its legal authority, while respecting the intentions of the democratically elected legislature by giving deference to the wisdom of the tribunal decision on the merits.

Administrative Law in Canada, 5th ed (Markham: LexisNexis Canada, 2011) at 209. Similarly, Jeremy deBeer et al, *Standards of Review of Federal Administrative Tribunals*, 4th ed (Toronto: LexisNexis Canada, 2012) at 53: "Reviewing courts are torn between their supervisory function as independent guardians of the rule of law and their respect for the will of the legislature to delegate decision-making responsibility to administrative tribunals."

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

[72] *Wilson*, *supra* note 2 at para 31.

at the time of *Crevier*, correctness review on jurisdictional matters would have been the assumed backdrop, thus making an explicit reference unnecessary. As Jones and de Villars note, the "courts' treatment of privative clauses" has always related to the "presumed right of the court to rule on the legality of governmental action",[73] and this concern for legality has always been based on the principle that at least sometimes administrative decisions must be correct, not just reasonable. In *Dunsmuir*, the emphasis was less on the impact of privative clauses and more on the function of judicial oversight of administrative action generally; again however, the idea that some questions of law require correctness review was clearly an integral part of Justices Bastarache and LeBel's understanding of the courts' function – else, why identify certain kinds of issues that automatically attract correctness review?

If retaining the possibility of correctness review is a core aspect of maintaining the balance between legislative intent and rule of law on judicial review of questions of law, there seems even less of a principled basis for arguing that the possibility of correctness review should be jettisoned in the context of statutory appeals. On an appeal, the rule of law and foundational constitutional principles are unlikely to be in tension. From the time of *Crevier*, where the Supreme Court first explicitly held that legislatures cannot completely oust judicial oversight of administrative decision making, the point of introducing the rule of law has been to explain why legislative intent, as expressed through strong privative clauses, cannot be given full force. However, where the rule of law's emphasis on access to the courts is built into the administrative scheme itself by way of an appeal provision, this must surely free courts to concentrate solely on the "polar star" of legislative intention.[74] This is certainly not to advocate for a return to pre-*Pezim*[75] days, with automatic application of the correctness standard to all appeals; however, where the legislature has invited judicial oversight by way of a statutory appeal, and the wording of a particular appeal provision or other indicia of legislative invite strict scrutiny, there is no principled reason for a court not to implement that. (Unless of course one accepts the conclusion of Justice Robertson of the New Brunswick Court of Appeal, that "the deference obligation is no longer the product of the will of the legislature or Parliament."[76])

My argument in this section, then, is that there is no principled reason for excising the possibility of correctness review, for either judicial review or appeals. In fact, longstanding understandings about the constitutional relationship among

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[73] Jones & de Villars, *supra* note 7 at 569.

[74] *CUPE v Ontario (Ministry of Labour)*, 2003 SCC 29 at para 149, 66 OR (3d) 735. See also *Khosa*, *supra* note 18 at para 93..

[75] *Pezim*, *supra* note 12.

[76] The Honourable Joseph Robertson, "Judicial Deference to the Decisions of Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" in Joseph Robertson, Peter Gall & Paul Daly, eds, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Markham: LexisNexis, 2014) 1 at 3.

legislatures, courts, and those who exercise administrative power, point to the necessity of retaining the standard of correctness, even while accepting that it will be used less often than reasonableness. On judicial review under a privative clause, correctness remains a way of protecting the rule of law, by ensuring that legislatures cannot insulate statutorily-created entities from the challenge that they have overstepped their delegated authority. On an appeal, if correctness review appears to be the legislature's intent, preserving the correctness standard allows the courts to fulfil their constitutional role by giving full weight to that intent. There could be no grounds for refusing to apply a correctness standard where this is expressly mandated by the legislature,[77] and there seems no principled reason to ignore a legislative desire for correctness review simply because this is communicated through other indicators of intent.

Pragmatic Considerations

If an argument is to be made for excising correctness review entirely, it must be made on pragmatic, rather than principled grounds. Two such arguments might be offered, both relating to efficient use of the judicial system. Would moving to a single deferential standard of review save court resources, either through eliminating the need for arguments about, and judicial determination of, the appropriate standard of review, or through reducing the instances of judicial review or appeal?

Dunsmuir hoped to reduce the amount of time spent arguing about standard of review, and the merging of the two deferential standards was clearly intended to be a step in this direction. In *Wilson*, similar concerns about time and effort led to Justice Abella's proposal for a single standard of review:

> A substantial portion of the parties' factums and the decisions of the lower courts were occupied with what the applicable standard of review should be. This, in my respectful view, is insupportable, and directs us institutionally to think about whether this obstacle course is necessary or whether there is a principled way to simplify the path to reviewing the merits.[78]

To the extent that *Dunsmuir* has encouraged lower courts to approach standard of review analysis more briskly, it seems likely that the merging of reasonableness *simpliciter* and patently unreasonable has played a role; however, I suspect that other elements of the *Dunsmuir* revisions such as the focus on precedent, the reversal of the previous requirement to do a complete standard of review analysis every time, and delineation of categories where deference will usually apply are

[77] As Justice Karakatsanis stated in *Capilano*, "[s]ubject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review … Unfortunately, clear legislative guidance on the standard of review is not common" (*supra* note 3 at para 35).

[78] *Wilson*, *supra* note 2 at para 20.

equally significant.[79] The amalgamation of deferential standards will have had some effect on brevity in that courts no longer have the thankless task of trying to explain the difference between unreasonable and not patently unreasonable. Other than that, however, discussion that previously occurred at the stage of choosing between unreasonableness or patent unreasonableness has largely moved to the application stage. Keeping in mind that "reasonableness takes its colour from the context",[80] at the application stage the court must evaluate arguments regarding the range of outcomes that could be considered reasonable. Contextual arguments that in pre-*Dunsmuir* days would have been seen as relevant to deciding which deferential standard of review to apply will now be relevant to deciding whether the span of acceptable outcomes is broad or narrow.[81] Similarly, if correctness review disappeared, that would certainly avoid any initial debate about the appropriate standard of review. However, arguments that are now used at that initial stage (for instance, arguments about the significance of the issue to the legal system as a whole) would likely crop up at the stage of determining the range of possible defensible interpretations that could be given to the provision under dispute.

Pragmatic arguments for doing away with correctness review could relate not just to a desire for greater brevity in legal argument and judicial analysis, but also to concerns about the number of challenges mounted to administrative decision-making. Does the continued possibility that courts will review against a correctness standard encourage appeals and applications for judicial review? There seems little empirical evidence that getting rid of correctness review would reduce litigation. Despite the frequent application of deference in fields such as labour relations, judicial review is still sought regularly – as is clear from both *Dunsmuir* and *Wilson*. In fact, the goal of preserving judicial resources might actually be undermined by eliminating the possibility of correctness review. David Jones contends that:

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[79] I say this based at least in part on a comprehensive study of substantive review of administrative action by the lower courts since *Dunsmuir*, undertaken by William Lahey and myself. Our findings and analysis will be reported in a series of three articles in the *Canadian Journal of Administrative Law and Practice*. Our first piece (coauthored along with Lauren Soubolsky and Madison Veinotte and to be published shortly), focusses on substantive review in the federal courts. We found that federal courts have taken seriously the Supreme Court's strictures on spending excessive time on choice of standard of review – but our analysis of the 216 cases forming the basis of our first article led us to conclude that this was the result of a number of elements in the *Dunsmuir* framework, not simply the reduction in the number of available standards of review.

[80] *Khosa*, *supra* note 18 at para 59, and *Catalyst Paper Corp v North Cowichan District*, 12 SCC 2 at para 18, [2012] 1 SCR 5.

[81] Again, I make this suggestion based on what we have seen thus far in our analysis, referenced at *supra* note 80, of lower courts' application of *Dunsmuir*. See also Jones & de Villars, *supra* note 7 at 544–545. A list of questions still unanswered by *Dunsmuir* includes the following: "Does the merging of the two former deferential standards actually achieve anything? Or does it merely shift the discussion from determining which of the two deferential standards applies to determining whether the substance of the administrative decision is 'unreasonable' in any one of a myriad of possible ways of being unreasonable?"

> if reasonableness ever becomes the only standard of review, that will not achieve either certainty or less litigation— there will be every incentive for litigants to take every case up the line in the hope of persuading the next judge that their interpretation is reasonable. Nor will it achieve consistency where there are two or more different reasonable interpretations.[82]

Having argued that neither considerations of principle nor pragmatic concerns support the elimination of the correctness standard of review, I now turn to the question of how broadly available this standard should be.

B. The Scope of Correctness Review

In *Dunsmuir*, Justices Bastarache and LeBel started their discussion on selecting the appropriate standard of review with the following statement:

> [Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.[83]

The deferential standard would "usually automatically apply" to factual findings, on review of discretion, and "where the legal and factual issues are intertwined with and cannot be readily separated."[84] Deference would "usually"[85] be appropriate:

> where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity [or] …. where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.[86]

Further, a reasonableness test should be applied on questions of law where this intention is signalled by the legislature, for instance through factors such as the presence of a privative clause (although the presence or absence of such a clause is not determinative) or the legislature's creation of a "discrete and special administrative regime in which the decision-maker has special expertise".[87] The

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[82] David Jones, "Administrative Law in 2016 Part II – An Additional Case", Case Comment on *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Limited*, 2016 SCC 47, [2016] 2 SCR 293, online: <sagecounsel.com/administrative-law-2016-part-ii-additional-case/> at 14 [Jones, "Administrative Law Part II"].

[83] *Dunsmuir*, *supra* note 5 at para 51.

[84] *Ibid* at para 53.

[85] *Ibid* at para 54.

[86] *Ibid*.

[87] *Ibid* at para 55.

possibility of reviewing questions of law for reasonableness was justified on the grounds that "[t]here is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated."[88]

(This of course needs to be read in light of Justices Bastarache and LeBel's earlier statement that "many legal issues attract a standard of correctness."[89]) After justifying the possibility of deference to some questions of law, Justices Bastarache and LeBel identified four kinds of legal questions for which correctness review is mandatory. Thus, '[a] question of law that is of "central importance to the legal system . . . and outside the . . . specialized area of expertise' of the administrative decision maker will always attract a correctness standard",[90] because "such questions require uniform and consistent answers."[91] Justices Bastarache and LeBel next referred to previous case law as indicating that division of powers issues, "as well as other constitutional issues are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution".[92] As well, "[a]dministrative bodies must … be correct in their determinations of true questions of jurisdiction or *vires"*,[93] narrowly defined. Finally, correctness review also applies automatically to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals".[94]

In the years separating *Dunsmui*r from *Wilson* and *Capilano*, this framework had been fine-tuned in various ways, all tending in the direction of greater deference on questions of law. While *Dunsmuir* stated that "many legal issues attract a standard of correctness",[95] it would be difficult to make such a sweeping statement today. Since *Dunsmuir*, the availability of correctness review has been narrowed by: a growing presumption of deference, untethered to contextual factors such as the existence of a privative clause or a specialized, expert administrative regime; a narrow reading of the four categories identified in *Dunsmuir*

[88] *Ibid* at para 56.

[89] *Ibid* at para 51.

[90] *Ibid* at para 55.

[91] *Ibid* at para 60.

[92] *Ibid* at para 58.

[93] *Ibid* at para 59. "Jurisdiction is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction".

[94] *Ibid* at para 61.

[95] *Ibid* at para 51.

as always requiring correctness review; and a tendency to treat those four categories as exhausting the possibility of review for correctness.

On the first of these three trends, there is now a broad starting presumption of deference, without the necessity of first showing the existence of a "discrete and special administrative regime in which the decision maker has special expertise".[96] The extent to which a court should determine whether a specialized regime has in fact been created, and should look for legislative indicators of expertise, was a point of disagreement between the majority and dissent in *Capilano*. As noted earlier, the majority assumed expertise on the part of the board, based on the fact that the board had been created and given statutory authority in the first place, and the fact that it was interpreting its home statute. *Dunsmuir*'s assessment of adjudicators under the *Public Service Labour Relations Act* as possessing expertise regarding their home and related statutes was broadened to apply to administrative decision makers more generally. [97] The dissent, on the other hand, found it unlikely that decision makers appointed to deal with a "vast array of municipal government issues"[98] would be more expert than the courts in statutory interpretation.

A leaning toward deference can also be seen in the way the four *Dunsmuir* categories calling for automatic correctness review have been kept within narrow boundaries. Regarding jurisdictional questions, the Supreme Court has been warning itself (and others) since the time of *CUPE v NB Liquor Corporation* not to be "alert to brand" issues as jurisdictional,[99] a warning reiterated by Justices Bastarache and LeBel in *Dunsmui*r. This was taken one step further some years after *Dunsmuir*, when Justice Rothstien, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, questioned the very concept of jurisdictional questions. [100] A second category of automatic correctness named in *Dunsmuir* is, by its nature, unlikely to occur frequently. Presumably it is fairly rare for cases to turn on the jurisdictional line between two expert tribunals. Further, to the extent that this line relates to division of powers issues (for instance, discerning whether a matter should be dealt with by the federal or a provincial Labour Relations Board), then this class of legal questions would collapse into a third *Dunsmuir* category – that of constitutional questions. As a category, constitutional issues might seem least susceptible to either contraction or expansion – either a question is constitutional in nature or it isn't. However, in *Doré*, the Court applied a reasonableness analysis to the question of whether an administrative decision infringed *Charter* rights, thus limiting the constitutional issues which automatically attract correctness review to

[96] *Ibid* at para 55. See also *Capilano*, *supra* note 3 at 22, and Van Harten et al, *supra* note 6 at 675.

[97] *Dunsmuir*, *supra* note 5 at para 68.

[98] *Wilson*, *supra* note 2 at para 86.

[99] [1979] 2 SCR 227 at 233, 25 NBR (2d) 237.

[100] *Alberta Teachers' Association*, *supra* note 42. While not the focus on this paper, I would note that a lively debate can be found in the literature as to whether the category of jurisdictional questions plays any real role in today in the judicial oversight of administrative action. In our analysis of the federal courts' application of the *Dunsmuir* framework (see *supra* note 80), we found that in 13 of the 216 federal court cases we reviewed, a question of law was identified as jurisdictional.

constitutional challenges to the enabling legislation itself. The final category (general questions of law of importance to the legal system as a whole and beyond the expertise of the decision-maker) has been used by the Supreme Court only twice since *Dunsmuir*. In *Saguenay*[101] the majority of the Court held that the parameters of the state's duty of neutrality vis-à-vis religion could be classified as such, as did the majority in *University of Calgary*, regarding the issue of whether Alberta's *Freedom of Information and Protection of Privacy Act*[102] "allows solicitor-client privilege to be set aside".[103] Issues which the Court has refused to classify in this way include: a labour arbitrator's interpretation of a management rights clause in a collective agreement, in the context of an attempt to impose mandatory alcohol testing;[104] a labour arbitrator's interpretation of the concept of estoppel;[105] the question of whether a human rights tribunal had the power to grant legal costs to a party;[106] and most recently, a labour arbitrator's rulings on evidentiary issues which were intertwined with concerns about deliberative secrecy.[107] In this last decision, Justice Gascon, writing for the majority, stated that "questions of this nature are rare and tend to be limited to situations that are detrimental to 'consistency in the fundamental legal order of our country'".[108]

Both because of the nature of the *Dunsmuir* categories, and the way in which they have been interpreted subsequently by the Supreme Court, most questions of law that come before the courts are not going to be placed in a class which requires automatic application of the correctness standard. The more pressing question, then, for discerning the potential scope of correctness review, is whether or not the four *Dunsmuir* categories represent the only instances where a court can deviate from deference.

Nothing in *Dunsmuir* itself limited correctness review of questions of law to the four named categories. Quite the opposite in fact. As noted above, it was taken as a given that "many legal issues attract a standard of correctness".[109] Further,

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[101] *Saguenay*, *supra* note 42 at para 46.

[102] RSA 2000, c F-25.

[103] *Supra* note 64 at para 20.

[104] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34, [2013] 2 SCR 458.

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

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

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

[108] *Ibid* at para 34, citing *supra* note 106 at para 22. Justice Côté, writing a minority decision, warned against interpreting this category of legal issues "too narrow[ly]" (at para 78).

Justices Bastarache and LeBel directed courts to look to relevant precedents, and it cannot be the case that precedent is relevant only where the earlier case selected the reasonableness standard. Finally, if standard of review could be determined solely by determining whether or not the issue in dispute falls into one of the four categories of automatic correctness review, there would be no need to retain the four-part standard of review analysis. The Court in *Dunsmuir* did, however, retain it, and instructed courts to engage in this analysis where the case law has not "already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question".[110] Despite these indications in *Dunsmuir* that correctness review could apply more broadly, subsequently there has been "a marked tendency"[111] by the Supreme Court to treat the four enumerated categories as exhausting the scope of correctness review.

In *Wilson*, Justice Abella suggested formalizing this tendency, as a back-up option should her colleagues be unpersuaded by arguments to move to a single deferential standard of review. While there was no explicit uptake on this proposal in either *Wilson* or *Capilano*, arguably the majority in *Capilano* came very close to accepting implicitly that the four categories of automatic correctness are exhaustive, given its reluctance to engage in contextual analysis regarding what the legislature might have intended in terms of deference.

In *Dunsmuir*, Justices Bastarache and LeBel summarized the process of identifying the appropriate standard of review as involving two steps:

> 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.[112]

The analysis at the second stage "must be contextual",[113] and is to be based on the four-part pragmatic and functional analysis, renamed as the standard of review analysis, although it may not always be necessary to consider all four factors. However, in *Capilano*, Justice Karakatsanis chastised the Appeal Court for engaging in a lengthy discussion of contextual matters. In her view, given the prior Supreme Court jurisprudence applying the reasonableness standard on statutory appeals:

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[109] *Supra* note 95 at para 51. As David Jones notes: "The judges in *Dunsmuir* clearly contemplated that there were other circumstances in which correctness would be the appropriate standard of review, beyond the four categories they specifically identified as examples. That is why they referred to the need for an analysis of the context—which was perfectly in line functionally with the previous jurisprudence about a pragmatic and functional approach for determining the nature of the issue and legislative intent about the standard of review" (Jones, "Administrative Law Part II", *supra* note 82 at 12).

[110] *Dunsmuir*, *supra* note 5 at para 62.

[111] *Supra* note 82 at 12.

[112] *Dunsmuir*, *supra* note 5 at para 62.

[113] *Ibid* at para 64.

> …there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted. … I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. [114]

The dissent in *Capilano* argued strenuously that correctness review can apply outside the four *Dunsmuir* categories, where there are sufficient indicators that the legislature intended this, particularly when combined with other contextual factors such as the need for consistency among various local boards interpreting the same legislation.

Adopting the dissent's approach would not create more categories of automatic correctness; the dissent in *Capilano* were clear that they had no interest in returning to pre-*Pezim* days,[115] where a right of appeal led inevitably to correctness review. However, eschewing all focus on context, and thus precluding any inquiry into legislative intent, or the impact of the standard of review chosen on the administrative scheme as a whole, seems at odds with the very purpose of judicial oversight of administrative action. Legislative intention may sometimes indicate a preference for strict scrutiny on other questions of law outside the four *Dunsmuir* categories, including where the particular wording of an appeal section invites such scrutiny, where the administrative body has little expertise in statutory interpretation, or where significant inconsistency of outcome would undermine the administrative scheme involved.[116] A rigid system of classification which dictates whether or not an administrative decision is owed deference based solely on the box within which the issue is seen as fitting would not only run the risk of ignoring legislative intent, but would also mark a surprising return to the "categorical and nominate"[117] approach, which was has been criticized for over two decades.

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[114] *Capilano*, *supra* note 3 at paras 34–35.

[115] *Ibid* at para 70–77.

[116] Inconsistency of decisions, by itself, is unlikely to justify correctness review: the inconsistency may be on a minor matter, or the administrative scheme may have its own methods for ensuring consistency over time (for example, as in *IWA v Consolidated-Bathurst Packaging Ltd*, [1990] 1 SCR 282, 73 OR (2d) 676*)*. But where there is no internal mechanism for ultimately achieving agreement on the meaning of core provisions, or where alternate interpretations of these provisions will provide significantly different rights for individuals in the same situation, then the need for consistency does seem to add weight to any arguments for correctness review based on legislative intent. Or, to bring arguments about consistency within the rubric of legislative intent, perhaps it could be argued that on issues of such significance, the failure to establish an internal method for ensuring consistency must indicate that the legislature intended this function to be undertaken by the courts.

[120] *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 24, [2003] 1 SCR 226. See also Justice Côté's comment on the "vice of formalism" in *Capilano*, *supra* note 3 at para 70.

C. Application of reasonableness review in particular circumstances

Thus far, I have argued that the possibility of correctness review should be retained and that its application should not be strictly limited to the four categories identified in *Dunsmuir*. This is not an attempt to undermine a general norm of deference for review of administrative action, but to say that there may be times when that norm should be set aside so as to give weight to legislative intent, or to serve other aims of the legal system, such as providing consistency on legal questions of significant import.

If deference is to remain as the general norm, we will, however, have to become used to the prospect of courts sometimes identifying reasonableness as the appropriate standard, then performing their own analysis of the question in dispute, rather than simply asking whether the impugned decision is reasonable. Here, I am not speaking of instances where an overly-interfering court pays only lip service to deference, but times when what looks like correctness in the "guise"[118] of reasonableness may be caused not by overly interventionist tendencies on the part of the reviewing judge, but by complexities inherent in the widespread use of the reasonableness standard.

According to *Dunsmuir*,

> [i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[119]

Yet, as highlighted by *Wilson* and *Capilano*, there are at least two scenarios where it would be difficult to apply the *Dunsmuir* understanding of reasonableness. The first is reasonableness review where a decision turns on a choice between two possible interpretations of the legislation in question, and the court determines that only one such interpretation can withstand even deferential review. The notion of a range of defensible outcomes seems to indicate that there will in fact be a range, which creates a dilemma, at least conceptually, when the court concludes there is only one right answer to be chosen from two possible alternatives. The second scenario is where the administrative decision maker has provided no reasons for its decision, thus making it difficult to review administrative action for justification, transparency and intelligibility. These challenges are examined in the next two sections.

[118] Jones & de Villars, *supra* note 7 at 821.

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

Reasonableness and choosing definitively between two possible interpretations

Although it is now axiomatic that there is only one reasonableness standard as opposed to a sliding scale, reasonableness still "takes its colour from the context",[120] and so there may be a wider or narrower range of outcomes reasonably available to the decision-maker. In fact, sometimes there may be only one outcome that a reviewing court will countenance as "defensible in respect of the facts and law".[121] This contrasts with cases such as *CUPE* 1979, where the Supreme Court accepted that there were numerous ways in which the disputed provisions of the *Public Service Labour Relations Act*[122] (described by Justice Dickson as "very badly drafted" and "bristl[ing] with ambiguities"[123]) might be interpreted.[124] The Court in *CUPE* accepted that the interpretation chosen by the Public Service Labour Relations Board was not patently unreasonable, but went on to say, "[t]he ambiguity of s.102(3)(a) is acknowledged and undoubted. There is no one interpretation which can be said to be 'right'."[125]

Even where "only a single defensible answer is available",[126] other aspects of the standard of review analysis may well indicate a legislative intention that deference be accorded the administrative decision-maker. In that situation, however, the reviewing court may find itself writing a decision that sounds very much like correctness review. Unless the court wishes, in essence, to answer the question before it with a shrug - an approach hardly likely to enhance confidence in either the administrative state or the judicial system– the court may well end up indicating which of the two possible, and incompatible, interpretations is reasonable, and which is not.

In *Wilson*, the only two interpretations offered for the disputed provisions of the *Canada Labour Code*[127] were either that non-unionized employees could be dismissed without just cause, or that they could not be. Likewise, in *Capilano*, the

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[120] *Khosa*, *supra* note 18 at para 59.

[121] *Dunsmuir*, *supra* note 5 at para 47. Which of course sounds very like the traditional understanding of correctness review where "[t]here can be only a 'single right answer' to the questions under review" (Régimbald, *supra* note 67 at 423, referring to *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at para 51).

[122] RSNB 1973, c P-25.

[123] *CUPE*, *supra* note 10 at 230.

[124] *Ibid* at 237. Justice Dickson noted: "Mr. Justice Limerick of the New Brunswick Appeal Division, in the course of his reasons in the present litigation, said: 'Four possible interpretations immediately come to mind'".

[125] *Ibid*.

[126] *Wilson*, *supra* note 2 at para 23.

[127] RSC 1985, c L-2.

relevant section of the *Municipal Government Act* either allowed an assessment review board to increase the tax assessment on a taxpayer appeal, or it did not. The majority in *Wilson*, applying a standard of reasonableness, did not explicitly reject an interpretation of the *Canada Labour Code* allowing employees to be terminated with reasonable notice; however, the majority concluded that:

> [t]he text [of the *Code*], the statements of the Minister when the legislation was introduced, and the views of the overwhelming majority of arbitral and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to the protection from being dismissed without cause".[128]

In the face of such unequivocal language, it would be a foolhardy adjudicator who, in the future, decided to apply the alternate interpretation. Similarly, the majority in *Capilano* not only found it reasonable for the board to interpret its authority as allowing for an increase in the assessment rate on a taxpayer appeal, but it also stated that the alternate interpretation would frustrate the purpose of Act. [129] Again, there seems little room for an assessment review board to delineate its powers differently in the future.

While both cases provide much-needed consistency on the questions before the Court, they also illustrate the difficulty of performing traditional reasonableness review in certain circumstances. David Jones' intriguing question in the context of another Supreme Court decision seems equally relevant to *Wilson* and *Capilano*: "At what point in time is the reasonableness of a decision determined—*before* the court determines the applicable standard of review, or only *after* the applicable standard of review has been determined?"[130]

Reviewing the reasonableness of non-existent reasons

The *Dunsmuir* approach to reasonableness may also pose a challenge where there are no reasons to be reviewed for "justification, transparency and intelligibility".[131] In *Dunsmuir*, Justices Bastarache and LeBel were alert to the possibility that an administrative decision-maker might not have provided reasons for the issue in dispute. While offering assurances that the merger of patent unreasonableness and reasonableness *simplicter* into one standard would not promote greater judicial intervention, they quoted with approval Professor David Dyzenhaus' description of deference as "a respectful attention to the reasons offered or which could be offered in support of a decision".[132] The possibility of supplementing the reasons of an

[128] *Wilson*, *supra* note 2 at para 39.

[129] *Capilano*, *supra* note 3 at para 61.

[130] Jones, "Administrative Law In 2016", *supra* note 6 at 14.

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

[132] *Ibid* at para 48, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.

administrative body received unanimous support from the Supreme Court in *Newfoundland Nurses' Union*, which added the gloss that the two aspects of reasonableness described in *Dunsmuir* were not to be treated as two separate tests but rather as an organic whole.[133] However, unless this means that *either* reasoning that offers justification and is transparent and intelligible *or* an outcome that comes within a range of acceptable outcomes is, by itself, sufficient to pass the reasonableness standard, the *Newfoundland Nurses' Union* gloss offers little assistance where the decision under review does not provide any reasons on the issue in dispute.

In *Alberta Teachers' Association*, the Court was faced with reviewing an issue raised for the first time on judicial review. Justice Rothstein offered the following advice for a reviewing court in this situation:

> Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. …
>
> However, … when the decision concerns an issue that was not raised before the decision maker … [i]f there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.
>
> …. [D]eference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. … [But] parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.[134]

Justice Stratas of the Federal Court of Appeal has been scathing about the *Dunsmuir* direction that courts should first seek to supplement, rather than subvert, an administrative decision-maker's reasoning, calling it "a rule that has been decreed, not deduced from an underlying doctrinal concept" and noting that "[w]ithout a coherent underlying concept to guide this rule, no one knows its limits or when or how it should be applied".[135] Perhaps rather than continuing the fiction of "supplementing", where reasons are non-existent, it should simply be acknowledged

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Stratas, *supra* note 4 at 38 argues that the Supreme Court in Dunsmuir "adopted this rule [of supplementing reasons] on the basis of a quote plucked out of context from a single academic article, that, if read in its entirely, deals with another subject entirely, and, in fact, advocates something quite different".

[133] *Newfoundland Nurses' Union*, *supra* note 20 at para 14.

[134] *Alberta Teachers' Association*, *supra* note 42 at paras 52–54.

[135] Stratas, *supra* note 4 at 38.

that, even if precedent or the standard of review analysis indicates deferential review, the court will be forced to undertake its own analysis.

In *Capilano*, at the hearing before the assessment review board, Edmonton East's counsel acknowledged that the board did have the authority to raise an assessment on a taxpayer appeal. Therefore, as Justice Karakatsanis noted, "it is hardly surprising the Board did not explain why it was of the view that it could increase the assessment: the Company expressly conceded the point".[136] Yet as Justice Karakatsanis also noted, "[w]hen a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging."[137] The majority considered the reasons which the board might have offered for its interpretation by examining the ordinary meaning of the section under review, how the section was interpreted by a predecessor body, the purpose of the Act, and general arguments about equity.

There was little else the Court could do in the absence of reasons from the Board. There seems little point in requiring a decision-maker to provide reasons not only for the questions that are clearly before it, but also for those questions which do not appear to be live issues. Yet, without an explanation from the assessment review board as to why it interpreted its authority as it did, it was difficult for the Court to review for the very thing that *Dunsmuir* tells us is the primary concern of a court engaged in determining whether a decision is reasonable or not: "the existence of justification, transparency and intelligibility within the decision-making process." In such a situation, a court will be forced to follow its own process of reasoning. My point here is that this should not be interpreted as a covert attempt to expand correctness review beyond its appropriate purview; instead it is the inevitable outcome of a system of judicial oversight where deference is the norm.

Conclusion

Should those of us who are interested in standard of review analysis be holding our collective breath, waiting for the Supreme Court to embark on a sea change of the magnitude wrought by *Dunsmuir*? A complete recalibration of *Dunsmuir* seems unlikely, given the lack of uptake on Justice Abella's suggestions in this regard. On the other hand, in light of the significant differences of opinion on the Court regarding key elements of the role of courts in overseeing administrative decision-making, we are likely to witness more lively exchanges on the availability and scope of correctness review; future decisions may also provide further commentary on how courts should go about reasonableness review where there are only two possible interpretations of a legislative provision or where no reasons were given by the body under review.

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[136] *Capilano*, *supra* note 2 at para 40.

[137] *Ibid* at para 36.

In this article, I have argued that while *Dunsmuir* makes deference the norm, there are no compelling reasons, from either a principled or pragmatic standpoint, for eliminating the possibility of correctness review for some questions of law. The dissents in *Wilson* and *Capilano*, and the majority decision in *University of Calgary* indicate that correctness review has a future. However, *University of Calgary* based its choice of the correctness standard on classifying the issue in dispute as a question of general law, of central importance to the legal system as a whole and outside the expertise of the administrative decision maker. This raises the question of whether the trend, visible in the majority decision in *Capilano*, of limiting correctness review to the four categories of legal questions identified in *Dunsmuir*, will continue to gain momentum or whether on occasion, the Supreme Court will adopt the reasoning of the dissent, such that correctness can on occasion be used outside those four categories. Of course, even if the *Dunsmuir* categories of automatic correctness are not treated as exhausting the possibility of correctness review, *Dunsmuir* indicates that deference should be the predominate approach to reviewing administrative action. Therefore, we will have to get used to the idea that sometimes the application of the reasonableness standard will look singularly like correctness review. Where this occurs because the court feels compelled to choose between two possible interpretations of the legislative provision in dispute, or because the decision-maker has not provided reasons on a key issue, courts' reliance on their own reasoning arises less from inappropriate interventionism and more from the difficulties of applying the *Dunsmuir* understanding of reasonableness in those contexts.