

WHITHER JUDICIAL REVIEW?

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*For some time, both Bench and Bar have called for simplification of judicial review of administrative action. In *Dunsmuir v. New Brunswick*, the Supreme Court of Canada went a long way in answering that call by reducing the number of review standards to two, correctness and reasonableness. It went even further. By suggesting that judicial and appellate review were converging in their approaches to review on the merits and to deference, the Court opened up the possibility that values such as rationality, consistency, equality, judicial economy, and the maintenance of respect for administrative justice could be more transparently taken into account when reviewing administrative action. This raises the possibility, once accommodation is made for procedural and remedial considerations, that the need in the future for a distinction between judicial and appellate review might fade altogether.*

*Depuis un certain temps déjà, autant les juges que les avocats demandaient une simplification du processus du contrôle judiciaire des décisions administratives. Dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, la Cour suprême du Canada a répondu dans une large mesure à cette demande, en réduisant à deux le nombre des normes de contrôle, soit celle de la décision correcte et celle de la décision raisonnable. La Cour a même été plus loin. En laissant entendre qu'il existe une convergence entre le contrôle judiciaire et l'appel quant à l'approche adoptée pour l'examen sur le fond et la déférence, la Cour rend possible une prise en compte plus transparente de valeurs telles la rationalité, la cohérence, l'égalité, l'économie judiciaire, ainsi que le respect de la justice administrative, lors du contrôle de décisions administratives. Ceci laisse entrevoir la possibilité que s'estompe complètement la nécessité, à l'avenir, de distinguer entre appel et contrôle judiciaire, une fois les besoins de la procédure et du processus d'indemnisation satisfaits.*

1. Introduction

In *Dunsmuir v. New Brunswick*,¹ the Supreme Court of Canada sought to simplify judicial review of administrative action. To that end, Deschamps

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¹ 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*].

J. observed that judicial review is “often not distinguishable” from appellate review of court decisions.² *Dunsmuir* made clear that the merits of substantive administrative outcomes are subject to judicial review and noted that deference standards are commonplace in criminal and civil appellate review.³ The purpose of this article is to show that the convergence of these two forms of review will help courts find an appropriate balance between the preservation of curial deference and the protection of other values integral to the administrative system of justice, values such as consistency in, and maintenance of public respect for, administrative decision-making.

The origin of modern judicial review can be found in the supervision by the English Court of Queen’s Bench of seventeenth century justices of the peace.⁴ Certiorari was available against these local officials for acts done without jurisdiction, but not for acts done within, so long as no error appeared on the face of the record.⁵ Judicial review was justified by the need to ensure the predominance of regular over inferior courts. That justification shifted in the mid-nineteenth century.⁶ Just as administrators in the early industrial and welfare state were expanding their powers, Dicey was making the constitutional argument that these administrators were not to offend parliamentary supremacy by giving themselves jurisdiction in areas not assigned to them.⁷ The same courts that prevented ordinary citizens from acting outside of the law would prevent administrators from exceeding or abusing their authority.⁸

Professor Craig described these developments as follows:

² *Ibid.* at 265.

³ *Ibid.* at 267. At 265, Deschamps J. cited a civil appeal, *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 on this point. Deference standards were also adopted in another civil appeal, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 and in a case involving a statutory right of appeal in an administrative matter, *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 [Dr. Q.].

⁴ Amnon Rubinstein, “On the Origins of Judicial Review” (1964) 2 U.B.C. L. Rev. 1 at 4.

⁵ Stanley de Smith, Rt. Hon. Lord Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1950) at 225-26.

⁶ For a detailed summary of these developments see: Paul Craig, “Dicey: Unitary, Self-Correcting Democracy and Public Law” (1990) 106 Law Q. Rev. 105 at 111-20.

⁷ Albert Venn Dicey, *Introduction to the Study of the law of the Constitution* (London: MacMillan, 1885).

⁸ David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Thomson Carswell: Scarborough, 2009) at 9-10.

It is apparent that the execution of the legislative will may require the grant of power to a Minister or administrative agency. Herein lies the modern conceptual justification for non-constitutional review. It was designed to ensure that the sovereign will of Parliament was not transgressed by those to whom such grants of power were made. ... The less well-known face of sovereignty, that of parliamentary monopoly, thus demanded an institution to *police* the boundaries which Parliament had stipulated. It was this frontier which the courts patrolled through non-constitutional review.⁹

While in theory judicial review was limited to jurisdictional review, judges who were anxious to intervene had little difficulty in straining the meaning of jurisdiction so as to accommodate almost anything that they regarded as a legal error. Judicial review became decidedly appellate in nature.¹⁰ Rubinstein summarized this:

... [J]udicial review has developed in terms of want of jurisdiction. It will be noted that this development did not have the effect of limiting the supervisory court's superintendence but rather of inflating the meaning of "want of jurisdiction" so as to meet all contingencies. The courts have shown a remarkable degree of indifference to orthodox conceptualism and paid little regard to the consequence of describing any irregularity or mistake as going to jurisdiction.¹¹

In order to counter this, Parliament passed privative clauses stating that interpretations of law made by administrators were final. Courts, anxious to resist encroachments on their power, had no trouble holding that administrative interpretations with which the court disagreed fell outside of jurisdiction and, as such, were nullities to which privative clauses did not attach.¹²

A tug-of-war thus ensued between legislatures anxious to protect their administrators from judicial interference and courts anxious to preserve their inherent supervisory authority. The doctrine of parliamentary supremacy provided rope to the legislative branch, rule of law to the judicial forces. In England, the strongest pull for the judicial side came from the 1969 decision in *Anisminic Ltd. v. Foreign Compensation*

⁹ Craig, *supra* note 6 at 113 [emphasis in original], cited by Wilson J. in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1333 [Corn Growers].

¹⁰ Amnon Rubenstein, *Jurisdiction and Illegality A Study in Public Law*, (Oxford: Clarendon Press, 1965) at 91-93.

¹¹ *Ibid.* at 81.

¹² Craig described the manipulation of the concept of jurisdiction as follows: "The flexibility inherent in the concept of jurisdiction preserved the veneer that the courts were simply applying the legislative mandate and were thereby obeying the sovereignty of Parliament;" see Craig, *supra* note 6 at 117.

Commission.¹³ In that case, the House of Lords interpreted jurisdiction to include not only the administration's authority to enter into an inquiry but also the possibility that the administration might lose jurisdiction at any point during the inquiry if it committed a jurisdictional error. This included errors of law, sometimes called "nominate" errors, such as applying the wrong legal test, answering the wrong question, failing to take into account relevant considerations or taking into account irrelevant ones. It also included procedural errors that amounted to breaches of natural justice. In Canada, *Anisminic* was followed in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*,¹⁴ a case that has been described as the "high water mark of activist" review in this country.¹⁵

*C.U.P.E. v. New Brunswick Liquor Corporation*¹⁶ began the Canadian push-back in favor of deference. *New Brunswick Liquor* held that jurisdiction – "the power to decide" – ought to be interpreted narrowly in two senses. First, it was to be determined at the outset of the inquiry, and even then Dickson J. cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."¹⁷ Second, the notion that jurisdiction could be lost once established was restricted to situations in which the decision-maker's interpretation of law could be described as being "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."¹⁸ By limiting the scope of jurisdiction, and so the opportunity for judges to substitute their opinions for those of administrative decision-makers, Dickson J. reduced the opportunity for judges to conduct appellate type review under the guise of conducting judicial review.

In *U.E.S., Local 298 v. Bibeault*,¹⁹ Beetz J. set out a "pragmatic and functional" test to be used in defining the jurisdictional boundary line.²⁰ That test identified four factors – the nature of the question, the presence

¹³ [1969] 1 All E.R. 208 (H.L.) [*Anisminic*].

¹⁴ [1970] S.C.R. 425.

¹⁵ John Evans, Hudson Janisch, David Mullan and Richard Risk, *Administrative Law: Cases, Text, and Materials*, 3rd ed. (Toronto: Emond Montgomery, 1989) at 565, cited by Wilson J. in *Corn Growers*, *supra* note 9 at 1335.

¹⁶ [1979] 2 S.C.R. 227 [*New Brunswick Liquor*].

¹⁷ *Ibid.* at 233.

¹⁸ *Ibid.* at 237.

¹⁹ [1988] 2 S.C.R. 1048 [*Bibeault*].

²⁰ The term "pragmatic and functional" was first used by Beetz J. in *Bibeault*, *ibid.* at 1088. He gave no explanation for either the origin of the phrase or its precise meaning. See *Dunsmuir*, *supra* note 1 at 248, where Binnie J. offered the following insight:

of a privative clause, the expertise of the administrative decision-maker, and the purpose of the enabling statute – to be used in determining the degree of deference to be shown an administrator. Subsequently, in *Dr. Q.*, McLachlin C.J.C. observed that “[t]he nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.”²¹

As is evident from this sketchy history, judicial review focuses on the jurisdictional boundary line that defines the limits of administrative authority. Matters outside of jurisdiction are held to a standard of correctness. The reviewing judge’s view of the matter prevails and, as a consequence, the review is appellate in nature. Matters inside of jurisdiction are held to a standard of deference so long as jurisdiction is not lost. The administrator’s view stands provided that the deference standard is met. Deference is what distinguishes judicial from appellate review.

Another distinguishing feature is the focus of the review. It is sometimes said that review of administrative action taken outside of jurisdiction extends to the “merits” of the decision. Review of the “merits” is concerned with substantive outcomes; it is associated with appellate type review. On the other hand, review of administrative action taken within jurisdiction is said to be limited to the “legality” of the process. “Legality” is concerned with the reasoning process by which the outcome is reached; it is associated with judicial review.²²

The dreaded reference to “functional” can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their “function”), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word “pragmatic” not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example, a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers [emphasis in original].

See also deSmith, Woolf and Jowell, *supra* note 5 at 249, and at fns. 55 and 56.

²¹ *Dr. Q.*, *supra* note 3 at 237.

²² Sir William Wade and Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) at 38, 954. See also Trevor Allan, “Pragmatism and Theory in Public Law” (1988) 104 Law Q. Rev 422 at 423 where the author states, citing Wade, *Administrative Law* (5th ed.) at 34 -36:

In regulating the legitimate boundaries of legal control of administrative discretion, a distinction is customarily made between the merits of administrative action and its legality: judicial review is appropriate in respect of the latter, but not the former.

And see Lord Hailsham of St. Marylebone, *Halsbury’s Laws of England*, vol. 1(1), 4th ed. reissue (London: Butterworths, 1989) at 116 para 59, where it is stated:

As will be shown, deference and review on the merits no longer distinguish judicial from appellate review. Both of these features are present in both kinds of review. This convergence permits deference to be accorded without the need for a separate judicial review methodology that tends to exclude other values defended in appellate reasoning.

There is no suggestion here that the procedural distinction between the two forms of review should be abandoned. Nor is there any suggestion that the remedial distinctions should be altered. It remains useful that judicial review procedure is generally more expeditious and that the usual remedy is reference back to the administrative authority to re-decide the matter on correct legal principles.²³

2. *What Went Wrong with Judicial Review?*

In a concurring judgement in *Toronto (City) v. C.U.P.E., Local 9*,²⁴ which became known as his “*cri de coeur*,”²⁵ LeBel J. delivered a powerful critique of judicial review in Canada. He acknowledged the criticism coming from both practitioners and judges and called for changes that would make judicial review “predictable, workable and coherent.”²⁶ His “*cri*” led to the reforms in *Dunsmuir*.

The use of the pragmatic and functional test to select between three, or possibly more, standards of review ran into several difficulties. The first related to historical ambiguities in the origin of the patently unreasonable standard of deference. Deference was intended to prevent courts from manipulating malleable concepts such as nominate error and jurisdiction in order to overrule administrative interpretations of law. However, the new concept of deference was framed in old interventionist jargon.

The patently unreasonable standard was introduced by Dickson, J. in *New Brunswick Liquor*. The reviewing court was to defer to the administrative decision-maker except in the exceptional case of an error that demanded the court’s intervention because it could not rationally be supported by the relevant legislation.²⁷ This approach was immediately undercut, however, by the examples that Dickson J. gave of such patently

Judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is thus different from an ordinary appeal.

²³ *Ibid.* at fn. 7.

²⁴ 2003 SCC 63, [2003] 3 S.C.R. 77 [*Toronto (City)*].

²⁵ Jones and de Villars, *supra* note 8 at 479-81.

²⁶ *Toronto (City)*, *supra* note 24 at 116.

²⁷ *New Brunswick Liquor*, *supra* note 16 at 237.

unreasonable errors. These included "... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the *Act* so as to embark on an inquiry or answer a question not remitted to it."²⁸ These were the very nominate errors that earlier had been said to cause administrators to lose jurisdiction and to provide courts with an excuse for excessive intervention.²⁹

The same historic tension surrounded the introduction of the pragmatic and functional test in *Bibeault*. Although the test incorporated such differentially-sensitive factors as relative expertise and the existence of a privative clause, the focus of the judgment was clearly on placing "renewed emphasis on the superintending and reforming function of the superior courts."³⁰ The word "deference" was not even mentioned in *Bibeault*. The principal concern in the case was jurisdictional excess. The interpretation of the enabling legislation was ruled to be a jurisdictional matter. A correctness standard of review was adopted. The Supreme Court intervened to substitute its interpretation of the statute in place of the administrative decision-makers' interpretation. The case was indistinguishable from appellate review in its result. The context in which the pragmatic and functional test originated was anything but a call to arms in favour of deference.

The origins of both the patently unreasonable standard and the pragmatic and functional test spoke to deference and respect for administrative decisions. However, reference to nominate categories and jurisdiction spoke to correctness and court intervention. The tension was evident from the beginning.

The second difficulty with the pragmatic and functional test was the imprecision of its four factors. These factors were fluid in definition and of uncertain relative weight. As such, they provided easy cover for interventionist courts and only tenuous protection for administrative decision-makers.

Several examples illustrated this. Privative clauses were not absolutes; their strength depended on the interpretation that courts gave them. Relative expertise could refer either to the statutory requirements for filling

²⁸ *Ibid.* This list of nominate errors was first set out in Canada in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] 1 S.C.R. 382 at 389.

²⁹ See David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 69-70 [Mullan, "Administrative Law"] and see the "*crt*" in *Toronto (City)*, *supra* note 24 at 125-26.

³⁰ *Bibeault*, *supra* note 19 at 1086 and 1090.

an administrative position or to the actual qualifications of the administrator in question.³¹ Over powerful dissents from L'Heureux-Dubé J., the Supreme Court was never prepared to concede the relative expertise of *ad hoc* human rights panels or commissions.³² The nature of the question, whether one of fact, law or mixed fact and law, was not always evident. Rather than the nature of the question leading, *a priori*, to the outcome, sometimes the outcome desired by the court led, *ex post facto*, to labeling the nature of the question.³³ The pragmatic and functional test gave little guidance on how the four factors were to be weighted when they pointed in opposite directions. The existence of a statutory right of appeal from decisions of an expert tribunal was sufficiently problematic in *Canada (Director of Investigation and Research) v. Southam Inc.*³⁴ that Iacobucci J. felt obliged to introduce an entirely new standard, reasonableness *simpliciter*, to deal with the issue. While the pragmatic and functional test appeared to be auto-applying, and to give an aura of objectivity, considerable scope was left to judicial discretion in deciding when to defer. Discretion and deference made uncomfortable bedfellows.

The third difficulty involved a multiplication of the number of standards of review. The Supreme Court stopped at three when, in *Law Society of New Brunswick v. Ryan*,³⁵ it rejected the suggestion that there was an unlimited number of standards along a spectrum between patent unreasonableness and correctness.³⁶ Even three proved problematic. It was difficult to distinguish between the patently unreasonable standard, which referred to decisions that were “clearly irrational” or “evidently not in accordance with reason,”³⁷ and the reasonableness *simpliciter* standard,

³¹ See Lorne Sossin, “Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law” (2003) 27 Advocates’ Q. 478; and Robert E. Hawkins, “Reputational Review I: Expertise, Bias and Delay” (1998) 21 Dal. L. J. 5.

³² Madam Justice Claire L’Heureux-Dubé, “The ‘Ebb’ and ‘Flow’ of Administrative Law on the ‘General Question of Law’” in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) at 308.

³³ See *Currie v. Commissioners of Inland Revenue* [1921] 2 K.B. 332 at 339:

[T]here has been a very strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision of the Commissioners, that the question is one of fact, and if he disagrees with them that it is one of law, in order that he may express his own opinion the opposite way.

Quoted in Timothy Endicott, “Questions of Law” (1998) 114 Law Q. Rev. 292 at 307.

³⁴ [1997] 1 S.C.R. 748 at 777 [*Southam*].

³⁵ 2003 SCC 20, [2003] 1 S.C.R. 247 [*Ryan*].

³⁶ *Ibid.* at 259 where Iacobucci J. stated: “I find it difficult, if not impracticable, to conceive more than three standards of review.”

³⁷ *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-64.

which referred to decisions for which “there [were] no lines of reasoning supporting the decision which could reasonably lead the tribunal to reach the decision it did.”³⁸

Professor Mullan has scoffed at the notion that there could be shades of irrationality: “I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational!”³⁹ LeBel J., in *Toronto (City)*, queried whether the theoretical efforts necessary to maintain the distinction were productive: “Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true ...”⁴⁰ The distinction was either a non-distinction or one so fine as to be incapable of application.

Fourth, the judiciary could not agree on whether the pragmatic and functional test was concerned exclusively with the legality of the decision, the predominant view, or whether it extended to the merits of the decision under review, the position of a cogent minority. In *CAIMAW v. Paccar of Canada Ltd.*,⁴¹ La Forest J., later supported by Iacobucci J. in *Ryan*,⁴² stressed legality: “The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.”⁴³ He suggested that if reviewing judges started by determining that the outcome was not one that they would have reached, they risked closing their minds to the possibility that the reasoning leading to the outcome was in fact tenable.

On the other hand, Sopinka J., also writing in *Paccar*, indicated that he was prepared to consider substantive outcomes when applying the standard of review:

While I agree generally with La Forest J. on the principles underlying the scope and standard of review of labour board decisions, I cannot agree that it is always necessary for the reviewing court to ignore its own view of the merits of the decision under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that

³⁸ *Ryan*, *supra* note 35 at 270.

³⁹ David J. Mullan, “Recent Developments in Standard of Review”, in *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (Canadian Bar Association (Ontario), 2000) at 24-25, cited by LeBel J. in *Toronto (City)*, *supra* note 24 at 135.

⁴⁰ *Toronto (City)*, *ibid.* at 142.

⁴¹ [1989] 2 S.C.R. 983 [*Paccar*].

⁴² *Ryan*, *supra* note 35 at 270.

⁴³ *Paccar*, *supra* note 41 at 1004.

a decision under review is “reasonable” or “patently unreasonable” it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.⁴⁴

This same debate surfaced in *National Corn Growers Assn. v. Canada (Import Tribunal)*.⁴⁵ The issue was the meaning of the words “material injury” that were found in the Canadian Import Tribunal’s enabling legislation. The seven members of the Supreme Court who heard the case all adopted the patently unreasonable standard and upheld the Tribunal’s interpretation. Gonthier J., writing for four judges, undertook to assess “the reasonableness of the Tribunal’s decision” by conducting a detailed analysis of the issues dealt with by the Tribunal.⁴⁶ Wilson J., writing for the three concurring judges, was critical of this approach:

One must, in my view, not begin with the question whether the tribunal’s *conclusions* are patently unreasonable; rather, one must begin with the question whether the tribunal’s interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently unreasonable. If the tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal’s conclusions are unreasonable. It seems to me, however, that this is what my colleague has done. And in the process he has engaged in the kind of detailed review of a tribunal’s findings that this Court’s jurisprudence makes clear is inappropriate.⁴⁷

Reasons and outcomes are closely linked. As a matter of logic, reasonable reasons generally lead to sound outcomes and sound outcomes generally suggest that the reasoning was reasonable. For example, an evaluation of the reasoning process will consider whether the factors taken into account in reaching an outcome were relevant. The relevance of those factors, however, will depend on the reviewing judge’s view of what a sound outcome might be. As a practical matter, it is artificial to think that one can avoid forming an opinion on the merits when examining the reasoning that underlies an outcome. In *Dunsmuir*, the Court accepted that the merits should form part of the review process. Deference would be preserved not by attempting to isolate the reasoning process from the outcome, but rather by acknowledging that there usually exists a “range of acceptable options” or a “margin of appreciation” with respect to any outcome.⁴⁸

⁴⁴ *Ibid.* at 1017-18.

⁴⁵ *Supra* note 9.

⁴⁶ *Ibid.* at 1370.

⁴⁷ *Ibid.* at 1347-48 [emphasis in original].

⁴⁸ *Dunsmuir*; *supra* note 1 at 220-21 and 230.

The fifth difficulty concerned the transparent application of the pragmatic and functional test. In some cases the reviewing court would adopt a deferential standard but then overturn the administrator's decision after examining it on its merits. The impression left was that the courts had used the reasonableness standard on judicial review as a guise for intervening on correctness grounds much as it would have done on an appeal.⁴⁹

In his "*cri de coeur*," LeBel J. cited Professor Sossin's analysis of *Canada Safeway Ltd. v. RWDSU, Local 454*,⁵⁰ and Professor Holloway's analysis of *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*,⁵¹ to show examples where the Court, in rejecting an administrative interpretation, failed to explain why it felt that the administrator's interpretation lacked a rational foundation. LeBel J. drew the following conclusion:

At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred.⁵²

⁴⁹ One notable exception is *Southam*, *supra* note 34 at 787-88 where Iacobucci J. stated:

It is possible that if I were deciding this case *de novo*, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. ... But again, I cannot say that the Tribunal's approach was unreasonable.

... I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked on review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

⁵⁰ [1998] 1 S.C.R. 1079 as discussed in Lorne Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000) 11 Sup. Ct. L. Rev (2d) 37 at 49.

⁵¹ [1990] 3 S.C.R. 644 as discussed in Ian Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993) 22 Man. L.J. 28 at 64-65.

⁵² *Toronto (City)*, *supra* note 24 at 131.

In the final analysis, the pragmatic and functional test proved inadequate because it was as susceptible to manipulation by interventionist courts as had been jurisdiction, nominate grounds, and preliminary questions in the past.

3. Deference Affirmed

In 2002, David Dunsmuir was appointed by Order-in-Council to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick. The employment relationship was not perfect;⁵³ Dunsmuir's probationary period was extended twice, his performance reviews were mixed and, during his two-and-a-half years of employment, he was formally reprimanded three times. In the end, an overdue performance review was cancelled and he was formally terminated with a little over four months salary in lieu of notice. Following denial of his grievance, Dunsmuir referred the matter to adjudication.

Section 100 of the New Brunswick *Public Service Labour Relations Act* [PSLRA]⁵⁴ provided that a non-bargaining-unit employee could grieve a discharge and, if unsatisfied with the results, could refer the matter for adjudication. Section 100.1 (5) provided that section 97 of the *Act* applied *mutatis mutandis* to an adjudicator to whom a grievance had been referred. Section 97 (2.1) provided that "[w]here an adjudicator determines that an employee has been discharged ... for cause ..., the adjudicator may substitute such other penalty for the discharge ... as to the adjudicator seems just and reasonable in all the circumstances." Section 20 of the New Brunswick *Civil Service Act*⁵⁵ provided that "... termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract."

In a preliminary ruling, the adjudicator interpreted the PSLRA "*mutatis mutandis*" provision as giving him the same power to consider cause, and to substitute an alternate penalty, in cases of dismissal of a non-unionized employee as in cases involving a unionized employee.

Despite this preliminary interpretation, the adjudicator did not rely on the PSLRA nor rule on cause in reaching his final decision. Instead, citing the Supreme Court of Canada's decision in *Knight v. Indian Head School Division No. 19*,⁵⁶ he applied the doctrine of procedural fairness as it related to office holders at pleasure. He concluded that Dunsmuir had not

⁵³ Dunsmuir, *supra* note 1 at 202.

⁵⁴ R.S.N.B. 1973, c. P-25, as amended.

⁵⁵ S.N.B. 1984, c. C-51.

⁵⁶ [1990] 1 S.C.R. 653 [*Knight*].

been accorded fairness and so should be re-instated from the time of his dismissal. In the alternative, he ruled that Dunsmuir was entitled to eight months pay in lieu of notice.

On appeal, the Supreme Court, citing section 20 of the *Civil Service Act*, held that the matter was governed by contract law rather than fairness doctrine. The employer was entitled to dismiss Dunsmuir without cause. The required notice period in the circumstances was eight months. In reaching its conclusion, the Court overruled the earlier Knight decision. It also overruled the adjudicator's interpretation of the *PSLRA*.

The Supreme Court need not have considered the *PSLRA* in order to dispose of this case; its determination that contract law applied was sufficient to deal with the matter. The Court's reconsideration of judicial review doctrine was, strictly speaking, *obiter*.⁵⁷ The Court was unanimous, however, about the pressing need to reform judicial review. Bastarache and LeBel JJ. wrote:

The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges.⁵⁸

In a memorable phrase, Binnie J. opined that judicial review had lately become "unduly burdened with law office metaphysics."⁵⁹ He held that it should be pruned of its "unduly subtle, unproductive, or esoteric features."⁶⁰ Deschamps J. stated that "[t]he law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes."⁶¹

Bastarache and LeBel JJ., writing for five members of the Court, replaced the "patently unreasonable" and "reasonableness *simpliciter*" standards with a single new standard, "reasonableness."⁶² To reflect this, they renamed the "pragmatic and functional test" the "standard of review analysis."⁶³ They retained the familiar four factors making up the

⁵⁷ *Dunsmuir*, *supra* note 1 at 231 and 247.

⁵⁸ *Ibid.* at 201 and at 213 where Bastarache and LeBel JJ. called for the development of a principled framework for dealing with judicial review that was "coherent and workable."

⁵⁹ *Ibid.* at 248.

⁶⁰ *Ibid.* at 254.

⁶¹ *Ibid.* at 264.

⁶² *Ibid.* at 220.

⁶³ *Ibid.* at 227.

pragmatic and functional test and determined that all four pointed to “reasonableness” as the appropriate standard in *Dunsmuir*. They further held that the adjudicator’s interpretation of the *PSLRA*, by which he gave himself authority to consider the cause of Dunsmuir’s dismissal, was unreasonable because it ignored the employer’s right in contract law to dismiss without cause.

Whereas Bastarache and LeBel JJ. sought to reform the pragmatic and functional test, Binnie J. sought a whole new approach. Rather than focusing on the selection of a standard of review, he chose to define a “range of reasonable outcomes” within which the administrator’s decision must fall.⁶⁴ “‘Contextualizing’ a single standard of review,” Binnie J. explained, “will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.”⁶⁵ This contextual inquiry required consideration of the four factors that made up the pragmatic and functional test as well as the “who, what, why and wherefor of the litigant’s complaint on its merits.”⁶⁶

Deschamps J., writing for herself and two other judges, went even further. She held that except in cases in which a decision-maker was acting within his or her core expertise, and was protected by a privative clause, there was no need for judicial review methodology to be more complex than ordinary appellate review.⁶⁷ She gave two reasons for this. First, she noted that “reasonableness” and “deference” were not unique to administrative law and had not given rise in other areas to the complexities seen in administrative law. She concluded:

⁶⁴ *Ibid.* at 256.

⁶⁵ *Ibid.* [emphasis in original]. Although Bastarache and LeBel JJ. adopted a modified pragmatic and functional approach, they may also have been comfortable with Binnie J.’s methodology. In language very similar to Binnie J.’s, they stated at 220, “Tribunals have a margin of appreciation within the range of acceptable and reasonable solutions.”

These developments effectively overruled the statement in *Ryan*, *supra* note 35 at 268-69 where Iacobucci J., for the Court, wrote:

... [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a “margin of error” around what the court believes is the correct result.

⁶⁶ *Ibid.* at 263.

⁶⁷ *Ibid.* at 265 and 267.

The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.⁶⁸

The second reason related the “nature of the question” factor used in defining the scope of reasonableness:

Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.⁶⁹

Although the entire Court agreed on the result in *Dunsmuir*, the three concurring judgments each elaborated its own judicial review methodology. The judges could not agree on whether the *PSLRA* enabling statute or the common law of contract should be the starting point of the analysis.⁷⁰ Nor was there agreement on the appropriate standard of review. Six judges favored the new reasonableness standard, three a correctness standard. While all of the judges emphasized the importance of deference, the adjudicator’s interpretation of his home statute was overruled despite the protection of a privative clause. The “simplification” of judicial review, which was the object of the exercise, did not appear to make matters all that simple.

Nonetheless, *Dunsmuir* was an appropriate vehicle for reform. With it, the Court was able to take a significant step in reducing the complexity of judicial review. Following *Dunsmuir*, it will be easier for litigants to understand their chances on review and for lower courts to apply the law. Despite the different opinions, the judgments reached substantial consensus on five basic aspects of a judicial review methodology.

First, all members of the Court agreed on the kinds of issues that were to be considered jurisdictional and so subject to a standard of correctness on review. These included constitutional questions,⁷¹ true questions of jurisdiction or vires,⁷² procedural questions⁷³ and legal issues with precedential value beyond the facts of the immediate case.⁷⁴ With respect

⁶⁸ *Ibid.* at 267.

⁶⁹ *Ibid.* at 269.

⁷⁰ *Ibid.* at 268.

⁷¹ *Ibid.* at 224 and 249.

⁷² *Ibid.* at 225.

⁷³ *Ibid.* at 251.

⁷⁴ *Ibid.* at 249; at 249 and 252, Binnie J. also mentioned that a “full statutory right

to latter, each judgement adopted its own wording. Bastarache and LeBel, JJ. stated that “courts must also continue to substitute their own view of the correct answer where the question is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.”⁷⁵ Binnie J. objected to the phrase “central importance to the legal system” fearing that it would lead to distracting debate in the courtroom. He preferred instead to define “questions of general law” as all questions of law except “the home statute and closely related statutes which require the expertise of the administrative decision maker ...”⁷⁶ Deschamps J. wrote that “laws of general application such as the Constitution, the common law and the *Civil Code*,” where “consistency of the law is of prime societal importance,” were to be interpreted correctly.⁷⁷ Whatever the phrasing, there was agreement that interpretations of law with precedential value beyond the immediate administrative context in issue, or interpretations where consistency was a factor, were to be reviewed on a correctness basis.

Second, issues within jurisdiction were to be subject to a reasonableness standard of review defined as the range of acceptable outcomes available to the administrative decision-maker.⁷⁸ This recognized that there was likely to be more than one tenable outcome in any administrative context. Bastarache and LeBel JJ. stated clearly:

...[C]ertain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.⁷⁹

of appeal to the courts” is an indication that legislators intended that the court’s view of reasonableness is to be preferred to that of the administrative decision-maker.

⁷⁵ *Ibid.* at 226 where *Toronto (City)*, *supra* note 24 is cited. *Par contra*, deference would be accorded when interpreting questions of law that were not of general application and so would have little precedential value outside of the specific context under consideration; see *ibid.* at 223, where Bastarache and LeBel JJ. stated:

Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: ... Deference may also be warranted 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: ...

To the same effect see also *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12, [2009] 1 S.C.R. 339 at 361 [*Khosa*].

⁷⁶ *Dunsmuir*, *ibid.* at 251.

⁷⁷ *Ibid.* at 266.

⁷⁸ *Ibid.* at 221, 256 and 262.

⁷⁹ *Ibid.* at 220.

Binnie J., defined reasonableness in the same manner: "... a single 'reasonableness' standard will now necessarily incorporate ... an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision."⁸⁰

Third, the reasonableness standard applied to substantive outcomes, that is, to the merits of the administrative decision, as well as to the decision-making process. Bastarache and LeBel JJ. explained that "[a] court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes."⁸¹ Binnie J., anxious to avoid the abstraction associated with the selection of a standard of review, urged going directly to a consideration of whether the litigant's complaint, or the government's response, was reasonable.⁸² He stated that "... we should at least ... get the parties away from arguing about the tests [for selecting an appropriate standard of review] and back to arguing about the substantive merits of their case."⁸³ Deschamps J. agreed:

In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself.⁸⁴

These statements resolved the debate over whether merits were to be considered on judicial review in favor of the affirmative position adopted by Sopinka J. in *Paccar*⁸⁵ and Gonthier J. in *Corn Growers*,⁸⁶ and against the stance taken by Wilson J. in *Corn Growers*⁸⁷ and Iacobucci J. in *Ryan*.⁸⁸

Fourth, the Supreme Court stressed that reasonableness was a deferential standard.⁸⁹ The Court was concerned that the elimination of the adjective "patently" with the demise of the "patently unreasonable" standard would send a false signal to reviewing courts. Binnie J. observed:

⁸⁰ *Ibid.* at 260-61.

⁸¹ *Ibid.* at 220.

⁸² *Ibid.* at 253.

⁸³ *Ibid.* at 259.

⁸⁴ *Ibid.* at 265 and 267.

⁸⁵ *Supra* note 41.

⁸⁶ *Supra* note 9.

⁸⁷ *Ibid.*

⁸⁸ *Ryan*, *supra* note 35.

⁸⁹ If there was any doubt on this point, in *Khosa*, *supra* note 75 at 362, the Court made it clear that *Dunsmuir* was not abandoning deference and that courts were not to assert "a level of skill and knowledge in administrative matters which further experience showed they did not possess."

The danger of labeling the most deferential standard as “reasonableness” is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of “reasonableness” that counts.⁹⁰

Treating reasonableness as a deference standard meant taking deference seriously rather than simply paying lip-service to it.⁹¹ To ensure this, Binnie J. set out two presumptions.⁹² First, the “going-in presumption” was reasonableness, not correctness. Bastarache and LeBel JJ. made this same point by stating that true questions of jurisdiction or *vires* were narrow, and by reiterating Dickson J.’s caution that reviewing judges must be careful not to brand as jurisdictional issues that were doubtfully so.⁹³ Second, within jurisdiction a decision was presumed reasonable unless shown otherwise. Bastarache and LeBel JJ. underlined this point by stressing that the move towards a single reasonableness standard did not pave the way for a more intrusive review by the courts.⁹⁴ For her part, Deschamps J. stated that she used the word “deference” to define the contours of reasonableness.⁹⁵ The onus was on the applicant, therefore, to rebut these two presumptions favoring deference if it intended to argue either that the issue was outside the administrator’s jurisdiction, and so subject to the correctness standard, or to argue that the matter, while within jurisdiction, had been decided unreasonably.

Finally, all three judgments agreed that reasonableness was to be determined contextually.⁹⁶ Reasonableness was “a big tent that [would] have to accommodate a lot of variables.”⁹⁷ It had to be “calibrated to fit the circumstances.”⁹⁸ Context depended on “who [was] deciding what”⁹⁹ and on the breadth of the discretion granted to the administrator to formulate public policy. Binnie J. stated:

In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed

⁹⁰ *Dunsmuir*, *supra* note 1 at 257 and also at 256 and 260.

⁹¹ *Ibid.* at 221.

⁹² *Ibid.* at 259.

⁹³ *Ibid.* at 225-26, referring to *New Brunswick Liquor*, *supra* note 16 at 233; see also *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678 at 697 [*Nolan*].

⁹⁴ *Ibid.* at 221, cited with approval by Binnie J. in *Khosa*, *supra* note 75 at 350.

⁹⁵ *Ibid.* at 267.

⁹⁶ *Ibid.* at 227, 256, 259 and 261-62; see also *Nolan*, *supra* note 93 at 695.

⁹⁷ *Ibid.* at 259.

⁹⁸ *Ibid.* at 261.

⁹⁹ *Ibid.* at 255.

against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many “contextual” considerations as the court considers relevant and material.¹⁰⁰

The evaluation of context would continue to be heavily influenced by the four pragmatic and functional factors. *Dunsmuir*, along with three subsequent Supreme Court of Canada cases that dealt with judicial review methodology – *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*,¹⁰¹ *Canada (Citizenship and Immigration) v. Khosa*¹⁰² and *Nolan v. Kerry (Canada) Inc.*¹⁰³ – shed light on how these factors were to be applied. The first step was to verify whether the jurisprudence had already established the appropriate degree of deference for the particular category of question in issue.¹⁰⁴ The second step, if no precedent was available, was to undertake a detailed analysis applying the factors to the specific context under consideration.¹⁰⁵ The application of the factors was not to be a mechanical process. In *Khosa*, Binnie J. stated:

Factors should not be taken as items on a check list of criteria that need to be individually analyzed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation.¹⁰⁶

The “nature of the question” factor emerged as the logical starting point for the contextual analysis.¹⁰⁷ Cases of fact, mixed fact and law, exercise of discretion, and implementation of policy, called for deference without

¹⁰⁰ *Ibid.* at 262.

¹⁰¹ 2008 SCC 32, [2008] 2 S.C.R. 195 [*Proprio Direct*].

¹⁰² *Khosa*, *supra* note 75.

¹⁰³ *Nolan*, *supra* note 93.

¹⁰⁴ *Dunsmuir*, *supra* note 1 at 224-25 and 226. These steps were also followed in *Nolan*, *ibid.* at 695.

¹⁰⁵ *Dunsmuir*, *ibid.* at 226; *Khosa*, *supra* note 75 at 375.

¹⁰⁶ *Khosa*, *ibid.* at 376.

¹⁰⁷ *Dunsmuir*, *supra* note 1 at 264; note that in determining the appropriate standard of review in *Dunsmuir*, *ibid.* at 222, Bastarache and LeBel JJ. began their contextual analysis with the “nature of the question” factor. See also *Khosa*, *supra* note 75 at 351, where Binnie J. stated:

Dunsmuir teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review.

And see *Khosa*, *ibid.* at 403, where Rothstein J. provided several examples of legislation which put the focus of judicial review on the “nature of the question” under review as opposed to the nature of the decision-maker.

further inquiry. Deschamps J., writing for herself and two other members of the Court, felt that

[b]y focusing first on “the nature of the question,” ... it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.¹⁰⁸

All three judgments treated the “nature of the question” and the consideration of the merits of outcomes in the same manner. On this basis, it is possible to think that a majority of the Court will come to adopt expressly Deschamps J.’s view on the lessening importance of the distinction between judicial and appellate review.

The privative clause factor signalled, subject to constitutional and jurisdictional considerations, the legislature’s intention that deference be shown administrative decision-making. Bastarache and LeBel JJ. stated that a privative clause “gives rise to a strong indication of review pursuant to the reasonableness standard.”¹⁰⁹ Binnie J. referred to the existence of a privative clause as “more than just another ‘factor’ in the hopper of pragmatism and functionality,” and stated that “[i]ts existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it ...”¹¹⁰ Deschamps J. wrote that “where there is a privative clause, Parliament or a legislature’s intent to leave the final decision to that [administrative] body cannot be doubted and deference is usually owed to the body.”¹¹¹

The expertise factor also indicated restraint. Where an administrative decision-maker interpreted his or her home statute, or a closely-related statute, in areas within the decision-maker’s core expertise, deference would be shown on general questions of law that would otherwise attract review on the basis of correctness. Only “exceptionally,” where “the interpretation of that statute raises a broad question of the tribunal’s authority,” would correctness apply.¹¹²

¹⁰⁸ *Dunsmuir*, *supra* note 1 at 265; see also *Khosa*, *supra* note 75 at 376.

¹⁰⁹ *Dunsmuir*, *ibid.* at 223.

¹¹⁰ *Ibid.* at 258 [emphasis in original].

¹¹¹ *Ibid.* at 265-66. The statement was qualified to indicate that despite the presence of a privative clause deference was not owed where the administrative body overstepped its delegated powers or was interpreting legislation in respect of which it did not have expertise.

¹¹² *Nolan*, *supra* note 93 at 697 citing *Dunsmuir*, *supra* note 1 at 223 and 225. In *Nolan*, *ibid.* at 696, the expertise of the Financial Services Tribunal, “being both close to the industry and more familiar with the administrative scheme of pension law,” meant

There was some judicial disagreement about whether expertise by itself justified deference either in the absence of a privative clause or in the presence of a statutory right of appeal. If a clearly-worded privative clause signalled a legislative intention in favor of deference, parallel reasoning might suggest the opposite where the enabling statute contained either no privative clause or a statutory right of appeal. In *Khosa*, Rothstein J., in the minority on this point, held that expertise alone, without the presence of a privative clause, could not be taken as a “free-standing basis for deference.”¹¹³ He took issue with *Pezim v. British Columbia (Superintendent of Brokers)*,¹¹⁴ which held that an expert tribunal was entitled to deference even where a statutory right of appeal existed. The majority in *Khosa* disagreed, however, and reaffirmed *Pezim*. Therefore, while a clear statutory right of appeal might signal a legislative willingness to hold the administration to a correctness standard,¹¹⁵ that might not necessarily be the case depending on the expertise of the administrators involved. Binnie J. wrote:

I do not share Rothstein J.’s view that absent statutory direction, explicit or by necessary implication, no deference is owed to administrative decision makers in matters that relate to their role, function and expertise.¹¹⁶

One of the challenges with the pragmatic and functional analysis is determining the weight to be given each factor when one factor points in the direction of deference but another does not. Rothstein J. highlighted this issue: “How a court will weigh and balance the four standard of review factors remains difficult to predict and therefore more costly to litigate.”¹¹⁷ *Dunsmuir*, *Proprio Direct*, *Khosa* and *Nolan*, however, reaffirm that deference will be accorded in circumstances where an appropriately-

that the more deferential standard of reasonableness was appropriate even though the interpretation of pension plans raised questions of law that would normally attract correctness review. See also *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 at 783 [*Bell*], where a statutory grant of extensive regulatory powers, and a privative clause, made “self-evident” the expertise of the Canadian Radio-television and Telecommunications Commission. This expertise, and the polycentric nature of the matter in issue, suggested a more deferential standard of review.

¹¹³ *Khosa*, *supra* note 75 at 391.

¹¹⁴ [1994] 2 S.C.R. 557 [*Pezim*]. *Proprio Direct*, *supra* note 101, was also a case in which deference was shown an expert tribunal even in the presence of a statutory right of appeal; see *ibid.* at 206, where Abella J., for the majority, stated: “The question whether *Proprio Direct* breached those [ethical] standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association’s statutory responsibilities.”

¹¹⁵ *Dunsmuir*, *supra* note 1 at 249, 252 and 259-60; and *Khosa*, *supra* note 75 at 376.

¹¹⁶ *Khosa*, *ibid.* at 361.

¹¹⁷ *Ibid.* at 398.

worded privative clause or core administrative expertise is present.¹¹⁸ Relevant expertise, often associated with the interpretation of enabling legislation, will generally attract restraint even if the matter in issue is a general question of law, and even in the presence of a statutory right of appeal. In other words, where contextual factors point in opposite directions, the factors favoring deference will be given greater weight than the factors pointing to correctness. This clarity will go a long way towards making judicial review outcomes more predictable.

4. *Other Administrative Justice Values*

The common element behind the convergence of judicial and appellate review is respect for the system of justice under examination. Sometimes, perhaps most of the time, respect will mean deferring to the initial decision-maker. At other times, however, respect will mean intervening to strengthen values essential to the integrity of the system in question. In the case of administrative justice, lessening the distinction between judicial and appellate review will enable the Court to show respect by articulating rules that define a principled balance between the necessity for restraint and the advantages of intervention in various contexts.

Deschamps J. is not the only jurist to question the continuing utility of distinguishing between judicial and appellate review. The Honourable Roger P. Kerans, a retired judge of the Alberta Court of Appeal, and Kim M. Willey, argue that appropriate deference standards must be taken into account by all reviewing tribunals regardless of whether the context is criminal, civil or administrative.¹¹⁹ The two main standards that they cite are correctness, where the views of the appellate judge prevail, and reasonableness, where the opinion of the decision-maker of the first instance is retained unless the applicant can demonstrate that that decision is not one that a sensible person, acting responsibly, and who has been properly instructed in the governing law and the circumstances of the case, would make.¹²⁰ The factors to be taken into account in determining the appropriate standard of review include a “presumption of fitness” of the initial decision-maker, an analysis of the nature of the question including its precedential impact (consistency and universality), and a concern that the administration of justice not be brought into disrepute. Kerans and Willey conclude:

¹¹⁸ *Dunsmuir*, *supra* note 1 at 265-66.

¹¹⁹ Hon. Roger P. Kerans and Kim M. Willey, *Standards of Review Employed by Appellate Courts*, 2nd ed. (Edmonton: Juriliber, 2006).

¹²⁰ *Ibid.* at 38; three other standards are mentioned but they play a lesser role.

Much of this work [on standards of review], then, may apply equally to all forms of review despite what lawyers, for historical or other reasons, may call review. It applies to appeals, to reviews by one administrative tribunal of the work of another administrative tribunal, and to “judicial review,” the supervision by a judge or judges of the work of an administrative tribunal. ... We repeat that the key is that the second tribunal reviews the work of the first. That basic fact raises a presumption of fitness and, as a result, a measure of deference.¹²¹

This analysis not only supports Deschamps J.’s observations on the diminishing distinction between judicial and appellate review, it suggests that the one exception that she identified as separating the two forms of review might not be an exception after all. Normally, questions of law do not command deference on either judicial or appellate review. Deschamps J. pointed out, however, that deference would be accorded on judicial review where an expert administrative decision-maker, acting within jurisdiction, and protected by a privative clause, was dealing with a question of law concerning the interpretation of his or her home statute.¹²² The deference on questions of law shown an expert administrative decision-maker in the judicial review context, however, finds its counterpoint in the deference shown a trial judge “presumed fit” in the appellate context. The presumption of fitness described by Kerans and Willey is a presumption that the trial judge is fit to discharge his or her assigned task in a competent fashion.¹²³ Those tasks include elaborating the necessary legal rules and reaching a decision that is reasonable on the merits. So long as the trial judge’s elaboration of the law is reasonable, it will be allowed to stand on appeal. In other words, reasonable interpretations on questions of law by trial judges presumed fit, and by administrative decision-makers deemed expert, will both be treated as exceptions to the rule that questions of law must be dealt with correctly. Using the Kerans and Willey approach, there is no distinction between

¹²¹ *Ibid.* at 4-5. This passage is accompanied by fn. 4 that answers the traditional contrary view:

Professor Wade does not persuade us otherwise. See Wade, Sir W., *Administrative Law* 6th ed. (Oxford: Clarendon Press, 1988) p. 36. He distinguishes judicial review of administrative decision from appeals on the basis that the former is about lawfulness and the latter about “the merits.” In his own work, however, he acknowledges that prerogative review for lawfulness often amounts to review for reasonableness. The burden of this work is that this is largely true also of appellate review. ... Of course, prerogative review differs from appellate review in other ways, notably in procedural matters and the fact that the reviewer often cannot offer a substituted verdict. This lack of power to offer sensible relief does not detract from the fact that review occurs, and that a question about standard of review arises.

¹²² *Dunsmuir*, *supra* note 1 at 265-66.

¹²³ Kerans and Willey, *supra* note 119 at 13-15, 21 and 72.

judicial and appellate review in the one case that Deschamps J. felt separated the two forms of review.

Deference is one of the values that review takes into account. It shows respect for the abilities and experience of the initial decision-maker and concern for judicial economy. Kerans and Willey suggested, however, that the need to defend other values might justify a reviewing court's intervention. Where a court feels the need to defend these other values, it may, by labeling the matter in issue a "question of law," and so subject to correctness, substitute its opinion in place of the administration. Kerans and Willey put it this way:

When a reviewing tribunal categorizes an issue as an "error of law," it may simply be saying that the reviewing tribunal has decided that this is a matter for which the final decision rests with the reviewing tribunal. ...the mere invocation of the label begs the question *why* the issue is thus categorized.¹²⁴

The answer to this "why" question relates to three values that safeguard the integrity of the system of justice. First, intervention by way of the appellate court's law-making function will be justified where the court considers that a new precedent or rule, or a different interpretation of an existing law, is needed to bring about a clear improvement in the quality of law. Where no clear improvement is at stake, it would be a wasteful duplication of effort, given the presumption of fitness, for the appellate court to substitute its view for a reasonable interpretation by an initial decision-maker. Second, intervention will be justified on consistency grounds where subordinate decision-makers are not interpreting like rules, or deciding like cases, in a like manner. Third, there will be situations in which intervention is necessary to prevent the administration of justice from being brought into disrepute. A case of jurisdictional conflict between two subordinate decision-makers provides an example.

Consideration of these values is as relevant on judicial as on appellate review. Where an issue has precedential value beyond the particular administrative context in which it has arisen, where intra-tribunal panels cannot arrive at consistent decisions, or where jurisdictional confusion or other circumstances risk bringing the system of administrative justice into disrepute, the need for judicial intervention may in the appropriate circumstances trump the need for deference.

In *Dunsmuir*, consistency was cited as a justification for reviewing general questions of law on a correctness basis. Bastarache and Lebel JJ. stated that as important as the need for deference is, correctness with

¹²⁴ *Ibid.* at 157 [emphasis in original].

respect to certain questions of law is necessary in order to avoid inconsistent applications of law.¹²⁵ Questions of general law, because of their impact on the administration of justice as a whole, required uniform and consistent answers.¹²⁶ Deschamps J. stated that reduced deference would insure that laws of general application would be interpreted correctly and consistently, “a matter of prime societal importance.”¹²⁷

Dunsmuir provided an example of judicial review that was indistinguishable from appellate review. The case had an impact beyond Dunsmuir’s immediate situation because it prompted a more general examination of the employment relationship between government and contractual employees. The adjudicator’s decision to treat “dismissal without cause” in this context according to common law, as opposed to statute law, constituted an exercise in law-making with strong precedential value. Moreover, the adjudicator could not claim relatively greater expertise than the court with respect to interpreting the relevant common law. The precedential value of the decision, and the need to resolve a potential conflict in the law, justified the reviewing court in abandoning deference in favor of the exercise of its own law-making function.

This is not to say that reviewing courts will always place deference ahead of other administrative justice values. What it does say is that, as a result of *Dunsmuir*, courts conducting judicial review of administrative action can be transparent about taking these other values into account. Since *New Brunswick Liquor*, judicial review has distinguished itself from appellate review by citing the need to defer to administrative decisions taken within jurisdiction. When some courts felt a need to intervene, they would do so by adopting a deferential standard and then applying it in a non-deferential way. By suggesting that “the judicial review of administrative action is often not distinguishable from the appellate review of court decisions,”¹²⁸ Deschamps J. relieves the reviewing court of the need to pay lip-service to deference in situations in which it is necessary for reasons related to the integrity of administrative justice to substitute the court’s opinion for that of the administration.

Bibeault,¹²⁹ a successor rights case, provided an earlier example of a case where the need to support values integral to the administrative justice system made judicial review indistinguishable from appellate review. The question of law at issue was the interpretation of section 45 of the Quebec

¹²⁵ *Dunsmuir*, *supra* note 1 at 222.

¹²⁶ *Ibid.* at 250-51.

¹²⁷ *Ibid.* at 266.

¹²⁸ *Ibid.* at 265.

¹²⁹ *Supra* note 19.

Labour Code.¹³⁰ That section provided that union certification could only be transferred to a new employer upon the, “alienation or operation by another ... of an undertaking.” Section 46 of the Code stated that a “labour commissioner may make any order deemed necessary to record the transfer of rights ...” The Code further provided that decisions by Labour Commissioners could be appealed to the Labour Court, an administrative body. In *Bibeault*, the Labour Commissioner held that section 46 gave him jurisdiction to determine whether there had been an “alienation or operation by another ... of an undertaking.” He then held that such an “alienation or operation by another” had occurred and ordered the certification transferred. The Labour Court upheld the Commissioner’s decision but the members of that administrative body disagreed amongst themselves on the meaning of statutory words “alienation” and “undertaking.”

Writing for the Supreme Court, Beetz J. held that the question of whether there had been an “alienation ... of an undertaking” was a jurisdictional question to be reviewed on the basis of correctness. He overruled the Commissioner’s interpretation of section 46 of the Code holding that the section was merely procedural. It gave the Commissioner the power to record a transfer of rights, not the power to determine whether there had been an “alienation of an undertaking.” Beetz J. noted the Commissioner’s relative lack of expertise when it came to interpreting the concept of “alienation,” a concept borrowed from Quebec civil law.

It was not self-evident that the interpretation of the word “alienation” was a jurisdictional matter as opposed to a matter within the Labour Commissioner’s authority under the Code. Nor was it a given that the Quebec National Assembly intended “alienation” to have the same meaning in labour as in civil law. Arguably, the appropriate meaning in the labour context was best left to the Labour Commissioner who was interpreting his enabling statute, who had core expertise in the area, and who had an appreciation for the meaning that would best promote stable employer-employee relations.

In both *New Brunswick Liquor* and *Bibeault*, the issue concerned an administrative decision-maker’s interpretation of an enabling statute. The reasoning and results in the two cases differ. In *New Brunswick Liquor*, Dickson J. rejected the use of jurisdictional arguments and upheld the Board’s interpretation. In *Bibeault*, Beetz J. underlined the importance of jurisdiction as justification for invoking the “superintending and reforming” role of the court and quashed the administrators’

¹³⁰ *Labour Code*, R.S.Q., c. C-27.

interpretation.¹³¹ Following *Bibeault*, the Quebec National Assembly signalled its disagreement with the result in *Bibeault* by amending the enabling legislation to make it clear that Labour Commissioners had jurisdiction to determine whether an “alienation or operation by another ... of an undertaking” had occurred and by inserting a privative clause to protect their decision.

Despite all of this, Beetz J. was right to intervene in *Bibeault*. The real reason for his intervention cannot be understood in terms of policing jurisdictional boundaries. That simply begged the question as to why the interpretation of the enabling legislation was a jurisdictional matter at all. The real justification for the intervention was the need to assist an administrative agency that had gone into grid-lock as a result of its own inability to rationalize conflicting decisions from its different panels. This was not a situation in which the Court showed a lack of respect for the expertise of the labour administration. Rather, it was a situation in which the administration needed the help of an umpire to assist it in resolving an intra-agency conflict over the correct interpretation of its enabling statute. In these circumstances, the provision of assistance by the Court was, if anything, a mark of the respect for the labour administration.

These background facts were set out for the first time thirteen years after *Bibeault* in a case which relitigated the *Bibeault* issues. In *Ivanhoe Inc. v. UFCW, Local 500*,¹³² Arbour J. described the situation prior to *Bibeault* as one of “ongoing debate and paralysis.”¹³³ She painted the following picture:

It is therefore clear that at the time *Bibeault*, *supra*, was decided, the Labour Court found itself so deadlocked that no solution could apparently be reached unless the higher courts stepped in. At that point, the Labour Court [an administrative body] had been unable to develop a coherent policy for interpreting s. 45 that would have provided a clear definition of what constitutes an undertaking and of what type of transfer is required in order for s. 45 to apply. The decision in *Bibeault* answered these questions and broke the deadlock, so that the Labour Court could once again function properly.¹³⁴

Ivanhoe reversed *Bibeault*. The Supreme Court’s new willingness to defer to the Labour Court’s interpretation of the Code was based on the amendments to the Code which clarified the Commissioner’s jurisdiction and on the new privative clause. Also crucial was the fact that the Labour Court and Commissioners were able, as a result of Beetz’s decision in

¹³¹ *Bibeault*, *supra* note 19 at 1086 and 1090.

¹³² 2001 SCC 47, [2001] 2 S.C.R. 565 [*Ivanhoe*].

¹³³ *Ibid.* at 607.

¹³⁴ *Ibid.* at 597.

Bibeault, to develop a coherent successor rights jurisprudence.¹³⁵ Arbour J. underlined the importance of consistency as a value integral to administrative justice:

This Court has stressed the importance of the consensus positions adopted by administrative tribunals. Consensus allows for a degree of consistency and predictability in the law that fosters the equitable resolution of administrative disputes.¹³⁶

Although *Bibeault* was a judicial review case, it was, again to borrow Deschamps J.'s words, "not distinguishable" from appellate review. The court adopted a correctness standard in order to resolve an *intra*-agency conflict that was threatening the integrity of the administrative system.

*British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*¹³⁷ provides another example of judicial review that bears all of the hallmarks of appellate review. Here too, the Court was prepared to substitute its view of the law for that of the administration, this time in order to resolve an *inter*-agency jurisdictional conflict. As was the case in *Dunsmuir*, and in *Bibeault*, deference was made to accommodate other administrative law values.

The issue in *Shaw* was whether a cable company that was permitted to use a telephone company's poles was permitted to use cable company, rather than telephone company, linemen. A labour arbitrator held that the collective agreement between the telephone company and its linemen prevented the telephone company from allowing any linemen other than telephone company linemen on the poles. The Canadian Radio-television and Telecommunications Commission came to the opposite conclusion, ruling that the telephone company had to permit the cable company to use cable company linemen.

The Court unanimously agreed that in cases of "true operational conflict" it should intervene on correctness grounds to resolve jurisdictional conflicts and avoid incoherence in the law or its application. Five justices held that there was a "true operational conflict" in *Shaw*. They overturned the labour arbitrator's decision even though he was expert in the interpretation of the collective agreement and was protected by a privative clause.¹³⁸ L'Heureux-Dubé J. observed:

¹³⁵ *Ibid.* at 607.

¹³⁶ *Ibid.* at 608.

¹³⁷ [1995] 2 S.C.R. 739 [*Shaw*].

¹³⁸ *Ibid.* at 770.

... [I]t is my view that where the legislature creates two administrative tribunals which reach decisions that are in operational conflict, the “presumption of legislative coherence” requires the courts to abandon policies of curial deference and attempt to reconcile the conflict.¹³⁹

In an earlier case, *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*,¹⁴⁰ the Supreme Court refused to intervene to resolve an inter-agency jurisdictional conflict despite citing academic authority to the effect that consistency in administrative decision-making would enable regulatory authorities to plan their affairs in an atmosphere of stability and predictability, would help build public confidence in the integrity of the administrative justice system, and would forward the interests of justice by ensuring that similar cases would be given similar treatment.¹⁴¹ L’Heureux-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.”¹⁴² She wrote:

The requirement of consistency in the application of the law is unquestionably a valid objective and so a persuasive argument. For litigants to receive diametrically opposite answers to the same question, depending on the identity of the members of administrative tribunals, may seem unacceptable to some and even difficult to reconcile with several objectives, including the rule of law. Yet, as the courts have held, consistency in decision-making and the rule of law cannot be absolute in nature regardless of the context. So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.¹⁴³

In *Shaw*, L’Heureux-Dubé J. distinguished her holding in *Domtar* by stating that the conflict in *Domtar* was “relatively minor” and did not prevent the two administrative decisions in question from both being implemented.¹⁴⁴

The Supreme Court in *Shaw* recognized that judicial review of administrative action will, in appropriate circumstances, take into account values other than simply deference. In this, its approach to review mirrors that of appellate courts. This is not surprising. The values protected by appellate courts, which include deference as a primary consideration, also

¹³⁹ *Ibid.*

¹⁴⁰ [1993] 2 S.C.R. 756 [*Domtar*].

¹⁴¹ *Ibid.* at 784-87.

¹⁴² Yves-Marie Morissette, “Le contrôle de la compétence d’attribution: thèse, anthèse et synthèse” (1986) 16 *R.D.U.S.* 591 at 634, cited in *Domtar*, *ibid.* at 785-86.

¹⁴³ *Ibid.* at 787-88.

¹⁴⁴ *Shaw*, *supra* note 137 at 767-68.

include rationality, consistency, equality, judicial economy and the maintenance of public respect for justice. All of these values are also integral to the quality of administrative decision-making.¹⁴⁵

5. Conclusion

Judicial review will be simpler in the post- *Dunsmuir* era. Reviewing courts will be able to apply a single reasonableness standard to both the legalities and the merits of the administrative decisions. The real potential for simplification, however, is found in Deschamps J.'s insight that judicial and appellate review are often indistinguishable. The two forms of review have converged through time and both must protect similar values in order to safeguard the systems of justice that they supervise.

In chronicling administrative law's retreat from formalism over the last half century,¹⁴⁶ it is striking how often progress has been made by abandoning distinctions that once seemed indispensable but that later proved unworkable and unnecessary. Many jurisdictions have replaced multiple prerogative writs with a single statutory application for review. *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*¹⁴⁷ did away with the need to distinguish between judicial, quasi-judicial and administrative tribunals by introducing the doctrine of procedural fairness. The application of the patently unreasonable standard was generalized from cases where specialized tribunals were protected by privative clauses¹⁴⁸ to cases where they were not. Professor Langille described this evolution as giving rise to a "restrictive and unified theory of judicial review."¹⁴⁹ In *Baker v. Canada (Minister of Citizenship and Immigration)*,¹⁵⁰ L'Heureux-Dubé J. extended the application of the pragmatic and functional test from statutory interpretation cases to discretion cases.¹⁵¹ Professor Mullan commented:

¹⁴⁵ See Morissette, *supra* note 142 at 631-36, cited in *Domtar*, *supra* note 140 at 785-86.

¹⁴⁶ Wilson J. discusses this history in *Corn Growers*, *supra* note 9 at 1332-46.

¹⁴⁷ [1979] 1 S.C.R. 311.

¹⁴⁸ *New Brunswick Liquor*, *supra* note 16.

¹⁴⁹ Brian Langille, "Developments in Labour Law: The 1981-82 Term" (1983) 5 Sup. Ct. L. Rev. 255 at 246, cited by Wilson J. in *Corn Growers*, *supra* note 9 at 1340.

¹⁵⁰ [1999] 2 S.C.R. 817 [*Baker*].

¹⁵¹ See *ibid.* at 854 where L'Heureux-Dubé J. stated:

It is, however, inaccurate to speak of a rigid dichotomy of "discretionary or "non-discretionary" decisions. ... [T]here is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options.

... [B]y extending the 'pragmatic and functional' approach typical of review for jurisdictional error to review for abuse of discretion ..., the Court has provided an overarching or unifying theory for review of the substantive decision of all manner of statutory and prerogative decision makers."¹⁵²

Baker hinted at further distinctions that might potentially disappear. In that case, L'Heureux-Dubé J. referred to international and constitutional norms as possible repositories of values capable of defining the reasonable exercise of administrative discretion.¹⁵³ Some commentators saw in this a lessening of the traditional distinctions between the branches of public law and an emergence of a "unity to public law, organized around fundamental human rights."¹⁵⁴

The complex intellectual superstructure buttressing pre- *Dunsmuir* judicial review has been in risk of collapsing the whole enterprise for some time. The need to simplify has been pressing. *Dunsmuir* created the opportunity to do away with the distinction between the patently unreasonable and reasonableness *simpliciter* standards of review. Deschamps J. and two of her colleagues went further and challenged the distinction between judicial and appellate review. Their point is worth serious consideration. Both judicial and appellate review safeguard the same kinds of values, values such as deference, consistency and the need to preserve public respect for the administration of justice. Perhaps Dicey's refusal to think of administrative law as a separate branch of jurisprudence, and his insistence that the officials of the state be subject to ordinary law administered by ordinary courts, is, at least with respect to review, justified after all.¹⁵⁵

¹⁵² Mullan, "Administrative Law," *supra* note 29 at 108.

¹⁵³ *Baker*, *supra* note 150 at 861-62.

¹⁵⁴ David Dyzenhaus, "Baker: The Unity of Public Law?" in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford and Portland Oregon: Hart Publishing, 2004) at 3.

¹⁵⁵ Dicey, *supra* note 7 at 202-03.