Deference and Reasonableness Since *Dunsmuir*

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The author addresses two perennial problems in Canadian administrative law: the choice of a standard of review and the inconsistent application of the reasonableness standard. With these problems in mind, the Supreme Court of Canada in Dunsmuir *set out to establish a "principled framework that is more coherent and workable". The patent unreasonableness standard was eliminated, leaving the options of review as correctness and reasonableness, and the Court laid out some categories of issues that would properly be reviewed on each standard. Nevertheless, the author argues that the majority judgment failed to deliver a framework for judicial review that addresses these two problems in a coherent manner.*

*In four recent Supreme Court decisions—*Alberta Teachers', Halifax, Doré *and* Nor-Man*—the author detects a movement toward Binnie J's concurring suggestion in* Dunsmuir *that there should be a presumption of judicial deference, which would generally require judges to review administrative decisions on a standard of reasonableness rather than correctness. He goes on to illustrate that while this may be a promising development, it does not resolve the inconsistent application of the reasonableness standard. By contrasting the Court's decisions in* Alberta Teachers' *and* Newfoundland Nurses' *with those in* Figliola *and* Mowat*, the author demonstrates that the Court currently uses drastically different approaches to reasonableness review.*

Taking inspiration from the methodology used in Baker*, which identified the variables that would determine the degree of procedural fairness owed in a specific case, the author suggests a more contextual approach to reasonableness review. This would, in his view, allow meaningful engagement with the particularities of each case while respecting the values of "justification, transparency and intelligibility" advanced in* Dunsmuir.

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Introduction

> The problem is that courts have lately felt obliged to devote too much time to multi-part threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on the merits.
>
> –Binnie J, *Dunsmuir v New Brunswick (Board of Management)*[1]

In *Dunsmuir*, the Supreme Court of Canada set out "to re-examine the foundations of judicial review and the standards of review applicable in various situations".[2] While the Court's main objective was to simplify the unwieldy mechanics of the pragmatic and functional approach, the decision implicates other issues which extend beyond the standard of review. Even though the consequences of *Dunsmuir* are still unfolding, there is now enough material available to consider whether its impact lives up to its promise of establishing a "principled framework that is more coherent and workable".[3]

In order to assess *Dunsmuir*'s legacy, its effect on the practice of judicial review must first be clarified. In my view, the majority opinion in *Dunsmuir* raises two general issues related to judicial deference and reasonableness review. The first issue, which is the principal focus in *Dunsmuir*, concerns what Binnie J in his concurring opinion calls a "threshold" question about deference: should judges review an administrative decision according to a standard of correctness or reasonableness? The second issue concerns the more substantive question of reasonableness, which requires an assessment of "the who, what, why and wherefor of the litigant's complaint on the merits".[4]

1. 2008 SCC 9 at para 154, [2008] 1 SCR 190.
2. *Ibid* at para 24.
3. *Ibid* at para 32. See e.g. Gerald P Heckman, "Substantive Review in Appellate Courts since *Dunsmuir*" (2009) 47:4 Osgoode Hall LJ 751.
4. *Dunsmuir*, *supra* note 1 at para 154.

When *Dunsmuir* is framed in this way, it seems that the majority opinion is full of mixed messages. In one sense it preserves the status quo by relabelling, rather than rewriting, the pragmatic and functional approach: it is now called "standard of review analysis", but the content is essentially the same. The only minor difference is that after *Dunsmuir* one need not embark upon a standard of review analysis in situations where existing case law has already determined that judicial deference is owed with respect to a particular question.[5]

However, the decision implements other dramatic changes while claiming that those alterations are merely cosmetic rather than foundational. For example, the majority opinion explodes the distinction between the patent unreasonableness and reasonableness simpliciter standards of review, but insists that this move "does not pave the way for a more intrusive review by courts".[6] That opinion also categorizes a handful of issues which presumably attract correctness review: constitutional questions, "true" jurisdictional questions, questions of law which are of general importance to the legal system as a whole and issues concerning concurrent legal authority.[7] Nevertheless, Bastarache and LeBel JJ insist that they "neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years" and that judges "must not brand as jurisdictional issues that are doubtfully so".[8] In doing so, they reiterate Dickson J's warning in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp.*[9]

Mixed messages also haunt the Supreme Court's approach to reasonableness review in *Dunsmuir*. On the one hand, the majority opinion adopts David Dyzenhaus's idea that judicial deference requires "respectful attention to the reasons offered"[10] by an administrative decision-maker, and builds on that idea by stating that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility

5. *Ibid* at para 62.
6. *Ibid* at para 48.
7. *Ibid* at paras 58–61.
8. *Ibid* at para 59.
9. [1979] 2 SCR 227, 97 DLR (3d) 417.
10. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286 [Dyzenhaus, "The Politics of Deference"].

within the decision-making process".[11] On the other hand, the Court gives short shrift to the adjudicator's justification, which explained why he believed that the law entitled him to inquire into the public employer's reasons for firing David Dunsmuir. So, while the adjudicator's decision required "justification, transparency and intelligibility" on the part of that employer, the Court nevertheless concluded that it "was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded".[12] Moreover, the Court concluded that by requiring the employer to hear Dunsmuir before terminating his employment—a proposition that was reasonable given the state of Canadian administrative law at the time[13]—the adjudicator had committed a reviewable error of law.[14] In short, the Court's decision to quash the adjudicator's decision in *Dunsmuir* is ironic because the Court's substantive assessment of the decision is at odds with the nominal values and purposes it expressly associates with reasonableness review.

While it is tempting to sift through *Dunsmuir*'s tea leaves again, I want to focus instead on its impact by examining whether it has changed how judges approach the standard of review analysis and how they assess the reasonableness of administrative decisions. In Parts I and II, I will briefly situate *Dunsmuir* on the historical continuum of Canadian administrative law and will examine how it has affected the standard of review applied to a range of administrative decisions. This analysis reveals that while the concept of jurisdictional error is still at large, for the first time since *CUPE*, its days appear to be numbered. Over the past year, the Supreme Court has signalled its renewed commitment to *CUPE* in a series of decisions concerning a wide variety of administrative decisions made by privacy commissioners, labour arbitrators, professional disciplinary tribunals and human rights agencies. These cases suggest that the standard of review has shifted from correctness to reasonableness in subject areas where, until very recently, the Supreme Court has not been deferential. The

11. *Dunsmuir*, *supra* note 1 at paras 47–48.

12. *Ibid* at para 76.

13. See e.g. *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners* (1978), [1979] 1 SCR 311, 88 DLR (3d) 671; *Kane v University of British Columbia*, [1980] 1 SCR 1105, 110 DLR (3d) 311; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653, 69 DLR (4th) 489; David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21:2 Can J Admin L & Prac 117.

14. *Dunsmuir*, *supra* note 1 at para 117.

upshot of all of this is that since *Dunsmuir* the Court seems to be slowly tacking toward Binnie J's suggestion that there should be a presumption that administrative decisions are to be reviewed on a reasonableness standard.[15] In the long run, this shift toward a presumption of deference holds more promise of bringing real change than *Dunsmuir*'s proposed simplification of how judges and practitioners approach the threshold question in Canadian administrative law.

In Part III, I will shift my focus to consider how the application of the reasonableness standard of review in *Dunsmuir* reveals a persistent problem in Canadian administrative law—that despite all the rhetoric concerning the purposes of reasonableness review, the Supreme Court has generally failed to apply the reasonableness standard in a consistent or principled fashion. In this respect, *Dunsmuir* is symptomatic of a tendency toward a perfunctory form of merits review which fails to engage meaningfully with the substance and consequential impact of administrative decisions. I will argue in Part IV that while the Court's post-*Dunsmuir* approach to reasonableness review is both disappointing and confusing, it can be remedied by articulating a contextual approach—one that is inspired by the reasoning in *Baker v Canada (Minister of Citizenship and Immigration)*.[16] Such an approach should be premised on upholding the values of "justification, transparency and intelligibility" through judicial review, but should also explain why those values demand different degrees of independent, substantive scrutiny depending on the interests affected by the particular administrative decision. I will conclude by suggesting that the contextual factors identified in *Baker* for determining the content of the duty of fairness—the nature of the decision being made, the nature of the statutory scheme, the importance of the decision to the individual or individuals affected, the legitimate expectations of the person challenging the decision, and respect for the choices made by the agency itself—can also serve to identify what sort of justification reasonableness review calls for in a particular administrative context.

15. *Ibid* at para 146.
16. [1999] 2 SCR 817, 174 DLR (4th) 193.

I. Judicial Deference and Reasonableness Review Before *Dunsmuir*

In order to assess the likely impact of *Dunsmuir*, it is useful to consider how the case relates to some of the more general historical themes in Canadian administrative law. Given the parameters of this paper, I cannot undertake a detailed assessment of the voluminous case law which preceded *Dunsmuir*. Nevertheless, I will try to explain briefly where that case fits on the broader historical continuum.

To that end, it is helpful to divide the history of Canadian administrative law into three different periods of doctrinal development.[17] The first period might be called the "formal and conceptual" era, because the practice of judicial review hinged on a formal conception of the separation of powers, whereby legislatures, judges and administrative officials performed analytically distinct roles. Legislatures had a monopoly on creating law, judges had a monopoly on interpreting the law, and administrative officials were responsible for implementing the law.[18] The main point of the formalist conception of the separation of powers was to keep judges from reassessing the merits of legislation or administrative decisions, because that would extend beyond the formal role assigned to judges and enable them to meddle in politics. Thus, rather than coming to grips with more fundamental and controversial questions about institutional responsibilities in a modern constitutional democracy or scrutinizing the merits of a particular administrative decision, the law pertaining to judicial review erected a series of abstract conceptual distinctions that would maintain the formal separation of powers.[19]

In order to maintain the formalist account, judges asserted that the boundaries of administrative authority were determined *ab initio* by the legislature and that the scope of judicial review was determined by

17. See Laverne Jacobs, "Developments in Administrative Law: The 2007–2008 Term—The Impact of *Dunsmuir*" (2008) 43 Sup Ct L Rev (2d) 1.

18. See David Dyzenhaus, "Formalism's Hollow Victory" (2002) 4 NZL Rev 525.

19. See H Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36:4 UTLJ 343; Frederick Schauer, "Formalism" (1988) 97:4 Yale LJ 509; John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1:1 UTLJ 53 [Willis, "Three Approaches"].

the nature of the legal issue or the powers at stake instead of the more wide-ranging contextual analysis that is familiar today. Hence, if an administrative decision implicated so-called "jurisdictional" issues or "judicial" functions, judges were entitled to intervene on a correctness basis in order to preserve legislative sovereignty or a Diceyan conception of the rule of law, which asserts that superior court judges ought to have a monopoly on interpreting the law.[20] By contrast, if the issues were deemed to be "non-jurisdictional" or "administrative" in nature, the practice of judicial review was more circumspect, and sometimes even submissive towards administrative decisions.[21] The result was that during the formal and conceptual period, judges tended toward an all-or-nothing approach to judicial review—one which zealously scrutinized the implementation of progressive economic policy (particularly collective bargaining regimes),[22] but turned a blind eye to the exercise of executive power during wartime.[23]

The practical shortcomings of the formal and conceptual approach, especially the arbitrary manner in which the scope and intensity of judicial review were determined, were not lost on scholarly commentators. DM Gordon condemned the doctrine of jurisdictional error, on the ground that "[a]nything like serious examination . . . of the case law on jurisdiction must convince an open-minded inquirer that there is virtually no proposition so preposterous that some show of authority to support

20. Albert Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co, 1959); John Willis, "Statute Interpretation in a Nutshell" (1938) 16:1 Can Bar Rev 1; John Willis, "Administrative Law and the British North America Act" (1939) 53:2 Harv L Rev 251; John Willis, "Section 96 of the British North America Act" (1940) 18:7 Can Bar Rev 517; HW Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1; Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58:1 UTLJ 75.

21. Dyzenhaus, "The Politics of Deference", *supra* note 10 at 286.

22. See e.g. *John East Iron Works Ltd v United Steel Workers of America, Local 3493*, [1948] 1 DLR 652, [1948] 1 WWR 81 (Sask CA); *Toronto Newspaper Guild v Globe Printing Company*, [1953] 2 SCR 18, [1953] 3 DLR 561. See also Paul C Weiler, "The 'Slippery Slope' of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950–1970" (1971) 9:1 Osgoode Hall LJ 1.

23. See *Reference Re Orders in Council in Relation to Persons of the Japanese Race*, [1946] SCR 248, [1946] DLR 321.

it cannot be found".[24] Similarly, Bora Laskin (then a law professor at the University of Toronto) referred to the concept of jurisdictional error as a "comforting conceptualism" which enabled judges to interfere with labour board decisions, even though such interference frequently undermined the policy objective of maintaining peaceful industrial relations.[25] The solution to this predicament, according to John Willis, was for judges to eschew conceptual analysis in favour of a "functional" approach to judicial review, one that would move away from a hidebound interpretation of statutory texts and from speculation about legislative intent, and focus instead on contextual factors which explain why administrative officials are better equipped than courts to interpret and implement legislative policy in the public interest.[26] Laskin took Willis' advice with him to the bench.[27] It was, he argued, "preferable to avoid generalized observations about jurisdictional defects taken from other cases", and to focus instead "on an examination of statutory functions" which had been entrusted to administrative decision-makers.[28]

This critique began to filter into Canadian administrative law after Laskin was appointed to the Supreme Court. This led to the second period of doctrinal development, which might be called the "pragmatic and functional" period, heralded by the *Nicholson*[29] and *CUPE*[30] cases. At first glance, these two decisions might seem to be an odd couple: *Nicholson* expanded the scope of judicial review for procedural fairness, while *CUPE*

24. DM Gordon, "The Relation of Facts to Jurisdiction" (1929) 45:3 Law Q Rev 459 at 459.

25. Bora Laskin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30:10 Can Bar Rev 986 at 994. See also BL Strayer, "The Concept of 'Jurisdiction' in Review of Labour Relations Board Decisions" (1963) 28:4 Sask Bar Rev 157; Ken Norman, "The Privative Clause: Virile or Futile?" (1969) 34:4 Sask L Rev 334; JG Pink, "Judicial 'Jurisdiction' in the Presence of Privative Clauses" (1965) 23 UT Fac L Rev 5.

26. Willis, "Three Approaches", *supra* note 19 at 17. See also Michael Taggart, "Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law" (2005) 43:3 Osgoode Hall LJ 224 at 244–52.

27. Bora Laskin, "Forword" (1983) 7:3 Dal LJ x; Bora Laskin, "John Willis: An Appreciation" (1972) 22:4 UTLJ ix.

28. *Regina v Ontario Labour Relations Board, Ex parte Metropolitan Life Insurance* (1968), [1969] 1 OR 412 at 414, 2 DLR (3d) 652 (CA).

29. *Supra* note 13.

30. *Supra* note 9.

preached the virtue of judicial deference on matters of substance.[31] But they are united at a deeper level. They both rejected what I have called the formal and conceptual approach to judicial review, in favour of an approach that was grounded in an understanding of the regulatory context, policy objectives and practical consequences of administrative decision-making.

Nicholson and *CUPE* demonstrated that a contextual approach to judicial review could incorporate both concern for individuals affected by an administrative decision and respect for the legitimacy of the administrative state. In *Nicholson*, the Supreme Court rejected the traditional assumption that a duty of procedural fairness was contingent on a "superadded" duty to act judicially,[32] and held that the duty of fairness applied to "administrative" as well as judicial functions.[33] The conceptual distinction between those two types of functions no longer limited the reach of that duty, which was eventually extended to "every public authority making an administrative decision . . . which affects the rights, privileges or interests of an individual".[34] When Dickson J extended the contextual approach in *CUPE*, he also asserted that "courts . . . should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".[35] He suggested that judges should focus on other factors, such as expertise and the explicit legislative delegation of authority (often reinforced by a privative clause), which explained why administrative decisions warranted judicial respect. He concluded that when the meaning of a statutory provision was ambiguous and its interpretation fell within the statutory mandate of an administrative body, judges should only intervene when that body's

31. See David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51:3 UTLJ 193 at 197.

32. *R v Legislative Committee of the Church Assembly, Ex parte Haynes-Smith* (1927), [1928] 1 QB (KB) 411 at 415. See also *Nakkuda Ali v MF de S Jayaratne* (1950), [1951] AC 66 (PC).

33. *Nicholson*, *supra* note 13 at 324–30.

34. *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 653, 24 DLR (4th) 44. This contextual approach to procedural fairness was further refined in *Knight*, *supra* note 13 and *Baker*, *supra* note 16 (where L'Heureux-Dubé J noted that "[a]ll of the circumstances must be considered in order to determine the context of the duty of procedural fairness" at para 21).

35. *Supra* note 9 at 233.

decision was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".[36]

Despite these important shifts, the transition away from the formal and conceptual approach was anything but straightforward. In particular, the Supreme Court struggled to develop a viable alternative to the jurisdictional/non-jurisdictional dichotomy, which explains why that terminology continues to crop up to the present day.[37] In the years immediately following *CUPE*, one set of decisions simply invoked the label of jurisdictional error with little or no discussion about how *CUPE* had diminished the importance of jurisdictional inquiries.[38] In the same period, another set of decisions declared that a standard of correctness applied to jurisdictional issues, and reserved the *CUPE* standard of patent unreasonableness for non-jurisdictional issues.[39] Just as in the formal and conceptual era, these cases did not adequately distinguish jurisdictional

36. *Ibid* at 237.

37. See e.g. David Mullan, "The Re-emergence of Jurisdictional Error" (1985) 14 Admin LR 326; David J Mullan, "The Supreme Court of Canada and Jurisdictional Error: Compromising *New Brunswick Liquor*?" (1987) 1:1 Can J Admin L & Prac 71; David J Mullan, "A Blast From the Past: A Surreptitious Resurgence of *Metropolitan Life*?" (1992) 5 Admin LR (2d) 97; David J Mullan, "Jurisdictional Error Yet Again—The Imprecise Limits of the Jurisdiction-Limiting *Canada (Attorney General) v. P.S.A.C.*" (1993) 11 Admin LR (2d) 117; David Mullan, "Recent Developments in Administrative Law—The Apparent Triumph of Deference!" (1999) 12:2 Can J Admin L & Prac 191; David Mullan, "Revisiting the Standard of Review for Municipal Decisions—When is a Pile of Soil an 'Erection'?" (2000) 13:3 Can J Admin L & Prac 319; David J Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17:1 Can J Admin L & Prac 59.

38. *Blanco v Rental Commission*, [1980] 2 SCR 827, 35 NR 585; *Québec (AG) v Labrecque*, [1980] 2 SCR 1057, 125 DLR (3d) 545; *Skogman v The Queen*, [1984] 2 SCR 93, 11 DLR (4th) 161; *National Bank of Canada v Retail Clerks' International Union*, [1984] 1 SCR 269, 9 DLR (4th) 10. But see *Teamsters Union v Massicotte*, [1982] 1 SCR 710, 134 DLR (3d) 385. For academic commentary, see David J Mullan, "Developments in Administrative Law: The 1980–81 Term" (1982) 3 Sup Ct L Rev 1 at 40–49; David J Mullan, "Developments in Administrative Law: The 1981–82 Term" (1983) 5 Sup Ct L Rev 1 at 17–29.

39. *St Luc Hospital v Lafrance*, [1982] 1 SCR 974, 42 NR 434; *Alberta Union of Provincial Employees v Olds College*, [1982] 1 SCR 923, 21 Alta LR (2d) 104; *Canadian Labour Relations Board v Halifax Longshoremen's Association*, [1983] 1 SCR 245, 46 NR 324; *Bibeault v McCaffrey*, [1984] 1 SCR 176, 7 DLR (4th) 1; *Blanchard v Control Data Canada Ltd*, [1984] 2 SCR 476, 14 DLR (4th) 289; *Syndicat des employés de production du Québec et de l'Acadie v Canada (Labour Relations Board)*, [1984] 2 SCR 412, 14 DLR (4th) 457.

from non-jurisdictional issues. Nevertheless, the Court continued to assume that the distinction was self-evident and uncontroversial.

The real transition away from the formal and conceptual approach came only after the Supreme Court began to elaborate the pragmatic and functional approach to judicial review as a distinct analytical framework.[40] In the years that followed, the Court began to explain how various contextual factors—especially the significance of administrative expertise—grounded a more general case for judicial deference. Even in cases where the enabling legislation provided an express statutory right of appeal, the Court concluded that there were cogent reasons for deferring to administrative decisions.[41] However, the pragmatic and functional analysis did not purge some traditional conceptual elements which often pulled in different directions—especially the distinctions between jurisdictional and non-jurisdictional issues and between law and fact—so it became more complex, confusing and conflicted. To accommodate this complexity, the Court added an intermediate standard so that judges could assess an administrative decision on the basis of correctness, reasonableness simpliciter or patent unreasonableness. In *Pushpanathan v Canada*, Bastarache J declared that "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".[42] For a short time, therefore, it seemed that the pragmatic and functional approach had finally eclipsed the conceptual approach.

But while the pragmatic and functional analysis grew like Topsy during this period, relatively little attention was given to the second question of how one should assess the reasonableness of a particular administrative decision on its merits. Instead, the Court resorted to abstract and tautologous definitions. For instance, a patently unreasonable decision was defined as being "clearly irrational"[43] or as having an "immediate or

40. *Union des employés de service, local 298 v Bibeault*, [1988] 2 SCR 1048, 35 Admin LR 153.

41. *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, 114 DLR (4th) 385; *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, 144 DLR (4th) 1.

42. [1998] 1 SCR 982 at para 28, 160 DLR (4th) 193.

43. *Canada (AG) v Public Service Alliance of Canada*, [1993] 1 SCR 941 at 963, 101 DLR (4th) 673.

obvious" defect, whereas it took "some significant searching or testing" to discover whether a decision was merely unreasonable.[44] As a result, judges tended to resort to conclusory statements without adequately explaining why a particular decision was reasonable or unreasonable from a more concrete legal perspective that would have examined its justification in light of its particular regulatory context.

The one notable exception in this respect was *Baker*.[45] The dispute in that case revolved around a discretionary decision to refuse Mavis Baker's request for an exemption from a deportation order so she could stay in Canada while her application for permanent residency was being processed. Even though Baker had four children who were Canadian citizens, her request, which was based on on humanitarian and compassionate grounds, was denied without reasons. It was only after her lawyer requested an explanation that she received the unedited file notes compiled by the investigating officer. In those notes, the investigating officer stated that because Baker had four children in Jamaica and another four children in Canada, she would "be a tremendous strain on our social welfare systems for (probably) the rest of her life".[46] After seeing the file notes, Baker applied for judicial review claiming that the decision was unreasonable.

Baker's claim was denied by both levels of the Federal Court on the ground that the notes did not disclose any reviewable error. At first instance, Simpson J held that that those notes indicated that the investigating officer had considered the interests of the children.[47] Justice Strayer, writing for the Court of Appeal, affirmed Simpson J's decision because the fact that the international *Convention on the Rights of the Child* had not been incorporated into domestic law meant that the investigating officer was not legally required to give any particular weight to the children's interests. In other words, as long as those interests were considered on the face of the decision, the court had no business

44. *Southam, supra* note 41 at para 57.

45. *Supra* note 16.

46. *Ibid* at para 5.

47. *Baker v Canada (Minister of Citizenship and Immigration)* (1995), 101 FTR 110 at para 5, 31 Imm LR (2d) 150.

reweighing the relevant legal considerations to assess the reasonableness of the outcome.[48]

The *Baker* decision not only established a duty to give reasons as a matter of procedural fairness and subjected the substance of discretionary decisions to the standard of reasonableness simpliciter, but also held that the reasons proffered had to be reasonable in the sense that they demonstrated that the decision-maker was "alert, alive and sensitive" to relevant legal principles.[49] Justice L'Heureux-Dubé explained that in order to assess the reasonableness of the officer's decision, the Court had to retrace the officer's reasoning to ensure that he had *appropriately* considered the children's interests. It was not enough for the investigating officer to acknowledge Baker's children on the face of the decision; the file notes had to demonstrate that he was "alert, alive and sensitive" to the fact that the enabling legislation, the departmental guidelines and a ratified (but unimplemented) international treaty all expressed the importance of preserving familial relationships and prioritizing children's interests in state proceedings. Justice L'Heureux-Dubé was also careful to point out that her analysis did not entail "that children's best interests must always outweigh other considerations",[50] but only that "where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable".[51] This latter point is important, because it preserves the distinction between correctness review and reasonableness review by showing that L'Heureux-Dubé J was prepared to defer to a decision to deport Ms. Baker as long as the Minister's decision was adequately justified.

The final bracket of time, which spans roughly from 2002 to when *Dunsmuir* was heard in 2008, might be called the "dis-functional" period in Canadian administrative law. On the threshold standard of review issue, cases decided during this period convey weariness and frustration with how complex and conflicted the pragmatic and functional analysis had become.[52] Justice LeBel's concurring opinions in *Chamberlain v Surrey*

48. *Baker v Canada (Minister of Citizenship and Immigration)* (1996), [1997] 2 FC 127, 142 DLR (4th) 554 (FCA).

49. *Baker*, *supra* note 16 at para 75.

50. *Ibid.*

51. *Ibid.*

52. See Jacobs, *supra* note 17 at 8–10.

School District No 36[53] and *Toronto (City) v CUPE, Local 79*[54] provide a general outline of the dis-functional critique. In those opinions, LeBel J challenged the notion that the pragmatic and functional framework had to be routinely applied whenever a court engaged in judicial review. Instead, he asserted that the legislature's express or implied intent with respect to the particular grant of administrative jurisdiction still served as an adequate criterion for judicial intervention. This approach, on its face, resurrects the notion of jurisdictional error because it assumes that the parameters of judicial review can be determined by direct reference to legislative intent, rather than through the more nuanced pragmatic and functional analysis of the regulatory context. The following passage from LeBel J's concurring opinion in *Chamberlain* is revealing in this respect:

> The ultimate question remains the legislature's intention. Going through the various factors in the "pragmatic and functional method" is not always the best path to that intention. In the context of this appeal, we should look instead to the statutory grant of power to the Board and the conditions attached to it. The courts are responsible for ensuring that the Board acts within the scope of its power. In my opinion, interference with the Board's functions on any other basis would generally be unwarranted.

Justice Lebel continued: "I do not intend to cast any doubt on the validity of the pragmatic and functional approach. On the contrary, I suggest that it is more consistent with the philosophy underlying that approach to adapt the framework of judicial review to varying circumstances and different kinds of administrative actors than it is to go through the same checklist of factors in every case, whether or not they are pertinent—a methodology which, I would suggest, is neither pragmatic nor functional".[55]

In the years that followed, the Court provided more fuel for the dis-functional approach by identifying different conceptual categories of issues that would attract review on a correctness standard: constitutional questions,[56] so-called "true" jurisdictional issues,[57] and general questions

53. 2002 SCC 86, [2002] 4 SCR 710.

54. 2003 SCC 63, [2003] 3 SCR 77.

55. *Chamberlain*, *supra* note 53 at paras 194–95. See also *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19, [2004] 1 SCR 485.

56. *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54, [2003] 2 SCR 504.

57. *United Taxi Drivers'*, *supra* note 55; *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140.

of law which are of central importance to the Canadian legal system.[58] The suggestion was that there was no need to conduct a pragmatic and functional assessment where these issues were in play. This trend in the Court's administrative law jurisprudence prompted two prominent scholars to warn that the contextual approach to judicial review "appears to have given way to a new brand of formalism".[59]

With respect to the question of how to assess reasonableness, the Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)* retreated from the "alert, alive and sensitive" approach.[60] *Suresh* concerned a discretionary decision by the Minister of Citizenship and Immigration to deport a Convention refugee who had been detained on the suspicion that he was a threat to national security. In addressing whether the Minister's decision was reasonable, the Court explicitly distanced itself from *Baker* by stating that "[i]f the Minister has considered the correct factors, the courts should not reweigh them".[61] In other words, as long as the Minister's decision was not "unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures—it should be upheld".[62] So instead of asking whether the reasons given by the Minister were (in the terms used in *Baker*) "alert, alive and sensitive" to relevant legal principles (including *Charter* values), the Court held in *Suresh* that reasonableness review was restricted ensuring that relevant legal factors had been mentioned. This prompted David Mullan to observe that the Court was "increasing deference in relation to decision-making where there is frequently strong justification for judicial scrutiny".[63]

In later cases, LeBel J targeted the woolly definitions associated with the different standards of review and the difficulties in applying those definitions when engaging in a substantive assessment of an administrative

58. *Toronto (City), supra* note 54; *Canada (Deputy MNR) v Mattel Canada*, 2001 SCC 36, [2001] 2 SCR 100.

59. Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57:2 UTLJ 581 at 591.

60. 2002 SCC 1, [2002] 1 SCR 3.

61. *Ibid* at para 41.

62. *Ibid*.

63. David Mullan, "Deference from *Baker* to *Suresh* and Beyond—Interpreting the Conflicting Signals" in David Dyzenhaus, ed, *The Unity of Public Law* (Oxford: Hart Publishing, 2004) 21 at 22 [Mullan, "Deference"].

decision. The fact that there was still no method for implementing the reasonableness simpliciter standard of review and distinguishing it from patent unreasonableness meant that the whole enterprise of judicial review was on shaky ground:

> [T]he patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness simpliciter. It remains to be seen how these difficulties can be addressed.[64]

Despite these mounting concerns, the issue of how to assess substantive reasonableness did not attract much commentary from the Supreme Court.

II. Judicial Deference Since *Dunsmuir*

In retrospect, *Dunsmuir* was the capstone case for the dis-functional period. While the majority opinion in *Dunsmuir* was openly critical of how complex and conflicted the pragmatic and functional approach had become, it retained the same framework under a new name—"the standard of review analysis". But the case also asserted that this analysis can be circumvented altogether when the standard of review is determined by precedent or when the issue at stake involves (1) a constitutional question, (2) a "true" question of *vires*, (3) a general question of law or (4) concurrent legal authority.[65] The difficulty is that the reasoning in *Dunsmuir* on the standard of review straddled two conflicting narratives in Canadian administrative law. The first, the formal and conceptual narrative, asserts that judges are entitled to intervene on a correctness basis when the issue under review falls into an abstract class or category. The second, the pragmatic and functional narrative, asserts that judges should generally avoid categorizing legal issues in that way, and should focus instead on contextual factors which suggest that administrative officials have a legitimate role to play in interpreting relevant legal principles and values.

64. *Toronto (City)*, *supra* note 54 at para 66.
65. *Dunsmuir*, *supra* note 1 at paras 58–61.

In this regard, Binnie J's concurring opinion in *Dunsmuir* was prescient. While Binnie J agreed with the result in *Dunsmuir*, he expressed two particular misgivings about the majority's revised approach. First, he thought that the scope for correctness review should remain relatively narrow—that it should be confined to constitutional questions, questions outside the home statute of an administrative decision-maker, and review for procedural fairness.[66] Second, while he agreed that the patent unreasonableness standard should be sheared off the continuum, he suggested that the Court should develop a methodology for reasonableness review which was flexible enough to reflect "different degrees of deference, depending on who is deciding what".[67] Justice Binnie suggested that "[t]he going in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ('contextually' applied)".[68]

Although Binnie J wrote alone in *Dunsmuir*, his concern that correctness review should be used only in narrow circumstances features prominently in the Court's decisions over the past year. These decisions provide a clear signal that the Court intends to rein in the conceptual categories associated with correctness review. The most significant one in this respect is *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*.[69] An adjudicator found that the Teachers' Union had breached provincial privacy legislation by publishing members' personal information in a newsletter.[70] The union challenged the decision on the ground that the Privacy Commissioner had failed to complete the inquiry before the expiry of the 90-day deadline set out in section 50(5) of the Alberta *Personal Information Protection Act* or to give a written extension of that deadline.[71] Although the union did not raise that matter at all before the adjudicator, its judicial review application succeeded

66. *Ibid* at paras 127–29.

67. *Ibid* at para 135.

68. *Ibid* at para 146.

69. 2011 SCC 61, [2011] 3 SCR 654.

70. *Re Alberta Teachers' Assn*, [2008] AIPCD no 28 (QL).

71. *Personal Information Protection Act*, SA 2003, c P-6.5 ("[a]n inquiry into a matter that is the subject of a written request . . . must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that

both at first instance and on appeal. The chambers judge cited *Dunsmuir* as authority for the proposition that "the standard of correctness still applies to matters of jurisdiction"[72] and held that the time limit issue was a jurisdictional matter on which "it cannot be said that the Commissioner should be accorded deference".[73] The Court of Appeal held that the failure to meet the time limit was not a jurisdictional error *per se*,[74] but because the Commissioner had not justified or explained that failure the decision should nevertheless be quashed.[75]

The Supreme Court's decision in the *Alberta Teachers'* case is interesting, both from the perspective of judicial deference and from that of reasonableness review.[76] On the question of deference, the Court held that despite the wording of section 50(5), the chambers judge should not have applied the correctness standard. Justice Rothstein, writing for the majority, held that the chambers judge erred in assuming that the statutory provision raised a "true" question of *vires*. He went so far as to suggest that the concept of jurisdictional error may have outlived its usefulness, noting that "it may be that the time has come to reconsider whether... the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review".[77] But for the time being, Rothstein J held that "[t]rue questions of jurisdiction are narrow and will be exceptional", and that as long as an administrative tribunal is "interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness".[78]

The Court continued in the same direction in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*.[79] That case concerned the legality of a decision by the Nova Scotia Human Rights

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period, and (b) provides an anticipated date for the completion of the review", s 50(5); this legislative provision has since been amended to impose a limitation period of one year).

72. *Alberta Teachers' Assn v Alberta (Information and Privacy Commissioner)* (2008), 21 Alta LR (5th) 24 at para 10, 1 Admin LR (5th) 85 (QB).

73. *Ibid* at para 11.

74. *Alberta Teachers' Assn v Alberta (Information and Privacy Commissioner)*, 2010 ABCA 26 at para 19, 21 Alta LR (5th) 30.

75. *Ibid* at para 40.

76. For the reasonableness review aspect, see Part III below.

77. *Alberta Teachers'*, *supra* note 69 at para 34.

78. *Ibid* at para 39.

79. 2012 SCC 10, [2010] 1 SCR 364.

Commission to refer a matter to a board of inquiry. The complainant alleged that, by implementing an area tax rate to raise supplementary funding for public schools but then failing to provide the same level of supplementary funding to French and English language public schools, the municipality of Halifax had discriminated against francophone Acadian parents on the prohibited ground of ethnic origin. An investigator appointed by the Human Rights Commission filed three separate reports with respect to this complaint, all of which concluded that a *prima facie* case of discrimination had been made out on the facts. But when the Commission struck a board of inquiry, the city sought an order of prohibition, alleging that the Commission had no jurisdiction to inquire into the matter. At first instance, Boudreau J quashed the Commission's decision on the ground that the decision to refer the matter to a board of inquiry involved a jurisdictional question. Citing *Dunsmuir* and *Bell v Ontario (Human Rights Commission)*[80] as authority, he held that the complaint fell outside the ambit of the provincial *Human Rights Act* because the scheme of supplementary funding had been established by provincial legislation.[81] However, the Nova Scotia Court of Appeal overturned Boudreau J's decision, stating that "the judge in these circumstances should have exercised restraint".[82]

It is particularly interesting that the Supreme Court, in upholding the Court of Appeal, clearly distanced itself from the notion of jurisdictional review with respect to a decision by a human rights commission—a regulatory context in which the Court has historically been reluctant to extend any deference.[83] Justice Cromwell, who wrote the unanimous opinion, held that "the Commission's function is one of screening and administration, not of adjudication",[84] so its decision was discretionary in nature and therefore subject to judicial review on a reasonableness, rather than a correctness, standard.[85] Justice Cromwell went further by stating

80. [1971] SCR 756, 18 DLR (3d) 1.

81. *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2009 NSSC 12 at paras 49–53, 273 NSR (2d) 258.

82. *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2010 NSCA 8 at para 34, 287 NSR (2d) 329.

83. See e.g. Alison Harvison Young, "Human Rights Tribunals and the Supreme Court of Canada: Reformulating Deference" (1993) 13 Admin LR (2d) 206.

84. *Halifax, supra* note 79 at para 23.

85. *Ibid* at para 26.

that that the *Bell* decision "should no longer be followed in relation to its approach to preliminary jurisdictional questions",[86] and that "courts should exercise great restraint in intervening at this early stage of the process".[87] This statement, when read alongside the *Alberta Teachers'* case, is noteworthy because it does not simply warn judges to avoid branding an issue as jurisdictional, as Dickson J did in *CUPE*, but seems to indicate that the Court is finally rooting out the lingering vestiges of the pre-*CUPE* formal and conceptual framework.

The Supreme Court also appears to be reining in other categories that attract correctness review, most notably constitutional questions and general questions of law. In *Doré v Barreau du Québec*, the Court scaled back correctness review for constitutional questions[88] by holding that administrative decisions involving *Charter* values should be reviewed on a standard of reasonableness, not (as it had previously held) on a standard of correctness.[89] *Doré* concerned a decision by the disciplinary committee of the Quebec law society, pursuant to its statutory power to regulate the practice of law, to reprimand a member for sending an extremely inflammatory personal letter to a superior court justice who had upbraided him in open court. At the disciplinary hearing, Doré argued that article 2.03 (now article 2.00.01) of the law society's *Code of ethics of advocates*—which stated that "the conduct of an advocate must bear the stamp of objectivity, moderation and dignity"—infringed his freedom of expression under section 2(b) of the *Charter*.[90] The disciplinary committee rejected this argument on the basis that the impugned limitation was "entirely reasonable" in that Doré, as a member of an exclusive profession, had voluntarily accepted ethical restraints that were necessary to maintain public confidence in the administration of justice.[91] Having dispensed with the *Charter* objection, the committee suspended Doré's licence to practice for 21 days.

On appeal to the provincial Tribunal des professions, Doré argued that, although article 2.03 of the *Code of ethics of advocates* was constitutionally

86. *Ibid* at para 38.

87. *Ibid* at para 17.

88. 2012 SCC 12, [2012] 1 SCR 395.

89. *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 20, [2006] 1 SCR 256.

90. RSQ 1981, c B-1, r 1.

91. *Doré, supra* note 88 at para 17.

valid on its face, the disciplinary committee's decision constituted a disproportionate infringement of his section 2(b) rights. The Tribunal upheld the committee's decision on a correctness standard, and said that it was not necessary to engage in a full-blown *Oakes* analysis in order to reach this conclusion. Instead, the Tribunal engaged in a more general assessment of whether the sanction imposed on Doré was a proportionate restriction of his *Charter* rights, and found that it amounted only to a minimal restriction in light of the gravity of Doré's conduct and his lack of remorse. On judicial review of the Tribunal's decision, the Superior Court held that the Tribunal's analysis was "unassailable".[92] The Quebec Court of Appeal agreed, but only after conducting a full-fledged *Oakes* assessment.

The Supreme Court also upheld the Tribunal's decision, but it stated that the Court of Appeal should have reviewed that decision on the administrative law standard of reasonableness, rather than correctness. This aspect of the Court's decision is surprising. Instead of holding that the Tribunal's decision was not entitled to any deference because it dealt with a constitutional question, the Court chose the reasonableness standard on the basis of functional considerations—namely, that administrative decision-makers are better suited to apply the *Charter* in discrete cases because they have relevant expertise on the implementation of particular legislative policies and have the advantage of hearing evidence first hand.[93]

These functional considerations apply to administrative decisions that consider *Charter* values because those values, in the Court's words, "are being applied in relation to a particular set of facts".[94] The Court reserved correctness review for administrative decisions which assess the constitutionality of enabling legislation, because functional considerations are less significant in that context.[95]

92. *Ibid* at paras 20–21.

93. *Ibid* at paras 48, 54, where Abella J wrote:

> Deference is still justified on the basis of the decision-maker's expertise and proximity to the fact of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis [emphasis in original].

94. *Ibid* at para 36.

95. *Ibid*.

Similarly, in *Nor-Man Regional Health Authority v Manitoba Association of Health Care Professionals*, the Supreme Court held that the Manitoba Court of Appeal had erred in applying the correctness standard to a labour arbitrator's decision.[96] The arbitrator upheld a grievance alleging that the employer had been misinterpreting the seniority provisions of the collective agreement for over twenty years. However, the arbitrator refused to grant a remedy, saying that "[i]t would be unfair to permit the Union to enforce its interpretation" of the collective agreement because "[t]he Employer was entitled to assume that the Union had accepted its practice".[97] While the Court of Queen's Bench initially upheld the arbitrator's decision on a standard of reasonableness, the Manitoba Court of Appeal held that the proper standard was correctness, because applying the doctrine of estoppel was a pure question of common law analysis of central importance to the legal system as a whole, and the arbitrator had no more expertise than the courts in interpreting that doctrine.[98] Authority for this conclusion[99] was drawn from *Dunsmuir* and from the earlier case of *Toronto (City)*, in which the Supreme Court established the "general question of law" category for correctness review in relation to a labour arbitrator's decision that involved the common law doctrines of *res judicata* and abuse of process.[100]

The Supreme Court allowed the appeal, saying that the Court of Appeal had erred in applying the correctness standard. While the Supreme Court did not entirely remove the category of "general questions of law" from the scope of the correctness standard, it significantly shrunk that category. More specifically, the Court held that the labour arbitrator's interpretation of the common law concept of estoppel warranted a deferential standard of review:

96. 2011 SCC 59, [2011] 3 SCR 616.

97. *Nor-Man Regional Health Authority v Manitoba Assn of Health Care Professionals (Plaisier Greivance)*, [2008] MGAD no 30 (QL) at para 96.

98. *Manitoba Assn of Health Care Professionals v Nor-Man Regional Health Authority*, 2010 MBCA 55 at para 52, 255 Man R (2d) 93.

99. *Ibid* at paras 43–53.

100. *Toronto (City)*, *supra* note 54 at para 15.

> Common law and equitable doctrines emanate from the courts. But it hardly follows that arbitrators lack either the legal authority or the expertise required to adapt and apply them in a manner more appropriate to the arbitration of disputes and grievances in a labour relations context.

On the contrary, labour arbitrators are authorized by their broad statutory and contractual mandates—and well equipped by their expertise—to adapt the legal and equitable doctrines they find relevant within the contained sphere of arbitral creativity. To this end, they may properly develop doctrines and fashion remedies appropriate in their field, drawing inspiration from general legal principles, the objectives and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized.[101]

In effect, the Court in *Nor-Man* rejected the idea that the standard of review can be determined by simply slotting the issue at stake into an abstract category of questions to which correctness review applies. Instead, it recognized that relevant functional considerations—especially expertise—may mean that judicial deference is warranted, even when an arbitrator applies common law doctrines or principles.

In short, while the Supreme Court set up a series of categories of issues that would attract correctness review during the dis-functional period and in *Dunsmuir*, the case law from the past year indicates that the Court has begun to rein in those categories and recommit itself to the pragmatic and functional approach. Many of these cases—particularly *Alberta Teachers'*, *Halifax*, *Doré* and *Nor-Man*—involve issues which could easily have been characterized as jurisdictional, constitutional, or general questions of law that were of central importance to the legal system as a whole.[102] But in each case the Court held that judicial deference was warranted, meaning the decision at stake should be reviewed on a reasonableness standard.

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101. *Nor-Man*, *supra* note 96 at paras 44–45.

102. This list also arguably includes *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422 (which I examine further below). In that case, the Supreme Court reviewed an administrative decision regarding a question of concurrent authority according to a deferential standard of review. However, because the standard of review in that case was determined by the *Administrative Tribunals Act*, it does not necessarily demonstrate that the Court is extending the notion of deference with respect to this particular category. SBC 2004, c 45.

Nevertheless, as we will see shortly, the fact that the Court employs the reasonableness standard does not necessarily mean that it will defer substantively to an administrative decision. A lot depends on how the Court implements the notion of reasonableness in a particular case.

III. Reasonableness Review Since *Dunsmuir*

While the decisions from the Supreme Court over the past year suggest that judges should generally adopt a standard of reasonableness rather than correctness in reviewing administrative decisions, the case law on reasonableness review remains muddled. To some extent, this problem is unavoidable because of the tension between judicial deference and rule of law: contextual considerations support judicial respect for the legitimacy of administrative decisions, but also indicate that judges have a role to play in ensuring that the substance of administrative decisions is based on relevant legal principles and thereby in upholding the rule of law.[103] The result is that judges often struggle to reconcile respect for the administrative state with their constitutional role of holding administrative decision-makers accountable for their decisions.

This tension crops up in reasonableness review, and, once again, *Dunsmuir* is illustrative. One of the most powerful lines in *Dunsmuir* asserts that the purpose of reasonableness review is to ensure "justification, transparency and intelligibility within the decision-making process".[104] The Court seems to revive the *Baker* approach with this statement. It suggests that there is a link between the idea that reasons help to ensure procedural fairness—that is, to ensure that administrative decisions are transparent and intelligible—and the idea that judges have a legitimate role to play in scrutinizing the substance of those decisions to ensure that they are adequately justified. On these criteria, the adjudicator's decision in *Dunsmuir* seemed to have a solid foundation. He held that section 97(2.1) of New Brunswick's *Public Service Labour Relations Act* entitled him to hold a hearing in order to determine whether Dunsmuir had been

103. *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.
104. *Dunsmuir*, *supra* note 1 at para 47.

terminated for cause.[105] Ultimately, he determined that Dunsmuir had not been dismissed for cause, but upheld Dunsmuir's grievance on the basis that the employer had breached its duty of fairness at common law under the principles laid down in *Knight*.[106]

Nevertheless, the Supreme Court held that the adjudicator's decision was "deeply flawed" because it failed to give adequate weight to Dunsmuir's employment contract.[107] In a majority opinion that spans 118 paragraphs, the Court's analysis of that decision was relatively terse:

> By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide—or even have—such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.[108]

Even though the adjudicator's decision seemed to be well-grounded in both the legislative framework and the common law, the Court concluded that it was unreasonable because it required the employer to abide by the principles of "justification, transparency and intelligibility" when the employment contract had rendered those values irrelevant.

The significance of the Supreme Court's decision in *Dunsmuir* transcends the particular facts of that case because, along with *Baker* and *Suresh*, it reveals how the Court has adopted conflicting approaches to reasonableness review. As I pointed out in Part I, above, *Baker* established the "alert, alive and sensitive" approach to reasonableness review. This approach requires judges to retrace a decision-maker's reasoning process to ensure that a decision is demonstrably justifiable in light of a broad array of legal resources: legislation, departmental guidelines, international law and constitutional values. Conversely, *Suresh* established a more circumspect approach to reasonableness review, allowing judges to scan administrative decisions in order to ensure that relevant legal principles

105. RSNB 1973, c P-25 ("[w]here an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause . . . the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances", s 97(2.1)).

106. *Supra* note 13.

107. *Dunsmuir, supra* note 1 at para 72.

108. *Ibid* at para 74.

are formally acknowledged, but precluding them from "reweighing" the merits of the decision.[109]

Finally, *Dunsmuir* seemed to employ an approach that is distinguishable from both *Baker* and *Suresh*. *Dunsmuir* is distinguishable from *Baker* because, although the Court in *Dunsmuir* deconstructed or reweighed the reasons given by the adjudicator, it did not ask whether those reasons advanced fundamental legal values such as procedural fairness. In particular, it did not consider the importance of requiring public decision-makers to give publicly reasoned decisions. But *Dunsmuir* is also distinguishable from *Suresh*, in the sense that the Court in *Dunsmuir* clearly reweighed factors which went to the substantive merits of the decision in the course of finding that the adjudicator should have given priority to the contractual nature of the employment relationship over the common law principle of procedural fairness.

While there is an identifiable trend in the Supreme Court's analysis of the standard of review, its judgments over the past year are likely to exacerbate confusion by continuing to project conflicting approaches to reasonableness review. The *Alberta Teachers'* case is remarkable in this respect.[110] Recall that the issue in that case concerned the Commissioner's failure to provide a written extension to a statutory time limit for completing the inquiry, an issue which was not argued before the adjudicator but only raised on judicial review. The problem, for the Supreme Court, was to explain how one can assess the reasonableness of a decision which does not address a relevant legal issue.

The Court held that even though the adjudicator did not address the failure to abide by statutory time limits, her decision was reasonable. The salient passages of Rothstein J's decision on this point read as follows:

> In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of the inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons

109. See also *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. But see Mullan, "Deference", *supra* note 63. As noted earlier in the paper, Mullan has pointed out that the regulatory context of *Suresh* raises concerns that the Court is "increasing deference in relation to decision-making where there is frequently a strong justification for judicial scrutiny" (*Ibid* at 22).

110. *Supra* note 69.

for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.

. . .

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. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.[111]

Justice Rothstein's decision is striking because it asserts that the requirement of "justification, transparency and intelligibility" is not a universal feature of reasonableness review, and that a reviewing court can repair or fill in gaps which might otherwise raise concerns from a rule of law perspective.

Similar themes also crop up in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*.[112] That case concerned the legality of a labour arbitrator's decision on vacations under a collective agreement. Four nurses filed a grievance after their employer reduced their annual vacation entitlement. The grievance hinged on whether the calculation of that entitlement for permanent employees should include previous hours of service they accrued as casual employees. After hearing both parties, the arbitrator issued a 12-page decision which summarized the facts, the parties' arguments and the relevant provisions of the collective agreement. He concluded that permanent employees could not include their hours of service as casual employees when calculating their vacation entitlement because casual employees had no vacation rights under the collective agreement.

The nurses brought an application for judicial review, which succeeded at first instance. Justice Orsborn seemed to rely on the *Baker* approach to reasonableness review in saying that "the reasonableness of a tribunal's decision will depend both on the outcome falling within a range of

111. *Ibid* at paras 51–53 [emphasis in original].
112. 2011 SCC 62, [2011] 3 SCR 708.

acceptable outcomes, and on the setting out of a line of analysis that reasonably supports the conclusion reached".[113] To further emphasize this point, he expressly rejected the notion that the reasonableness of a decision could be assessed without considering the reasoning process used to justify the outcome.[114] He examined the arbitrator's decision, and concluded that it was "completely unsupported by any chain of reasoning that could be considered reasonable".[115] Justice Orsborn pointed out that the collective agreement defined "service" simply as including "any period of employment", which ostensibly included hours worked as a casual employee.[116] So, in his view, the arbitrator should not have reached the conclusion he did without providing more cogent reasons.

Justice Orsborn's decision was reversed in a split decision by the Newfoundland and Labrador Court of Appeal. For the majority, Welsh JA held that Orsborn J had erred in assessing the reasonableness of the arbitrator's decision. Instead of applying the *Baker* conception of reasonableness review, Welsh JA adopted the more circumspect *Suresh* approach. She conceded that "a more expansive explanation would have been preferred", but held that "the purposes for providing reasons are met if the reader may ascertain 'why' the decision was made".[117] In other words, Orsborn J erred in retracing the logic of the arbitrator's decision to see whether it provided an adequate justification for the outcome. In Welsh JA's view, so long as one can ascertain an outline of the decision-maker's reasoning, a reviewing judge should give the decision-maker the benefit of the doubt.

Justice of Appeal Cameron wrote in dissent: "an examination of the 'line of reasoning' or the 'chain of analysis' of the arbitrator are completely consistent with inquiring into the process of 'articulating the reasons'. All are concerned with the required logic which one needs for justification".[118] Like Orsborn J in the court below, Cameron JA held that the arbitrator's chain of reasoning was fundamentally flawed, to

113. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2008 NLTD 200 at para 21, 283 Nfld & PEIR 170 (SC) [emphasis in original].

114. *Ibid* at para 22.

115. *Ibid* at para 31.

116. *Ibid* at para 10.

117. *Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Nurses' Union*, 2010 NCCA 13 at para 24, 294 Nfld & PEIR 161.

118. *Ibid* at para 44.

the point of being unintelligible.[119] This last point is important, because it suggests that the arbitrator's reasons were so flawed that the decision was tantamount to a breach of fairness, which meant that no degree of deference could have saved it.

The Supreme Court did not address these conflicting approaches to reasonableness review. In a terse but unanimous judgment, Abella J upheld the Court of Appeal's decision by adopting a relatively narrow interpretation of the "justification, transparency and intelligibility" requirement from *Dunsmuir*. First, with respect to the procedural duty to provide reasons, Abella J pointed out that *Baker* "did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness".[120] This seems to suggest that the scope of the procedural duty to provide reasons is relatively narrow, and that the normative justification for that duty—as set out in *Baker*—is not relevant to the qualitative assessment required by reasonableness review. So long as one can ascertain why the decision was reached, the substance of the reasoning raises no concerns about procedural fairness.

Second, Abella J cautioned that when engaging in a separate inquiry about reasonableness, judges should be wary of reassessing the reasoning process used by an administrative decision-maker:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion. In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.[121]

In Abella J's view, the reasons given by the arbitrator "showed that [he] was alive to the question at issue and came to a result well within the range of reasonable outcomes".[122] However, while the Court clearly thought that Orsborn J and Cameron JA had overreached by retracing the arbitrator's chain of reasoning, it remains unclear how one can ascertain whether a

119. *Ibid.*
120. *Newfoundland Nurses'*, *supra* note 112 at para 20 [emphasis in original].
121. *Ibid* at para 16.
122. *Ibid* at para 26.

conclusion is "within the range of acceptable outcomes" without engaging in such an exercise.[123]

While the Supreme Court was willing to adopt a deferential approach to reasonableness review in *Alberta Teachers'* and *Newfoundland Nurses'*, it clearly took a more interventionist approach to such review in *Figliola*[124] and in *Canada (AG) v Mowat*.[125] *Figliola* concerned a British Columbia Human Rights Tribunal decision on whether a Workers' Compensation Review Officer had "appropriately dealt with"[126] a human rights complaint. The complaint alleged that the Workers' Compensation Board's (WCB) Chronic Pain Policy, which imposed a fixed compensation award of 2.5 per cent of total disability benefits for persons suffering chronic pain, infringed section 8 of the British Columbia *Human Rights Code*, which prohibited discrimination on the basis of disability. The complaint was dismissed by a Review Officer on the basis that the fixed award policy did not violate section 8 or, if it did, that there was a *bona fide* justification for the policy.[127] When the complainants appealed this decision to the WCB's Appeal Tribunal, the provincial legislature amended the enabling legislation so as to revoke that Tribunal's jurisdiction to apply the *Human Rights Code*. Instead of applying for judicial review, the complainants sought to bring the matter before the British Columbia Human Rights Tribunal. At the hearing, the WCB brought a preliminary motion, alleging that the Tribunal had no jurisdiction because the complaint had already been "appropriately dealt with" by the Review Officer within the meaning of section 27(1)(f) of the *Code*.

The Human Rights Tribunal rejected the motion for three interrelated reasons.[128] First, the Tribunal addressed the WCB's argument that the complaint was barred by the common law doctrine of *res judicata*.

123. *Ibid*.

124. *Supra* note 102.

125. 2011 SCC 53, [2011] 3 SCR 471 [*Mowat* SCC].

126. *Human Rights Code*, RSBC 1996, c 210 (which provides that "[a] member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply", a list which includes "the substance of the complaint or that part of the complaint has been appropriately dealt with in another proceeding", s 27(1)(f)).

127. *Ibid*, s 8.

128. *Figliola v British Columbia (Workers' Compensation Board)*, 2008 BCHRT 374 (available on QL) [*Figliola* HRT].

After examining the Supreme Court decision in *Danyluk v Ainsworth Technologies*,[129] the Tribunal concluded that its discretionary power under section 27(1)(f) should be exercised in a way that was consistent with the relevant common law approach to finality in litigation. Second, the Tribunal held that the Review Officer had neither real nor perceived independence to adjudicate the complaint, because section 99(2) of the *Workers Compensation Act* imposed an unequivocal statutory duty to apply WCB policy. Finally, the Tribunal noted that, even though the WCB called no evidence to rebut the complaint at the initial hearing, the Review Officer nevertheless found that there was a *bona fide* justification for the policy. As the Tribunal member put it:

> WCB officers such as the Review Officer have no expertise in interpreting or applying the *Code*. Regarding deficiencies in the process, there was only one party before the Review Officer, who, in the absence of evidence, made findings about the appropriate comparator group, that the dignity of the Complainants was not impacted by the Policy, and that there was a [*Bona Fide* Justification] for the Policy. There was no analysis regarding where the onus lay in establishing a BFJ or what the applicable interpretive principles with respect to human rights legislation are. . . . The rights and interests protected by the *Code* are of a quasi-constitutional nature and of fundamental importance. In my view, given the process before the Review Officer, and the fact that the Review Decisions were not final decisions at the time they were issued, it would work an injustice on the Complainants to lose their right to pursue the Complaints at a hearing before the Tribunal, where they will be able to call evidence and make submissions relevant to their allegations and WCB will be able to call evidence and make submissions to justify the Policy.[130]

The Tribunal concluded "that the substance of the Complaints was not appropriately dealt with in the review process", and that "the parties to the Complaints should receive the benefit of a full Tribunal hearing".[131]

Diverging from the Court of Appeal, the Supreme Court quashed the Tribunal's decision on the ground that it did not show adequate regard for the unwritten "principles of finality, the avoidance of multiplicity of proceedings, and protection for the integrity of the administration of justice".[132] Despite the fact that the provincial *Administrative Tribunals Act* required the Court to apply the patent unreasonableness standard

129. 2001 SCC 44, [2001] 2 SCR 460.
130. *Figliola* HRT, *supra* note 128 at paras 46–47.
131. *Ibid* at para 50.
132. *Figliola* SCC, *supra* note 102 at para 25.

of review, the Court held that the Tribunal had unreasonably exercised its discretionary power by ignoring unwritten legal principles that were only implicit in its home statute:

> Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.[133]

The Court concluded that the Tribunal had "ignored its true mandate under s. 27(1)(f)" because it had duplicated proceedings and arguments already considered by the Review Officer.[134]

A similar approach to reasonableness review was taken in *Mowat v Canadian Armed Forces*,[135] which concerned the legality of a costs award by the Canadian Human Rights Tribunal. At the conclusion of a six-week hearing of a sexual harassment complaint which produced 4 000 pages of transcripts, the Tribunal awarded Donna Mowat $4 000 for pain and suffering. Mowat then submitted a claim to recoup the cost of retaining legal advice at various points in the complaint process. For her claim to succeed, the Tribunal had to decide whether fees were recoverable under section 53(2)(c) of the *Canadian Human Rights Act*, which stated that the Tribunal could order compensation "for any expenses incurred by the victim as a result of the discriminatory practice".[136]

When the Tribunal addressed this issue of statutory interpretation, it noted that Federal Court jurisprudence on the subject was conflicted. One line of cases held that the Tribunal could award legal costs under section 53(2)(c) because the *Act* should be broadly construed so as to advance the policy of combatting discrimination and compensating its

133. *Ibid* at para 36.
134. *Ibid* at para 54.
135. 2005 CHRT 31, 54 CHRR D/21.
136. RSC 1985, c H-6, s 53(2)(c).

victims.[137] Another line of cases held that if Parliament had intended to give the Tribunal the authority to award legal costs, it would have done so explicitly.[138] Ultimately, the Tribunal concluded that it had the power to award legal costs, because, in its words, "[t]he predominance of authority from the Federal Court" favoured a broad interpretation of section 53(2).[139] Moreover, the Tribunal noted that to hold otherwise would mean that in the circumstances, the complainant's success on the merits "would amount to no more than a pyrrhic victory".[140] The Tribunal's award of $47 000 for legal costs (which covered only a portion of Mowat's legal fees) was upheld as reasonable at first instance,[141] but was overturned on a correctness standard by the Federal Court of Appeal.[142]

The Supreme Court's decision in *Mowat* seems to reflect the broader trends noted above. On the one hand, on the standard of review question, the Court said that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference".[143] This was a bold statement because it involved a concession that the Court's past decisions, holding that human rights tribunal decisions on questions of law were not entitled to deference, may not have been consistent with the functional values underpinning the deferential approach in other administrative contexts.[144] So when the Court acknowledged in *Mowat* that "[t]he question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute",[145] it seemed to be signalling a move toward a less intrusive attitude to judicial

137. *Canada (AG) v Thwaites*, [1994] 3 FC 38 at paras 50–57, 3 CCEL (2d) 290 (FCTD); *Canada (AG) v Stevenson*, 2003 FCT 341, 229 FTR 297; *Canada (AG) v Brooks*, 2006 FC 500, 291 FTR 32.

138. *Canada (AG) v Lambie* (1996), 124 FTR 303 at para 42, 68 ACWS (3d) 318; *Canada (AG) v Green*, [2000] 4 FC 629, 183 FTR 161.

139. *Mowat v Canadian Armed Forces*, 2006 CHRT 49 at para 27 (available on WL Can).

140. *Ibid* at para 29.

141. *Canada (AG) v Mowat*, 2008 FC 118, 322 FTR 222.

142. *Canada (AG) v Mowat*, 2009 FCA 309, [2010] FCR 579.

143. *Mowat* SCC, *supra* note 125 at para 24.

144. *Ibid* (LeBel and Cromwell JJ: "At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals" at para 21).

145. *Ibid* at para 25.

review of human rights agencies, at least on the threshold question of the standard of review.

However, as in *Figliola*, the Court quickly changed tack and concluded that the Tribunal's decision was unreasonable on its merits. After conducting "a careful examination of the text, context and purpose" of the statutory provisions, LeBel and Cromwell JJ concluded that the Tribunal's interpretation was deeply flawed.[146] While they recognized that the wording of section 53(2)(c) was broad enough on its face to include an award of legal costs, they found that "when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination".[147] Justices LeBel and Cromwell then proceeded to carefully deconstruct section 52—examining its text, its legislative history, counterpart provisions in provincial human rights legislation, and the like. On *ejusdem generis* reasoning, they concluded that Parliament did not intend to confer such a broad remedial power on the Tribunal.

Even at a purely formal level, without considering the substantive merits of the administrative decisions rendered in these cases, it is difficult to reconcile the restorative approach to reasonableness review taken in *Alberta Teachers'* and *Newfoundland Nurses'* with the more restrictive approach in *Figliola* and *Mowat*. In both *Alberta Teachers'* and *Newfoundland Nurses'*, the Court held that even when an administrative official fails to address a salient legal issue in his or her reasons, the decision may nevertheless pass reasonableness muster if a judge can imagine a reasonable justification for the outcome, or is satisfied that the outcome falls within the range of reasonableness. By contrast, in *Figliola* and *Mowat* the Court parsed the administrative body's interpretation of its enabling legislation and concluded that the outcome was unreasonable, although in both cases that body had clearly explained how the outcome advanced the policies, purposes and principles of human rights legislation. While the Court has made some modest strides toward simplifying the standard of review, the methodological and substantive issues associated with reasonableness review remain in dire need of attention.

146. *Ibid* at para 32.
147. *Ibid* at para 35.

IV. Toward a Contextual Approach to Reasonableness Review

The best way to address the problems associated with reasonableness review is to take up Binnie J's suggestion in *Dunsmuir* that the practice of reasonableness review needs to be contextualized. To date, contextual analysis has focussed on the threshold question of when deference is appropriate instead of on assessing the reasons that underpin an administrative decision. If we accept the proposition that the vast majority of administrative decisions are to be reviewed on a reasonableness standard, the main question is why this standard demands more cogent reasons in some contexts than others. In the short space that remains, I will try to sketch out the contours of a contextual approach to reasonableness review.

The starting point in developing a contextual approach is to revisit the relationship between two pivotal cases: *Nicholson* and *CUPE*.[148] As explained above, these cases laid the foundation for modern Canadian administrative law by rejecting abstract conceptual analysis and favouring a more practical and nuanced inquiry that would calibrate the practice of judicial review. In *Nicholson*, the Court rejected the conceptual distinction between judicial and administrative functions in order to establish a general principle of procedural fairness which applies whenever an administrative decision implicates an individual's rights, interests or privileges. In *CUPE*, the Court rejected the conceptual distinction between jurisdictional and non-jurisdictional error in order to establish a general principle of deference grounded in such contextual considerations as respect for democratic delegations of legal authority and respect for administrative expertise.

Because *Nicholson* and *CUPE* have traditionally been understood as addressing separate issues—procedural fairness and substantive review—administrative lawyers often overlook the more fundamental links between them. They are united in articulating a conception of legality that requires administrative officials to give public reasons for their decisions, and requires judges to respect those reasons as long as they are legally acceptable. Put more simply, as Dyzenhaus and Fox-Decent have said, this

148. Dyzenhaus & Fox-Decent, *supra* note 31.

interpretation of *Nicholson* and *CUPE* asserts that "the duty to provide reasons is of a piece with [the notion] that the discretion must be exercised reasonably".[149] Contrary to Abella J's suggestion in *Newfoundland Nurses'*, this understanding of legality asserts that the fairness aspect of the duty to provide reasons cannot be readily divorced from concerns about judicial deference and reasonableness review: they are part of one constitutional package in which administrative officials are entitled to interpret the law, but judges have a duty to ensure "justification, transparency and intelligibility within the decision-making process".[150]

Instead of resorting to abstract conceptual definitions of what is "reasonable", review for reasonableness should be reconceived as a tool for reconciling judicial respect for administrative decisions with a judicial concern for ensuring that administrative decisions are legally acceptable in a particular regulatory setting. Justice Binnie suggested such an approach to reasonableness review in *Dunsmuir*,[151] but so far the Court has been unwilling to expand on this idea other than to simply say that reasonableness is "a single standard that takes its colour from the context"[152] or "is an essentially contextual inquiry".[153]

The result, as we have seen, is that the Court continues to veer between two approaches to reasonableness review that are at opposite extremes. One is a restorative approach, which (as in *Alberta Teachers'* and *Newfoundland Nurses'*) either imposes no duty on administrators to give reasons or enables judges to fill important legal gaps when reasons are deficient. The other is a restrictive approach which leaves little or no room for interpretive disagreement between courts and administrators (as in *Figliola* and *Mowat*). The restorative approach is problematic; the

149. *Ibid* at 228.

150. *Dunsmuir*, *supra* note 1 at para 47.

151. *Ibid* (per Binnie J: "The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. 'Contextualizing' a single standard of review 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. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection [the pragmatic and functional approach] to another [reasonableness review] without any overall saving to motorists in time or expense" at para 139 [emphasis in original]).

152. *Khosa*, *supra* note 109 at para 59.

153. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18, [2012] 1 SCR 5.

idea that judges should attempt to repair administrative decisions which are silent on their face has led to results which are deeply flawed from a rule of law perspective—especially in national security cases, where judges have assumed that executive decision-makers acted properly unless a claimant can produce evidence to the contrary.[154] The restorative approach also gives government officials a perverse incentive to remain silent or to provide obscure reasons, in the expectation that a reviewing court might find that there was no duty to give reasons or might speculate about possible legal justifications for the outcome.

A different set of concerns applies to the more restrictive approach taken in *Figliola* and *Mowat*. For well over a generation, lawyers and academics have noted that human rights agencies in Canada have had mixed messages from the executive, legislative and judicial branches.[155] While these agencies are given bold and broad statutory mandates to interpret and enforce constitutional values like equality and non-discrimination, those mandates have been frequently undercut by executive measures or, as was demonstrated on the facts of *Figliola*, legislative attempts to deflect the enforcement of human rights legislation without expressly repealing enabling legislation. An equally disturbing trend is that superior courts have often trimmed the jurisdiction of human rights agencies or failed to appreciate the functional case for judicial deference on questions of law, even though Canadian human rights agencies have been ahead of the curve (relative to their judicial counterparts) in developing purposive interpretations of constitutional values and expanding protection for vulnerable communities.[156]

Although the Supreme Court now acknowledges that its jurisprudence on judicial review of human rights agencies is in tension with the idea of judicial deference, its decisions in *Figliola* and *Mowat* exacerbate the problem of access to justice for victims of alleged discrimination. In *Figliola*, the court nullified a statutory provision that gave express authority to a provincial human rights tribunal to ensure that decisions

154. See e.g. *Liversidge v Anderson* (1941), [1942] AC 206 (HL (Eng)).

155. R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000).

156. *Ibid.* See also Annette Nierobisz, Mark Searl & Charles Théroux, *Human Rights Commissions and Public Policy: The Role of the Canadian Human Rights Commission in Advancing Sexual Orientation Equality Rights in Canada* (Ottawa: Canadian Human Rights Commission, 2008).

by other administrative agencies adequately addressed human rights issues with the result that affected individuals must incur the expense of applying to superior courts for judicial review. In *Mowat*, the Court refused to allow the Canadian Human Rights Tribunal to award legal costs, which will surely dissuade individuals from bringing human rights complaints.[157] In both cases, the result seems to undercut a purposive understanding of human rights legislation, which prioritizes the values of efficiency, equality and non-discrimination and gives human rights agencies broad powers to interpret and implement measures that vindicate those values.

At this point, it might be helpful to rediscover the *Baker* method of reasonableness review, which requires judges to ask whether an administrative decision was "alert, alive and sensitive" to relevant legal principles, in a way that is commensurate with the decision's impact on individual interests. If the duty to give reasons was grounded in the doctrine of procedural fairness that duty would, in the words of L'Heureux-Dubé J, be "flexible and variable" and would depend "on an appreciation of the context of the particular statute and rights affected".[158] She identified a series of contextual variables that would help determine the degree of procedural fairness owed in the circumstances, and justified the duty to give reasons in cases such as this "where the decision has important significance for the individual".[159] Even though there was no statutory duty in *Baker* for the Minister to provide reasons, the Court was prepared to imply one because "[i]t would be unfair for a person subject to a decision . . . which is so critical to their future not to be told why the result was reached".[160] In establishing a common law duty to give reasons, the Court required administrative officials to provide a public justification for their decisions unless the legislature expressly relieves them of this duty.

This same contextual sensitivity was brought to bear when L'Heureux-Dubé J assessed the reasonableness of the immigration officer's discretionary decision in *Baker*. She recognized that "considerable deference should be accorded to immigration officers", because of "the fact-specific nature of

157. Paul Groarke, "*Canadian Human Rights Commission v. Canada (AG)*: SCC Decision Shapes Dim Reality for Human Rights Complainants" (30 October 2011), online: The Court <http://www.thecourt.ca>.

158. *Baker*, *supra* note 16 at para 22.

159. *Ibid* at paras 23–27, 43.

160. *Ibid*.

the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language".[161] Nevertheless, she concluded that the investigating officer's notes were unreasonable, because they disclosed a line of reasoning which was inconsistent with the declared objectives of the enabling legislation, ministerial guidelines and the *Convention on the Rights of the Child*. These legal materials indicated that the investigating officer should have given "substantial weight" to the children's interests and the hardship that would be inflicted on Ms. Baker if she were forced to return to Jamaica under the circumstances.[162] In other words, even though context may require judicial deference, deference does not mean judges should endorse an administrative decision whatever its content—it still requires judges to ask whether the content of an administrative decision is legally justifiable.

As with any case which implements a contextual approach, *Baker* can only bring us so far. It only provides us with an illustration of how to navigate the complex terrain of a particular case, without necessarily indicating what the outcome should be under different circumstances. Nevertheless, it provides one constructive example of how to negotiate the different normative considerations associated with procedural fairness, judicial deference and reasonableness review without resorting to bright lines and categorical distinctions.

Conclusion

While the Court in *Dunsmuir* aspired to solve some of the most perplexing questions in administrative law, the enduring value of the case lies in its illustration of two persistent problems with judicial review. The first problem concerns the constant allure of jurisdictional categories and correctness review. As long as the category of "jurisdictional" issues remains available, judges will be tempted to short-circuit the difficult task of reasonableness review by stipulating that the nature of the decision demands correctness oversight. While *Dunsmuir* represents a historical moment when the Court seemed to have lost its faith in

161. *Ibid* at para 62.
162. *Ibid* at para 75.

contextual analysis, cases from the past year suggest that it has renewed its commitment to *CUPE* and signalled its intent to rein in the conceptual categories associated with correctness review. As a result, there is once again cause for optimism that less time will be spent agonizing over the threshold question of the proper standard of review.

The second problem illustrated by *Dunsmuir* concerns the thorny issue of reasonableness review. Recent Supreme Court decisions demonstrate that the reasonableness standard is being applied in dramatically different ways, which again raises serious questions about the consistency and legitimacy of judicial review. This suggests that more work needs to be done to explain why the burden of justification is more or less demanding in different administrative contexts.[163]

One way to address this problem is to rediscover Canadian administrative law and, in particular, to develop a deeper appreciation of landmark decisions like *Nicholson*, *CUPE* and *Baker*. While these decisions continue to occupy a central place in Canadian administrative law, they still tend to be regarded as distinct cases instead of constituent elements in a normatively coherent conception of legality. By re-examining the fundamental relationship between these central cases and their broader historical significance, administrative lawyers can articulate a "principled framework that is more coherent and workable" by developing a contextual approach to reasonableness review.[164]

163. Sossin & Flood, *supra* note 59 at 591.
164. *Dunsmuir*, *supra* note 1 at para 32.