

Canada's Bipolar Administrative Law: Time for Fusion

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Canadian judicial review of administrative action is structured around two poles: substantive review and procedural review. On matters of substance, the administrative decision maker is generally accorded deference by the reviewing court. On matters of procedural fairness, the court accords no deference, and determines the "correct" process. The author argues that this distinction is indefensible and instead suggests that the current approach to procedural review should be replaced by the framework for substantive review.

The article begins by outlining the current status of the two poles of procedural and substantive judicial review. In doing so the author rejects the idea that institutional review represents a third pole, separate from procedural review. He then considers the different role that legislative intent plays in the two standards of review. Through the lens of the Supreme Court of Canada's decision in Canada (Citizenship and Immigration) v Khosa, the author argues that the reasons supporting legislative intent's heightened role in substantive review apply also to procedural review, therefore justifying the application of the reasonableness standard at both poles, in appropriate circumstances.

Evidence of the impending fusion of review is further demonstrated by reviewing two recent appellate court decisions where the reasonableness standard has been applied to traditional procedural issues. The author concludes that the universal application of the framework for substantive review is not only logistically desirable, but better respects the democratic principle as articulated through legislative intent.

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Introduction

A bipolarity afflicts the Canadian law of judicial review of administrative action.¹ For more than thirty years, Canadian courts have preached deference in substantive review by refusing to overturn reasonable decisions made by administrative decision makers, often refusing to substitute their own judgment even on questions of law.² Yet, on matters of procedure, courts have no qualms about stepping into the shoes of administrative decision makers.³

I am not the first to question the difference in the standards applied to substantive and procedural review. Many others have urged reform.⁴

1. For the purposes of this article, I treat administrative law and judicial review of administrative action as co-extensive. This is purely a terminological choice: Obviously the territory of "administrative law" is much vaster than that occupied by judicial review.

2. See e.g. *Canadian Union of Public Employees Local 963 v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417. See generally Joseph Robertson, Peter Gall & Paul Daly, *Judicial Deference to Administrative Tribunals in Canada: Its History and Future* (Toronto: LexisNexis Canada, 2014).

3. See e.g. *Nicholson v Haldimand Norfolk Regional Police Commissioners* (1978), [1979] 1 SCR 311, 88 DLR (3d) 671 [*Nicholson*] (jettisoning the old classification of administrative, quasi-judicial and judicial functions for a general duty of fairness).

4. See e.g. Lorne Sossin & Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57:2 UTLJ 581 (advocating "a true spectrum of deference" at 599).

Some perceived the landmark decision in *Baker v Canada (Minister of Citizenship and Immigration)*⁵ to be the sounding of the death knell for the process/substance distinction.⁶ That bell has not yet tolled. But I argue in this article that it is about to and that it should. The firm distinction between substantive review and procedural review can no longer hold.

The bipolarity is explained by the different role played by legislative intent at the poles of substantive review and procedural review. On matters of substance, legislative intent is an important justification for deferential judicial review; statutory provisions are taken to reveal a legislative preference for the primacy of administrative over judicial interpretation.⁷ By contrast, on matters of procedure, legislative intent plays a subordinate role. Here, statutes only provide the context in which courts review the fairness of decision-making processes; courts maintain a position of interpretive supremacy, regardless of the breadth of decision-making power delegated by statute.⁸

The lens through which I perceive the bipolarity is the Supreme Court of Canada's largely unheralded decision in *Canada (Citizenship and Immigration) v Khosa*.⁹ There, the Court was faced with a statute, the *Federal Courts Act*, that purported to lay out a general framework for judicial review of federal administrative action.¹⁰ In determining whether the statutory scheme could govern judicial review of decisions made under it, the Court had to grapple with the role of what American scholars have called "administrative common law".¹¹ In *Khosa*, the Court reaffirmed the fundamental importance of legislative intent in justifying a deferential approach to substantive judicial review. But it had comparatively little to say about procedural review, commenting perfunctorily that the standard

5. [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker* cited to SCR].

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

7. See Part II-A, below.

8. See Part II-B, below.

9. 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*].

10. RSC 1985, c F-7.

11. See e.g. Gillian E Metzger, "Foreword: Embracing Administrative Common Law" (2012) 80:5 Geo Wash L Rev 1293. See also Emily Bremer, "The Unwritten Administrative Constitution" (2014) 66:3 Fla L Rev 1215; Adrian Vermeule, "Conventions of Agency Independence" (2013) 113:5 Colum L Rev 1163.

of review is correctness. *Khosa* thus exposes the bipolarity in Canadian administrative law.

In Part I of this article, I outline Canada's existing administrative law landscape, demonstrating how it indeed has two poles. In Part II, I argue that the deferential standard of substantive review should be extended to incorporate procedural review. Following the Supreme Court's reformulation of administrative law doctrine in *Dunsmuir v New Brunswick*¹² and the decisive role of legislative intent in substantive review,¹³ attempting to keep legislative intent in a subordinate position in procedural review has become more and more difficult. The internal logic of the Court's recent cases is also at odds with the bipolar approach to judicial review of administrative action, and considered by reference to first principles, the argument for judicial supremacy on procedural questions is weak. Finally, recent appellate court decisions strongly suggest that it is time that the two were treated identically.¹⁴ I conclude by arguing that fusion of the two poles would further the values of democracy and good administration while also respecting the rule of law.

I. Canada's Bipolar Administrative Law

Canadian courts have been inconsistent in the doctrines they apply when reviewing administrative action. The Supreme Court differentiates between: (i) *substantive review*—review of interpretations of law and exercises of discretion and (ii) *procedural review*—review of the adequacy of procedural safeguards in administrative decision-making processes. The law on *independence* of administrative decision makers may seem to represent a third pole, but ultimately it is consistent with the Court's general approach to procedural review.

In describing Canada's administrative law as bipolar, I do not mean to suggest either that the approach is necessarily incoherent or that there is a tenable distinction between substance and procedure as a theoretical matter. Rather, the argument of this article is that substantive and procedural review should be treated similarly, or, in other words, that the two poles of Canadian administrative law ought to be fused.

12. 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

13. I refer to this as the "post-*Dunsmuir*" framework.

14. See Part II-A, below.

A. Substantive Review

(i) The Multi-Factor Test

Substantive review represents the first of the two poles. This type of review is engaged when an administrative decision maker's interpretation of law or exercise of discretion is challenged. Throughout the past three decades, the Supreme Court has reviewed these decisions with varying degrees of deference. The Court developed a multi-factor test to determine the appropriate standard of review of administrative action.¹⁵ Under the most recent manifestation of the test, a court considers (i) statutory language, (ii) expertise of the decision maker relative to the reviewing court, (iii) the purpose of the relevant statutory provisions and (iv) the nature of the question at issue.¹⁶ This allows courts to calibrate the appropriate intensity of judicial review. Applying the test in individual cases permits courts to determine whether the appropriate standard of review is correctness or reasonableness.¹⁷ Where correctness is the governing standard, the court will undertake its own analysis of the relevant issue(s) to determine whether the correct result was reached. But where reasonableness is the governing standard, the court gives deference to the administrative decision maker.

As Iacobucci J explained in an important extrajudicial essay, the multi-factor analysis was developed by the Supreme Court in response to the structure of the administrative state.¹⁸ Legislatures had made a series of choices to vest significant decision-making authority in administrative bodies. Judicial response, informed by the state of the statute book as a whole, was necessary. The multi-factor test thus aimed to accommodate the complexity inherent in the administrative system:

15. See *Dunsmuir*, *supra* note 12 at para 63.

16. See e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 11 Admin LR (2d) 117.

17. Previously, there were three standards: correctness, reasonableness *simpliciter* and patent unreasonableness. See generally *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247. Citing confusion, the Court reduced these to two in *Dunsmuir*, *supra* note 12.

18. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27:2 Queen's LJ 859.

[L]egislatures have delegated numerous powers in myriad ways, and have made various choices about how this delegated power should be supervised. There is no reason why the courts should wilfully disregard these complexities in order to make their supervisory role easier. Having access to multiple standards of review . . . allows courts to deal with these complexities in a sophisticated and, arguably, a more effective and practical way.¹⁹

As this quotation suggests, the common law of substantive review in Canada is inspired by the realities of the statute book and the modern administrative state. In *Dunsmuir*, the Supreme Court attempted to simplify the framework for substantive review by codifying categories of decisions that would invoke the correctness or reasonableness standards. These categories are a distillation of three decades of application of the multi-factor test.²⁰

Indeed, following *Dunsmuir*, the teachings of the multi-factor test have hardened into an outright presumption that, when an administrative decision maker is interpreting its home statute or closely connected statutes with which it is familiar, the decision maker is entitled to deference.²¹ This is based on legislative intent. Justice Rothstein explained that “[b]y setting up a specialized tribunal to determine certain issues *the legislature is presumed to have recognized superior expertise in that body in respect of issues arising under its home statute or a closely related statute, warranting judicial review for reasonableness.*”²²

19. *Ibid* at 872–73.

20. For a critical overview of *Dunsmuir* and subsequent developments, see Paul Daly, “The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law” (2012) 50:2 Osgoode Hall LJ 317 [Daly, “Form Over Substance”]. For a positive take, see Andrew Green, “Can There Be Too Much Context in Administrative Law?: Setting the Standard of Review in Canadian Administrative Law” (2014) 47:2 UBC L Rev 443.

21. See *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61 at para 34, [2011] 3 SCR 654 [*Alberta Teachers’ Association*] (the interpretation of such statutes “should be presumed to be a question of statutory interpretation subject to deference on judicial review” at para 34).

22. *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 11, [2012] 2 SCR 283 [emphasis added]. See also *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] (“[in *Dunsmuir*] the Court held that judicial review should be guided by a policy of deference, *justified on the basis of legislative intent*, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state” at para 30 [emphasis added]).

Legislative intent has been and remains the “polar star”²³ of substantive review in Canada.

(ii) *Khosa* and Administrative Common Law

The Supreme Court’s decision in *Khosa* demonstrates the relevance of legislative intent in substantive review. Here, the Court considered an important question that it had left largely unaddressed during the three decades of multi-factor analysis and in *Dunsmuir*.²⁴ Review of federal administrative decision makers is governed by section 18.1(4) of the *Federal Courts Act*.²⁵ This section seems to set out a comprehensive scheme for judicial review of federal administrative action:

The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.²⁶

On what basis could the Court justify applying administrative common law when the legislature had already set out the grounds on which the federal courts could intervene to strike down administrative decisions? Against the backdrop of these provisions, the necessity and legitimacy of the multi-factor approach in the federal administrative context appear doubtful. In particular, any suggestion that deference should be accorded to administrative decision makers’ interpretations of law seems extremely doubtful: Section 18.1(4)(c) suggests that any error of law “in making a

23. *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149, [2003] 1 SCR 539.

24. But see the gnomonic comments in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 37–38, [2005] 2 SCR 100.

25. *Supra* note 10.

26. *Ibid.*, s 18.1(4).

decision or an order” would justify judicial intervention. Whither, in short, the common law of substantive review?

Writing for the majority in *Khosa*, Binnie J addressed the inevitability of administrative common law in the following terms. He acknowledged that reference to section 18.1(4) should be the “first order of business”,²⁷ but noted that “most if not all judicial review statutes are drafted against the background of the common law of judicial review”.²⁸ It is impossible to understand a framework statute like the *Federal Courts Act* without an appreciation of curial approaches to judicial review. This point is made clear by considering an objection raised by Rothstein J. In his set of concurring reasons, he argued that section 18.1(4) did not need to be supplemented at all by reference to the common law, because its terms were clear: It “occupies the area of standard of review and therefore ousts the application of the common law on this question”.²⁹ But when Rothstein J read section 18.1(4)(c) as invoking the standard of correctness for judicial review of questions of law,³⁰ he too had to rely on something unwritten. In order to determine what is a “question of law” he had to read the *Federal Courts Act* with a prior conception in mind of what constitutes “law”. This conception could only be informed by a particular understanding of the purposes of judicial review. Thus the language of section 18.1(4) is not self-executing: It requires interpretation. To put it in Binnie J’s terms, section 18.1(4) is “open textured” and has to be “supplemented by the common law”.³¹

For Binnie J, a sole focus on section 18.1(4) would have been inapposite. To begin with, “a measure of deference has come to be accepted as appropriate where a particular decision has been allocated to an administrative decision maker rather than to the courts”.³² In other words, even though the legislature had enacted a general framework statute in the shape of the *Federal Courts Act*, its interrelationship with other statutes, and with the statute book as a whole, also has to be taken into consideration. The adoption of section 18.1(4) did not exhaust legislative intent. Speaking both to the necessity and legitimacy of administrative

27. *Khosa*, *supra* note 9 at para 18.

28. *Ibid* at para 19.

29. *Ibid* at para 128.

30. *Ibid* at para 72.

31. *Ibid* at para 44.

32. *Ibid* at para 25.

common law, Binnie J explained that it was necessary for the *Federal Courts Act* to be “sufficiently elastic to apply to the decisions of hundreds of different ‘types’ of administrators, from Cabinet members to entry-level *fonctionnaires*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers”.³³ Understood in this way, *Khosa* reaffirms the importance of legislative intent in substantive review: for it is only by reference to the statute book as a whole that the logic of *Khosa* is sustainable.

Having established both the necessity and legitimacy of administrative common law, Binnie J distinguished between *grounds* and *standards* of judicial review. The distinction separates, for example, error of law (a ground of review) from reasonableness and correctness (standards of review). This move permitted Binnie J to justify applying a standard of reasonableness to questions of law, even in the face of section 18.1(4): “[P]ara. (c) provides a *ground* of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute”.³⁴ This distinction between grounds and standards is drawn from the multi-factor approach. It appears nowhere in the *Federal Courts Act* but is rather a judicial tool designed to implement the deferential approach based on legislative intent:

Under the Supreme Court’s approach, we do not determine what considerations are relevant and then impose our determinations of relevance on the tribunal. Rather, the tribunal is given “substantial leeway . . . in determining the . . . ‘relevant considerations’ involved in a given determination,” and then we engage in reasonable review of what the tribunal has done. Reasonableness review is supposed to be truly deferential review.³⁵

Writing for a unanimous Court in *Dr Q v College of Physicians and Surgeons of British Columbia*, McLachlin CJC wrote that “it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker”.³⁶ Identifying grounds of judicial review assists an applicant in persuading a reviewing

33. *Ibid* at para 28.

34. *Ibid* at para 44 [emphasis in original].

35. *Kane v Canada (Attorney General)*, 2011 FCA 19 at para 102, 328 DLR (4th) 193, Stratas JA, dissenting, rev’d 2012 SCC 64, [2012] 3 SCR 398 [citations omitted].

36. 2003 SCC 19 at para 25, [2003] 1 SCR 226 [*Dr Q*].

court to quash an administrative decision, but it remains necessary to demonstrate that the decision as a whole was unreasonable.

Given that any determination of proper purposes (to take one example) depends on an interpretation of the administrative decision maker's home statute, there ought to be a presumption of deference in favour of the administrative decision maker.³⁷ These doctrinal nuances result from the Court's development of a framework motivated by an appreciation of legislative intent as it is manifested in the statute book as a whole.

Where the reasonableness standard is appropriate according to the post-*Dunsmuir* framework, legislative intent is further relevant in defining the "range" of reasonable outcomes. *Khosa* teaches that reasonableness is a "single standard that takes its colour from the context".³⁸ In part, this context is formed by the relevant statutory provisions, which may broaden the scope of the decision maker's discretion,³⁹ or confine its room for interpretive manoeuvre.⁴⁰

(iii) Post-*Khosa* Inconsistency

The Court's subsequent commitment to the approach it adopted in *Khosa* has not been full-fledged. For one, it has passed over the British Columbia *Administrative Tribunals Act* (ATA)⁴¹ without sustained reflection. Sections 58(2)(a) and 59(3) of the ATA purport to apply a standard of review of "patent unreasonableness" to certain administrative decisions.⁴² The standard is defined identically in sections 58(3) and 59(4) as follows:

37. See *Alberta Teachers' Association*, *supra* note 21.

38. *Supra* note 9 at para 59.

39. See e.g. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 ("[t]he fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation" at para 18).

40. See e.g. *British Columbia (Securities Commission) v McLean*, 2013 SCC 67, [2013] 3 SCR 895 ("[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation . . . the 'range of reasonable outcomes' will necessarily be limited to a single reasonable interpretation—and the administrative decision maker must adopt it" at para 38 [citations omitted]).

41. SBC 2004, c 45.

42. *Ibid*, ss 58(2)(a), 59(3).

[A] discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.⁴³

An alert reader of *Khosa* will note that these provisions simply specify *grounds* of review; indeed, they parrot the classic grounds of judicial review for abuse of discretion. They do not—regardless of what the legislature wished to accomplish—specify a *standard* of review. *Khosa* shows that there is a significant difference between a statute identifying the sorts of error that *may* lead an administrative decision maker to make an unlawful decision and specifying *when* judicial intervention is justified. *Khosa* holds that judicial intervention is justified only when, say, a failure to take statutory requirements into account renders a decision unreasonable as a whole.

Nevertheless, in *British Columbia (Workers' Compensation Board) v Figliola* the Court failed to appreciate this difficulty, simply noting uncritically that, “based on the directions found in section 59(3) of the ATA, the Tribunal’s decision is to be reviewed on a standard of patent unreasonableness”.⁴⁴ On the facts, a majority of the Court held that the decision in the case was unreasonable because “the Tribunal based its decision to proceed . . . on predominantly irrelevant factors and ignored its true [statutory] mandate”.⁴⁵ This is just the sort of judicial interventionism which the Court claimed to have jettisoned in *Dr Q*. When the opportunity next arises, the Court ought to look more closely at legislative attempts to define the standard of review.

However, the brief treatment in *Figliola* should not gainsay the Court’s evident commitment to the relevance of legislative intent in developing its substantive review jurisprudence. As *Khosa* demonstrates, this commitment is so strong that even general framework statutes have to be supplemented by the common law of substantive review.

43. *Ibid*, ss 58(3), 59(4).

44. 2011 SCC 52 at para 20, [2011] 3 SCR 422 [*Figliola*]. See also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.

45. *Figliola*, *supra* note 44 at para 54. The concurring judges, led by Cromwell J, were slightly more deferential, but also accepted that the patent unreasonableness standard applied. *Ibid* at para 97.

B. Procedural Review

Procedural review represents the second pole, one at which legislative intent is much less important.⁴⁶ For the most part, statutes simply provide the background against which judicially developed norms of fairness are implemented. Relative to substantive review, Canadian courts have developed the common law of procedural fairness with little regard to legislative intent. Where statutory provisions explicitly oust the common law, legislation is vitally important, but otherwise it only forms the context for the application of judicially developed principles of procedural fairness.⁴⁷ This was made strikingly clear in *Khosa*: “[P]rocedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review”.⁴⁸ Questions of procedural fairness are “governed by common law principles”.⁴⁹ Legislative intent plays a subordinate role.

(i) Scope of Procedural Fairness

Knight v Indian Head School Division No 19 is one of the two leading Canadian cases on procedural fairness.⁵⁰ In her majority reasons, L’Heureux-Dubé J envisaged a broad scope for procedural fairness. She conceived of it as “a general right” that would arise “*autonomous of the operation of any statute*”.⁵¹ The existence of a common law right to procedural fairness—with a corresponding duty of fairness on the

46. I am not concerned in this article with statutes governing the conduct of administrative proceedings, such as the *Statutory Powers Procedure Act*, RSO 1990, c S.22. These statutes typically set out basic procedural rights which may be augmented if the decision maker so chooses. Even here, however, the common law may play a role. See e.g. *Innisfil Township v Vespra Township*, [1981] 2 SCR 145, 123 DLR (3d) 530 [cited to SCR] (where the right to cross-examine a witness was established “by the interpretation of the provisions of the three statutes as they apply to the hearing by the Board, and by the application of the principles of common law” at 175).

47. Where the statutory provisions clearly oust procedural protections, an applicant will have recourse to section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See e.g. *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350.

48. *Supra* note 9 at para 43.

49. *Ibid.*

50. [1990] 1 SCR 653, 69 DLR (4th) 489 [*Knight* cited to SCR].

51. *Ibid.* at 668 [emphasis added].

administrative decision maker in question—is dependent on three judicially developed factors: “(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual’s rights”.⁵²

The common law analysis is not conclusive of the existence of a right to procedural fairness. Once the three factors have been considered, any relevant statutory provisions and, in the case of public employees, contracts of employment “must then be considered to determine whether this entitlement is either limited or excluded entirely”.⁵³ However, any such restriction would have to be “quite clear”.⁵⁴ Notice here how the common law norm of procedural fairness is detached from statute: The first step is for the reviewing court to consider the three factors and to determine whether a right to procedural fairness ought to exist. It is only at this point that the reviewing court moves on to determine whether legislation has ousted administrative common law. This provides a marked contrast with the importance of legislative intent in the context of substantive review.

Statutory provisions often play an important background role in convincing a court that a right to procedural fairness exists; they may provide context for an application of the *Knight* factors. For example, in relation to public servants, statutes have the potential to play a greater role because the jobs in question—including, sometimes, appointment and termination procedures—are often created by statute. Yet even here, legislative intent will not necessarily play a dominant role.

In *Nicholson v Haldimand Norfolk Regional Police Commissioners*, the Court determined that a duty of fairness (and specifically a hearing) was owed when terminating a police constable’s contract.⁵⁵ The relevant statute had previously specified that a police constable held the office “at the pleasure” of the Board of Commissioners of Police. However, the term “at pleasure” had since been removed from the legislation. Chief Justice Laskin reasoned that this revision demonstrated “a turning away from the old common law rule” that holders of offices “at pleasure” could be dismissed at the will of the state, and thus now a duty of fairness was

52. *Ibid* at 669.

53. *Ibid* at 668.

54. *Ibid* at 678.

55. *Supra* note 3.

owed.⁵⁶ But the main force of his judgment was the recognition of an overarching duty of fairness in order to avoid arbitrariness and injustice.⁵⁷ The police constable was entitled to a hearing because he was owed a general duty of fairness, not because of any particular legislative intention demonstrated by removing the phrase “at the pleasure” from the Act. Chief Justice Laskin held that: “*Status in office* deserves this minimal protection, however brief the period for which the office is held.”⁵⁸

When the law on procedural fairness for civil servants was revised in *Dunsmuir*, legislative intention was a background consideration.⁵⁹ In denying a duty of fairness in the termination of the employment of an office holder “at pleasure”, the Court looked to the contract of employment, not to the statute: “[W]here a dismissal decision is properly within the public authority’s powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness”.⁶⁰ Subsequently, in *Canada (Attorney General) v Mavi*, the Court characterized *Dunsmuir* as creating a “rather narrow . . . employment contract exception from the obligation of procedural fairness”.⁶¹

The recent decision of the Court of Appeal of New Brunswick in *Ouellette v Saint-André*, however, indicates that legislative intent can nevertheless play an important role in procedural review, although not as central to the analysis as it would be in substantive review.⁶² In *Ouellette*, the applicant was the Clerk, Treasurer and Administrative Officer of the respondent township, a position from which she could be dismissed for cause by a super majority of the municipal council. A series of concerns arose over her stewardship of the township’s finances. Auditors were appointed and reported negatively on the applicant. The applicant was made aware of the auditors’ findings. She had several meetings with the mayor and the council in which she failed to explain herself satisfactorily. Inquiries were made by the council with a financial institution. These inquiries yielded evidence that the financial institution was not responsible

56. *Ibid* at 324.

57. *Ibid* at 325–26.

58. *Ibid* at 328 [emphasis added].

59. See David J 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.

60. *Dunsmuir*, *supra* note 12 at para 106.

61. 2011 SCC 30 at para 51, [2011] 2 SCR 504 [*Mavi*].

62. 2013 NBCA 21, 402 NBR (2d) 228 [*Ouellette*].

for any discrepancies. The applicant was not informed of the inquiries nor given an opportunity to respond to their findings. On receipt of the evidence, the council voted unanimously to dismiss the applicant.

Justice Bell held that the applicant in *Ouellette* did have a right to procedural fairness, distinguishing *Dunsmuir* because Mr. Dunsmuir had “the opportunity to challenge a for cause dismissal”.⁶³ The fact that the applicant could only be dismissed for cause and by a super majority further suggested that procedural rights should attach. Legislative intent provided important context:

[J]oint requirements of cause and a 2/3 majority would lead one to conclude that Ms. Ouellette was entitled to an opportunity to address Council. In my view, it would not be reasonable for the Legislature to impose such stringent conditions on termination, particularly the percentage vote by Council, without intending to provide the public officer an opportunity to respond and present her position to Council.⁶⁴

Justice Bell established the applicant’s right to procedural fairness by drawing on *Dunsmuir*. There, the Court had held that a duty of procedural fairness survives in the public employment context (a) where a public employee is not protected by contract, or (b) the duty of fairness flows from a statutory power governing the employment relationship.⁶⁵ Without a contract, and with a statutory scheme regulating the relationship between the parties and indicating the nature and importance of the decision, a duty of fairness had to be imposed on what was an exercise of public power *par excellence*.

The message from *Ouellette* is that the statute provides the context. The context-sensitive application of the three *Knight* factors by a reviewing court will determine whether a right to procedural fairness exists.

(ii) Content of the Right to Procedural Fairness

Once a right to procedural fairness has been found to exist, the content of that right must also be determined. In the leading case on content, *Baker v Canada (Minister of Citizenship and Immigration)*, L’Heureux-Dubé J expanded on her *Knight* analysis to offer a non-exhaustive list of

63. *Ibid* at para 17.

64. *Ibid* at para 18.

65. See *Dunsmuir*, *supra* note 12 at paras 115–16.

five factors for determining the extent of the procedural protections “in a given set of circumstances”.⁶⁶ In a subsequent case the Court summarized the factors as follows:

- (i) “the nature of the decision being made and the process followed in making it”;
- (ii) “the nature of the statutory scheme and the ‘terms of the statute pursuant to which the body operates’”;
- (iii) “the importance of the decision to the individual or individuals affected”;
- (iv) “the legitimate expectations of the person challenging the decision”; and
- (v) “the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances”.⁶⁷

It is trite law that the extent of procedural protection depends on context. The rules of procedural fairness “are not engraved on tablets of stone”.⁶⁸ In part, this context is formed by the statutory scheme that manifests the legislative choice to vest authority in an administrative decision maker rather than a court: “The common law duty of fairness is not free-standing, but is imposed in connection with the particular scheme in which the impugned administrative decision has been taken.”⁶⁹ As the Court explained in *Mavi*: “Once the duty of procedural fairness has been found to exist, the particular legislative and administrative context is crucial to determining its content.”⁷⁰ Legislative intent is thus indirectly relevant to determining the extent of procedural protection.

Nonetheless, a standard of correctness applies to questions of procedural fairness and the final word on whether the duty of fairness has been satisfied

66. *Baker*, *supra* note 5 at para 21.

67. *Mavi*, *supra* note 61 at para 42 [footnotes omitted]. It may be the case that claims to procedural rights are determined by reference to rules rather than pursuant to the standards set out in *Baker*. See e.g. *Boshra v Canadian Association of Professional Employees*, 2011 FCA 98, 415 NR 77. Justice Evans observed: “Judicial intervention on the ground of procedural fairness is only warranted where an oral hearing is necessary to provide a reasonable opportunity for parties to effectively make their case or to answer that against them.” *Ibid* at para 15. However procedural claims are determined—by rules or by standards—it is the reviewing court that has the final word.

68. *Lloyd v McMahon*, [1987] AC 625 at 702 (HL (Eng)).

69. *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116 at para 45, [2010] 2 FCR 488 [*Irving Shipbuilding*].

70. *Supra* note 61 at para 41.

rests with the reviewing court. Indeed, L'Heureux-Dubé J made this clear in *Baker*. She described the factors in the *Baker* test as “principles” whose role is to “help a court determine whether the procedures that were followed respected the duty of fairness”.⁷¹ To put it slightly differently, the role of the reviewing court “is to ask whether the requirements of procedural fairness and natural justice in the particular circumstances have been met”.⁷² In this process, “some weight” may be given “to the considered choices of the agency under review”,⁷³ according them a “margin of deference”⁷⁴ that leavens the application of the correctness standard. But the ultimate decision remains that of the reviewing court. Legislative intent is not treated as carving out an interpretive space for the decision maker as it does in substantive review. Whether the individual has a right to, say, an oral hearing or representation by counsel, does not depend on the reasonable determination of the administrative decision maker, rather it depends on the conclusions of a reviewing court.

The *Baker* factors relating to statutory provisions should accordingly be taken with a grain of salt. For one thing, the nature of the statutory scheme is surely bound up with and inseparable from the nature of the decision and its effect on the individual; as a result, statutory provisions are of derivative importance in determining whether a particular procedural right ought to be accorded.⁷⁵ More seriously, an administrative decision maker’s discretion to choose procedures is not *carte blanche*. Decision makers have significant latitude in managing their proceedings: Discretionary decisions about, for example, the law of evidence, are not best analyzed as potential breaches

71. *Baker*, *supra* note 5 at para 28 [emphasis added].

72. *Ontario Provincial Police Commissioner v MacDonald*, 2009 ONCA 805 at para 37, 255 OAC 376.

73. David Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004) 17:1 Can J Admin L & Prac 59 at 87. See also *Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 42, 455 NR 87 [*Re:Sound*] (discussed in Part II-C, below).

74. *Mission Institution v Khela*, 2014 SCC 24 at para 89, [2014] 1 SCR 502.

75. One exception is the relevance of a statutory appeal to the existence of a right to reasons. Courts, Canadian courts included, have often justified the imposition of a reason-giving requirement on the availability of a statutory appeal, on the basis that the efficaciousness of the appeal would be endangered were reasons not given. See e.g. *Baker*, *supra* note 5 at para 43. Significantly, the right to reasons is the weakest point of the divide between process and substance, because it seems to imply that only reasons good enough to survive substantive review will be satisfactory. See e.g. Dyzenhaus & Fox-Decent, *supra* note 6 at 217.

of procedural fairness.⁷⁶ But decisions to grant or refuse a procedural right are of a different nature. If an administrative decision maker has a choice whether to, say, grant an individual a right to be represented by counsel before a tribunal, it cannot refuse to grant the right if doing so would violate the common law.⁷⁷ As Sopinka J put it in *Prasad v Canada (Minister of Employment and Immigration)*:

We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures *subject to the proviso that they comply with the rules of fairness* and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.⁷⁸

In other words, if the nature of the decision is grave and of great importance to the affected individual, the fact that the decision maker could exercise discretion would be rather beside the point: The only lawful course is to

76. See *Université du Québec à Trois-Rivières v Larocque*, [1993] 1 SCR 471 at 487, 11 Admin LR (2d) 21. Chief Justice Lamer stated:

I have no hesitation in concluding that the arbitrator had complete jurisdiction to define the scope of the issue presented to him, and that only an unreasonable error on his part in this regard or a breach of natural justice could have constituted an excess of jurisdiction. I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

Ibid. Nonetheless, Lamer CJ held that any error leading to a breach of the principles of natural justice would invalidate a decision. It would be more straightforward to say that unreasonable decisions about the conduct of a hearing would justify judicial intervention, pursuant to the approach I advocate in Part II, below. See also *Canadian Airport Workers Union v Garda Security Screening Inc*, 2013 FCA 106 at para 5, 227 ACWS (3d) 856; *Ontario (Ministry of Community, Family and Children Services) v Crown Employees Grievance Settlement Board* (2006), 81 OR (3d) 419 at para 22, 51 Admin LR (4th) 114 (CA).

77. See e.g. 2747-3174 *Québec Inc c Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 71, 140 DLR (4th) 577 [*Québec Inc*]; *Keefe v Clifton Corp*, 2005 ABCA 144, 29 Admin LR (4th) 245 ("Council's discretion to determine its own procedure is subject to compliance with its own legislative scheme and procedural fairness" at para 21).

78. [1989] 1 SCR 560 at para 46, 57 DLR (4th) 663 [emphasis added].

grant the right. Discretion must be exercised in accordance with common law principles.

As a result, it seems clear that the common law of procedural review—that which governs both the existence and content of the right to procedural fairness—is a judicially developed norm subject to displacement only by clear statutory language. For the purposes of substantive review, a reviewing court must ask itself “[d]id the legislator intend the question to be within the jurisdiction conferred on the tribunal?”,⁷⁹ whereas a court seized of a procedural fairness matter must apply the *Knight* and *Baker* factors in the context of the relevant statutory scheme. Legislative intent operates largely in the background.

C. Independence

A third pole might seem to come into view once institutional review, an offshoot of procedural review, is considered. Institutional review concerns challenges to administrative decision-making structures that may give rise to a reasonable apprehension of bias.⁸⁰ Of particular interest in institutional review is the curial norm of independence. At this pole, legislative intent seems to push out the common law entirely. Yet on closer inspection, the Court’s treatment of institutional review, more generally, aligns with its treatment of procedural review. The subcategory of independence appears to be an anomaly.

Previously, the Court identified the hallmarks of administrative decision makers’ independence as (i) security of tenure and (ii) protection from executive interference.⁸¹ On this approach, the common law required that administrative decision makers be free from external pressure, especially from elected members of the executive branch. But the Court reversed course in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*.⁸² Strikingly, the Court suggested that the norm of administrative independence was itself *dependent* on choices made by the legislature:

79. *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1087, 35 Admin LR 153.

80. See Guy Régimbald, *Administrative Law*, 1st ed (Markham: LexisNexis, 2008) at 299.

81. See *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129; *Québec Inc*, *supra* note 77.

82. 2001 SCC 52, [2001] 2 SCR 781 [*Ocean Port Hotel*].

It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended. . . . Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive.⁸³

Administrative decision makers' independence, then, depends entirely on legislative intent. There is no room for administrative common law.⁸⁴ Statutes reign supreme.

A subtle difference in the way procedural rights and institutional structure are constructed may explain the apparent disconnect between the two. Consider the following passage from *Ocean Port Hotel*:

[G]iven their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it.⁸⁵

This claim is normative: note the use of "properly". But it follows from a descriptive claim: Each time an administrative decision-making structure is established, a choice is made about the desired level of independence. This is not the case with procedural rights. As far as procedures are concerned, the legislature need say nothing at all, leaving it entirely up to the administrative decision maker—and ultimately the courts on judicial review—to identify the appropriate procedures. Legislative choice as to independence, by contrast, is unavoidable as a practical matter. Practical reality, then, may explain the difference in approach to procedure and independence.

However, this fact of legislative life does not require courts to cede their place entirely. The Court's use of "properly" reflects only one possible approach to defining the norm of independence. The Court could have required the legislature to expressly oust security of tenure and institutional independence. Instead, the Court allowed the legislature to define the content of the norm of independence, leaving no room for the common law.

83. *Ibid* at paras 20–22.

84. In the absence of a constitutional argument, which is quite difficult to establish. See e.g. *R v Saskatchewan Federation of Labour*, 2013 SKCA 61, 363 DLR (4th) 263. But see also the strong argument made by Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: University of British Columbia Press, 2013).

85. *Supra* note 82 at para 24.

In other cases, it is notable that the Court has treated other types of institutional review and procedural review identically. Where an administrative decision maker has discretion, it must exercise that discretion in a way that avoids creating a reasonable apprehension of bias, just as it has to exercise discretion in a way that is consistent with the common law of procedural fairness.⁸⁶

IWA v Consolidated-Bathurst Packaging Ltd is a good example of a case where institutional and procedural review were treated identically.⁸⁷ Here, an administrative tribunal allowed board members sitting on a case to discuss general policy implications of a draft decision with the entire board after the hearing but before reaching a final decision. The individuals affected by the decision had no knowledge of the discussions, nor the opportunity to respond to them. *Prima facie*, this structure violated the principle that “he who hears must decide”.⁸⁸ Justice Gonthier noted that “nothing” in the governing statute gave “the chairman, the vice-chairmen or other Board members the power to impose his opinion on any other Board member”.⁸⁹

Board members holding general policy discussions in order to achieve consistency in decisions was permissible, but, Gonthier J cautioned, “this *de jure* situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions”.⁹⁰ Participants in the high-level discussions could not lawfully descend into the factual minutiae of individual cases. The common law spoke to fill the statutory silence. Thus, the common law of institutional review shades into that of procedural review: They are not poles apart.⁹¹ Of course, this only throws into sharper relief the distance between

86. See *Québec Inc*, *supra* note 77 at para 71.

87. [1990] 1 SCR 282, 86 DLR (4th) 524 [*Consolidated Bathurst* cited to SCR].

88. *Ibid* at 330, 335. Strictly speaking, this principle is an aspect neither of the rule against bias nor procedural fairness—hence the utility of the institutional review category.

89. *Ibid* at 333.

90. *Ibid*.

91. To that extent, the argument made in Part II, below, also applies to institutional review. See e.g. *Canadian Union of Public Employees (Airline Division) v Air Canada*, 2013 FC 184 at para 43, 53 Admin LR (5th) 1 (applying a standard of reasonableness to a decision about delegation of functions). But in other circumstances, institutional questions—such as independence and bias—look more like the sort of questions that are and would continue to be subject to correctness review. See Part II-C, below.

the anomalous approach to independence in *Ocean Port Hotel* and the approach taken in the procedural fairness context.⁹²

D. Clear Statutory Language

One explanation for the bipolarity I have identified is to suggest that it is caused simply by a lack of clarity on the part of legislatures. As Binnie J said in *Khosa*: “[T]he legislature can by clear and explicit language oust the common law in this as in other matters”.⁹³ Perhaps, then, the bipolarity is only apparent—if legislative intent were clear, courts would have to give effect to it. Any bipolarity is the result of happenstance and reveals nothing profound about the Canadian approach to judicial review of administrative action.

This explanation does not speak to the bipolarity that I have identified. The differences between substantive and procedural review require an explanation. Simply stating that legislatures have not been sufficiently clear—but that all would be well if only they were more specific—does not explain the differences. The absence of clear legislative intent may be a condition precedent to the emergence of two distinct poles, but it is not the *reason* for the emergence of two distinct poles, and it does not *justify* the divergent approaches that have been taken in the absence of legislative clarity. Silence alone cannot be relied upon to defend approaches that diverge so markedly.

II. Fusing the Two Poles

The divergence between substantive and procedural review of administrative decisions in Canada has been attacked by two recent appellate cases. Building on this jurisprudence, I argue based on both doctrinal coherence and first principles that this distinction should be abandoned. Moreover, the deferential standard presumptively applied in substantive review should be applied to procedural review as well. Traditionalists who fear the extension of deference to questions of procedural fairness need not recoil. Modern reasonableness review is robust enough to provide adequate protection for procedural rights.

92. See generally Ellis, *supra* note 84.

93. *Supra* note 9 at para 50.

A. Challenges to Orthodoxy

Two recent attempts have been made by appellate judges to unite the two poles in *Syndicat des travailleuses et travailleurs de ADF-CSN c Syndicat des employés de Au Dragon forgé inc*⁹⁴ and *Maritime Broadcasting System Ltd v Canadian Media Guild*.⁹⁵

Justice Bich of the Quebec Court of Appeal was the first to challenge the prevailing orthodoxy in *Au Dragon forgé*. The case involved a contest before the Commission des relations du travail (Quebec's labour relations board) between two unions over the right to represent the employees of a company. There were allegations that membership procedures were not properly followed and that consents had been improperly procured. The union that ultimately lost its accredited status wanted access to the names of a number of employees that the Commission had determined did not belong to it. The Commission refused the request, citing section 36 of the *Labour Code*, which prevents "anyone" from revealing "that a person belongs to an association of employees", providing that anyone who "becomes aware of the fact that the person belongs to the association is bound to secrecy".⁹⁶

The union argued that its right to full answer and defence had been denied, in violation of the principle *audi alteram partem*. At first instance, the Commission's decision was quashed: The union had been deprived of critical information and section 36 was not sufficiently clear to oust the right to procedural fairness.⁹⁷ Although section 36 appears clear enough on its face, the union proposed a purposive analysis, arguing that the section's purpose is to protect employees from being pressured by their employer. The union argued that section 36 did not speak to the *inter-union* conflict at issue. Following the traditional approach to procedural fairness, since there was no clear prohibition on their application, procedural fairness rights should apply with full force.

Justice Bich did not accept this argument. One means of upholding the Commission's decision would have been to say that section 36 was sufficiently clear to oust (or at least, qualify) the common law right to

94. 2013 QCCA 793, 243 ACWS (3d) 446 [*Au Dragon forgé*].

95. 2014 FCA 59, 70 Admin LR (5th) 1 [*Maritime Broadcasting*].

96. CQLR, c C-27, s 36.

97. See *Au Dragon forgé*, *supra* note 94.

full answer and defence. But Bich JA went further. In her view the issue was not about the Commission breaching the rules of natural justice, but rather was about statutory interpretation. Thus the Commission's compliance with procedural fairness could not be subjected to review on a correctness standard. Rather, in interpreting and applying section 36 (and other related provisions) the Commission was subject to review on a deferential standard.

This, Bich JA held, was consistent with the Supreme Court's approach in *Doré v Barreau du Québec*.⁹⁸ There, a deferential standard was applied to a disciplinary tribunal's interpretation of the *Charter* right to freedom of expression. Sauce for the *Charter* goose should be sauce for the procedural fairness gander.⁹⁹ On the facts, the Commission's interpretation of section 36 struck the necessary reasonable balance between the principle of *audi alteram partem* and the statutory objectives of protecting the identity of employees involved in labour.¹⁰⁰ As a result, the task of presenting a full case might be made more difficult and time-consuming, but it was certainly not rendered impossible.¹⁰¹

This approach is distinct from that traditionally taken by courts in procedural fairness cases. A traditionalist would have held either (a) that section 36 was insufficiently clear to oust the common law (as the judge of

98. *Ibid* at para 44.

99. *Ibid* at para 45.

100. *Ibid* at para 49.

101. The court in *Au Dragon forgé* stated:

En somme, au nom d'une vision très stricte de la règle *audi alteram partem*, l'intimé souhaiterait la transmission intégrale de tous les renseignements que possède la Commission, y compris quant à l'appartenance syndicale des salariés, écartant ainsi les articles 35 et 36 C.t. Mettant plutôt dans la balance le principe de la confidentialité de l'appartenance syndicale et la règle *audi alteram partem*, la Commission choisit une interprétation qui combine ces deux valeurs : on protège ainsi, généralement, la confidentialité de l'appartenance syndicale tout en permettant que soient dévoilées aux parties intéressées les informations détenues par la Commission, mais d'une manière non nominative On peut donc parler de « mise en balance proportionnée », pour emprunter la terminologie de la Cour suprême dans l'affaire *Doré c. Barreau du Québec*. Au pire, le fait de ne pas communiquer à un syndicat la liste des membres de son concurrent pourrait rendre la réalisation de son enquête un peu plus difficile ou, plus exactement, un peu plus longue, mais nullement insurmontable.

Ibid at para 61.

first instance did), or (b) that it was sufficiently clear. But Bich JA held that the Commission had only to strike a reasonable balance. Unquestionably, she applied a deferential standard in determining the content of the right to procedural fairness.

Writing only for himself, Stratas JA took a similar view in *Maritime Broadcasting*.¹⁰² In this case a trade union successfully applied to the Canadian Industrial Relations Board for certification of a bargaining unit, but the application was opposed by Maritime Broadcasting. The company complained (i) that the Board departed without warning from a previously established policy, (ii) that the Guild was given the chance to make additional submissions and (iii) that no oral hearing was held. The Board reconsidered each of these issues but declined to depart from its initial position.

Justice Stratas approached the matter from “first principles”, holding that a deferential standard should be applied for three reasons.¹⁰³ First, he held that context is vitally important to the resolution of procedural fairness issues, and that the administrative decision maker, as the “fact-finder”, is “best placed” to resolve those issues in a manner that is sensitive to context: “Armed with these advantages, the Board is master of its own procedure, free to design, vary, apply and, in reconsideration proceedings, assess its procedures to ensure they are fair, efficient and effective.”¹⁰⁴ Second, Stratas JA noted that in *Dunsmuir*, the Supreme Court urged reasonableness as the default standard of review for expert tribunals acting in their areas of specialization.¹⁰⁵ In many cases, questions of procedural fairness will fall into these areas of specialization because they are “indistinguishable from any other decision where an administrative decision-maker applies law with which it is familiar, such as its home statute, to a set of facts before it”.¹⁰⁶ Third, he held that a series of pre-*Dunsmuir* cases which accorded deference (or at least referred to the possibility of deference) on procedural fairness questions, “remain good law”.¹⁰⁷

102. *Supra* note 95.

103. *Ibid* at para 50.

104. *Ibid*.

105. *Ibid* at paras 51–53.

106. *Ibid* at para 51.

107. *Ibid* at para 54.

The most important of this string of pre-*Dunsmuir* cases is *Bibeault v McCaffrey*.¹⁰⁸ For a unanimous Court, Lamer J accorded deference to the labour commissioners' decisions to refuse to hear the applicants' representations.¹⁰⁹ The applicants were employees who claimed that they had an interest in decisions to define bargaining units and wanted to participate in the decision-making process. The request to fully participate raised a question of procedural fairness: Did the employees have an interest which would entitle them to participate?¹¹⁰ The employees sought to "piggyback" on a statutory provision which suggested that they were an interested party. As Lamer J explained:

The complaint by the employees that the *audi alteram partem* rule has been infringed assumes that the law gives them the status of interested party and that, if so, it has not deprived them of the characteristics of that status. Such a finding is within the authority of the commissioners, and the latter, as a consequence of the privative clause, is immune from review by the superior courts unless it is patently unreasonable.¹¹¹

Though much water has passed under the substantive review bridge since *McCaffrey* was decided, its stance on deference remains as compelling as ever. An expert administrative tribunal, interpreting its home statute as the legislature intended,¹¹² is as entitled to deference today as it was in 1984.

B. Arguments in Favour of Fusion

The Court's recent insistence that "the standard for determining whether the decision maker complied with the duty of procedural

108. [1984] 1 SCR 176, 7 DLR (4th) 1 [*McCaffrey* cited to SCR].

109. *Ibid* at 184.

110. See also *Caimaw v Paccar of Canada Ltd*, [1989] 2 SCR 983, 62 DLR (4th) 437 [cited to SCR] (describing the issue in *McCaffrey* as follows: "[T]he right to be heard was, in that case, a statutory right, and the issue for decision by the Labour Commissioners was as to the scope of that right" at 1016).

111. *McCaffrey*, *supra* note 108 at 184–85 [emphasis added]. See also *ibid* ("[i]f employees were interested parties, the legislator would not have to specify in whose presence the investigation should be held" at 187).

112. In *McCaffrey*, a privative clause protected the decision maker, but the presence of such a clause is no longer a requirement for deference. Rather, it is enough that the decision maker interprets a statute in the specialized domain entrusted to it by the legislature.

fairness will continue to be ‘correctness’”¹¹³ rings hollow. Even if the jurisprudence has “satisfactorily” established correctness as the standard of review for procedural fairness claims, the Court has acknowledged that the “relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review”.¹¹⁴ Post-*Dunsmuir*, this inconsistency calls for a reassessment of the prevailing orthodoxy.

The dominant role of legislative intent has led to the “triumph” of reasonableness review on matters of substance.¹¹⁵ On some occasions, as in *Au Dragon forgé* and *McCaffrey*, a decision maker will have to interpret its home statute in order to resolve a procedural fairness issue. Post-*Dunsmuir*, that interpretation is presumptively entitled to deference. It is difficult to perceive why a subcategory of interpretations of law should be treated differently simply because they deal with matters of procedure rather than substance.

More generally, reasonableness is now also the standard of review in three other situations analogous to those involving procedural fairness. First, the Court made clear in *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals* that when a decision maker applies a common law rule, such as estoppel, while acting within its specialized domain, the resulting decision should be reviewed deferentially:

[L]abour 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.¹¹⁶

113. *Mission Institution v Khela*, *supra* note 74 at para 79.

114. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48, [2013] 2 SCR 559.

115. See John M Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014) 27:1 Can J Admin L & Prac 101.

116. 2011 SCC 59 at para 45, [2011] 3 SCR 616. See also *Figliola*, *supra* note 44.

The second situation involves the application of an external statute. In *Bernard v Canada (Attorney General)*,¹¹⁷ the Public Service Labour Relations Board had to apply the *Privacy Act*¹¹⁸ to a labour relations matter. The Board concluded that a union member's contact information must be provided to the union. Was the Board's interpretation of the privacy implications of this decision outside its area of labour relations expertise and reviewable for correctness, as the applicant urged? As Evans JA explained, the issue was not one of "general application" of the *Privacy Act* but rather turned on findings of fact made in the Board's specialized domain.¹¹⁹ There was no "readily extricable question of more general application that would elevate it to one of statutory interpretation" because the Board was applying the *Privacy Act* "to a labour relations context, its undisputed area of expertise".¹²⁰ On appeal, the Court laconically stated that the Board had come to a "reasonable" conclusion.¹²¹

Most significantly, the third situation occurs where the *Charter* is applied in the context of a particular statutory scheme. As Abella J explained in *Doré*: "An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values".¹²² *Doré* establishes that alleged breaches of constitutional rights, in some cases, are reviewable on a deferential standard.¹²³ If deference is applied to alleged breaches of the *Charter*, it is hard to justify applying a higher standard of review for alleged breaches of procedural fairness. It would be incongruous for common law procedural safeguards to provide more robust protection than the *Charter*.

In summary, as these three situations demonstrate, automatic correctness review on all procedural matters is inapposite. Instead,

117. 2012 FCA 92, [2013] 4 FCR 370 [*Bernard CA*].

118. RSC 1985, c P-21.

119. *Bernard CA*, *supra* note 117 at para 36.

120. *Ibid* at para 37.

121. *Bernard v Canada (Attorney General)*, 2014 SCC 13 at para 33, [2014] 1 SCR 227. See also *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42 at para 13, 371 DLR (4th) 383.

122. *Supra* note 22 at para 47.

123. *Ibid*. See also *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467.

deference on procedural fairness would be consistent with the general “orientation” of the Court’s recent jurisprudence.¹²⁴

These arguments for doctrinal consistency mesh with arguments from first principles. First, where an administrative decision maker is required to interpret a statutory provision central to its mandate in order to resolve an issue of procedural fairness,¹²⁵ deference is justified by legislative intent. It is the legislature that empowered the administrative decision maker to interpret the provision in the first place. As then-Professor Evans commented shortly after the Court began to advocate a policy of judicial deference to administrative interpretations of law:

The composition and institutional structure of the agencies, together with the expertise and the wide range of procedural tools available to them, apparently persuaded the courts that these bodies had indeed been given the primary statutory responsibility for implementing and elaborating the legislative mandate within their area of regulation.¹²⁶

Second, even in the absence of a particular provision dispositive of a procedural fairness question, there will typically be compelling reasons for deference. An administrative decision maker “knows the circumstances in particular proceedings before it”, has “expertise in the dynamics” of a particular regulatory domain and “has policy appreciation”.¹²⁷ Resolving the competing interests of meaningful participation and effective decision making may also be a delicate task: “Flexibility is necessary to ensure that individuals can participate in a meaningful way in the administrative process and that public bodies are not subject to procedural obligations that would prejudice the public interest in effective and efficient public decision-making.”¹²⁸ It may, moreover, turn on the appreciation of facts and the elaboration of the decision maker’s policy agenda—matters that traditionally call for deference. As the Court has recognized:

The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal,

124. See *Au Dragon forgé*, *supra* note 94 at para 46.

125. *Ibid* at para 42.

126. John M Evans, “Developments in Administrative Law: The 1984–85 Term” (1986) 8 SCLR (2d) 1 at 27.

127. *Maritime Broadcasting*, *supra* note 95 at para 50, Stratas JA.

128. *Re:Sound*, *supra* note 73 at para 36, Evans JA.

including the nature of the statutory scheme and the expectations and practices of the [decision maker's] constituencies.¹²⁹

These practical justifications for deference are linked to legislative intent because they reflect the very reasons that decision-making authority was granted to administrative decision makers by the legislature in the first place;¹³⁰ the “natural inference” is that they influenced the legislative decision to create and empower the administrative decision maker in question.¹³¹ Closer to the parties and more sensitive to the dynamics of the regulatory environment than a reviewing court, the administrative decision maker should benefit from deference in its resolution of procedural issues.

More broadly, the replacement of the concept of “natural justice” by that of a general duty of fairness undermines the case for judicial supremacy on matters of procedure.¹³² In the old system, inferior tribunals were subject to judicial review only when acting “judicially”.¹³³ A deviation from the rules of natural justice was a failure to act judicially, which reviewing courts could correct, just as an appellate court would correct the errors of a lower court. In addition, courts could be said to have expertise in respect of the content of the rules of natural justice since these rules applied to their own functions. Once natural justice came to

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

130. See Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) at 71 [Daly, *Theory of Deference*].

If reasons which explain the delegation of power can plausibly be inferred from a proper consideration of the relevant statutory provisions, then it can be argued that they influenced the legislative decision to delegate power to a body other than a court, and are thus factors that a reviewing court ought to consider . . . Consistent with their obligation to give effect to legislative intent, if, by reference to the relevant statutory provisions, it can plausibly be inferred that the practical justifications [for deference] influenced the decision to delegate power, courts ought to look to [these reasons] in determining the appropriate degree of curial deference to accord to delegated decision-makers.

Ibid. See also *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 49, 144 DLR (4th) 1 [Southam].

131. See *Southam*, *supra* note 130 at para 49.

132. I am grateful to Derek McKee for prompting this thought.

133. See *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co*, [1924] 1 KB 171 (CA).

be replaced by fairness, however, these justifications for intrusive judicial review of procedural questions ceased to be persuasive.¹³⁴ Canadian administrative law is long overdue for a change in the orthodox position on questions of procedural fairness.

C. Time for Fusion

It is now necessary to consider how the two poles might be fused. One possibility is simply to “give weight” to administrative decision makers’ determinations, as Evans JA suggested in *Re:Sound v Fitness Industry Council of Canada*:

In short, whether an agency’s procedural arrangements, general or specific, comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency’s choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the agency’s expertise, a degree of deference to an administrator’s procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.¹³⁵

It is unclear that this would actually represent a change to existing practice, for it is possible for courts to give weight to the procedural choices of a decision maker while retaining the final word on fairness for themselves.¹³⁶ Indeed, Evans JA’s proposal might be seen as following the orthodoxy and rejecting fusion, as it would continue to treat substantive review and procedural review distinctly. Moreover, to employ “weight” as a standard of review distinct from reasonableness and correctness would go against the grain of recent jurisprudence.¹³⁷ Completely integrating procedural review into the substantive review framework is the only viable option for fusion.

134. See generally David Mullan, “Fairness: The New Natural Justice” (1975) 25:3 UTLJ 281; Martin Loughlin, “Procedural Fairness: A Study of the Crisis in Administrative Law Theory” (1978) 28:2 UTLJ 215; Derek McKee, “The Standard of Review for Questions of Procedural Fairness” [unpublished, on file with author].

135. *Supra* note 73 at para 42.

136. See Part I-B-(ii), above.

137. My own view is that two standards of review are insufficient and that the attraction of adding others often overwhelms judges. For the insufficiency of the two standards,

Another approach to fusing the poles would be Bich JA's deferential approach in *Au Dragon forgé*. However, this would apply only in limited circumstances. In *Au Dragon forgé*, Bich JA justified a deferential approach on the basis that the issue in the case was one of statutory interpretation, not procedural fairness.¹³⁸ Deciding when a case is one of statutory interpretation and not of procedural fairness would, however, prove a tricky task. And, as I have argued, compelling reasons for deference on questions of procedural fairness will exist in cases other than those involving the interpretation of a decision maker's home statute.

Recognizing that deference will be appropriate on a wide range of questions of procedural fairness opens up the possibility for a complete fusion of substantive review and procedural review under the post-*Dunsmuir* framework.¹³⁹ Deference on questions of procedural fairness will be as appropriate as deference on substantive issues in situations where a decision (i) relates to the interpretation of a decision maker's home statute or statutes closely connected to its function; (ii) raises issues of fact, discretion or policy; or (iii) involves inextricably intertwined legal and factual issues.¹⁴⁰ As Stratas JA put it in *Maritime Broadcasting*, the decisions on procedural fairness were entitled to deference because they were evaluated "under the umbrella of legislation empowering the Board to consider its own procedures based on its appreciation of the particular circumstances of cases and to vary or depart from those procedures when it considers it appropriate".¹⁴¹

Traditionalists can take comfort in the availability of correctness review in some circumstances. In the post-*Dunsmuir* framework, procedural fairness questions may be reviewable on a standard of

see Daly, *Theory of Deference*, *supra* note 130. For the attraction of adding other standards, see Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483; Paul Daly, "The Scope and Meaning of Reasonableness Review" 52 Alta L Rev [forthcoming in 2015] [Daly, "Reasonableness Review"]. "Weight" could be accommodated as a distinct standard of review, but this would only be possible after a fusion of substantive review and procedural review.

138. *Supra* note 94 ("la norme de la décision correcte s'appliquera lorsqu'est en jeu, directement, le respect des règles de justice naturelle" at para 31 [emphasis added]).

139. Again, my own view is that the post-*Dunsmuir* framework is badly flawed. See Daly, "Form Over Substance", *supra* note 20. My argument here is that whatever framework for substantive review is in place should be applied—warts and all—to procedural review.

140. *Smith v Alliance Pipeline*, 2011 SCC 7 at para 26, [2011] 1 SCR 160.

141. *Supra* note 95 at para 63.

correctness either because they are (i) “true” questions of jurisdiction or *vires* going to whether a decision maker’s “statutory grant of power gave it the authority to decide the matter”¹⁴² or, more commonly, (ii) because they are questions of general law of central importance to the legal system due to their “precedential value” outside of a “specific regulatory regime”.¹⁴³ For example, interpretation of a framework statute such as the *Federal Courts Act* or the *Statutory Powers Procedure Act* would fall into the latter category and be reviewable on a correctness standard, as might issues relating to the application of the duty of fairness to administrative,¹⁴⁴ commercial¹⁴⁵ or legislative decisions.¹⁴⁶

Traditionalists might argue that procedural rights should not be left to the mercy of administrative decision makers. In many situations that give rise to procedural fairness claims—especially those concerning the scope of the duty of fairness—no contemporaneous explanation is given by the decision maker.¹⁴⁷ This, it might be argued, is an unpromising basis for deference since it would undermine the dignitary interests of individuals and thereby undermine the rule of law.

But traditionalists should not recoil. Reasoned decisions are required to allow reviewing courts to exercise their constitutionally guaranteed function of judicial review.¹⁴⁸ Without a reasoned decision, there can be no deference, for there is nothing to defer to.¹⁴⁹ As Professor Mullan cautioned in a commentary on *McCaffrey*, it is important to have regard to “the nature of the decision-maker, including its capacities for making procedural judgments (particularly in comparison with the courts’ own

142. *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 61, 371 DLR (4th) 219.

143. *Ibid* at para 60.

144. See e.g. *Knight*, *supra* note 50 at 670.

145. See e.g. *Irving Shipbuilding*, *supra* note 69.

146. See e.g. *Canada (AG) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735, 115 DLR (3d) 1.

147. It would also be relatively unusual for a decision maker to give a reasoned explanation as to why a promise to follow a particular procedure was not sufficiently “clear, unambiguous and unqualified” to ground a legitimate expectation. *Mavi*, *supra* note 61 at para 68.

148. See e.g. *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm LR (4th) 267; *Leahy v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 FCR 766; *Wall v Independent Police Review Director*, 2013 ONSC 3312, 362 DLR (4th) 687.

149. There are cases in which the Court has deferred in the absence of contemporaneous

expertise in such matters) and the seriousness with which it has dealt with the procedural question under review”.¹⁵⁰ Nonetheless, where an expert decision maker denies a procedural claim, or protests the application of the duty of fairness to some or all of its activities, if it furnishes a reasoned decision based on statutory provisions or context with which it is familiar, it is hard to see why deference should be refused. Yet I emphasize that fusion would not mean subjecting all fairness questions to deferential review: “Courts give no deference to decision-makers when the issue is whether the duty of fairness applies in given administrative and legal contexts”,¹⁵¹ which would doubtless often continue to be the case either because no reasoned decision has been given or because the question at issue falls into one of the correctness categories.

A decision that falls into one of the reasonableness categories can be reviewed deferentially. Here too there are safeguards. The Court has emphasized that a deferential standard of review permits judicial intervention where the administrative decision lacks “justification, intelligibility and transparency” or falls outside the “range” of acceptable outcomes.¹⁵² These criteria hold administrative decision makers to a high standard and ensure respect for the rule of law. In the particular context of procedural fairness, administrative decision makers’ room for manoeuvre may accordingly be somewhat limited:

Given the well-defined legal standards set by the existing case law on procedural fairness, the range of acceptable and defensible options or margin of appreciation open to the administrative decision-maker often will be constrained. There will be cases, however,

reasons. See e.g. *Alberta Teachers’ Association*, *supra* note 21 at paras 53–56. Even at its most expansive, however, the practice of deferring in such situations was premised on the authority of the decision maker to interpret the relevant provisions authoritatively, the consistency of the interpretation with the principles of statutory interpretation and the inefficiency of remitting the matter for further reasons. See *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 71–72, [2013] 3 SCR 895. For criticism, see Daly, “Reasonableness Review”, *supra* note 137; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 DLR (4th) 567. See also *Re:Sound*, *supra* note 73 at para 35.

150. David J Mullan, “Developments in Administrative Law: The 1983–84 Term” (1985) 7 SCLR (2d) 1 at 19.

151. *Re:Sound*, *supra* note 73 at para 35.

152. *Dunsmuir*, *supra* note 12 at para 47.

where the nature of the matter and the circumstances before the administrative decision-maker should prompt the reviewing court to give the decision-maker a wider margin of appreciation.¹⁵³

There is nothing to fear from the fusion of substantive and procedural review under the post-*Dunsmuir* framework.

Conclusion

The values of democracy and good administration underpin the post-*Dunsmuir* framework for substantive review. Presumptive deference to administrative decision makers' interpretations of their home statutes is based on the specialized expertise of those decision makers (a matter of good administration) and ultimately on legislative intent (a matter of democracy). These values also underpin deference on questions of procedural fairness. The legislature has delegated the interpretation of the relevant statute to the administrative decision maker (a matter of democracy) and has done so because an expert administrative decision maker is more likely than a reviewing court to be familiar with what procedural rights are required to effectively achieve its statutory mandate (a matter of good administration).¹⁵⁴

But good administration and democracy are not the only relevant values. The requirements of "justification, transparency and intelligibility" and of decisions falling within a "range" of acceptable outcomes ensure respect for the rule of law by allowing reviewing courts to overturn irrational, illogical, arbitrary, inequitable or disproportionate decisions.¹⁵⁵ Individual dignity and autonomy are thereby respected.

Currently, legislative intent usually justifies deferential review on substantive issues while procedural questions are subjected to review on the standard of correctness. This bipolar system has been challenged by recent appellate court decisions. As I have demonstrated, it is possible to

153. *Maritime Broadcasting*, *supra* note 95 at para 58.

154. See generally Paul Daly, "Administrative Law: A Values-Based Approach" in Mark Elliott & Jason Varuhas, eds, *Process and Substance in Public Law Adjudication* (Oxford: Hart Publishing, 2015) [forthcoming].

155. See further Paul Daly, "Unreasonable Interpretations of Law" 70 SCLR (2d) [forthcoming] (in which I criticize the Court's current approach but indicate the value of reasonableness review).

fuse the two poles under the post-*Dunsmuir* framework by applying the deferential standard of substantive review to procedural questions without compromising Canadian courts' ability to uphold the rule of law.

Canada's framework for substantive review is respectful of the rule of law while alive to the concerns of good administration and democracy. Fusing it with the framework for procedural review would safeguard the "fundamental legal order of our country"¹⁵⁶ and greatly simplify the task of judicial review of administrative action.

156. *Canada (Attorney General) v Mowat*, 2011 SCC 53 at para 22, [2011] 3 SCR 471.