

The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency

*The Honourable Justice David Stratas**

The standard of judicial review rests at the very core of administrative law. For decades now, analytical approaches to judicial review have been constructed and demolished, and new ones offered in their place. In recent years, judges—including those on the Supreme Court of Canada—have openly expressed dissatisfaction with the current state of judicial review in administrative law and its application in Canada’s highest court. Today, we have an incoherent and inconsistent jurisprudence that remains at risk of further change. Doctrinal clarity is the solution, but to achieve it, certain fundamental questions must be settled. Does the standard of review matter? What fundamental concepts animate judicial review? What is “reasonableness” and how should reasonableness review be conducted? Answering these questions and others, the author aims to close the never-ending construction site and allow for responsible renovations based on settled doctrine using accepted pathways of legal reasoning.

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Introduction

Doctrinal incoherence and inconsistency plague the Canadian law of judicial review. This must stop.

Professor Emeritus David Mullan—the dean of the Canadian administrative law academy—has identified at least fifteen fundamental, unresolved problems in the law of judicial review.¹ For some time now, these have festered and remain unaddressed. Other academic commentators highlight the growing pile of unanswered questions and doctrinal confusion.² One rising member of the

1. David Mullan, “Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action: The Top Fifteen!” (2013) 42:1&2 Adv Q 1.

2. See e.g. Peter A Gall, QC, “Problems with a Faith-Based Approach to Judicial Review” (2014) 66 SCLR (2d) 183 at 223–31; Matthew Lewans, “Deference and Reasonableness Since

academy opines that only a couple of Supreme Court of Canada cases in the last eight years contribute to the doctrine while the rest—tens of cases—do not and are best ignored.³

For a while now, judges attending judicial education conferences regularly have been expressing frustration. Some are now articulating it in their reasons.⁴

These judges are not alone. Now, even judges on the Supreme Court of Canada are openly registering dissatisfaction about the current state of administrative law and the manner in which their Court applies it.⁵

The administrative law of most other major Commonwealth countries does not seem to be in such turmoil. But ours is—and has been for far too long.

Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan. Roughly forty years ago, the Supreme Court of Canada told us to categorize decisions as judicial, quasi-judicial or administrative.⁶ Then, largely comprised of different members, the Court told us to follow a “pragmatic and functional” test.⁷ Then, with further changes in its composition, it added another category of review, reasonableness, to join patent unreasonableness and correctness.⁸ Then, with more turnover of

Dunsmuir” (2012) 38:1 Queen’s LJ 59 at 82–92; Paul Daly, “*Dunsmuir*’s Flaws Exposed: Recent Decisions on Standard of Review” (2012) 58:2 McGill LJ 483 at 485; Paul Daly, “The Scope and Meaning of Reasonableness Review” (2015) 52:4 Alta L Rev 799 [Daly, “Reasonableness Review”].

3. See Paul Daly, “The Signal and the Noise in the Supreme Court of Canada’s Administrative Law Jurisprudence” (10 December 2015), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/12/20/the-signal-and-the-noise-in-the-supreme-court-of-canadas-administrative-law-jurisprudence/>; Paul Daly, “Can This Be Correct?: *Kanhasamy v. Canada* (Citizenship and Immigration), 2015 SCC 61” (11 December 2015), *Administrative Law Matters* (blog), online: <www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanhasamy-v-canada-citizenship-and-immigration-2015-scc-61/> [Daly, “Can This Be Correct?”].

4. See e.g. *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at paras 44–45, 392 DLR (4th) 351; *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City of)*, 2015 ABCA 85 at para 11, 382 DLR (4th) 85; *Skyline Agriculture Financial Corp v Farm Land Security Board*, 2015 SKQB 82 at paras 35–37, 473 Sask R 283; *Cornel v Canada (Transportation Appeal Tribunal)*, 2015 FC 755, 483 FTR 36.

5. See *Kanhasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 112, [2015] 3 SCR 909, Moldaver and Wagner JJ, dissenting [Khanhasamy]; *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57 at paras 185, 190, [2015] 3 SCR 615, Abella J, dissenting.

6. See *Martineau v Matsqui Institution Inmate Disciplinary Board*, [1978] 1 SCR 118, 74 DLR (3d) 1.

7. *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, 95 NR 161 [UES Local].

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

judges, it told us to follow the principles and methodology in *Dunsmuir v New Brunswick*.⁹ Now it appears that we may be on the brink of another revision: As we shall see, the Supreme Court of Canada—mysteriously—is often not deciding cases in accordance with the principles in *Dunsmuir* and other cases decided under it.

Administrative law matters. Resting at its heart is the standard of review, the body of law that tells us when the judiciary can legitimately interfere with decision making by the executive—a matter fundamental to democratic order and good governance, a matter where objectivity, consistency and predictability are essential.

Interference with the executive by the non-elected judiciary can be controversial, particularly in the many politically sensitive matters that arise. If the standard of review is well-defined and applied objectively in accordance with stable law, much of the controversy disappears. The appearance, and of course the reality, is that the judiciary is not playing politics: it is dispassionately and neutrally applying objective doctrine worked out years before. The executive is measured up against known legal rules, not something made up or manipulated by the judiciary on the fly. Predictability is maximized: Governments can know their powers and limits, and everyone can knowledgeably plan their affairs.

Right now, we are far from realizing these objectives. Confusion and uncertainty surround so many fundamental questions in administrative law, at least as far as Supreme Court of Canada cases are concerned.

Why this article? I have to work with this jurisprudence every day. I may soon be faced with another reconstruction of this area of law. I have worked for clarity, consistency, unity and simplicity in this crucial area of law for much of my life. As well, as I have recently explained elsewhere,¹⁰ growing inattention to doctrine in public law on the part of the judiciary, the legal profession and the academy threatens our ability to address possible abuses by government in the future. We must pay more attention now to the settlement of the doctrine in this area of law before it is too late.

To these ends and for these reasons, I have written this article.¹¹ I identify some of the unresolved fundamental questions in the Canadian law of judicial

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

10. See The Honourable Justice David Stratas, “Reflections on the Decline of Doctrine” (Lecture delivered at the Canadian Constitutional Foundation, Toronto, 8 January 2016), online: YouTube <<https://www.youtube.com/watch?v=UxTqMw5v6rg>>.

11. On general issues such as these and on smaller but serious concerns about the correctness of jurisprudence, intermediate appellate judges are permitted to comment. The Supreme Court

review arising from Supreme Court of Canada jurisprudence. Then I offer some constructive suggestions for consideration.

I. Fundamental Questions

A. Does the Standard of Review Matter?

In the seminal case of *Dunsmuir*, the Supreme Court of Canada instructs us to determine the standard of review in every case, deciding between correctness review and reasonableness review.¹² This is consistent with the importance of the standard of review, explained above.

But today, the Supreme Court of Canada itself does not always settle the standard of review.¹³ In fact, in some cases, it does not discuss the standard of review at all.¹⁴ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)* and *Febles v Canada (Citizenship and Immigration)*, both administrative law cases, were so devoid of administrative law discussion the Court did not even caption them as administrative law cases.¹⁵ In those cases, the Court itself interpreted the law and applied it to the facts in the face of legislative regimes that vested the decision-making power with administrators, not the courts.

So does standard of review still matter? As explained above, it should.

of Canada recognizes that it does not have a monopoly on developing the law, and that it is best developed by a dialogue among the Supreme Court of Canada, appellate courts and trial courts in the decided cases, with the assistance of the academy and counsel. See *R v Henry*, 2005 SCC 76 at para 56, [2005] 3 SCR 609; *Canada v Craig*, 2012 SCC 43 at para 21, [2012] 2 SCR 489; *R v Mentuck*, 2001 SCC 76 at para 17, [2001] 3 SCR 442. In the end, the Supreme Court of Canada's word is final and judges in lower courts must comply regardless of their personal views. See *Canada v Craig*, *supra*.

12. *Supra* note 9.

13. See e.g. *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [B010].

14. See *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 SCR 431, aff'g 2012 FCA 324, 357 DLR (4th) 343 [*Febles*, SCC] (a case where there was substantial disagreement and discussion in the Federal Court of Appeal on the standard of review).

15. See *ibid*.

B. *What Authorities Are Relevant to the Standard of Review Analysis?*

Dunsmuir grandparents certain pre-*Dunsmuir* cases on the standard of review.¹⁶ But recently, the Supreme Court of Canada suddenly overturned this aspect of *Dunsmuir* and decreed a different rule: pre-*Dunsmuir* cases on the standard of review survive only if consistent with “recent developments in the common law principles of judicial review” (i.e., *Dunsmuir* and post-*Dunsmuir* cases).¹⁷ In effect, this ends grandparenting.

Why suddenly the new rule? It is a mystery left unexplained, a rule decreed with no stated doctrinal justification or explanation.

Kanthasamy v Canada (Citizenship and Immigration) adds to the confusion by both dismissing the helpfulness of pre-*Dunsmuir* cases and then relying exclusively on pre-*Dunsmuir* cases to determine the standard of review, all in the same paragraph.¹⁸

Assuming standard of review is still relevant—and it should be—what cases are relevant to it?

C. *When Must We Go Beyond the Dunsmuir Presumptions and Conduct a Full Standard of Review Analysis?*

Dunsmuir gave us certain presumptive rules to assist us in determining the standard of review. It also gave us factors to consider when determining whether the presumptive rules are rebutted.

But *Dunsmuir* never explained when we should resort to the factors rather than the presumptions. Early on, by and large, the Supreme Court of Canada used the presumptions and ignored the factors. Now, suddenly, the Supreme Court of Canada has gone to the factors without instructing us when we should do this.¹⁹ So which should we follow: presumptions or factors?

D. *Does the Principle of Legislative Supremacy Matter?*

Absent constitutional or *vires* objection, legislation binds everyone. No one is above the law.

16. *Supra* note 9 at para 62.

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

18. *Supra* note 5 at para 44.

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

This principle, enshrined in the English *Bill of Rights, 1668*,²⁰ was won at the cost of long struggle, bloodshed and revolution centuries ago. It has been part of the Canadian Constitution since our foundation.²¹ And like any other constitutional principle, no court can ignore it.²² It forms part of the core of our doctrine of judicial review.²³

Legislation sometimes signals that the standard of review should be correctness—no deference at all to the administrative decision maker. In some cases, the Supreme Court of Canada reads these signals and properly carries out the legislator’s intent, reviewing the decision for correctness.²⁴

But sometimes not. In cases where the legislator has enacted a full, untrammelled right of appeal from the administrative decision maker to the reviewing court, the legislator is instructing the reviewing court to interfere as it would in any appeal. This means, for example, that errors by the administrative decision maker in interpreting legislation would be legal errors that the reviewing court can correct. Yet, that is not the case. Even where the legislator has granted a full right of appeal, there is a presumption that administrative interpretations of legislation are subject to deferential reasonableness review.²⁵

Sometimes legislative provisions suggest that the standard of review in a case should be reasonableness—deference to the administrative decision maker. For example, privative clauses—clauses forbidding or greatly restricting judicial review—should matter.²⁶ But there are many Supreme Court of Canada cases where the presence of a privative clause in legislation goes unmentioned.

More questions about legislative supremacy arise in the area of the jurisdiction of administrative decision makers to consider “values” inherent in

20. (UK), 1 Will & Mar c 2, s 2.

21. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 (opening words of sections 91 and 92 and the preamble stating that we have a Constitution “similar in Principle” to that of the United Kingdom).

22. See generally *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 63, 161 DLR (4th) 385 [*Secession Reference*]; *JP Morgan Asset Management (Canada) Inc v MNR*, 2013 FCA 250 at para 35, [2014] 2 FCR 557.

23. See *Dunsmuir*, *supra* note 9 at paras 27–30.

24. See e.g. *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283.

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

26. See *Dunsmuir*, *supra* note 9 at para 52. See also the appropriate attention paid to the privative clause in the decision *New Brunswick (Board of Management) v Dunsmuir*, 2006 NBCA 27 at paras 10–17, 297 NBR (2d) 151, Robertson JA.

the *Canadian Charter of Rights and Freedoms*.²⁷ The Supreme Court of Canada has held that administrative decision makers can import “*Charter values*” into any matter before them, even where the legislative provision setting out the decision maker’s powers is limited and even where that provision seems inconsistent with the proffered *Charter values*.²⁸ This conflicts with earlier holdings based on the constitutional principle of legislative supremacy to the effect that the *Charter* does not add to or affect the subject-matter jurisdiction of subordinate bodies.²⁹

Doré v Barreau du Québec also conflicts with the seminal *Charter* case of *Slaight Communications Inc v Davidson*.³⁰ In *Slaight*, the Supreme Court of Canada said, in accordance with the principle of legislative supremacy, that in such cases the administrative decision maker must follow the legislative provision, and a litigant must constitutionally challenge the provision directly, either by asking the administrative decision maker to disregard the provision or, where permissible, through court proceedings for a declaration of invalidity.³¹

In *Doré*, the Supreme Court of Canada, disparaging *Slaight*, suggests there is a growing departure from “Diceyan principles”, in other words, the principle that legislation governs the scope of authority of administrative decision makers.³² This is contrary to the constitutional principle of legislative supremacy, is unsupported by authority and conflicts with many authorities, including the foundational case of *Dunsmuir*.³³

The recent case of *Kanthasamy* is seen by some as another example where the principle of legislative supremacy has been flouted.³⁴ Under section 74 of the *Immigration and Refugee Protection Act*,³⁵ appeals can only be taken to the Federal Court of Appeal if the Federal Court states a certified question on a question of law. This is a legislative signal that the Federal Court of Appeal should, in

27. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

28. See *Doré v Barreau du Québec*, 2012 SCC 12 at para 24, [2012] 1 SCR 395 [*Doré*].

29. See *R v 974649 Ontario Inc*, 2001 SCC 81 at paras 22–23, [2001] 3 SCR 575; *Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 63–65, 24 OR (3d) 358.

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

31. See the combined effect of *ibid* and *Nova Scotia (Workers’ Compensation Board) v Martin; Nova Scotia (Workers’ Compensation Board) v Lasaur*, 2003 SCC 54, [2003] 2 SCR 504.

32. *Supra* note 28 at para 29.

33. See *Dunsmuir*, *supra* note 9 at para 29.

34. *Supra* note 5.

35. SC 2001, c 27, s 74.

return, answer the question correctly. But in *Kanthasamy*, the majority of the Supreme Court of Canada disagreed, holding that the standard of review was reasonableness. It read section 74 down to a gate-keeping function, though it did not disagree with the fact that the Federal Court of Appeal must answer the certified question correctly. The majority did this without looking at the text, context and purpose of the provision, as it normally does. And in relegating section 74 to a gate-keeping function, it contradicted some of its own relevant authority to the contrary, without explanation.³⁶

As a result of *Kanthasamy*, in some cases the federal courts will now have to answer the certified question of law correctly, find that the administrative decision maker applied an incorrect view of the law but then go on to consider whether its decision should still stand (i.e., be regarded as a legally acceptable decision, despite the answer to the certified question). Surely Parliament did not have in mind this result when it enacted section 74.

E. How Do We Conduct Reasonableness Review? What Does “Reasonableness” Mean?

The main effect of *Dunsmuir* has been to subject most administrative decisions to reasonableness review rather than correctness review. Thus, the proper methodology of reasonableness review and the meaning of reasonableness is very much the core of judicial review and must be doctrinally settled. Unfortunately, the core is a mash of inconsistency and incoherence.

- I -

The reasonableness standard of review means entirely different things in different cases, but we know not why.³⁷

Often the Supreme Court of Canada purports to engage in reasonableness review—a “deferential standard”³⁸—but acts non-deferentially, imposing its own view of the facts or the law or both over the view of the administrative decision maker, without explanation.³⁹

36. See Daly, “Can This Be Correct?”, *supra* note 3.

37. See generally Lewans, *supra* note 2 at 82–92; Daly, “Reasonableness Review,” *supra* note 2 at 814–27.

38. See *Dunsmuir*, *supra* note 9 at para 47.

39. See e.g. *British Columbia (Workers’ Compensation Board) v Figliola*, 2011 SCC 52, [2011] 3 SCR 422; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*,

There are sometimes exceptions where the Supreme Court of Canada defers to administrative decision making quite consistently with the words of *Dunsmuir*.⁴⁰ Why deference prevails in these cases but not in so many others has never been explained.

*Kanhasamy*⁴¹ adds to the confusion by doing several inconsistent things at once: The Court begins by interpreting afresh the legislative provision that the administrative decision maker interpreted as if the standard of review were correctness, then it considers the standard of review and decides that the standard of review is reasonableness, and finally it parses the administrative decision maker's reasons for error on an exacting basis as if the standard of review were correctness.

What does the reasonableness standard mean and how should it be applied? After reading the decisions of the Supreme Court of Canada, many are baffled.

- II -

Reasonableness review requires us to start with the administrative decision and inquire “into the qualities that make [it] reasonable”.⁴² This makes sense: The legislator has chosen the administrative decision maker to decide the merits and so reviewing courts should respect that choice by beginning with a careful examination of what the administrator decided.

2012 SCC 37, [2012] 2 SCR 345; *Quebec (Commission des normes du travail) v Asphalte Desjardins Inc*, 2014 SCC 51, [2014] 2 SCR 514; *United Food and Commercial Workers, Local 503 v Wal-Mart Canada Corp*, 2014 SCC 45, [2014] 2 SCR 323; *Canadian Artists' Representation v National Gallery of Canada*, 2014 SCC 42, [2014] 2 SCR 197; *John Doe v Ontario (Finance)*, 2014 SCC 36, [2014] 2 SCR 3; *Dionne v Commission scolaire des Patriotes*, 2014 SCC 33, [2014] 1 SCR 765; *Martin v Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] SCR 546; *B010*, *supra* note 13; *Kanhasamy*, *supra* note 5; and many, many more. Many commentators describe these cases and others like them as “disguised correctness cases”.

40. See e.g. *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 [*Nor-Man*]; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Canada (Attorney General) v Kane*, 2012 SCC 64, [2012] 3 SCR 398; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65, [2012] 3 SCR 405; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*]; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 SCR 364; *Agraira*, *supra* note 17; and many, many more.

41. *Supra* note 5.

42. *Dunsmuir*, *supra* note 9 at para 47.

But repeatedly, reasonableness review has been conducted without starting with the administrative decision. Often, the Supreme Court of Canada does its own analysis of the merits (supposedly under reasonableness review) and finds the administrative decision to be wrong, offering only cursory words. Seldom is an administrative decision analyzed in any depth.⁴³ Sometimes the fact that an administrative decision was made is not even mentioned.⁴⁴

On judicial review, the reviewing court is to review the administrative decision. This must especially be so in the case of reasonableness review. What are we to make of the fact that the administrative decision is often ignored or even unmentioned?

- III -

When conducting reasonableness review, reviewing courts are to pay “respectful attention” to the administrative decision maker’s reasons and “be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful”.⁴⁵ In other words, reviewing courts should not embark on a “line-by-line treasure hunt for error”.⁴⁶

But here too, chaos reigns, with administrators’ reasons being closely parsed in some cases and barely looked at in others, all purportedly under the reasonableness standard of review.⁴⁷

- IV -

In *Dunsmuir*, the Supreme Court of Canada told us that reasonableness review is to take place on the basis of the reasons which could be offered in support of a decision.⁴⁸ Later, in *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, the Supreme Court of Canada in effect doubled down on this, saying that a reviewing court operating under the reasonableness standard should strive to uphold the outcome reached by the

43. See generally authorities listed in *supra* note 39.

44. See *Febles*, SCC, *supra* note 14.

45. *Newfoundland Nurses*, *supra* note 40 at para 17.

46. *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458 [citation omitted].

47. See the authorities listed in *supra* notes 39–40 (which well illustrate this conflicting approach).

48. *Supra* note 9 at para 48.

administrative decision maker and “seek to supplement [its reasons] before [seeking] to subvert them”.⁴⁹

However, on the day before *Newfoundland Nurses* was released, the Supreme Court of Canada said something quite different, telling lower courts to restrain themselves in finding additional reasons to support a decision.⁵⁰

In the end, we have different approaches in different cases with no explanation. Sometimes under the reasonableness standard the Supreme Court of Canada supplements the reasons to uphold an outcome.⁵¹ Sometimes not.⁵² We know not why.

The problem is that the rule allowing reviewing courts to supplement reasons is a rule that has been decreed, not deduced from an underlying doctrinal concept. In *Dunsmuir*,⁵³ the Supreme Court of Canada adopted this rule solely on the basis of a quote plucked out of context from a single academic article that, if read in its entirety, deals with another subject entirely and, in fact, advocates something quite different. Without a coherent underlying concept to guide this rule, no one knows its limits or when or how it should be applied.

As will be seen below,⁵⁴ I consider the rule to be contrary to proper doctrine and the proper role of the reviewing court in judicial review.

F. Where Does the Charter Fit in?

Above, I have shown how *Doré* sits uneasily with the principle of legislative supremacy⁵⁵. But it causes doctrinal incoherence in another respect.

If an administrative decision maker interprets a *Charter* provision, applies it and disregards a legislative provision, the standard of review for its decision

49. *Supra* note 40 at para 12, citing 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 304.

50. See *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*]. Mystifyingly, *Newfoundland Nurses*, *supra* note 40, does not refer to *Alberta Teachers*, *supra*.

51. See e.g. *Public Service Alliance of Canada v Canada Post Corp*, 2011 SCC 57, [2011] 3 SCR 572, rev’g in part 2010 FCA 56, [2011] 2 FCR 221.

52. See e.g. *Kanthasamy*, *supra* note 5. In fact, in that case, the administrator’s reasons were parsed to bits.

53. *Supra* note 9 at para 48.

54. See the text accompanying notes 132–34, *below*.

55. See the text accompanying notes 28–30, *above*.

is correctness.⁵⁶ Owing to the importance of interpretations of constitutional provisions, this makes sense. But if that same administrative decision maker interprets a *Charter* provision and finds a *Charter* value that determines the question it is deciding, the standard of review is reasonableness.⁵⁷ Why the difference?

Further compounding the confusion, we are left in uncertainty as to whether *Doré* still is good law. Recently, without explanation, three members of the Supreme Court of Canada declined to apply, let alone mention, *Doré*.⁵⁸ The other four members of the Court made *Doré* central to their reasons. Given that the Court normally staffs its appeals with nine judges, will *Doré* remain the governing law?

G. What Is the Standard of Review for Procedural Fairness?

In this area, there has been incoherence. Recently, the incoherence has increased. In the same case, the Supreme Court of Canada has told us not to defer to administrators' procedural decisions but also to defer to them on certain things.⁵⁹ Why and when we must defer or not defer goes unmentioned.

Dunsmuir never discussed this standard of review issue.⁶⁰ Decades of earlier case law from the Supreme Court of Canada is all over the place.⁶¹ Rules seem to be decreed in this area without any underlying doctrinal basis or rationale and certainly none based on the animating concept underlying judicial review.⁶²

Unsurprisingly, multiple views on this issue have emerged in my court, the Federal Court of Appeal—and despite pleas for resolution—none is in sight.⁶³

56. See *Dunsmuir*, *supra* note 9 at para 58.

57. See *Doré*, *supra* note 28.

58. See *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613.

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

60. See discussion in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at para 53, 373 DLR (4th) 167 [Maritime Broadcasting].

61. See the cases reviewed in *ibid* at paras 50–55 such as *Prasad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at 568–69, 57 DLR (4th) 663; *Council of Canadians with Disabilities v VLA Rail Canada Inc*, 2007 SCC 15 at para 231, [2007] 1 SCR 650; *Bibeault v McCaffrey*, [1984] 1 SCR 176, 7 DLR (4th) 1; *Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 SCR 713.

62. See discussion of the animating concept in the text accompanying notes 71–73, *below*.

63. See the summary of the multiple views in *Bergeron v Canada (Attorney General)*, 2015 FCA 160 at paras 67–71, 474 NR 366.

H. How Are Appellate Courts to Review First-Instance Judicial Review Decisions?

In the area of judicial review, appellate courts are to “step into the shoes” of the first-instance reviewing court—in effect, conducting *de novo* review of the administrative decision maker’s decision.⁶⁴ In other words, *Dunsmuir* review, the review that governs the relationship between judges and administrative decision makers, is to be done afresh by the appellate court.

But why is it *de novo* review in the appeal court? In this circumstance, the appellate court is reviewing the decision of the first-instance court, not the decision of the administrative decision maker. Shouldn’t the appeal court, engaged in appellate review, apply the normal appellate standard of review, the standard that governs the relationship between appellate courts and first-instance courts?⁶⁵ For better or worse, that is the rule in every other area of law, including constitutional adjudication.⁶⁶

II. Answering the Questions: Achieving Doctrinal Clarity, Consistency, Unity and Simplicity

Doctrinal clarity, consistency, unity and simplicity are possible. To achieve this, previously pronounced rules without a proper conceptual or doctrinal basis must be abandoned, other rules should be tweaked to reflect a proper conceptual basis, and then the doctrine must be applied dispassionately and consistently.

The Federal Court of Appeal—staffed by many across Canada who have spent their lives practising, teaching, studying and judging in the area of judicial review—supervises thousands of federal administrative decision makers and, more broadly, the federal executive, massive as it is. We are the last port of call in ninety-eight percent of the administrative law matters that come before us. By a large margin, we decide more judicial reviews than any other appellate court in Canada. We strive to arrive at results using consistent methodology and principled doctrinal analysis. As a result, we have developed coherent doctrine and have achieved a good measure of predictability. We have a general consensus on the broad strokes of the law of judicial review and our cases have

64. See *Agraira*, *supra* note 17 at paras 45–46.

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

66. See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331; *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

answered many of the fundamental questions posed above. Some of our cases are mentioned below.

But the Supreme Court of Canada has never cited, let alone considered, any of these cases. Not a single one. However, we in the Federal Court of Appeal should not feel snubbed. The work of every other appellate court in Canada also goes unmentioned and unconsidered. In this area of law—for reasons unknown—the Supreme Court of Canada considers only its own decisions.⁶⁷

If my suspicions are correct and the Supreme Court of Canada is about to embark on one of its once-a-decade, wholesale revisions to the law of judicial review,⁶⁸ now is the time to offer suggestions. Here are some.

A. Appellate Standard of Review and Administrative Law Review Distinguished

Recently, administrative law review was used to change the law of appellate review in one area of private law.⁶⁹ The reverse must not happen.

The administrative law analysis of the margins of appreciation that should be afforded to administrative decision makers—at present, the *Dunsmuir* approach—must never be confused with the appellate standard of review found in *Housen v Nikolaisen*.⁷⁰ In short, the Supreme Court of Canada got it right on this in *Mouvement laïque québécois v Saguenay (City)*⁷¹ and must not reverse position.

The appellate standard of review is the relationship between appellate courts and lower courts—a relationship between judges and other judges all within the judicial branch. This is different from the relationship between reviewing

67. This is to be contrasted with the Supreme Court of Canada's approach in criminal law cases. Lower court cases are regularly reviewed. Differences among the courts are identified and resolved often on the basis of fundamental principle. Not surprisingly, Canadian criminal law, although sometimes unclear, is a model of coherence and consistency compared to Canadian administrative law.

68. See the text accompanying notes 6–9, *above*.

69. See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 104–06, [2014] 2 SCR 633. A number of appellate courts have already distinguished *Sattva*, and have limited its application. See *MacDonald v Chicago Title Insurance Co of Canada*, 2015 ONCA 842, 127 OR (3d) 663; *Vallières v Vozniak*, 2014 ABCA 290, 377 DLR (4th) 80; *Ledcor Construction Limited v Northbridge Indemnity Insurance Co*, 2015 ABCA 121, 386 DLR (4th) 482; *Robb v Walker*, 2015 BCCA 117 at para 48, 69 BCLR (5th) 249. See also Earl A Cherniak, QC, “*Sattva* Revisited” (2015) 34:2 Adv J 6 at 7.

70. *Supra* note 65.

71. *Supra* note 19 at paras 31–44.

judges within the judicial branch and legislatively empowered decision makers within the executive branch.⁷²

The relationship between appellate courts and lower courts is unchanging. A legal case may involve contracts, torts, property—you name it—and the appellate court's posture when reviewing the lower court is exactly the same in all instances.

This makes sense. A first-instance judge is a first-instance judge is a first-instance judge. And the first-instance judge's powers are the same regardless of the case—to receive evidence, to find the facts, to ascertain the law that applies and apply that law to the facts, regardless of the subject matter of the case. An appellate judge is an appellate judge is an appellate judge. And the appellate judge's powers and tasks are also the same regardless of the case.

On the other hand, the relationship between reviewing courts and administrative decision makers is entirely different. The extent to which reviewing courts may interfere with administrative decision makers depends primarily upon what particular legislation in a particular context says, and other factors too.

While a first-instance judge is a first-instance judge, the same cannot be said for administrative decision makers. Administrative decision makers vary greatly in their mandates, their powers and their subject matters. A law society benchler sitting on a discipline committee deciding whether a lawyer has pilfered from a trust fund bears no relationship to the federal cabinet deciding whether, in light of all of the policy considerations, a transcontinental pipeline should be built. To treat them the same is folly.

And administrative decision makers and their tasks differ from judges and their tasks. The development and finalization of a broadcasting policy by those experienced in broadcasting who sit on the Canadian Radio-television and Telecommunications Commission (CRTC) and are governed by particular legislation is fundamentally different from a decision by a legally trained judge deciding on whether a particular party has breached a particular contract. To treat them the same is folly.

Under some legislative regimes, the courts are left free to interfere with administrative decision makers. Under others, they are not. Some administrative decision makers decide subject matters familiar to courts, perhaps justifying more intrusion by courts. Other administrative decision makers decide matters outside of the ken of the courts, perhaps justifying less intrusion by courts.

72. See *Canada (AG) v Long Plain First Nation*, 2015 FCA 177 at paras 88–89, 388 DLR (4th) 209.

Some administrative decision makers decide subject matters the way courts do, using similar criteria and methods of reasoning. Others do not, for good reason. Administrative decision makers and their relationships with reviewing courts cannot be regarded as a monolith, identical regardless of the context.

From time to time, I hear some judges and others—frustrated with the mess that has been the Canadian law of judicial review and desperate for simplicity—urge a single standard of review rule for courts to apply to anyone who decides anything anywhere. If adopted, this would be a unilateral judicial decree that a judicially constructed standard of review for relationships within the judicial branch apply to every decision maker in the executive branch regardless of any law legislatures enact, regardless of the subject matter and regardless of the courts’ ability to deal with it practically and capably. This is something no other western democracy—let alone any unelected court—has ever contemplated. That should be warning enough not to do such a thing. We must not let our desperation about the current mess take us to worse places.

B. The Basic Soundness of Dunsmuir

At the outset, the Supreme Court of Canada in *Dunsmuir* planted the right seeds and initially did much to help them germinate. *Dunsmuir* is doctrinally sound. But as the above analysis shows, the Supreme Court of Canada has allowed weeds to grow in the garden, choking and obscuring what ought to be thriving and clear.

In *Dunsmuir*, the Supreme Court of Canada astutely recognized that the law of judicial review is animated and explained by a single concept.⁷³ This animating concept is a tension between two constitutional principles, both of which are deeply rooted in our history and our democratic and constitutional arrangements:

- On one side is the constitutional principle of legislative supremacy;⁷⁴ the legislature has vested jurisdiction over a subject matter to an administrative decision maker, not the courts—sometimes with a privative clause to boot; and

73. *Supra* note 9 at paras 27–30.

74. See the text accompanying notes 20–23, *above*.

- On the other side is the constitutional principle that the judiciary must sometimes enforce minimum rule of law standards—things such as rational fact-finding, procedural fairness and (at least) acceptable and defensible interpretations and applications of law.⁷⁵

In some cases, the latter trumps the former. This explains why sometimes courts interfere with the decisions of administrative decision makers even though a legislative provision, known as a privative clause, forbids judicial interference of any sort.

As will be seen below, this animating concept has the potential to inform the doctrine surrounding the standard of review and when courts ought to interfere. Unfortunately, since deploying this concept in *Dunsmuir*, the Supreme Court of Canada has never returned to it to develop it further and draw upon it. Frequently, new rules have sprung up without any grounding or justification in this animating concept. Thinking about, developing and coherently applying this animating concept is one of the keys to doctrinal clarity.

In *Dunsmuir*, the Supreme Court of Canada did much good in other areas too.

As is well known, the Supreme Court of Canada eliminated an unnecessary category of review, created certain presumptive rules and grandparented some earlier case law, all in the interests of simplification. These innovations eliminated a number of debating points, thereby reducing the amount of argument and analysis, and furthering judicial economy and access to justice—two judicial policies well established in the cases.

Dunsmuir also appropriately recognized that administrative decision makers, their decisions, their governing legislation and their circumstances come in all shapes and sizes. To this end, it defined reasonableness as a range or a margin, rather than something static.⁷⁶ As we all know, ranges and margins can vary, sometimes broad and sometimes not.

Later Supreme Court of Canada cases have shrewdly picked up on this and have acknowledged that the margins of appreciation move in or out based on the circumstances (albeit, the Supreme Court of Canada has never defined

75. See *Crevier v AG (Quebec) et al.*, [1981] 2 SCR 220, 127 DLR (3d) 1; *UES Local*, *supra* note 7. See also *Secession Reference*, *supra* note 22 at para 70; *Dunsmuir*, *supra* note 9 at paras 27–30, 52.

76. *Dunsmuir*, *supra* note 9 at para 47.

the circumstances).⁷⁷ So some decision makers deserve a large margin of appreciation concerning the decisions they make, others less so, some none at all.

C. Margins of Appreciation and What Makes Them Vary: The Intensity of Review

This idea of varying margins of appreciation, sometimes called “intensity of review” in the academic literature, is something all leading Commonwealth courts care about in their reasons, either expressly or implicitly.⁷⁸ In their cases, reasons are often articulated why review in a particular case should be intense or less intense.

In a similar vein, the Federal Court of Appeal has also tried to articulate what makes margins of appreciation vary.⁷⁹ These circumstances and factors are not fabricated or drawn from free-standing policy, personal predilection or judicial whim. They reflect the animating concept behind judicial review, the tension between legislative supremacy and the rule of law.⁸⁰ Not coincidentally,

77. See *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 17–18, 23, [2012] 1 SCR 5 [*Catalyst*]; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paras 37–41, [2013] 3 SCR 895 [*McLean*].

78. See e.g. *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 at para 107; *R (on the application of Rotherham Metropolitan Borough Council and others) v Secretary of State for Business, Innovation and Skills*, [2015] UKSC 6 at para 78.

79. See *Canada (Minister of Transport, Infrastructure and Communities) v Farwaha*, 2014 FCA 56 at paras 90–99, 455 NR 157 [*Farwaha*] (matters within the ken of the executive, like security matters, can broaden the margin of appreciation; strong, personal work-related interests can narrow it); *Canada (AG) v Boogaard*, 2015 FCA 150 at paras 41–52, 373 DLR (4th) 167 [*Boogaard*] (the nature of the decision, the breadth and purpose of the legislative provision, the factual complexity and matters within the ken of the executive can broaden); *Canada (AG) v Abraham*, 2012 FCA 266 at paras 37–50, 440 NR 201 [*Abraham*] (settled case law can constrain); *Canada (AG) v Canada (Human Rights Commission)*, 2013 FCA 75 at paras 13–14, 444 NR 120 [*Canadian Human Rights Commission*] (same); *Walchuk v Canada (Justice)*, 2015 FCA 85 at para 33, 469 NR 360 [*Walchuk*] (fundamental liberty interests can constrain); *Canada (AG) v Almon Equipment Limited*, 2010 FCA 193 at para 53, [2011] 4 FCR 203 [*Almon*] (statutory recipes can constrain); *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at para 82, [2015] 4 FCR 75 [*Forest Ethics*] (fact-based decisions informed by policy and specialization can broaden); *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para 66, 379 DLR (4th) 737 (matters within the ken of the executive, not the courts, can broaden); *Paradis Honey Ltd v Canada*, 2015 FCA 89 at paras 136–37, 382 DLR (4th) 720 [*Paradis Honey*] (same). See also *Mills v Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para 22, 237 OAC 71.

80. See e.g. *Farwaha*, *supra* note 79 at para 91. See also the text accompanying notes 71–73, *above*.

they bear a strong resemblance to the circumstances and factors invoked in courts throughout the Anglo-American world, courts that work with the same animating concept.

D. When Assessing the Intensity of Review, Have Regard to the Legislative Words

In determining the intensity of review in a particular case, legislative words matter.⁸¹ As explained above, the constitutional principle of legislative supremacy means that unless there is a constitutional objection, legislative words are binding—not optional extras to be jettisoned when inconvenient.⁸²

What legislators say must affect the intensity of review. Some legislative words can broaden the margin of appreciation.⁸³ Others can narrow it, such as recipes set out in legislation that must be followed or other constraining words.⁸⁴

The Alberta Court of Appeal recognized the importance of legislative words in *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*.⁸⁵ It assiduously collected various legislative signals and carefully scrutinized them to determine the intensity of review. Similar approaches have been adopted elsewhere.⁸⁶

E. Move Away from Rigid Categories of Review

Roughly three years ago in *McLean v British Columbia (Securities Commission)*, the Supreme Court of Canada added an important gloss to *Dunsmuir* and the idea of margins of appreciation.⁸⁷ There, the Supreme Court of Canada recognized that in the context of reasonableness review an administrative

81. See *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 26, 160 DLR (4th) 193; *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149, [2003] 1 SCR 539.

82. See *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 151 at para 26, 474 NR 268 [*Ishaq*]; *Erasmus v Canada (AG)*, 2015 FCA 129 at para 47, 473 NR 245.

83. *Boogaard*, *supra* note 79 at paras 42–44; *Walchuk*, *supra* note 79 at para 34.

84. *Almon*, *supra* note 79 at para 53; *Walchuk*, *supra* note 79 at paras 33, 56.

85. *Supra* note 4.

86. See e.g. *Pfizer Canada Inc v Canada (AG)*, 2014 FC 1243, [2015] 4 FCR 235; *Takeda Canada Inc v Canada (Minister of Health)*, 2013 FCA 13, 440 NR 346 [*Takeda*]; *Canada (Citizenship and Immigration) v Kandola (Litigation guardian of)*, 2014 FCA 85, 372 DLR (4th) 342 [*Kandola*].

87. *Supra* note 77 at para 38.

decision maker may have many possible and acceptable outcomes available to it. Or perhaps only a few. Or sometimes even just one.

When an administrative decision maker has only one acceptable and defensible outcome available to it under the reasonableness standard, it has to be correct. If it reaches a different outcome, it is “unreasonable”.

Recognizing this, why must we determine whether the case falls into the category of correctness review or reasonableness review? The real question is the intensity of review that an administrative decision maker should be given.

Sometimes the margin of appreciation to be given is extremely broad,⁸⁸ sometimes quite broad,⁸⁹ other times not so broad⁹⁰ and sometimes, as *McLean* acknowledges and as appropriately happens in constitutional cases,⁹¹ there is no margin at all. We need not speak of categories or labels like “correctness” or “reasonableness”. As the discussion here shows, the intensity of review can be evaluated without slotting the case into “correctness” or “reasonableness”.

No other leading Commonwealth court engages in pointless labelling or categorization exercises when assessing the intensity of review. All simply express or imply what sort of margin of appreciation should be given to the administrative decision maker and then decide the case. So should we.

F. Assess Whether a Decision Is Acceptable or Defensible Using a Consistent Methodology

In *Dunsmuir*, among other things, the Supreme Court of Canada aptly defined reasonableness as a range of acceptability and defensibility.⁹²

In assessing acceptability and defensibility, one must start with the decision of the administrative decision maker. As the Supreme Court of Canada put it in *Dunsmuir*, where the administrative decision maker is to be afforded some margin of appreciation on the matter, there must be “respectful attention” to what it has done.⁹³ After all, a reviewing court’s role is to *review* what the administrative decision maker has done, not *impose* its own view of the

88. See e.g. *Thorne’s Hardware Ltd v R*, [1983] 1 SCR 106, 143 DLR (3d) 577 [*Thorne’s Hardware*]; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 at para 28, [2013] 3 SCR 810 [*Katz Group*]; *Catalyst*, *supra* note 77.

89. See e.g. *Nor-Man*, *supra* note 40.

90. See e.g. *McLean*, *supra* note 77; *Huang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 228, 464 NR 112.

91. See *Dunsmuir*, *supra* note 9 at para 58.

92. *Ibid* at para 47.

93. *Ibid* at para 48.

matter.⁹⁴ Where an administrative decision maker is to be afforded a margin of appreciation, a reviewing court cannot interfere just because it would have decided differently.⁹⁵

The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility.⁹⁶ As well, certain indicia, sometimes called a “badge of reasonableness”, can help to signal that an administrative law decision might not be acceptable or defensible.⁹⁷ Decisions whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well be ones where interference is warranted.⁹⁸ So might be decisions containing key factual findings made without logic, without any rational basis or entirely at odds with the evidence. Those that depart in an unexplained way from administrative or judicial precedent may also be suspect.⁹⁹

Care must be taken not to allow acceptability and defensibility “to reduce itself to the application of rules founded upon badges”.¹⁰⁰ Rather, “[a]cceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and-ready, hard-and-fast rules.”¹⁰¹ Nor, as I shall suggest at the end of this article, is it permissible or legitimate to evaluate acceptability and defensibility on the basis of personal predilections, ideological visions or free-standing policy opinions.

94. See generally *Kane v Canada (AG)*, 2011 FCA 19 at paras 101–09, 328 DLR (4th) 193, Stratas JA, dissenting, the Supreme Court, *supra* note 40, *semble*, agreeing.

95. See *Delios v Canada (AG)*, 2015 FCA 117 at para 28, 472 NR 171 [*Delios*].

96. See *ibid* at para 27.

97. *Farnaba*, *supra* note 79 at para 100.

98. See *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at paras 42, 47, [2010] 1 SCR 427; *Almon*, *supra* note 79 at para 21.

99. See e.g. *Forest Ethics*, *supra* note 79 at para 69; *Farnaba*, *supra* note 79 at para 100; *League for Human Rights of B’Nai Brith Canada v Odynsky*; *League for Human Rights of B’Nai Brith Canada v Katriuk*, 2010 FCA 307 at para 87, [2012] 2 FCR 312; *Boogaard*, *supra* note 79 at para 81. Though, in the case of departures from administrative precedent, this is not automatically so. See *Domtar Inc v Québec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, 105 DLR (4th) 385.

100. *Delios*, *supra* note 95 at para 27.

101. *Ibid*.

G. In Developing Doctrine, Avoid Creating Debating Points

As I have already explained, administrative law doctrine must emanate from the animating concept behind judicial review. But there are other judicially recognized policies—not free-standing policies—that can and should shape administrative law doctrine.

The Supreme Court of Canada recently recognized one of these policies. Modern litigation and the rules surrounding it must be attentive to the need to enhance access to justice and minimize the cost of litigation.¹⁰² To the extent we can unify, distill or simplify rules without damaging the concepts they serve, such as the animating concept behind judicial review, we should. We need to move away from multi-faceted, overly elaborate tests and categorization exercises that create debating points that provide little or no benefit. Simpler rules or, where possible, leaving pronouncements at the level of standards and concepts, minimizes the risk of conflicting case law over particular details that really do not matter.

To this end, in explaining what makes the margins of appreciation vary from case to case and what administrative decisions are unacceptable or indefensible, it would be a mistake to over define these concepts, such as setting out some mandatory, multi-branch test or prescribing categorization exercises. Some concepts are best left as they are—as concepts, not technical rules in precisely worded tests where the words must be parsed and fine distinctions must be debated.

Just imagine the mountain of case law in the law of negligence if we had to follow a precisely worded, four-branch test to decide whether a defendant's conduct falls below the standard of care or is just an “innocent” error of judgment. In administrative law, we have tried out that sort of approach under the former “pragmatic and functional” test to determine the standard of review. Let's not go back there.

In answering questions about the margin of appreciation and whether a decision is acceptable or defensible, we need not give a mathematical or precise answer; the determination is mainly a qualitative one.

And often the determination is an easy one that requires few words. For example, we know that labour arbitrators deciding labour matters and regulators formulating and applying broad policy within their field of regulation

102. See *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*].

normally get broad margins of appreciation.¹⁰³ When they stray beyond that, when legislation constrains what they can do or where other factors canvassed in the case law come to bear,¹⁰⁴ their margins of appreciation can shrink. And we know what qualities make a decision unacceptable or indefensible—in fact, we have started to see badges or indicators that can assist us.¹⁰⁵

H. Special Issues in Reviewing Administrative Decisions

(i) Reviewing Administrators' Legislative Interpretations

Legislation and the administrative decision makers who interpret it come in all shapes and sizes. Thus, it would be a mistake to adopt a monolithic approach, such as correctness review, for all legislative interpretations by administrative decision makers. Sound reasons in common sense, logic and policy call for a deferential approach in certain situations.¹⁰⁶

As in the case of other decision making by administrators, the margins of appreciation for legislative interpretation must vary according to the circumstances. But in the case of legislative interpretation, some additional considerations come to bear.

Sometimes the legislator chooses words that are so clear that the administrator has few, if any, interpretive options available to it and so the margin must be narrow or non-existent. And sometimes the legislator chooses words so broad, such as “public interest” and “reasonable”, giving the administrator the power to shape the meaning of the provision based upon its policy appreciation, specialization and experience, albeit in accordance with the purposes of the legislation.¹⁰⁷ In such cases, the margin of appreciation to be given must be

103. See e.g. *Canada (AG) v Gattien*, 2016 FCA 3 at paras 33–39, 479 NR 382.

104. See e.g. the cases mentioned in *supra* note 79.

105. See the text accompanying notes 97–99, *above*. In eschewing rigid rules to govern us in this area, I do not for a moment advocate a loose “consider all the circumstances” approach divorced from an understanding of the animating concepts underlying judicial review. The jurisprudence must be rigorous and grounded in genuine doctrinal concepts such as the matters considered in the cases, *supra* notes 79, 95–99, not on personal predilections.

106. See Cass R Sunstein & Adrian Vermeule, “The Unbearable Rightness of *Auer*” (2016) 83 U Chicago L Rev [forthcoming], online: SSRN <ssrn.com/abstract=2716737>; Frank AV Falzon, QC, “Statutory Interpretation, Deference and the Ambiguous Concept of ‘Ambiguity’ on Judicial Review,” (2016) 29:2 Can J Admin L & Prac 135.

107. See e.g. *Navigation Protection Act*, RSC 1985, c N-22, ss 6–7, 13; *Canada Grain Regulations*, CRC, c 889, s 8(1); and hundreds of other examples across the country.

very broad indeed; to do otherwise would offend the constitutional principle of legislative supremacy.

Suppose that a legislative provision provides that a dog licensing board can grant dog licences only on Tuesday. “Tuesday” is a very restrictive word with a tight meaning. It does not mean Wednesday or Sunday. The dog licensing board has no margin of discretion in interpreting “Tuesday”. “Tuesday” is Tuesday. The board has to get it right.

However, suppose that the legislative provision is different. Suppose that it allows the dog licensing board to grant dog licences only when “reasonable”. That is a broader word that has many shades of meaning depending on the circumstances. That meaning may be informed by the expertise of the board in this licensing regime or its experience in administering it. Here, the dog licensing board will have a broader margin of appreciation.

When courts review administrators’ interpretations of legislation, a danger must be recognized. Some courts begin by interpreting the legislation themselves and deciding upon a correct meaning. In doing that, they create a yardstick to measure what the administrative decision maker has done. That is correctness review. It gives the administrative decision maker no margin of appreciation when perhaps it should have been given one.¹⁰⁸

Here, judicial humility pays dividends. Counsel often surprises us by suggesting interpretations of legislation we did not come up with ourselves. Sometimes we end up accepting those interpretations. The danger of surprise is higher when an administrative decision maker, informed by years of experience and cognizant of policies beyond our ken, interprets legislation it uses every day.¹⁰⁹ In assessing administrators’ interpretations of legislation, we should refrain from adopting a posture of judicial arrogance by developing and applying our own yardstick.

In my view, the right approach was taken in *Workplace Health, Safety and Compensation Commission v Allen*.¹¹⁰ There, the Supreme Court of Newfoundland and Labrador (Court of Appeal) looked to the legislative purpose, context and text of the legislation just to acquaint itself with the landscape relevant to the interpretive task. But the Court did not resolve the issue definitively itself. Instead, after appreciating the interpretive landscape, it looked to what the

108. See *Delios*, *supra* note 95 at paras 28, 38–39; *Forest Ethics*, *supra* note 79 at para 68.

109. See The Honourable John M Evans, “Triumph of Reasonableness: But How Much Does It Really Matter?” (2014) 27:1 *Can J Admin L & Prac* 101 at 110–11.

110. 2014 NLCA 42, 357 Nfld & PEIR 1.

administrative decision maker did, in part to educate itself as to considerations relevant to the interpretive task that it did not itself appreciate or that lie within the unique appreciation of the administrative decision maker. Only then did it assess whether the administrative decision maker acted within its margin of appreciation.

(ii) Appreciating the Role of Reasons

Reasons are, as the Supreme Court of Canada says in *Newfoundland Nurses*, to be viewed organically in light of the record.¹¹¹ But some read *Newfoundland Nurses* as suggesting that administrative decision makers need only show that they were alive to the matters before them.

Applying this low standard to all administrative decision makers in all contexts—the monolithic approach—is at odds with administrative law principles.¹¹² Further, it fails to take into account how reasons can affect the outcome of reasonableness review. I think that can happen in at least three ways.

First, the more an administrative decision maker explains its decision and invokes expertise and specialized understandings in explicit reasons, the more the reviewing court is likely to find the administrative decision maker acted within its margin of appreciation. An administrative decision maker that does not explain its conclusion leaves it open to the reviewing court—baffled by how the administrator reached its conclusion—to find the conclusion wanting or to wonder whether the administrator even did the job it was supposed to do under its governing legislation. In short, good reasons can be an admission ticket to deference.

Take, for example, the dog licensing board mentioned above.¹¹³ Suppose it acts under a legislative provision that allows it to grant licences to any “dog”. Someone walks into the board’s offices and wants a licence for a coyote dog. Is a coyote dog a “dog” within the meaning of the legislative provision? If the board says “yes” and invokes its licensing experience along with expert evidence about whether coyote dogs are part of the *genus canis*, a reviewing court may give the board a broader margin of appreciation. It

111. *Supra* note 40 at para 15.

112. See *D’Errico v Canada (AG)*, 2014 FCA 95 at paras 12–13, 459 NR 167 [*D’Errico*].

113. See the text accompanying note 107, *above*.

is dealing with a subject matter beyond the court's ken. But if the board says "yes" and offers no reasons, the court will be more likely to second-guess. In fact, it may conclude from the absence of reasons that the board failed to consider the matter before it at all and quash the board's decision.

Administrators' reasons can be important in the reviewing process in another way. If insufficient reasons are given or if the record in conjunction with the reasons is too sparse, the reviewing court may not be able to understand enough about the case in order to conduct reasonableness review. Reasons must also be sufficient to allow the reviewing court to discharge its reviewing task.¹¹⁴

Finally, in some cases, particularly where much turns on the matter, administrative decision makers must provide a proper, transparent account of themselves and their decision making to both the parties and the public at large.¹¹⁵ It must not be forgotten that administrative decision makers form part of the government and must be held accountable to the public they serve.

(iii) Reviewing Decisions by Ministers of the Crown

Many ministers are both administrative decision makers and members of Parliament. Does that affect the margin of appreciation they should be afforded in their decision making?

At one time, the Federal Court of Appeal took a monolithic approach and held that ministers and their delegates were always subject to correctness review.¹¹⁶ But today we recognize the shortcomings of that approach.¹¹⁷ For example, many decisions are made by specialist delegates of the minister who apply their expertise to detailed facts and thus deserve a broad margin of appreciation.

Some ministerial delegates write up legislative interpretations. Others implicitly or expressly adopt policy statements that embody legislative interpretations. The reasonableness of those can be assessed like all other administrative decision makers. But some delegates and many ministers in their personal capacity simply decide without expressing an actual interpretation

114. See *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 FCR 766.

115. See *Dunsmuir*, *supra* note 9 at para 47; *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 at para 16, [2011] 4 FCR 425; *Abetew v Taxicab Board (Man)*, 2013 MBCA 19, 288 Man R (2d) 288.

116. See *David Suzuki Foundation v Canada (Fisheries and Oceans)*, 2012 FCA 40, [2013] 4 FCR 155.

117. See *Kandola*, *supra* note 86; *Takeda*, *supra* note 86 at para 33, Stratas JA, dissenting.

of the relevant legislative provision, nor signalling any implicit or explicit adoption of an interpretation made elsewhere, such as in a policy statement. Here is where the failure to explain in their reasons may cause a finding of unreasonableness, as I have explained above.

(iv) Reviewing for Procedural Fairness

The time has come to recognize that procedural decisions come in all shapes and sizes.

Courts are particularly vigilant in reviewing procedural fairness where the interests at stake are high. Thus, administrative decision makers who make procedural decisions affecting those facing the expropriation of their home or the loss of their licence to practice a profession are often subject to exacting review. In many cases, the review is described as correctness review.

However, some cases are different. Suppose a labour arbitrator has been managing a case for years, observing the inter-party dynamics and understanding the litigation complexities in it. At the last minute, a party seeks an adjournment of a long-scheduled hearing. The arbitrator decides not to adjourn the case. On judicial review, the reviewing court will recognize the fact-based nature of the decision, the arbitrator's knowledge of the management-labour dynamic and the arbitrator's privileged position to appreciate what has been going on in this particular matter. In such a case, reviewing courts are deferential, sometimes highly so.¹¹⁸

In short, just as the intensity of review of substantive decisions should vary according to the circumstances, procedural decisions should also be subject to the same flexible approach. The approach discussed above—arriving at a sense of what the margin of appreciation should be in a particular case—is apposite to procedural decisions as well. Decisions are decisions and they should be reviewed using the same methodology.

118. Too often, one sees cases where a reviewing court ignores the conflicting case law. See the text accompanying notes 58–62, *above* and the conflicting messages in *Khela*, *supra* note 59 at paras 79, 89. In some cases, the reviewing court confidently states that the standard of review for procedural matters is correctness. See e.g. *Air Canada v Greenglass*, 2014 FCA 288, 468 NR 184. The use of the correctness standard makes no sense in a large number of cases. Is a reviewing court really going to second-guess a labour arbitrator, in the situation described here, with absolutely no deference solely on the basis of its remote and detached understanding of the paper record before it? It is doctrinally incoherent for the reviewing court to state that the standard of review is correctness and then do something entirely different.

Some view “procedural” decisions as somehow being different from “substantive” decisions. But upon reflection, most will realize that those are labels that do not tell us much and that sometimes confuse. It is often hard to know what label to give to a decision. Sometimes decisions have substantive and procedural aspects at the same time.¹¹⁹

If a tribunal denies a person standing to make submissions on the ground that her submissions will not be relevant to the issues in the case, is the decision “procedural” or “substantive”? It is “procedural” if you characterize the decision as preventing her from having her say on an issue that is of concern to her and creating an appearance of unfairness. It is “substantive” if you characterize the decision as being a ruling on the nature of the issues before the tribunal and the relevancy of the person’s proposed submissions to those issues. So which is it? Do we call the wine glass half empty or half full? The margin of appreciation to be afforded to the tribunal should not depend on the arbitrary outcome of a labelling exercise.

Simplicity and unification—objectives that advance clarity of the law and access to justice—suggest that a decision of any sort should be reviewed using one methodology.¹²⁰ As the conflicting Supreme Court of Canada decisions recognize,¹²¹ some “procedural” decisions deserve deference, some less so, others not at all. It all depends on the animating concept behind judicial review and the factors and circumstances that affect its application in an individual case.

(v) Reviewing Municipal Bylaws, Regulations and Orders-in-Council

Sometimes decisions by public bodies to enact municipal bylaws under municipal statutes, and regulations and orders-in-council under a statute are judicially reviewed. They are decisions susceptible to judicial review, just like the decisions of other administrative decision makers, such as the Canada Industrial Relations Board, the CRTC, the National Energy Board, and the Canadian International Trade Tribunal. All that differs is the nature of the decision and the decision maker.

Public bodies that enact municipal bylaws under municipal statutes and regulations and orders-in-council under a statute often do so for policy

119. See *Forest Ethics*, *supra* note 79 at paras 79–82.

120. See *Hryniak*, *supra* note 102; *Maritime Broadcasting*, *supra* note 60.

121. See the text accompanying notes 58–62, *above*.

reasons based on their appreciation of the needs of the community.¹²² Thus, in accordance with the above analysis, they often enjoy a very broad margin of appreciation in their decision making.¹²³ But not always.

In some cases, a public body's power to enact a bylaw, regulation or order-in-council may be quite constrained, significantly limiting what it can enact.¹²⁴ Sometimes this is referred to as a concern about "legality", an unhelpful label that can be misused. For the reasons discussed above, it is in the interests of simplicity and unification to speak in terms of margins of appreciation and to draw upon the insights discussed above. In cases where the power to enact a bylaw, regulation or order-in-council is constrained and a question arises about whether the public body acted within that power, the margin of appreciation to be given to the public body's assessment of its power might be quite narrow and, depending on the precision of the language, non-existent.¹²⁵

(vi) Procedural Issues Arising in Applications for Judicial Review

From time to time, lower court judges are confused about the content of the record before the reviewing court in an application for judicial review. The confusion arises from the fact that those judges also sit as first-instance courts that determine actions.

The two roles—judge on a judicial review and judge determining an action—are different. In the former, the judge is reviewing an administrative decision maker's decision on the merits: The judge is not the "merits-decider". In the latter, the judge is the merits-decider: The judge is deciding what is admissible and should be in the record.

122. See *Catalyst*, *supra* note 77 at para 19.

123. See *ibid.* A tendency in the cases is to use labels such as "egregious", "aberrant" or "overwhelming" to describe just how unacceptable a regulation, bylaw or order-in-council must be in order for it to be set aside. See *Thorne's Hardware*, *supra* note 88 at para 9. See also *Catalyst*, *supra* note 77 at para 20, citing *Kruse v Johnson*, [1898] 2 QB 91 (UK). See also *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* (1947), [1948] 1 KB 223 (CA(UK)); *Lehndorff United Properties (Canada) Ltd v Edmonton (City)* (1993), 157 AR 169, 14 Alta LR (3d) 67 (QB), *aff'd* (1994), 157 AR 169, 23 Alta LR (3d) 1 (CA). The labels are unhelpful. The intensity of review depends on the context and contexts come in all shapes and sizes.

124. See *Catalyst*, *supra* note 77 at para 15.

125. See Part II.H.i, *above*. *Quaere* whether the Supreme Court, in *Katz Group*, *supra* note 88, has prescribed a general rule of great deference to decision making in this area that is inconsistent with principle. Nevertheless, *Katz Group* is the law and binds us all, unless it can be distinguished in a particular case.

As a general rule, the record before the judge reviewing an administrative decision maker's decision on the merits consists of the material the administrative decision maker considered. There are exceptions to this general rule. The exceptions are founded upon and are consistent with the differing roles of the administrative decision maker and the reviewing court.¹²⁶

Related to this is the introduction of issues in the reviewing court that were not raised before the administrative decision maker. Quite consistent with the above discussion, the Supreme Court of Canada has rightly placed stringent restrictions on the introduction of new issues.¹²⁷ The reviewing court is not the place to raise issues that could have been considered by the administrative decision maker.

On the subject of the content of the record before the reviewing court, too often interveners participating in a judicial review or an appeal from a judicial review add to the evidentiary record by smuggling evidence into books of authorities or making improper statements in their memoranda of fact and law. This is improper.¹²⁸ Also improper is the raising of new issues.¹²⁹

The Supreme Court of Canada often admits interveners into its appeals on condition that they do not add to the record. But despite that, interveners

126. See *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 NR 297 [*Association of Universities*]; *Delios*, *supra* note 95 at paras 41–53; *Forest Ethics*, *supra* note 79 at paras 43–45; *Connolly v Canada (AG)*, 2014 FCA 294, 466 NR 44; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189.

127. See *Alberta Teachers*, *supra* note 50 at paras 22–28; *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 67, [2015] 3 SCR 147. On constitutional issues raised for the first time on judicial review, see *Okwuobi v Lester B Pearson School Board*; *Casmir v Quebec (Attorney General)*; *Zorrilla v Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 SCR 257; *Forest Ethics*, *supra* note 79 at paras 46–47.

128. See *Public School Boards Ass'n of Alberta v Alberta (Attorney General)*, [1999] 3 SCR 845 at 847, 180 DLR (4th) 670 [*Public School Boards Ass'n*]; *Ishaq*, *supra* note 82 at paras 18–24; *Canada (Human Rights Commission) v Taylor*, [1987] 3 FCR 593 at 608, 37 DLR (4th) 577 (cited approvingly in *Public School Boards Ass'n*, *supra*); *Zaric v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para 14, 2016 CarswellNat 283 [*Zaric*].

129. See *Canada (AG) v Canadian Doctors for Refugee Care*, 2015 FCA 34 at para 19, 470 NR 167; *Ishaq*, *supra* note 82 at para 17. On occasion, interveners are allowed into proceedings even though they intend to make international law submissions, submissions not made below, where international law issues are irrelevant to the case. See *Gitsxaala Nation v Canada*, 2015 FCA 73 at paras 15–20, 2015 CarswellNat 4831. In some quarters, the view is prevalent that international law is always relevant, and sometimes those inclined to policy and personal predilections rather than law use it to disrupt domestically enacted legislation. Of course, this is wrong. See *Capital Cities Comm Inc v CRTC*, [1978] 2 SCR 141, 81 DLR (3d) 609; *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292.

sometimes insert articles, policy material and international studies containing social science evidence into their books of authorities or memoranda and sometimes the Supreme Court of Canada relies upon this material.¹³⁰ This can undercut the legitimacy and acceptability of public law outcomes, making them appear to be based on someone's untested, out-of-court say-so, rather than rigorously tested, admissible evidence.

On occasion, these problems are worsened by the admission of multiple interveners supporting only one side of the case, particularly where the interveners espouse political causes. This creates the appearance of "a court-sanctioned gang-up against one side" and can raise an apprehension that a decision was influenced by the weight of politics, not doctrine.¹³¹

I. Pay More Attention to Remedial Discretion

Post-*Dunsmuir*, the significance of the Court's remedial discretion not to set aside an administrative decision has often been overlooked.

Take, for example, the rule that courts should uphold the outcome reached by an administrative decision maker who has made a serious mistake in the reasoning by trying to supplement the reasons.¹³² This rule is problematic. Reviewing courts should not be in the business of cooing up an outcome that the administrative decision maker, knowing of its mistake, might not have reached.¹³³

At the level of basic concept, reviewing courts are reviewers and administrative decision makers are the merits-deciders. Thus, reviewing courts should not meddle in the merits of cases and draft supplemental reasons that the administrator should have drafted; they review decisions already made and written up, nothing more.¹³⁴

130. Some take the view this happened in *Kanbasamy*, *supra* note 5.

131. *Zaric*, *supra* note 128 at para 12.

132. See *Dunsmuir*, *supra* note 9 at para 48. See also the discussion at the text accompanying notes 48–54, *above*.

133. See *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at paras 33–37, 372 DLR (4th) 567 (on this point agreeing with *Alberta Teachers*, *supra* note 50 rather than *Newfoundland Nurses*, *supra* note 40).

134. See *Alberta Teachers*, *supra* note 50 at paras 23–28; *Association of Universities*, *supra* note 126 at paras 15–19; *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at paras 27–30, 473 NR 283 [*Budlakoti*].

All these doctrinal problems can be avoided by keeping the reviewing court's remedial discretion front of mind. Where an administrative decision maker has made an error in reasoning that would not have affected the outcome or where practical considerations militate against sending the matter back for redetermination, the reviewing court may exercise its discretion not to quash the decision.¹³⁵

Administrative law discretions, such as remedial discretions and some discretions regarding preliminary objections to judicial review, should be guided by public law values resident in the cases.¹³⁶ These deserve more discussion and better definition in the case law.

J. Enhance the Legitimacy and Acceptability of Judicial Review

The legitimacy of judicial review and its acceptability to the public we serve very much depends on our approach and attitude when applying all of the foregoing.

When we review the decisions of the executive and its agencies, we must always:

- Act in a coherent and consistent way relying upon pre-determined, objective doctrine emanating from and reflecting the animating concept behind judicial review—namely, the tension between parliamentary supremacy and the reviewing court's duty to enforce rule of law standards and other legal concepts known to our law, including public policies emanating from legislation and relevant to the task at hand; and
- Avoid resorting to *ad hoc* subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions—matters that can depend on the idiosyncrasies of an individual judge and can vary unpredictably—about what is just, appropriate and right.

135. See *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 115 Nfld & PEIR 334. For practical examples, see *Community Panel of the Adams Lake Indian Band v Dennis*, 2011 FCA 37, 419 NR 384; *D'Errico*, *supra* note 112.

136. See *D'Errico*, *supra* note 112 at paras 15–21; *Budlakoti*, *supra* note 134 at para 60. See also the enumeration of public law values in *Wilson v Atomic Energy of Canada Limited*, 2015 FCA 17 at para 30, 467 NR 201, citing Paul Daly, “Administrative Law: A Values-Based Approach” in John

The former is the stuff of legal contestation and the legitimate domain of the courts; the latter is the stuff of public debate and the politicians we elect.

Personal predilection must never be translated into enforceable law. There is a clear line between decrees founded upon the whims of individual lawyers who happen to hold a judicial commission and the considered pronouncements of judges relying upon doctrine that is objective and settled. In a free and democratic society ruled by law, only the latter is acceptable.¹³⁷ Judges expect public decision makers to act in accordance with law rather than personal fiat.¹³⁸ As public decision makers, judges must also expect that of themselves.

On this, Sir Owen Dixon, CJC, as he then was, of the Australian High Court wrote:

It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.¹³⁹

Justice Benjamin Cardozo of the New York Court of Appeal, as he then was, put it this way: “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in

Bell et al, eds, *Public Law Adjudication in Common Law Systems: Process and Substance* (Oxford: Hart Publishing, 2016) 23.

137. See e.g. Alexander Hamilton, “The Federalist No 78” in Alexander Hamilton, James Madison & John Jay, *The Federalist* (New York: Random House, 1937) 502 at 510; *Lochner v New York*, 198 US 45 (1905) Holmes J, dissenting; *American Federation of Labor v American Sash & Door Co*, 335 US 538 at 542–56 (1949), Frankfurter J, concurring. Recently, in a laudable decision, the New Zealand High Court condemned “instinctual approaches” to judicial review as being contrary to the rule of law. See *AI (Somalia) v The Immigration & Protection Tribunal & ANOR*, [2016] NZHC 2227 at para 2. See also Dean R Knight, “Modulating the Depth of Scrutiny in Judicial Review: Scope, Grounds, Intensity, Context” [2016] 1 NZLR 63.

138. See *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689.

139. Sir Owen Dixon, “Concerning Judicial Method” (Lecture delivered at Yale University, September 1955) cited in *Harrison v Carswell*, [1976] 2 SCR 200 at 218–19, 62 DLR (3d) 68.

pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.”¹⁴⁰

These are not visions of the law that lead us to stasis. Far from it. The law can evolve but only upon “a responsible, incremental extension of legal doctrine achieved through accepted pathways of legal reasoning”.¹⁴¹ Evolution may be prompted by concepts developed from judicial experience in working with the doctrine,¹⁴² such as the recognition today that our legal rules should be developed and applied with a view to simplicity, unification and access to justice.¹⁴³ As well, certain indisputable values—now pre-eminent in our legal system through constitutional entrenchment, common law doctrine or public policies expressed in legislation—can also prompt and shape the evolution of judge-made law. These include freedom of the individual, equality and non-discrimination, procedural fairness, individual responsibility, duties of care to those who may suffer foreseeable harm, and the need for certainty and predictability in our law, to name a few.

Legal doctrine and the settled legal method to discern and develop it are larger than any one of us on any court—indeed, all of us put together. Most of it preceded our entry into the judiciary and will long outlast us.

We must respect it by applying it faithfully and, when necessary, developing it incrementally by using accepted pathways of legal reasoning drawing upon proper sources. We must not disrespect it by, for example, manipulating the administrative decision under review, fiddling with the margin of appreciation, cherry-picking authorities, misrepresenting the doctrine, reacting *ad hoc* to the facts of a case, saying one thing and then doing another, or ignoring legislative signals in order to reach a personally-preferred outcome. Those who reason tendentiously do not act judicially.

140. Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven, Conn: Yale University Press, 1921) at 141.

141. *Paradis Honey*, *supra* note 79 at para 117.

142. See Oliver Wendell Holmes, Jr, *The Common Law* (Cambridge, Mass: Belknap Press of Harvard University Press, 1963) (the “life of the law has not been logic: it has been experience” at 6). A good example is *Donoghue v Stevenson*, [1932] AC 562 (HL(UK)). The speeches of Lord Buckmaster and Lord Atkin both were arguably loyal to the precedents as they existed at the time. However, Lord Atkin’s view won out. It was based on his sense, honed by judicial experience, that an expanded scope of liability for negligence would better comport with judicially recognized notions of responsibility.

143. See *Hryniak*, *supra* note 102.

In my view, the Ontario Court of Appeal recently performed review objectively and neutrally on the basis of predetermined, objective doctrine in *Carrick (Re)*,¹⁴⁴ as did all of the other provincial appellate courts in the decisions cited above. The Federal Court of Appeal also recently performed review in a similar way in *Canada (AG) v Sandoz Canada Inc.*,¹⁴⁵ *LeBon v Canada (AG)*,¹⁴⁶ *Atkinson v Canada (AG)*,¹⁴⁷ and *National Bank of Canada v Lavoie*¹⁴⁸—just a few examples of many.

Most recently, a majority of the Supreme Court of Canada performed reasonableness review in a doctrinally appropriate way in the extradition case of *MM v United States of America*.¹⁴⁹ Perhaps *MM* is a good sign for the future.

I look forward to the day when we can close the never-ending construction site that, to this point, has been Canadian administrative law and stand back and admire what has been constructed. Afterwards, perhaps only minor fixes and renovations will be required. One can only hope.

144. 2015 ONCA 866 at paras 24–26, 128 OR (3d) 209.

145. 2015 FCA 249, 390 DLR (4th) 691.

146. 2012 FCA 132, 433 NR 310.

147. 2014 FCA 187, [2015] 3 FCR 461.

148. 2014 FCA 268, 469 NR 206.

149. 2015 SCC 62 at paras 104ff, [2015] 3 SCR 97. Portions of the analysis appear to be correctness review under the guise of reasonableness, but it must be borne in mind that the Minister's margin of appreciation was quite narrow due to the existence of settled case law that must be followed. See e.g. *Abraham*, *supra* note 79; *Canadian Human Rights Commission*, *supra* note 79. The careful, fair and non-tendentious manner in which the majority of the Court assessed the content of the Minister's decision while it conducted reasonableness review deserves praise.