Romancing Reasonableness

An aspirational account of the Canadian case law on judicial review of substantive administrative decisions since *C.U.P.E. v. N.B. Liquor Corporation*

by

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Abstract

This thesis surveys the last three decades of Canadian jurisprudence on the standards of review applicable to judicial review of substantive administrative decisions, with a focus on the guidance that is or is not forthcoming on the significance and practical application of reasonableness (deferential) review. My argument is that the doctrinal developments I survey trace out a burgeoning understanding of the purposes of substantive review which is at the same time a particular understanding of administrative state legitimacy. I refer to an account of legitimacy, or the legitimacy proper to law, that conceives of law as an aspirational project aimed at fostering relationships of reciprocity as between legal subjects and legal authorities. On this account (advanced in the work of David Dyzenhaus, and others), common law administrative law principles of procedural fairness and substantive reasonableness function as co-ordinate mechanisms for grounding administrative decision-making in a “culture of justification”.

Romancing reasonableness: An aspirational account of the Canadian case law on judicial review of substantive administrative decisions since *CUPE v. NB Liquor*

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Chapter III. Conclusion
Introduction

It is the objective of this thesis to offer a survey of the last three decades of Canadian jurisprudence on the standards of review applicable to judicial review of substantive administrative decisions, with a focus on the guidance that is or is not forthcoming on the significance and practical application of reasonableness (deferential) review. My argument is that the doctrinal developments in interpreting and applying the standards of review that I survey herein trace out a burgeoning understanding of the purposes of substantive review which is at the same time a particular understanding of administrative state legitimacy – even as this area of law, or pockets of it, continue to relay deep challenges to legitimacy, so understood. I refer to an account of legitimacy, or the legitimacy proper to law, that conceives of law as an aspirational project aimed at fostering relationships of reciprocity as between legal subjects and legal authorities. On this account (which I weave through this thesis with reference to the work of Dyzenhaus and others, in turn inspired by the work of Lon L. Fuller, and others), common law administrative law principles of procedural fairness and substantive reasonableness are understood as co-ordinate mechanisms for grounding administrative decision-making in a “culture of justification” – on a conception of justification again grounded in the regulative ideal of state-subject reciprocity.

Yet here a question arises for administrative law and practice, in light of the normative-purposive ideal of legitimacy/legality that I have suggested animates, and as such continues to be worked out within, the modern law on substantive review. This question, which I seek to address herein through consultation of the case law on
substantive review, is: what, exactly, is required of administrative decision-makers and of courts – indeed, of the administrative state more broadly -- in order to be adequate to the expectations of legality? In what sense, that is, may administrative law be said to participate in a form of legality that befits, or enacts, a “culture of justification”?

This question arises with renewed intensity following the 2008 Supreme Court of Canada decision in Dunsmuir v. New Brunswick. In the substantive review portion of that judgment, the Court suggested (in this all three concurring judgments agreed) that it was high time to attenuate the longstanding preoccupation with “calibrating” or identifying the appropriate standard of review that had come to dominate this area of law. On proposing a (purportedly) simplified standard of review analysis, the judges in Dunsmuir indicated that judges and lawyers should now be turning more promptly or directly to the real work of substantive review -- the work of answering the question: should the challenged decision stand or fall, as a matter of law? Yet this shift in orientation, combined with the collapse of what had formerly been two graduated standards of reasonableness review into a single deferential standard (in distinction from the remaining alternative, correctness), raises anew questions about the sort of analysis that should drive the work of substantive review, particularly where deference is deemed to be warranted. Again, these are the questions that motivate my efforts herein to trace the historical progression of the law on the standards of review: its progress, I suggest, toward an idea or ideal of reasonableness expressive of the commitment of all three branches of government to justification in their interactions with each other and with the individuals who are subject to administrative decisions.

1 [2008] 1 S.C.R. 190. [Dunsmuir]
Before turning to the specific objectives of each of the chapters that lie ahead, let me first offer, by way of orientation to the area of law with which my thesis engages, a sketch of the considerable tensions that soon become evident upon consulting the case law and commentary on the proper ends and conduct of substantive review. Indeed these tensions go some distance toward explaining the complex interplay of deference and non-deference in the case law I consult herein. Their origins may be understood to coincide with the origins of administrative law: i.e., in the deceptively simple legal fact of formal conferral of authority upon administrative decision-makers, not judges, to make certain decisions under certain statutory frameworks (or, less commonly, as a matter of prerogative power). That legal fact supplies the decisions of the executive/administrative branch with an element of political legitimacy, whether authority was conferred for reasons of mere political or economic expediency, enhanced democratic accountability, targeted deployment of sector-specific expertise, or some combination of these. As such, conferral of legal decision-making authority upon administrators grounds an inference that those decisions should be disturbed on review only where there is good reason to do so, consistent with the grant of authority.

From this legal (typically legislative) fact have historically flowed two divergent claims or schools of thought on the proper relationship of administrative decision-makers and judges. On the one side are the functionalists, who discern in the legislature’s formal grant of authority a pragmatic rationale for divesting judges of authority over vast swaths of state action and conferring that authority upon administrators. On this view, the fact that administrators are empowered and indeed obliged to apply their pre-existing or acquired sector-specific knowledge in pursuit of sector-specific statutory purposes,
grounds a strong claim to administrative legitimacy. The complement to this claim is the critique that judges (or traditionalist judges) tend to be too quick to substitute their opinions – read individualist common law values -- for the field-sensitive decisions of administrators, and with these, the public policy purposes of legislators.  

On the other side are the constitutional traditionalists. The figurehead of the traditionalist camp is the formidable 19th century constitutional theorist, A.V. Dicey. Dicey’s constitutionalism was rooted in a conception of the rule of law which was on the one hand procedural or process-oriented – in the thesis that all persons, including government, should be subject to the “ordinary law in the ordinary courts.” But on the other hand that conception was substantive: for inhering in the “ordinary law,” so conceived, was a firm prioritization of individualist common law values of private property and freedom of contract. Hence the suspect place of the administrative state in Dicey’s constitutionalism. That is, even as Dicey’s model of constitutional ordering recognized the principle of Parliamentary supremacy, it was highly suspicious of the

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2 Mark Walters draws out the tendency for administrative law functionalists (in Canada, John Willis) to follow the lead of the American Legal Realists in bracketing normative questions about the nature or content of government purposes in favour of an exclusive preoccupation with function and efficiency. See Walters, “Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law” in Forsythe et al, eds., Effective Judicial Review: A Cornerstone of Good Governance (Oxford: Oxford UP, 2010) 300. Yet Walters rightly locates the work of the realist Felix Cohen as constituting an important exception to this divorcing of function from purpose. See ibid at 311, fn. 73, citing Cohen, “The Problems of a Functional Jurisprudence” (1937) 1 MLR 5. In “Transcendental nonsense and the functional approach” (1935) 35 Columbia LR 809 at 848-49, Cohen poses the challenge of attending both to the substantive values informing legal rules and decisions (as such forging a “critical theory of social values”) and to the social effects of legal rules and decisions -- as equally necessary to the legal realist effort to supplant the formalist tendencies of then-dominant jurisprudential strategies.


administrative institutions that Parliament had constructed to advance social policies at odds with or in any case disconnected from common law sources.  

So in what sense does Dicey’s constitutionalism represent a faction or attitude within the modern lineage of Canadian administrative law? The primary concern of the constitutional traditionalist is that administrative decision-makers lack the legal expertise – and so the requisite immersion in the institutional craft of statutory interpretation, and moreover the requisite familiarity with the normative touchstones of common law reasoning -- to warrant judicial deference. Yet the alternative to deference is one of two extremes: either judicial abstinence (on the assumption that the space carved out for administrative activity -- e.g., by way of a privative clause and/or conferral of Ministerial discretion -- constitutes a legislatively-hedged protectorate for the free play of political fiat), or alternatively, judicial supremacy (particularly where administrative decisions involve interpretation of law – and, it turns out, it is rare that they do not).

In short, the traditionalist views administrative decision-makers as being of suspect legal competence: unlikely, or at least far less likely than are judges (who beyond their legal training possess the not inconsiderable constitutional guarantee of independence from the executive) to render decisions that are correct in law or, alternatively, expressive of the best interpretive construction in the circumstances. Embedded in this view -- as the functionalists feared – is a privileging, explicit or implicit, of common law values oriented toward protection of the individual as against

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6 Dyzenhaus, “Hollow Victory,” ibid. at 532-33. Mary Liston states that the Diceyean model of constitutionalism, or specifically of the rule of law, was one in which “administrative bodies were viewed with distrust as almost inherently lawless forms of governance.” (“Governments in Miniature”, supra note 4).


8 Dyzenhaus, supra notes 5 & 6.
the state, or of individual rights as against state-backed utilitarian calculation. And again it should be noted that, as the functionalists and particularly the left-leaning functionalists point out, the common law values on which the traditionalist judges have tended to draw have as often as not been taken from the common law of property or contract, as opposed to post-WWII (in the main, statutory) conceptions of human rights.

My account of the modern case law on substantive review (“modern” here describing the law since the 1979 Supreme Court of Canada case *C.U.P.E. v. N.B. Liquor Corporation*9) – and in particular, my account of the winding journey of the conception of and commitment to deference through this case law – seeks to bring the above-described tensions to the surface, while also tracing out a story of their (possible, if ever-deferred) romantic resolution.

Chapter 1 describes in broad outline the unfolding of this story over the course of the modern administrative law jurisprudence from *CUPE* to just prior to *Dunsmuir* (so from 1979 to 2008). The chapter begins by setting the stage for its examination of the jurisprudence on the standards of review with an account of competing approaches to statutory interpretation that are bound up in complex yet identifiable ways with competing understandings of and approaches to applying the standards of review. It then sets about examining the significance of the standards of review in the case law prior to *Dunsmuir*. In this, its central objective is to identify, and to illustrate by way of key cases, how competing principles informing the work of substantive review have historically issued not only in tensions among but moreover tensions within specific judgments. This is particularly so with the rise of reasonableness review, which may be said to call into question (or to make more apparent the conceptual and legal challenges

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9 [1979] 2 S.C.R. 227 [*CUPE*].
inherent to) the binary logic of the preceding order of substantive review. The tensions to which I refer are perhaps most starkly illustrated 1) in the uncertainty of the conceptual and methodological commitments of correctness review following the demise of the positivist “science” of statutory interpretation, and moreover following the rise of review for reasonableness, and 2) by the frequency with which judicial review (pre- and post-reasonableness simpliciter) involves imputation of fixed legal limits -- explicitly or implicitly set on a correctness standard -- to decisions otherwise attracting deference and even “utmost” deference. The chapter concludes by asking whether or in what sense these and other elements of the substantive review jurisprudence may be understood to be consistent with the commitment to deference, and moreover the commitment to a “culture of justification,” that may be said to be the central defining feature of this area of law as it has developed since CUPE.

Chapter 2 turns to the law in and just after Dunsmuir, specifically inquiring into the turn explicitly registered in that decision from preoccupation with identifying the standard of review to a renewed focus on what it means to properly apply the standard on review – and in particular, what it means to exhibit deference on review. The latter question gains particular momentum with the articulation in Dunsmuir of a renewed commitment to deference in matters involving questions of law or law-interpretation. Should Dunsmuir thus be read as the culmination, or happy end, of the romantic account of substantive review that began with CUPE?

The chapter examines the signals in Dunsmuir that we are entering a new phase of reasonableness review. In this, it first queries, in the abstract as it were, the import of the Dunsmuir majority’s statements on the conduct of reasonableness review –including the
majority’s elaboration of this standard through a distinction between review of the reasoning process (according to criteria of transparency, intelligibility, and justification) and review of the decision’s outcome (whether it falls within a range of reasonable outcomes). Building on the work of other commentators, the chapter then specifically considers the proposition that the time is now ripe for carving out a formal place for proportionality analysis within reasonableness review. Finally, on examining the conduct of substantive review in Dunsuir itself and in subsequent decisions of the Supreme Court, I suggest that the post-Dunsuir jurisprudence continues to exhibit the marked instability as between attitudes of judicial supremacy and judicial abdication that may be traced back to the origins of the modern period of substantive review. That is, as yet, Dunsuir has not delivered up a resolution to the tensions registered in the post-CUPE case law on the meaning and application of deferential review.

Chapter 3 offers some concluding reflections on the progress toward a culture of justification that is traced out in the romantic story of substantive review explored in the foregoing two chapters. Moreover, it offers some preliminary reflections upon a further challenge to, or perhaps the next chapter of, the commitment to a culture of justification in (and beyond) this area of law. This is the challenge of more fully or equitably integrating those subject to administrative decision-making into the project of constituting fundamental values that I and others have argued is implicit in the work of the administrative state. On the one hand, this means attending further to the tensions within the mutually-implicated values of deference and justification in the law on reasonableness review. But on the other, it means extending the ambit of inquiry out from the immediate setting of the administrative hearing and/or decision to contemplate a
more expansive form of state duty: \textit{i.e.}, to provide the material and social supports necessary to securing state-subject reciprocity, so as to bring the ideals informing the law on substantive review closer to the reality of state-subject interaction in and beyond administrative decision-making settings. The chapter illustrates this claim, or this challenge, by reference to a pre-\textit{Dunsmuir} case, \textit{Starson v. Swayne}.\footnote{[2003] 1 S.C.R. 722, 2003 SCC 32. [\textit{Starson}]} 

Thus I conclude by proposing a project of future inquiry into the conditions of administrative legality under the aegis of state-subject reciprocity. This forecasted project is oriented by the claim that the aspiration toward administrative state legitimacy will not be satisfied through a narrow focus upon the reason-giving practices of administrative decision-makers, but moreover, requires taking seriously the central administrative law insight that justification is bound up with, or is dependent upon, the quality of the state-subject interactions that precede reason-giving. The practical question accompanying this claim is: what kinds of institutional mechanisms or supports are required in order to build capacity for the work of public justification? With respect to decision-makers, how is it possible to build or instill the capacity to hear (to be “alert, alive and sensitive”\footnote{This quotation is from Justice L’Heureux-Dubé ’s judgment in \textit{Baker v. Canada (Minister of Citizenship and Immigration)}, [1999] 2 S.C.R. 817 [\textit{Baker}] at para 75. I discuss \textit{Baker}, and the possible implications of this quotation, in Chapters 1 and 2.} to) the claims of the subject and in this to discern the broader values implicated in those claims -- and moreover to justify decisions in light of what is heard? With respect to the persons affected by administrative decisions, how is it possible to build the capacity of all legal subjects to participate in the work of public justification, so fostering the reflective capacities required to connect up individual or group-based experiences and interests with broader social values and purposes -- so as to be stand, in
and beyond the arenas of administrative law, as both authors and subjects of law?
Among the imperatives central to this future project of critical inquiry is that of investigating, within specific administrative settings, how these participatory and justificatory capacities may be compromised by structural inequalities and deep attitudinal biases reaching beyond the immediate administrative decision-making forum: \textit{i.e.}, by asymmetries in the distribution of the material and social supports essential to the integration of all legal subjects into the work of constituting the administrative state and so the rule of law.

To sum up: ongoing controversies around the principles and conduct of substantive review have tended to play off two aggressive spectres one against the other. On the one side is the spectre of simplistic substitution of judicial knowledge and values for administrative knowledge and values. On the other side is the spectre of technocratic rule, and with this, judicial abdication of responsibility to preserve the rule of law and more specifically to protect the individual from the disciplinary (or broadly political) sway of narrowly sector-preoccupied administrators. Each of these grounds competing charges of illegitimacy: respectively, the collapse of the rule of law to the rule of judges, and the collapse of the rule of law to the rule of politico-technocrats.

The broad objective of this thesis is to resituate these controversies in favour of a different model of the constitutional order and so the legitimate relationship of legislatures, judges, administrative decision-makers, and the individuals subject to administrative decisions. On adopting this model of legitimacy -- a model that weds attentiveness to the normative features of law or legality with attentiveness to the institutional relationships most adequate to those normative features: ultimately, a model
of constitutional pluralism, or democratic constitutionalism, as Dyzenhaus has termed it\textsuperscript{12}-- and in tracing the presence of this model of constitutionalism in the law on substantive review, I suggest that we may come to appreciate the deep potential of administrative law: its capacity to steer, in light of the value of reciprocity, the interaction of the various participants in the constitutional order as they co-constitute the norms informing that order.

Along the way, the questions that arise for the law on substantive review are: what is expected of administrative bodies in justifying their decisions? How might the law on substantive review overcome the skeptic’s claims of illegitimacy that have dogged this area of law since the rise of the administrative state -- \textit{i.e.}, the claim that judges on review are usurping tribunals’ proper functions to express their prioritization of abstract, individual rights over sector-specific expertise aimed at advancement of the public interest? How is content to be given to the concept of deference as respect for, not “submission” to,\textsuperscript{13} administrative decision-makers and decisions -- given the complexity of administrative decision-making contexts, including the diverse values and competing claims to knowledge engaged therein? More specifically, how are these complexities best negotiated in the face of the competing values and knowledge claims asserted on the one side by those with administrative decision-making authority, and on the other by those whose significant individual interests are at stake? What sorts of aspirations or

\textsuperscript{12} Dyzenhaus, “Constituting the Rule of Law: Fundamental Values in Administrative Law” (2002) Queen’s L.J. 445 [“Constituting the Rule of Law”] at 448-451, 487-502. The idea of state-subject “reciprocity” that is at the heart of Dyzenhaus’s constitutional pluralism -- standing as the internal (purposive) logic of legality -- is described in that paper as follows (at 501):

[T]he content of law is viewed in terms of a relationship of reciprocity between legislature and subject, so that interpretive authority is shared between the institutions of the legal order, including the subject who as citizen contests the law within the domain of its application to him.

\textsuperscript{13} “Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: in \textit{Baker}, supra note 11, \textit{per} L’Heureux-Dubé J. at para. 65, citing Dyzenhaus, “The Politics of Deference,” \textit{supra} note 5 at 286.
ideals, and moreover what methods or models of reasoning or of justification, should
guide the various actors in administrative decision-making arenas as they set about
negotiating these tensions? These are among the questions I take up herein.
CHAPTER ONE

The Rise of Reasonableness in the Modern Law on Substantive Review*

I. Introduction: The Modern Law on Substantive Review

In 2008, the Canadian case law on the standards of review structuring judicial oversight of substantive administrative decisions underwent something of a sea-change. For roughly 10 years prior, Canadian administrative law had featured three standards of review, representing, at least in theory, three distinct judicial postures toward disputed administrative decisions. These were, respectively: correctness, wherein the decision under review was said to command low or no deference; reasonableness, wherein the decision commanded some, but not great, deference; and patent unreasonableness, wherein the decision commanded the highest deference.

In the Supreme Court judgment in Dunsmuir v. New Brunswick,14 these three standards were collapsed to a pair: correctness and reasonableness, connoting, at least on a cursory view, a simple binary of non-deference versus deference.15 This development was generally (if tentatively) welcomed as advancing the cause of simplifying substantive review. Moreover, Dunsmuir’s judicial downsizing of the standards of review and ostensible simplification of the work of selecting a standard was regarded, not least by the judges issuing the decision, as potentially enabling a freeing-up of judicial and jurisprudential energy in order to engage more directly with the question of how to assess the legal adequacy of administrative decisions—most specifically, how to conduct

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14 Supra, note 1.

15 As I suggest in what follows, this was in a sense a harkening-back to the state of affairs pre-1997, when just two standards—correctness and patent unreasonableness—were on offer. Yet the deferential standard of reasonableness on offer post-Dunsmuir is conceived quite differently from the now-defunct patent unreasonableness standard, as I hope to show.
substantive review on a reasonableness standard in a manner consistent with deference. Not only had there been a paucity of concrete guidance for judges on this point hitherto, but as a result, a paucity of guidance for administrators in terms of the substantive expectations attaching to their decisional practices.

In the chapter that follows this one, I suggest that *Dunsmuir* has indeed proven valuable in initiating renewed reflection on the meaning of deference, or reasonableness, on substantive review – which development may conceivably inspire further critical inquiry into the significance and indeed the legitimacy of non-deference, or the continued role of correctness review in administrative law. These are inquiries that touch on fundamental questions of administrative state legitimacy, going as they do to the proper relationships of legislatures, judges, administrators and the individuals and groups subject to administrative decisions. And yet, as has ever been the case in the unfolding modern law on substantive review, the path toward resolving or even meaningfully broaching these questions is neither simple nor well-defined.

In order to better appreciate the possibilities for and limits upon deference in a post-*Dunsmuir* world, I suggest that we must first revisit the past. Indeed, I argue in Chapter II that *Dunsmuir*’s guidance on the significance and practical conduct of reasonableness review opens directly onto the very tensions and ambiguities that have plagued substantive review throughout the lifecycle of the modern jurisprudence. It is these tensions and ambiguities that this chapter takes up, with the objective of arriving at the present juncture in substantive review doctrine better equipped to assess the challenges that lie ahead. Traditionally, the challenges proper to substantive review have been apprehended as part of a general conflict between judicial values (typically
converging upon individual rights) and administrative values (typically converging upon
the public interest, or welfarist values potentially in tension with individualist values).
But that image of perennially clashing judicial and administrative world-views as the oil
and water of administrative law has arguably gradually fallen out of favour in the
understanding of the project of substantive review that has come to orient the modern
jurisprudence. The question is: what if any alternative model might take its place?

*The rise of reasonableness – a romance*

The story of the emergence and shifting significance of the modern standards of
review in Canadian administrative law supports starkly divergent accounts. On the one
side are the skeptical accounts, according to which both the exceeding intricacy of the
“pragmatic and functional”16 analysis going to the choice of standard (hardly displaced,
the skeptic will observe, by *Dunsmuir*’s “standard of review analysis”),17 and the elusive
quality of judicial pronouncements on how to apply the standards (hardly improved, the
skeptic will add, by *Dunsmuir*’s restatements) amount to ornate doctrinal cloaks for the
continued privileging of judicial over administrative opinions on matters given to

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16 The phrase is first introduced by the Supreme Court of Canada in *U.E.S., Local 298 v. Bibeault*, [1988] 2
S.C.R. 1048 at para 122: “The formalistic analysis of the preliminary or collateral question theory is giving way
to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error.”
In *Bibeault*, this analysis is characterized as assisting in the work of determining the decision-maker’s
jurisdiction: i.e., whether the decision goes to determining the limits of the decision-maker’s jurisdiction or
mandate (in which case a correctness standard would apply), or alternatively falls within that jurisdiction or
mandate (in which case the decision is subject to review only where “patently unreasonable”).
The factors animating the pragmatic and functional analysis as set out in *Bibeault* are later slightly
modified (as is the guiding objective of the analysis – no longer oriented by the lodestar of jurisdiction but
rather that of “deference”) in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1
S.C.R. 982 at paras 29-38. The restated criteria include whether there is a privative clause (or, in the later case
law, a statutory right of appeal), the nature of the question (fact, law, or mixed law and fact), the purpose of the
legislation and relevant provision, and the relative expertise of the decision-maker and courts on the matter at
hand.
17 *Supra* note 1 at paras 51-64, esp. para 63.
administrators to decide. That is, the inordinate attention given to parsing and elaborating the standards of review over the last three decades amounts to a thin masking of an indomitable judicial will to have the last word on the scope and limits of executive action.

But the dominant story of the development and significance of the standards of review proceeds in a more romantic fashion. On that account, the modern law on substantive review, beginning with the 1979 Supreme Court judgment in *CUPE*,¹⁸ expresses a gradual reconciliation of the judiciary and the administrative state under the banner of a common “culture of justification.”¹⁹ That is, the romantic discerns in *CUPE* and the subsequent cases a radical shift away from traditional judicial tendencies to regard the administrative state as a lawless zone,²⁰ a conception accompanied by strategies of closely hedging administrative powers or jurisdiction through the deployment of abstract or formal legal categories. With this shift comes a concomitant evolution toward recognizing the context-specific reasonableness of, and institutional reasons for deference to, administrative decisions. *CUPE* is thus read as heralding an era of substantive review in which judges and administrative decision-makers are acknowledged to bring different strengths to the common project of ensuring that the decisions of public bodies are not arbitrary but justified.

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¹⁸ *Supra* note 9.
¹⁹ “[S]ocieties governed by the Rule of Law are marked by a certain ethos of justification. … Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. … A culture of justification shifted the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of rationality and fairness.” (The Honourable Justice B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1999) 12 Can. J. Admin. L. & P. 171 at 174-75).
The mechanisms driving this romantic reconciliation are the standards of review elaborated in and after *CUPE*. That is, the judgment of Dickson J. for a unanimous Court in that case may be understood to forge a new or renewed relationship between the judiciary and the administrative state, specifically by way of a newly-minted standard of review: the standard of patent unreasonableness. Prior to *CUPE*, judicial review was understood either to be barred entirely (where a decision of law was protected by a privative clause, or where a decision was not a decision of law but rather of fact or discretion) or was conducted as correctness review (for errors of law -- including certain egregious errors of fact or discretion deemed “errors of law”). In the background analysis to this innovation, Dickson J.’s judgment bespeaks a judiciary committed to taking seriously not only the formal indicia of the legislature’s entrusting certain administrative actors with exclusive powers of decision (specifically where expressed through a privative clause), but also the practical or functional justifications for granting those decision-makers presumptive authority where their decisions are subject to legal challenge.\(^\text{21}\) As such, *CUPE* prescribes a purposive and at the same time pragmatic reading of the institutional arrangements promulgated in administrative decision-makers’ enabling statutes. In this way, the standard of patent unreasonableness was forged in an acknowledgment both of legislative intent and of the unique capacities and insights of administrative agencies. Moreover, those unique capacities recognized by the Court went specifically to the ability of administrative agencies to discern legislative intent -- or

\(^{21}\) *CUPE, supra* note 9 at paras. 13-14, referring to the “[c]onsiderable sensitivity and unique expertise” required of Public Service Labour Relations Board members “if the twin purposes of the legislation are to be met” (i.e., “the need to maintain public services, and the need to maintain collective bargaining”). See the discussion of *CUPE* in Audrey Macklin, Chapter 8, *Administrative Law in Context*, supra note 4; and see Dyzenhaus & Fox-Decent, “Process/Substance,” *supra* note 20 at 200.
rather, (and perhaps even more radically), to make justified decisions about how best to advance the statutory mandate where laws yield no singular interpretation.\textsuperscript{22}

Yet, the romantic account continues, the starkly dualist alternatives of deference and non-deference presented in \textit{CUPE} were still bound up in overly rigid formalist strictures—in particular, the requirement that a privative clause be in place as a necessary condition of deference. As the pragmatic and functional analysis became increasingly oriented to decision-specific experience or expertise, conflicting statutory indicia (for example, where administrative expertise was accompanied by lack of a privative clause or by a right of appeal) placed strain on the dualist model of deference or no deference. Therefore, this model eventually gave way to a tripartite model. Indeed, with the insertion of the standard of reasonableness \textit{simpliciter} between the standards of correctness and patent unreasonableness (in \textit{Canada (Director of Investigation and Research) v. Southam Inc.})\textsuperscript{23} it seemed we were well on the way to a happy ending to the romantic’s story. For now judges were able to take fuller notice of the practical bases for deferring to administrative decisions, while retaining a responsibility to ensure that those decisions were justified. This development may be understood to have deepened the insights of \textit{CUPE}, as recognition of administrative legitimacy was now implicit both in the extension of deference on a reasonableness standard (that is, even in the absence of a privative clause explicitly directing the court to refrain from review) and in the expectation of reasonableness under that standard (implying that administrative decision-makers have the authority and capacity to interpret their statutes in a reasonable—and not

\textsuperscript{22} \textit{CUPE, ibid.} at 237. Justice Dickson states of the statutory language in dispute: “There is no one interpretation which can be said to be "right".”

\textsuperscript{23} [1997] 1 S.C.R. 748 [\textit{Southam}]. Also relevant is the extension of the standard of review analysis to the exercise of discretion in \textit{Baker, supra} note 11. See Geneviève Cartier, Chapter 10, \textit{Administrative Law in Context, supra} note 4.
just “not patently unreasonable”—manner). The development of this middle standard may thus be regarded, on the romantic account, as a key expression of the idea that administrative bodies have independently valuable roles to play in shaping the contours of public justification.

Yet the forging of a third standard raised new questions for the jurisprudence on substantive review: namely, how did review for reasonableness relate to—or potentially alter the pre-existing relationship of—patent unreasonableness and correctness review? Should the three-standard model be conceived of as a broad spectrum allowing for subtle gradations of deference responsive to the diversity of administrative agents, such that reasonableness review would effectively shade into correctness review on the one end and patent unreasonableness review on the other? Or did this model feature three discrete and determinate modes of judicial engagement? The latter question was resolved by the Supreme Court in *Ryan v. Law Society of New Brunswick*, where the Court unanimously affirmed a commitment to (just) three distinct standards of review. But questions remained—indeed, questions that went to the very coherence and workability of the law on substantive review. In short, what exactly was the import of, and what were the differences between, the (three) standards of review? Typically, those standards were characterized in terms of graduated degrees of deference, inversely correlated to graduated degrees of stringency. In *Dr. Q.*, McLachlin C.J. informed us that correctness review was “exacting review,” reasonableness review demanded “significant searching and testing,” and patent unreasonableness review meant that the decision must be left “to

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the near exclusive determination of the decision-maker.” But what did such characterizations amount to, on reflection and in practice? Increasingly, commentators asked: Do the three standards actually do the work they are said to do on the romantic account? Do they succeed in integrating or harmonizing judicial and administrative duties and competencies, in promoting a common culture of justification? Or do they amount to a lot of judicial smoke and mirrors?

Enter Dunsmuir, and the collapse from three to two standards – effectively nullifying the original expression of deference in this jurisprudence (“patent unreasonableness” review), and leaving just correctness and reasonableness review. This is where we now find ourselves: in a post-Dunsmuir world. But despite the claims of increased simplicity and clarity that have marked this latest jurisprudential shift, courts, commentators, and students of this area of law are perhaps more anxiously than ever asking: what is the import of the collapse from three to two standards – and in particular, what is its import for the conduct of deferential review? This is the question I seek to situate against the rise and fall of the precedent standards – and moreover, against the overarching concern of this thesis to bring administrative law imperatives into closer contact with the imperatives of administrative state legitimacy.

In this chapter, my focus is both how the standards of review were characterized – in the period reaching from CUPE just prior to Dunsmuir -- and how they were applied; that is, with what judges said about the standards of review during this significant phase of the jurisprudence, and what they actually did in determining whether a given administrative decision was within or beyond the limits of legality. This inquiry would

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appear to be directed at the crowning moment of substantive review: the application stage, wherein legal oversight is brought directly to bear on a contested decision. As I have suggested above, this is the moment that Dunsmuir now insists we attend to more closely. And indeed, it may be observed that in the jurisprudential tradition I take up herein, the application of the standard of review to the decision under review has tended to play as the weak final act of the substantive review judgment: a gesture overshadowed by strenuous efforts to identify the appropriate standard. In this, application of the correctness standard has often been conducted as if merely a matter of making the law (particularly the enabling statute) speak for itself – so demanding uncritical assent to assertions of a plain or otherwise unitary legislative intent. Such an approach may lead us to wonder whether other perspectives on the significance of the statute (most notably, the perspective of the administrative decision-maker) are being suppressed.26

Alternatively, where a deferential standard is in play (whether reasonableness or, pre-Dunsmuir, patent unreasonableness), its application has at times seemed no more than a sniff test,27 registering judicial intuitions that defy public articulation, and that as such arguably fail to meet a fundamental criterion of the rule of law. That is to say that, at least for much of the jurisprudence on substantive review including that which I consult herein, it has tended not to matter how context-sensitive or careful the threshold analysis of the standard of review has (or has not) been: the ensuing application of the standard has frequently been vulnerable to the charge that the reasonableness or patent

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27 Or “puke test”: see Dyzenhaus, “Constituting the Rule of Law” supra note 12 at 493 (n.110), referring to the position of Wilson J. in National Corn Growers, supra note 4.
unreasonableness, correctness or incorrectness, of the impugned decision was asserted with insufficient justification. Such charges have lent increased potency to the skeptical thesis that at the end of the day, the standards of review are of little or no relevance to the outcome of substantive review: in the end, substantive review is a judge’s game.

What if any resources are there in the law on substantive review, pre- or post-*Dunsmuir*, for alleviating these concerns? This is the question I begin to investigate herein. By this chapter’s end, we should be better equipped to consider whether or how the case law on substantive review might be classed as a form of jurisprudential or constitutional romance, advancing the reconciliation of the judiciary and administrative decision-makers -- and those subject to state action -- under the rule of law -- or whether (as the skeptic would urge), the enterprise is better classed as farce.

What remains of this chapter are two parts. The first sets out some background observations on competing approaches to statutory interpretation that may have important and even determinative relevance to the practice of substantive review: not only what standard is selected but also what the outcome of review is likely to be, regardless of the standard. The second part examines each of the three pre-*Dunsmuir* standards in turn, first considering how they were historically characterized and then how they were applied in selected Supreme Court decisions. As noted, I then take up, in Chapter II, the return to a two-standard model in *Dunsmuir*, discussing the implications of that case for deferential review again with an eye to the links and possible disjunctions between theory and practice.

II. Statutory Interpretation and Substantive Review: Working Theories
The assessment of the substantive legality of an administrative decision is steeped in the work of statutory interpretation. Therefore it is wise, in broaching the subject of substantive review, to at least briefly consider competing conceptions of or approaches to statutory interpretation. I suggest herein that these competing conceptions or approaches in turn imply competing models of constitutional ordering – i.e., models of the proper work of, and so separation and/or interactions of, the legislative, executive / administrative, and judicial branches. In more concrete terms, I suggest that adoption of one or another approach to statutory interpretation may be significant to or even determinative of the outcome of substantive review.

Let us start with the “modern principle” of statutory interpretation, articulated in the second edition of Driedger’s *Construction of Statutes* and repeatedly endorsed by the Supreme Court:

Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

General judicial acceptance of this principle tends however to obscure continuing conflicts among judges (and sometimes even among decisions of a single judge) as to the

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29 While what follows takes as its focus the competing ways that judges understand (or appear to understand) the project of statutory interpretation – including competing perspectives on the role of administrative decision-makers in this project – in Chapter II, on considering the implications of *Dunsmuir* and more broadly the implications of the rise and transformation of reasonableness review, I take up the further question of whether administrators do or should bring distinct approaches to the work of statutory interpretation.

factors that bear relevance, or primary relevance, when interpreting contested statutory
texts.\textsuperscript{31} Here we may roughly distinguish what may be termed positivist approaches from
pragmatic or normative approaches.\textsuperscript{32}

In rough terms, a positivist approach to statutory interpretation flows from the
presumption that statutory language contains a singular and unified meaning that is stable
over time.\textsuperscript{33} Judges adhering to that presumption tend to accept further that ascertainment
of the core meaning is to be sought through interpretive techniques proper to and
perfected by the judiciary. Those techniques may involve a strict focus on the statutory
text, or efforts to situate the text in its legislative context. But on either variant of this
approach, the objective is to “find” a determinate legislative intent.\textsuperscript{34} A positivist
approach to law or to law-interpretation is often accompanied by a commitment to legal
formalism. On this model, law is a self-contained system of formal concepts, knowledge
of which is primarily taxonomic, and application of which requires sorting case-specific
facts by means of deductive and inductive links to the taxonomic system.\textsuperscript{35} That said, the

175 [“Statutory Interpretation”]; S. Beaulac & P. Côté, “Driedger’s ‘Modern Principle’ at the Supreme Court

\textsuperscript{32} Sullivan, “Statutory Interpretation,” \textit{ibid.}, distinguishes textualist and intentionalist (which I am loosely
calling “positivist”) from pragmatic (which I am calling “normative”) approaches to statutory
interpretation.

\textsuperscript{33} See D. Dyzenhaus, “David Mullan’s Theory of the Rule of (Common) Law” in G. Huscroft & M.
Taggert, eds., \textit{Inside and Outside Administrative Law: Essays in Honour of David Mullan} (Toronto:
University of Toronto Press, 2006) 448 at 474 [\textit{Inside and Outside}]: “[T]he point of the positivist
conception of law is to insist that real law is the determinate content of valid law, where determinate means
determinable in accordance with tests that do not rely on moral considerations and arguments, including
arguments about the principles of an internal morality of law.”

argues that legal positivism is committed neither to textualism nor to originalism in statutory interpretation.

\textsuperscript{35} Katrina Wyman surveys the many deployments of the term formalism in legal academia in her article “Is
Dyzenhaus: “Formalism is formal in that it requires judges to operate with categories and distinctions that
determine results without the judges having to deploy the substantive arguments that underpin the
categories and distinctions”. (“Constituting the Rule of Law,” \textit{supra} note 12 at 450). And see Hanoch
interplay of legislative and common law systems in administrative law tends to wreak havoc with formalism, strictly conceived.

A general criticism raised to the positivist approach to law-interpretation is that it smuggles into legal judgment contestable value-driven choices, where those choices should be explicitly submitted for public justification.\textsuperscript{36} In administrative law, a positivist approach may further be argued to work against a meaningful conception of deference, in that it restricts the potential for judges to acknowledge the operation and thus the contestability of their own value-laden presumptions in the face of the potentially competing values or perspectives of administrative decision-makers. That said, in the face of a privative clause, the positivist approach suffers the traditional tension between acknowledgment that administrative decision-makers have been granted exclusive interpretive authority over their enabling statutes, and insistence that such authority is proper to the judiciary.\textsuperscript{37}

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\textsuperscript{36} Sullivan, supra note 31 at 220-25.\textsuperscript{37} Justice Rothstein’s judgment in \textit{Khosa} provides a compelling example of this tension. \textit{Canada (Citizenship and Immigration) v. Khosa}, 2009 SCC 12, [2009] 1 S.C.R. 339 at para 74, and more generally at paras 76-98. [\textit{Khosa}]
In contrast, it is the explicit submission of the value-laden bases of legal judgment for public justification that marks a normative approach to statutory interpretation.\(^{38}\) Such an approach proceeds on the assumption that contested matters of statutory interpretation cannot be resolved by exclusive reference to the text,\(^{39}\) or even by situating the text in its social context,\(^{40}\) but also require judgments about the competing values or social priorities informing alternative statutory constructions.

This approach is reflected in the acknowledgement of Justice L’Heureux-Dubé in her judgment in the *Baker* case,\(^{41}\) discussed below, that all law-interpretation involves the exercise of discretion – i.e., discretion is not the exception in law, but the rule.\(^{42}\) That is not to say that law is without any anchor beyond the whim of the judge. Rather, the normative model of law-interpretation suggests a conception of the rule of law in which the legitimacy of state action is contingent not on strict adherence to legislative or

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\(^{38}\) Sullivan, supra note 31 at 184-87, 220-27 (on the “pragmatic” approach to interpretation).

\(^{39}\) Sullivan, *ibid.*, makes this point, in part in light of a set of standard critiques of textualist and intentionalist approaches:

> Communication through natural language is never a sure thing; rules drafted by legislatures tend to be general and are often abstract; and legislatures cannot form intentions with respect to how these rules should apply to every possible set of facts.

\(^{40}\) The point is put in general, pragmatic terms, by Dagan, *supra* note 35, at p.649:

> A prescription for sensitivity to situations and facts is vacuous without general normative commitments. These commitments are indispensible if we are to resolve – as law always needs to do – conflicts between the very demands and interests that case sensitivity exposes.

\(^{41}\) *Supra* note 11.

\(^{42}\) L’Heureux-Dubé writes (for the majority) in *Baker*:

> It is, however, inaccurate to speak of a rigid dichotomy of ‘discretionary’ or ‘non-discretionary’ decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision-making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. (*ibid*, at para. 54).
majority will but on consistency with the important public values inscribed in our social and legal traditions.\textsuperscript{43}

In the administrative law context, adherence to such a conception may (but arguably need not) entail an attitude of strict non-deference where an administrative decision is understood to place in issue important public values. That is, some judges may insist on correctness review in such cases in accordance with an understanding of their role as exclusive arbiters of the values expressed at common law and in the constitution.\textsuperscript{44}

Yet other judges (we may call them constitutional pluralists) may view the same interpretive problems as supportive of deference on review, on the understanding that administrative decision-makers may be uniquely positioned to work out how the basic commitments of the social, political, and legal order inform or interact with the sector-specific values and policy objectives of administrative regimes.\textsuperscript{45}

There are tensions in each of these approaches to statutory interpretation, in terms of their implications for the relationship between courts and administrative decision-makers. A positivist insistence that there is one right answer in construing disputed statutory provisions seems inconsistent with the rationale for deference expressed in

43 As Sullivan, \textit{supra} note 31 at 227, notes, this model is supported by the following statement of McLachlin C.J. for the Court in \textit{Reference re Secession of Quebec}, [1998] 2 S.C.R. 217 at 247 [\textit{Secession Reference}]:

\begin{quote}
[A] system of government … must be capable of reflecting the aspirations of the people. But there is more. Our law’s claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the “sovereign will” or majority rule alone, to the exclusion of other constitutional values.
\end{quote}

Compare Mary Liston’s discussion of \textit{Secession Reference} in chapter 4 of \textit{Administrative Law in Context}, \textit{supra} note 4.

44 See “Constituting the Rule of Law,” \textit{supra} note 12 at 448-51, where Dyzenhaus points out that the Supreme Court’s endorsement of “unwritten constitutional principles” in the \textit{Secession Reference} is accompanied by other statements expressing a “formalist” vision of the separation of powers, whereby judges bear exclusive responsibility for working out those principles.

45 \textit{Ibid.} Dyzenhaus refers to this as the “democratic” vision of the constitutional order, and, further, argues that such a vision is implicit in the majority decision of L’Heureux-Dubé J. in \textit{Baker, supra} note 11. This is also the attitude taken by L’Heureux-Dubé J. in \textit{Mossop, supra} note 26.
But such an approach is nonetheless apt to express deference by placing high and even determinative importance on the existence of a privative clause, and, further, by resisting importation of value-laden constraints on administrative decision-making absent a direct constitutional challenge. The constitutional pluralist expresses deference by acknowledging a role for administrative decision-makers in the project of defending and elaborating the rule of law. But he or she may thereby invest those decision-makers with a duty to consider and even to attribute determinative importance to the values the judge deems essential to the legitimate exercise of the relevant statutory powers.

To shift the terrain slightly, a further matter of significant background importance to substantive review, apart from the general approach to statutory interpretation adopted in a given case, is what base of evidence and argument the reviewing court is able to draw upon to inform its interpretation of the legality of the disputed decision. Is there a record of the reasons for decision, or other means (for example, policies or guidelines) of informing the court of the considerations the decision-maker took into account? Was the administrative decision-maker able to participate in the proceedings to provide such information or otherwise assist the court? Wade MacLauchlan has argued that the immediate challenges facing substantive review on the way to a culture of justification lie precisely in devising better ways for tribunals to apprise courts of the institutional and social policy considerations informing their decisions. This includes instilling better practices of reason-giving among administrative decision-makers. Such institutional developments—accompanied by developments in the capacity or willingness of courts to

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46 I refer to the recognition given by Justice Dickson in CUPE (supra note 9) to the fact that there may be more than one reasonable interpretation of disputed statutory language. See note 22, supra.
47 On the traditional restrictions on such involvement to issues relating to tribunal jurisdiction, see D. Mullan, Administrative Law: Cases, Texts, and Materials (Toronto: Emond Montgomery, 2003) at 704-5, 1230-41.
exhibit appropriate sensitivity to such information—are held out by MacLauchlan as potentially supplanting formalist and positivist tendencies to rely upon loose notions of “legislative intent” and “jurisdiction” in this area of law.\textsuperscript{48}

III. Tensions in the Rise of Reasonableness Review

With that we may begin to delve more deeply into the dominant story of the modern standards of review. Can the jurisprudence on the meaning and application of the standards resolve the tensions that surface in substantive review between the imperative to respect administrative authority and the imperative to uphold the rule of law? Moreover, what implications might this jurisprudence have in terms of resolving or at least forcing revisitation of the stark conflicts that may arise between sector-specific administrative knowledge and the knowledge (and moreover the interests) professed by the legal subject?

Among the matters canvassed in this section are the following. First, how are we to understand the continuing purchase of review for correctness after \textit{CUPE},\textsuperscript{49} given that the decision called into question a positivist approach to statutory interpretation and the thesis that only judges may legitimately interpret law? Second, did the notion of review for patent unreasonableness, introduced in \textit{CUPE} and elaborated in subsequent cases—until its ultimate jettisoning in \textit{Dunsmuir}\textsuperscript{50}—offer any meaningful guidance about how


\textsuperscript{49} Supra note 9.

\textsuperscript{50} Supra note 1.
best to conceive of and go about discerning the limits of legality in a manner expressive of deference? Alternatively, what sorts of cautionary tales might that case law offer? And finally, how did the latecomer to the standard of review jurisprudence, review for unreasonableness (or reasonableness *simpliciter*), first manifest itself in relation to the other two standards? What gap in the jurisprudence did it fill? And what sorts of aspirations may be said to have distinguished this standard from its dualist predecessors?

Having investigated these questions, we may proceed (in Chapter 2) to consider the implications of *Dunsmuir*’s shift to two standards of review, and in particular, the possible significance of *Dunsmuir*’s unified/revitalized reasonableness standard for guiding judgment in addressing the tensions between deference to administrative decision-making and protection of the rule of law.

**i. A Contested Correctness**

1. *The Correctness Standard in Theory*

   Let us begin with the standard most expressive of the institutional authority of the judiciary: review for correctness. In Chapter 2, we will see that *Dunsmuir* indicates no significant change in approach to the meaning or application of this standard from that which has held the field since *CUPE*. Indeed, this standard may at first blush appear so plain in meaning as to be beyond serious consideration for reform – indeed, so as to be beyond comment. That is, asserting a criterion of correctness would appear to amount merely to an insistence that the decision-maker get it right, full stop. But on reflection,
the meaning of “getting it right” and the method by which this is evaluated are less than transparent; indeed, in some cases, these matters have been hotly contested.

In Ryan, Iacobucci J. wrote that where a correctness standard is imposed, “the court may undertake its own reasoning process to arrive at the result it judges correct.”\(^{52}\) This is set in contrast to what we will see shortly has long been considered a key feature of deferential review. That is, despite some initial dissension on this point, the deferential standards pre-dating Dunsmuir (patent unreasonableness and reasonableness simpliciter) were generally recognized not to admit of judicial determination of the “right answer” to a disputed matter, followed by assessment of the relative accuracy of the tribunal’s answer. Just what these standards did connote is something I will take up in a moment.

Iacobucci J.’s description of correctness review in Ryan implies that the court need not put any effort into specifically assessing the administrative decision-maker’s reasons or casting those reasons in their best light. Nor must it admit that there may be dimensions to those reasons that lie beyond its traditional capacities or exceed its powers of appreciation. Rather, given that the court has, through a pragmatic and functional analysis, deemed itself best placed to resolve the matter under review, it is apparently free to revisit the decision originally put to the administrative decision-maker as it sees fit.

One understanding of correctness review is that it describes the sort of oversight appropriate to decisions or statutory provisions that inherently admit of just one right answer. This is contrasted to the sort of interpretive dispute in issue in CUPE,\(^{53}\) where there was significant ambiguity or room for interpretive discretion. However, with the rise of a duty on decision-makers to give reasons in cases affecting important interests

\(^{51}\) Supra note 24.
\(^{52}\) Ibid. at para 50.
\(^{53}\) Supra note 9.
(reasons that courts would appear to be bound to explain any departure from, as part of the commitment to public justification), and, moreover, with the rise of purposive approaches to statutory interpretation acknowledging some discretion in all interpretive judgment, this view of the basis for correctness review becomes less convincing.\footnote{See “Process/Substance,” supra note 20 at 235-36; “Constituting the Rule of Law,” supra note 12 at 469 (n.46).}

A final, general question that may be asked of correctness review is on what occasions this standard is likely to be selected and applied. Here it should be noted that while the jurisprudence following \textit{Pushpanathan}\footnote{Supra note 15.} indicated that a case-specific pragmatic and functional analysis was always required in order to determine whether correctness review was warranted,\footnote{Dr. Q., supra note 25 at paras. 21-25.} this has been overturned with \textit{Dunsmuir}. Instead (to look ahead for just a moment), \textit{Dunsmuir} advises that a correctness standard will presumptively or typically apply in certain types of cases, including those that raise constitutional questions,\footnote{\textit{Dunsmuir}, supra note 1 at para. 58. But see Dyzenhaus, “Constituting the Rule of Law,” supra note 12 at 493-496, and Evan Fox-Decent, Chapter 7, \textit{Administrative Law in Context}, supra note 4 (interrogating the convention of correctness review of tribunal determinations of constitutional questions).} “true questions of jurisdiction or \textit{vires}\footnote{\textit{Dunsmuir}, \textit{ibid.}, at para 59. In terms of the past jurisprudence, see, for example, \textit{Nanaimo v. Rascal Trucking Ltd.}, 2000 SCC 13, [2000] 1 S.C.R. 342. On the contested nature of the jurisdictional question, see “After the Revolution,” supra note 48 at 322, 331-32.} – here \textit{Dunsmuir} draws on, while seeking to distance itself from,\footnote{See \textit{Dunsmuir}, \textit{ibid.}.} a particularly contested element of the pre-\textit{Dunsmuir} landscape -- and cases concerning the relative jurisdictional scope of different tribunals.\footnote{Ibid. at para. 61. But see British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Inc., [1995] 2 S.C.R. 739.} \textit{Dunsmuir} further invokes a strain within the prior jurisprudence wherein correctness review tended to follow characterization of the question as “pure
law,” “general law,” or law of “great precedential value” — although here it raises the threshold by stipulating that the question of law in issue must be “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”. Finally, both pre- and post- *Dunsmuir*, the correctness standard has generally been understood to apply in the review of procedural fairness -- although some doubts were raised on this count following the *Baker* case.

All of the bases on which *Dunsmuir* advises a presumption of correctness review are rooted in the pre-*Dunsmuir* case law. Arguably, all may be characterized as matters about which the administrative decision-maker lacks expertise or institutional authority relative to the court. That said, as Macklin has suggested, such characterizations of the question on review may be open to dispute.

2. Correctness Review in Practice

I focus in this section on two touchstone cases that are useful in provoking reflections on the nature and methods of correctness review. Then I briefly survey how some of the controversies reflected in these cases have played out in more recent case law engaging correctness review. Throughout this section and the sections that follow, one must keep in mind that until the mid-1990s, there were two standards on offer in the review of tribunal interpretations of law: correctness or patent unreasonableness.

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61 See, for example, Southam, supra note 23 at paras. 35-37; Pushpanathan, supra note 16 at para. 47; Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 26; *Dr. Q.*, supra note 25 at para. 34.
62 *Dunsmuir*, supra note 1 at para 60.
63 Ibid.
64 Chapter 8, *Administrative Law in Context*, supra note 4.
Application of the latter standard was, with few exceptions, contingent on a privative clause;\textsuperscript{65} \textit{i.e.}, absent a privative clause, correctness review remained the default option.

From the vantage of reasonableness review (or a jurisprudence in which that standard is available, even in the absence of a privative clause), we may regard the initial post-\textit{CUPE} dualism counterposing utmost deference against strict non-deference as placing a certain strain upon both standards. For under that model, cases now understood to attract a form of deference described as “respect for, not submission to”\textsuperscript{66} administrative reasoning were positioned on one side or the other of a more radical deference / non-deference divide.

Two cases that bring out the tensions of correctness review are \textit{Bibeault}\textsuperscript{67} and \textit{Mossop}.\textsuperscript{68} \textit{Bibeault} involved a school board’s terminating janitorial service contracts with companies whose workers were on strike, and then contracting with another company for such services. The question was, did this fit the criterion of “alienation or operation by another” of an “undertaking” under the successor employer provisions of Quebec’s labour law? If so, the union representing the employees of the original companies would represent those of the new company, continuity of the collective agreement would be assured, and the strike would carry on. Audrey Macklin has noted a schism in the judgment of Beetz J., which on the one hand consolidates a set of “pragmatic” and “functional” queries for discerning whether deference is due, and on the other continues

\textsuperscript{65} However, the courts had extended deference to certain specialized tribunals on questions of law interpretation in the absence of a privative clause. See \textit{Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)}, [1989] 1 S.C.R. 1722 at 1746.

\textsuperscript{66} \textit{Supra} note 13.

\textsuperscript{67} \textit{Supra} note 16.

\textsuperscript{68} \textit{Supra} note 26.
to frame its analysis in terms of a formal concern to patrol the limits of administrative jurisdiction.\textsuperscript{69}

It is the latter concern that animates the disposition of the case. Beetz J. concludes that the issue is jurisdictional, meaning that no deference is due. This conclusion turns on his determination that the statutory language includes terms of art at civil law, the interpretation of which demands general legal expertise. From there, the objective is to determine the right answer to the question: were the successor employer provisions engaged or not?

Beetz J. canvasses the purpose of the key disputed provision (in light of the purpose of the statute as a whole); this is stated to be protection of “the benefits resulting from certification and the collective agreement.”\textsuperscript{70} He then situates that general purpose in light of the principle, derived from attention to the four corners of the statute, that collective bargaining requires a single union, a single employer, and a single undertaking. That principle, in addition to analysis of the terms “alienation” and “undertaking” at civil law, leads Beetz J. to conclude that a legal relationship between employers (in transferring a single undertaking) is required to trigger the disputed provision. According to Beetz J., the alternative construction accepted by the labour commissioner and upheld by a majority of the Labour Court gave the terms of art in question “a non-legal and even uncommon meaning”\textsuperscript{71}—one that more broadly was “inconsistent with the purposes of the Labour Code.”\textsuperscript{72} He suggests that the source of this inconsistency was the

\textsuperscript{69} Macklin, Chapter 8, Administrative Law in Context, supra note 4 at 207. Also see Dyzenhaus, “The Politics of Deference,” supra note 5 at 291.

\textsuperscript{70} Bibeault, supra note 11 at 1098.

\textsuperscript{71} Ibid. at 1110.

\textsuperscript{72} Ibid. at 1103.
commissioner’s and tribunal’s misguided “desire to protect the certification and collective agreement despite all the vicissitudes of the undertaking.”

The judgment of Beetz J. in Bibeault thus favours conceptual coherence as between the statute and the civil law over the context-inflected sympathies of the tribunal. Now, few will argue that coherence, in the law or in general, is inherently a bad thing. But on reading this case, we may ask ourselves whether we are convinced by the construction of the statute adopted by Beetz J. What else might we want to know from the administrative decision-makers in order to form our opinions? More generally, how important is it that terms of art at civil or common law are preserved from novel interpretations in administrative sectors? Does one’s answer to this differ depending upon whether the terms relate to commercial or contract law versus human rights?

Moving from the labour context to the human rights context, now consider Mossop. In this case, a majority of the Supreme Court overturned a decision of the Canadian Human Rights Tribunal on the basis that the prohibited ground of “family status” (not otherwise defined in the Canadian Human Rights Act) could not be interpreted to extend protection to a same-sex couple. The majority, as well as two judges dissenting on the result, adopted a correctness standard of review. (Here we encounter the phenomenon of judges agreeing on a correctness standard and then disagreeing on what the “right answer” is upon applying that standard – a fairly common occurrence throughout this jurisprudence.) L’Heureux-Dubé J. wrote a dissenting judgment adopting a patent unreasonableness standard.

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73 Ibid.
74 Supra note 26.
75 The basis on which a correctness standard was adopted are discussed in Macklin, supra note 69 at 216.
The concurring majority judgments in *Mossop* express two variants of what I have described above as a positivist approach to statutory interpretation. Lamer C.J. (Sopinka and Iacobucci JJ. concurring) grounds his analysis in legislative intent. This analysis is framed by a gesture toward the parallel universe of normative jurisprudence available solely to claimants invoking the *Charter*. That is, given that Mr. Mossop had opted to base his claim exclusively in arguments from statutory interpretation, Lamer C.J. suggests that the Court is bound by contextual indicia that “family status” was not intended to encompass same-sex relationships. Here he emphasizes the absence of “sexual orientation” from the statute’s prohibited grounds of discrimination at the time the proceedings arose, even in the face of a recommendation by the Canadian Human Rights Commission that it be added. The failure of Parliament to act on the commission’s recommendation, he reasons, amounted to its “refusal” to do so.

Lamer C.J. states the principle driving his analysis as follows:

Absent a *Charter* challenge of its constitutionality, when Parliamentary intent is clear, courts and administrative tribunals are not empowered to do anything else but to apply the law. If there is some ambiguity as to its meaning or scope, then the courts should, using the usual rules of interpretation, seek out the purpose of the legislation and if more than one reasonable interpretation consistent with that purpose is available, that which is more in conformity with the *Charter* should prevail.

In this case, however, the legislative intent is clear, so no recourse to the *Charter* as an interpretive aid may be had.

In his concurring judgment, La Forest J. (writing for himself and Iacobucci J.) also focuses on legislative intent. However, his judgment is more insistently fixed on the

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77 *Mossop*, supra note 26 at 581-82.
statutory text and, specifically, the word “family.” He describes his approach as consistent with “the ordinary rules of statutory interpretation” which demand that one give “to the words used in a statute their usual and ordinary sense having regard to their context and to the purpose of the statute.” In applying this principle, however, La Forest J. emphasizes not the general purpose of the *Canadian Human Rights Act*—that of eradicating discrimination—but the “usual and ordinary sense” of the word “family.” His conclusion is that the “dominant” and thus ordinary sense of the word, or that which represents the consensus of the Canadian public, is the “traditional family.” This is the meaning that therefore must be understood to have been Parliament’s intent both when the statute was enacted and at the time the dispute arose.

L’Heureux-Dubé J. is alone in arguing that a patent unreasonableness standard should apply. However, her disposition of the matter is endorsed in the separate dissenting reasons of McLachlin and Cory JJ., who determine that a correctness standard is in order. This seems to indicate that for McLachlin and Cory JJ., the judgment of L’Heureux-Dubé J. represents the best account of the “right answer” to this interpretive dispute. Thus, while our objective in this section is to consider correctness review, it is worth contrasting the approach taken by L’Heureux-Dubé J. with that of the majority.

The judgment of L’Heureux-Dubé J. is not the superficial gloss that we will see some have endorsed as the model of patent unreasonableness review. And yet it distinguishes itself from the approach of the majority in two key ways. First, it takes an emphatically normative approach to statutory interpretation. L’Heureux-Dubé J. expresses the distance between her approach and that of the majority as follows:

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79 The implications of this are the subject of careful analysis in Dyzenhaus, “Constituting the Rule of Law,” *supra* note 12 at 464-68.
Even if Parliament had in mind a specific idea of the scope of “family status,” in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of those principles to change over time. These codes leave ample scope for interpretation by those charged with that task.

The point here is that, at least with human rights statutes, it is essential to orient interpretive judgment with reference to human rights principles (in this case, specifically equality or non-discrimination). These are asserted in this passage not as statute-specific but as “fundamental.” As such, they may be curtailed only by the most explicit expressions of legislative intent. Thus it seems that there is, if not a right answer in this case (and perhaps, for L’Heureux-Dubé J., there is), then at least a right and a wrong way of going about resolving the question.

Both the reliance of La Forest J. on an “unexamined consensus” and the reliance of Lamer C.J. on the legislative context come in for criticism as insupportably invoking a singular majority will, and so understating the importance of human rights principles to the rule of law generally or to this instance of statutory interpretation in particular. In this way, L’Heureux-Dubé J.’s judgment reflects a commitment to a normative model of statutory interpretation, or a model of the rule of law and its place in statutory interpretation known as “common-law constitutionalism.” Under this model, statutes are understood not as closed systems but as requiring interpretation in light of the animating principles and values of the wider social and legal tradition.

80 Mossop, supra note 26 at 621.
81 See the discussion of normative approaches to statutory interpretation in part II, above. For a penetrating account of historical and contemporary features of common-law constitutionalism, see M.D. Walters, “‘Common Public Law in the Age of Legislation’: David Mullan and the Unwritten Constitution” in Inside and Outside, supra note 33 at 421, and “The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law” (2001), 51 UTLJ 91.
The second major difference between L’Heureux-Dubé J.’s judgment and that of the majority (and here she differs also from her fellow dissenters) is, of course, her selection of a patent unreasonableness standard. Thus, while the tradition of common-law constitutionalism tends to place the burden of identifying and prioritizing fundamental values on the shoulders of judges alone, L’Heureux-Dubé J. indicates through her adoption of deference that the tribunal has a legitimate role in this enterprise. This is confirmed in her method of reasoning, which throughout draws upon and amplifies the evidence and argument accepted by the tribunal. That is, the decision of the tribunal is drawn upon not simply as a base of fact or policy separable from legal analysis, but as an exercise in statutory interpretation which is itself a model of the interdependency of facts and values in legal judgment. As such, L’Heureux-Dubé J. demonstrates both a respect for Parliament’s will to assign the tribunal the role of administering this statute, and a commitment to the idea (again, cast as a principle of law) that in administering the statute, the tribunal’s task is to transcend narrow constructions of parliamentary will.

In agreeing with L’Heureux-Dubé J.’s disposition of the case, the other dissenters, McLachlin and Cory JJ., indicate their support for the idea that the statutory text must be read in light of social context (and thus changing social conceptions of family), and with particular sensitivity to the ways that human rights principles inflect and are inflected by that text and context. Yet according to L’Heureux-Dubé J., this sensitivity is, moreover, best served by careful attention to the reasons of the tribunal. In light of the fact that the other dissenters select a correctness standard, a question that arises is whether they are to be understood to say that the “right answer” would have been secured absent the
tribunal’s reasons, or alternatively that in this case, correctness review is compatible with—even in some measure dependent upon—attentiveness to tribunal reasoning.

Perhaps the convergence of these dissenting opinions despite their divergent standards may be chalked up to the fact that there was no reasonableness standard available at the time Mossop was decided. That is, rule of law concerns to protect the very values that L’Heureux Dubé J. cites may have rendered the patent unreasonableness standard unpalatable to the other judges, even if they might otherwise have been sympathetic to according the tribunal some deference.

Since Mossop and, moreover, since the introduction of review for reasonableness, the Court has indicated a willingness to accept that (some) deference to human rights tribunals on matters involving the interpretation and application of human rights statutes may, in some cases, be warranted. However, its insistence on the exclusive authority of the judiciary on matters of human rights holds strong in instances where the administrative decision-maker is not a human rights tribunal. This was the case in Pushpanathan and also in Trinity Western University v. British Columbia College of Teachers. Unlike Mossop, both these decisions feature majority judgments that place human rights at the core of the substantive review analysis, so taking a resolutely normative approach to resolving the disputed exercise of administrative powers. However, both also hold that there is no basis for deference to the bodies whose decisions are under review. In these judgments, then, correctness review is arguably rooted less in the idea that the decisions under review lend themselves to one right answer (in a

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82 See Dyzenhaus, “Constituting the Rule of Law,” supra note 12 at 467-68.
83 See, for example, Pushpanathan, supra note 16 at para. 45.
84 Ibid.
formalist-positivist sense) than the idea that judges hold a unique institutional capacity to uphold the rule of law and, in particular, to adjudicate matters of fundamental human rights—even if, or perhaps because, such adjudication necessarily involves contestable and significantly discretionary value judgments.

The dispute in *Pushpanathan* involved interpretation of a provision of the federal immigration statute incorporating article 1F(c) of the *UN Convention Relating to the Status of Refugees*, 86 according to which persons “guilty of acts contrary to the purposes and principles of the United Nations” are deemed ineligible for refugee status. The question was whether Mr. Pushpanathan, who had been convicted of drug trafficking, was ineligible to apply for refugee status on this basis. At the Supreme Court of Canada, the majority and dissent adopt contrary opinions about whether drug trafficking is “contrary to the purposes and principles of the United Nations” per the Act and Convention. The majority focuses, in considerable measure, on the intention of the drafters of the incorporated convention. But it also may be understood to make an explicit, contestable value judgment in privileging the Convention’s commitment to human rights protection as a basis for narrowly construing the disputed disqualifying provision, where it could have focused instead (as did the dissent and tribunal) on the multiple UN statements and instruments evincing a purpose of eradicating the drug trade.

Here it is important to recall that, at the stage of pragmatic and functional analysis aimed at selecting the standard of review, both the majority and dissent in *Pushpanathan* found little basis for expressing deference to the tribunal on the significance of the relevant domestic and international laws. In the main, this flowed from the finding that while the members of the tribunal were practiced at making factual determinations, they

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did not necessarily have legal training or expertise. Moreover, these concerns were exacerbated by the institutional concern to secure a clear and consistent approach to such general questions of law as this one, involving interpretation of domestic legislation in light of international law. These factors, combined with the strong emphasis placed by the majority on grounding resolution of this interpretive problem in a remedial reading of the relevant human rights regime, may convince us that the majority’s approach both to the standard of review and to the application of the standard was indeed correct. But one may nonetheless consider whether or how the decision might have been crafted in a manner expressive of deference. That is, might review for reasonableness (available at this point in the jurisprudence) have achieved the same result in a more defensible manner? Alternatively, is the more supportable conclusion that, particularly where fundamental interests are in play, it is institutionally (if not logically) necessary that a single “correct” answer be asserted, despite the potential for multiple reasonable interpretations? That is, is this necessary both in the interest of predictability and on the thesis that some interpretations, though reasonable, will be less consistent with human rights values than others? Still: in what sense (if any) can it be said to be “incorrect” to weigh, e.g., the value of national security or safety more highly than human rights in a specific case?

87 There is, in the discussion in Pushpanathan (supra note 16) of the appropriateness of a correctness standard for reviewing “general questions of law,” some slippage as between concerns for tribunal consistency and concerns for tribunal error. The majority cites Justice Iacobucci in Southam (supra note 23) for the proposition that “a determination which has ‘the potential to apply widely to many cases’ should be a factor in determining whether deference should be shown,” (at para 43). Consider this in light of Domtar Inc. v. Quebec (Commission d’appel en matière de lesions professionnelles) [1993] 2 S.C.R. 756, discussed infra. [Domtar]
It is perhaps instructive to compare the majority decision in *Pushpanathan* with the application of correctness review in *Trinity Western*. That case involved the BC College of Teachers’ [BCCT’s] refusal, under its broad public interest mandate to set secondary educational standards, to grant Trinity Western University accreditation for all five years of a teacher-training program. The tribunal’s concern was the requirement that students at Trinity Western sign a community standards contract which included a pledge to refrain from “homosexual behaviour,” described as a “sexual sin.” In its decision, the majority employed a markedly abstract conceptual analysis of the competing interests in play and their appropriate resolution, and concluded that the BCCT had failed to balance its equality-based concerns about Trinity Western’s teacher-training program with a concern for the university’s (and/or its students’) freedom of religion.

Here one may again ask: might the analysis of the judges on review have been improved, or more fully or clearly justified, by directing closer attention to the practical bases for BCCT’s concerns? The dissent of L’Heureux-Dubé J., conducted on a patent unreasonableness standard, arguably demonstrates such attentiveness. But at the same time, one may question her bold assertion in that dissent that religious freedom was simply not engaged by the BCCT decision, independent of a direct Charter claim. Here it appears that L’Heureux-Dubé J. is yielding to the formal separation-of-powers approach adopted by the majority in *Mossop*, whereby statutory interpretation and Charter rights claims must remain distinct, at least where the legislation or legislative history admits no easy importation of Charter values. However, particularly given the importance of this move for her substantive conclusions, one may ask whether the claim

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88 *Supra* note 85.
of non-engagement of this protected interest amounts to an effort (inconsistent with Justice L’Heureux-Dubé’s apparent broad commitment to a normative approach to statutory interpretation) to force the supremacy of one value without explicit justification in light of competing values.\(^{90}\)

Beyond these examples of normative approaches to statutory interpretation, correctness review has also continued to be applied in ways that suggest a more positivistic understanding of the enterprise. For example, in *Barrie Utilities*,\(^ {91}\) Gonthier J. for the majority characterized the phrase “the supporting structure of a transmission line” as a matter of “pure statutory interpretation.”\(^ {92}\) He then proceeded to render its plain meaning. But on the other side were arguments that the contrary interpretation (favoured by the Canadian Radio-Television and Telecommunications Commission) both was eminently reasonable and reflected cogent policy goals consistent with its mandate. In expressing concern with the approach of the majority, Bastarache J. in dissent drew upon the reasons of L’Heureux-Dubé J. for a unanimous Court in *Domtar Inc. v. Quebec (Commission d’appel en matière de lésions professionnelles)*.\(^ {93}\)

Substituting one’s opinion for that of an administrative tribunal in order to develop one’s own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision, it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily “exact” science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*\(^ {94}\)

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\(^{90}\) Arguably, on a result-driven analysis, L’Heureux-Dubé J. does this to avoid the charge that the tribunal was patently unreasonable in failing to take into account a mandatory relevant factor (more of which below).

\(^{91}\) *Supra* note 26.

\(^{92}\) *Ibid.* at para 16.

\(^{93}\) [1993] 2 S.C.R. 756 [*Domtar*].

\(^{94}\) *Barrie Utilities*, *supra* note 8 at para. 128 (per Bastarache J.), quoting *Domtar, ibid.* at 775.
Here we should consider carefully what it means to say that statutory interpretation is no longer an “exact” science. In particular, what does this mean for a correctness standard of review? Examination of how correctness review was applied in the above cases reveals tensions between a positivist approach to statutory interpretation, which looks to the text (or sometimes text and legislative context) as a closed system indicative of a determinate legislative intent, and a normative approach, which views problems of statutory interpretation in light of background assessments not only of social facts but also of competing value-laden purposes. Arguably the latter approach, taken seriously, begins to erode the idea that courts need not give any weight or respect to the justificatory efforts of tribunals, even on matters reserved for correctness review. This proposition is further supported when one considers that it may be difficult if not impossible ever to achieve a surgical separation of fact and law, or policy and law.

However, on the other side, how, if not through correctness review, can administrative law channel the traditional rule of law concerns to ensure consistency in the interpretation and application of core or system wide legal principles, and to protect important individual rights? Is the idea or ideal of correctness, or the application of that standard in certain cases, nonetheless vital (despite its inherent tensions) to the project of striking the right balance between the role of judges and that of administrators in our constitutional order?

The bedrock of correctness review is the concept of jurisdiction: the idea that administrative decision-makers cannot enjoy unlimited authority, and moreover, do not enjoy authority (or final authority) on questions going to the scope or limits of their mandate. Moreover, as we have seen, the correctness standard of review reflects the rule
of law concern for stability in law, particularly in matters of general legal (including constitutional) significance. Yet for all that, the standard sits uneasily with the aspiration of integrating the work of administrative tribunals more fully into the legal and constitutional order. For signals that this is indeed an aspiration that is proper to the modern jurisprudence on the standards of review, we must press a little further in our unearthing of the pre-Dunsmuir cases.

ii. In Search of Patent Unreasonableness

1. The Patent Unreasonableness Standard in Theory

In briefly recounting the romance of reasonableness as discerned in the jurisprudence on substantive review, I have alluded to the Supreme Court judgment generally regarded as ushering in the modern jurisprudence on the standards of review: Justice Dickson’s judgment for the Court in CUPE.95 Yet that judgment inherited from the previous jurisprudence the idea of a strict divide, relevant specifically to decisions protected by a privative clause, between “jurisdictional questions” going to the limits of administrative decision-makers’ statutory mandates (in respect of which they must be correct) and “questions within jurisdiction” (in respect of which they command deference). On the old approach, decisions taken within jurisdiction were understood to escape review, short of misinterpretations so egregious they were deemed to exceed the statutory mandate. In CUPE, Dickson J. indicated that the matter of jurisdiction could be quickly dispatched, on finding that the tribunal had carriage over the subject matter and

95 Supra note 9.
parties. Thus, the interpretive challenge in that case was “for [the board] alone to decide within its jurisdiction.” However, Dickson J. then posed the further question:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board’s interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

As David Mullan has observed, in these two sentences Dickson J. bridges two antithetical approaches to substantive review. That is, the first sentence alludes to a set of grounds, such as “asking the wrong question,” historically deployed to frame administrative decisions as in excess of jurisdiction and so to yoke tribunals’ interpretive efforts to the opinions of courts. In contrast, the second sentence—both its use of the term “patently unreasonable” and its fleshing out of this term with the idea of an interpretation that “cannot be rationally supported by the relevant legislation”—is poised to become the touchstone of the next few decades of deferential review. In the context of Dickson J.’s judgment in CUPE, the second formulation conveys both the idea that statutory language may accommodate more than one reasonable interpretation, and that there is good reason for courts to defer to expert tribunals where their interpretations fall within the ambit of reasonableness.

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96 CUPE, supra note 9 at 237.
97 Ibid.
99 In a citation just prior to the above quotation from CUPE, Dickson J. refers to his previous articulation of the sorts of error that take a tribunal beyond its jurisdiction, in Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Assn. [1975] 1 S.C.R. 382 at 389 (“acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or so misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it”). This list is in turn drawn from the House of Lords case Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 at 171 (H.L.), a case recognized as the nadir of deferential review in its support for the idea that all administrative decisions involving interpretation of law attract correctness review. Anisminic’s list was relied upon in Canada’s equivalent low watermark of deference, Metropolitan Life Insurance Co. v. I.U.O.E., Local 796, [1970] S.C.R. 425.
Cases decided subsequent to *CUPE* at times manifested the uneasy coexistence of these approaches, whereby courts ostensibly deployed patent unreasonableness review, yet engaged in what appeared to be a search for the “right answer.” One may include in this class judgments that made the common analytical move on patent unreasonableness review of adopting a correctness-style assessment of statutory purposes in order to assess whether the decision-maker “failed to take into account a relevant factor” or “took into account an irrelevant factor.” More generally, deep uncertainty about the meaning and practical implications of the search for patent unreasonableness was expressed throughout the case law that followed *CUPE*. For example, Cory J. struggled to quell concerns about the unpredictability inherent in this standard in *Canada (Attorney General) v. Public Service Alliance of Canada*:

It is said that it is difficult to know what “patently unreasonable” means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary “patently,” an adverb, is defined as “openly, evidently, clearly.” “Unreasonable” is defined as “[n]ot having the faculty of reason; irrational. … Not acting in accordance with reason or good sense.” Thus, based on the dictionary definition of the words “patently unreasonable,” it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

Some later cases attempted to throw lifelines back to the phrase “clearly irrational” to add putative clarity to the central inquiry under this standard. Others formulated further variations on the theme. For instance, in *Voice Construction Ltd. v. Construction and General Workers’ Union, Local 92*, Major J. stated that “[a] definition

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of patently unreasonable is difficult, but it may be said that the result must almost border on the absurd.”\textsuperscript{102}

With the rise of the reasonableness \textit{simpliciter} standard, the courts strove to further refine the concept of patent unreasonableness. In response to these attempts, two concurring judgments penned by LeBel J. in 2003 and 2004 effectively consolidated the debates around the import of the patent unreasonableness standard – laying the way for the standard’s demise.\textsuperscript{103} In short, LeBel J. pointed out that the case law had sought (in what he argued to be deeply incoherent fashion) to distinguish and thus clarify the import of patent unreasonableness review with reference on the one hand to “the magnitude of the defect necessary to render a decision patently unreasonable,” and on the other, “the ‘immediacy or obviousness’ of the defect, and thus the relative invasiveness of the review necessary to find it.”\textsuperscript{104} LeBel J.’s assessment of the failure of either definitional strand to lend coherence to the concept of patent unreasonableness, as distinguished from correctness review on the one end and reasonableness review on the other, is taken up further in Chapter 2, with discussion of the \textit{Dunsmuir} decision.

In \textit{Voice Construction}, Major J. stated that situations in which a pragmatic and functional analysis will justify patent unreasonableness review “will be rare.”\textsuperscript{105} That said, the standard held an important place in the jurisprudence right up until its demise in \textit{Dunsmuir}. It was assigned in connection with questions of law (where the contested

\textsuperscript{102} 2004 SCC 23, [2004] 1 S.C.R. 609 [\textit{Voice Construction}] at para. 18. To this LeBel J. rejoins (at para. 40): “With respect, adding yet another definition of patent unreasonableness would not make its application any easier nor its conceptual validity more obvious.”

\textsuperscript{103} \textit{Toronto (City) v. CUPE, Local 79}, 2003 SCC 63, [2003] 3 S.C.R. 77 [\textit{Toronto (City)}], and \textit{Voice Construction}, supra note 102 at para. 18

\textsuperscript{104} \textit{Toronto (City)}, \textit{ibid.} at para. 78.

\textsuperscript{105} \textit{Supra} note 102 at para. 18. But note Lahey and Ginn’s observation in “After the Revolution” (\textit{supra} note 48 at 274, 297) that lower courts often applied this standard to decisions not protected by a privative clause.
statutory provisions were deemed to fall squarely within the mandate of the decision-maker), as well as, less contentiously, questions of fact, or mixed law and fact—in addition to (since Baker) the exercise of discretion.\textsuperscript{106} Where the matter in issue was deemed to be a pure question of fact, the inquiry into patent unreasonableness tended to echo the traditional inquiry (pre-dating CUPE) requiring that there be “no evidence” supporting the conclusion in order to warrant review.\textsuperscript{107} Patent unreasonableness review of discretion also hearkened back to the traditional grounds of review, specifically inquiring into whether the discretionary decision could be said to be “unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures.”\textsuperscript{108} In one case, the Supreme Court articulated a multifaceted test for determining whether the exercise of a broad remedial power was patently unreasonable.\textsuperscript{109} But in the main, as LeBel J. suggested, guidance on the import of the standard tended to be rooted in characterizations of the “magnitude” and/or “immediacy or obviousness” of the defect.\textsuperscript{110}

In taking up a few instances of application of this standard, I am concerned in particular to track judicial constructions of statutory purposes as these relate to the legal limits on decision-makers’ interpretive discretion. The question here is: are such background assessments necessarily done on a correctness standard, even where utmost deference is otherwise indicated? Would deference to administrators’ interpretations of the general ambit of statutory purposes, and/or prioritization of those purposes, place an

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\textsuperscript{106} See Geneviève Cartier, Chapter 10 in \textit{Administrative Law in Context}, supra note 4.
\textsuperscript{107} \textit{Toronto (City) Board of Education v. O.S.S.T.F., District 15}, [1997] 1 S.C.R. 487 [OSSTF].
\textsuperscript{108} \textit{Suresh v. Canada (Minister of Citizenship and Immigration)}, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 41 [Suresh].
\textsuperscript{109} \textit{Royal Oak Mines Inc. v. Canada (Labour Relations Board)}, [1996] 1 S.C.R. 369. But consider in what respect, if any, this test is expressive of deference.
\textsuperscript{110} \textit{Supra} note 104.
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indefensible strain upon the rule of law? Relatedly, what would be the implications of such deference for those whose important interests are affected by administrative decision-making? These questions are at the centre of ongoing controversies about administrative legitimacy, including controversies about the proper relationship of judges and administrative decision-makers in working out the significance of core public values. And so they are also at the centre of what I have been referring to as the romantic story of the standards of review, or the rise of reasonableness in this area of law.

2. Patent Unreasonableness Review in Practice

So far, I have noted some considerable uncertainty in the historical characterizations of the patent unreasonableness standard – which uncertainty may be understood to anticipate the dissolution of this standard. But a closer look at the case law addressing how the standard is to be applied may nonetheless assist in bringing out some core controversies about the meaning or expression of deference on review that I argue remain live controversies post-Dunsmuir.

As noted above, a basic principle stated in relation to patent unreasonableness review (following some dissension on this point in the early case law) was that the reviewing judge must not measure the decision against his or her sense of the “correct” decision.\(^{111}\) Yet the question that may be said to have beset this case law thereafter was to how to gauge patent unreasonableness, if not against the judge’s opinion of the right answer.

\(^{111}\) Ryan, supra note 24 at para. 50.
A second principle went to the allowable level of engagement with the decision-maker’s reasoning, and with the evidence and argument on the record. Thus Iacobucci J. in Southam suggested that while patent unreasonableness review may involve review of the record, it should not require “significant searching or testing” to detect the fatal defect. Uncertainty arose, however, in the attempt to quantify the depth of probing in this manner.

Refraining from ascertainment of the ‘right answer’

In CUPE, more questions are raised than answered about the method of patent unreasonableness review. Here we must recall that the statutory provision in issue in the case was markedly ambiguous. On one view, Dickson J.’s survey of the competing interpretations of the provision taken by the Public Service Labour Relations Board and by the reviewing judges at the Court of Appeal advances his assertion that no single interpretation could be “said to be ‘right.’” Indeed, Dickson J. grants that each of these opinions was reasonable on its face. But viewed in light of his background assessment of the purpose of the disputed provision in promoting the unique quid pro quo of public sector collective bargaining, it seems that the tribunal’s conclusion that the provision prohibited the Liquor Corp. from replacing striking workers with management was, if not

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112 See Southam, supra note 23 at para. 57.
113 The disputed provision of New Brunswick’s Public Service Labour Relations Act stated: “the employer shall not replace the striking employees or fill their position with any other employee.” R.S.N.B. 1973, c. P-25, s. 102(3).
114 See Audrey Macklin’s discussion of Dickson J.’s observations on the ambiguity of the contested statutory phrase in CUPE as launching what would become, in subsequent case law, a “more radical critique of the conceit that there is always only one correct interpretation of a statutory provision”. Chapter 8, Administrative Law in Context, supra note 4 at 205.
115 CUPE, supra note 1 at 237.
116 Ibid. at 240-41.
right (on a positivist account), then the best interpretation (on a pragmatic assessment of background norms and purposes). Here we may ask what is doing the work in this judgment: purposive statutory interpretation or deference? Or a happy coincidence of the two?

Dickson J. suggests that he has made much of the statutory purpose only because “to some, the Board’s interpretation may, at first glance, seem unreasonable if one draws too heavily upon private sector experience”\(^\text{117}\), moreover, he exhibits restraint in his conclusion that “at a minimum, the Board’s interpretation would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal.”\(^\text{118}\) But one may wonder how the judgment would have gone if the tribunal had drawn a conclusion as much at odds with the purpose of the statute and provision, as characterized by Dickson J., as the Court of Appeal’s conclusion. Here the approach to patent unreasonableness taken by Dickson J. in *CUPE* might be both compared with and contrasted to the approach adopted by L’Heureux-Dubé J. in dissent in *Mossop*. Both ground their judgments in reflections on the statutory purpose that convey a strong impression that the judge is independently verifying the interpretive judgment of the tribunal. However, it is important to note that, like L’Heureux-Dubé J. in *Mossop*, Dickson J. in *CUPE* does not arrive at his construction of statutory purpose whole cloth, of his own invention, but rather draws upon and amplifies the explicit reasoning of the board.\(^\text{119}\) Still, looking back to those strains of guidance in the case law that suggest the judge must not engage in too deep or probing a review, and must not base his or her


\(^{118}\) *Ibid.*

\(^{119}\) See the comments near the end of the board decision, [1977] N.B.P.S.L.R.D. No. 7 (20 September 1977), putting forward the very *quid pro quo* argument that Dickson J. draws upon in his reasons.
conclusion on an independent assessment of the right answer, the question may be asked of the judgment in *CUPE* (as well as that of L’Heureux-Dubé J. in *Mossop*): are these judgments fit models of patent unreasonableness review, viewed from the vantage of the principles ultimately articulated as governing this expression of utmost deference?

As I have suggested, one of the first controversies that arose in the case law following *CUPE* was whether patent unreasonableness review should, or indeed must, begin with the court’s assessing the “right answer” in law (if the court found that the statute lent itself to such a determination). That controversy reaches back to Sopinka J., who, in a concurring opinion in *C.A.I.M.A.W. v. Paccar of Canada Ltd.*, [120] wrote:

> Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is “reasonable” or “patently unreasonable” it is making a statement about a logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made. [121]

David Mullan articulated two criticisms of this approach as follows:

> First, it assumes the existence of a single correct answer to the statutory interpretation exercise at stake and the capacity of the Court rather than the Tribunal to discern that answer. Secondly, in a very practical sense, it must be extremely difficult for any Court, having concluded that a tribunal has “got it wrong,” to then say that the error was not a patently unreasonable one. [122]

The approach taken by Sopinka J. in *Paccar* was rejected in the subsequent case law, as confirmed in a statement in *Ryan* that on applying a reasonableness (and by implication, also a patent unreasonableness) standard, “a court should not at any point ask

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[120] [1989] 2 S.C.R. 983 [*Paccar*].

[121] *Paccar*, *ibid.* at 1018 (Sopinka J. writing for himself and Lamer J.). This approach may be said to be adopted by McLachlin J. in her majority judgment in *W.W. Lester (1978) Ltd. v. UA.*, *Local 740*, [1990] 3 S.C.R. 644.

itself what the correct decision would have been.”123 That said, if it is inappropriate for a reviewing court to check its intuitions of “patent unreasonableness” against its determination of the right answer, then what conceptual or practical tools may it use to justify its decision on review?

**Depth of probing / Immediacy or magnitude of error**

A related controversy about how to adhere to the spirit of *CUPE* arose in the 1990 judgment in *National Corn Growers*.124 That case involved a finding of the Canadian Import Tribunal that the importation of subsidized American grain corn into Canada was the cause of actual or potential “material injury” to Canadian corn producers, triggering the imposition of a countervailing duty. The majority judgment of Gonthier J. and concurring opinion of Wilson J. agreed that the appropriate standard was patent unreasonableness. But Wilson J. took pains to distinguish her opinion on the proper application of that standard from the approach taken by Gonthier J. Her argument with the majority turned upon the issue cast above as “depth of probing.” Thus she wrote that “to embark upon a detailed analysis of the extent to which the evidence will support the Tribunal’s finding in the face of a privative clause is to engage in the very kind of meticulous analysis of the Tribunal’s reasoning that *C.U.P.E.* made clear courts should not conduct.”125 Such meticulous analysis was by Wilson J. deemed synonymous with evaluation of the “correctness” or “merits of the Tribunal’s conclusions.” Wilson J. stated her alternative as follows:

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123 See Ryan, supra note 24 at para. 50.  
124 *National Corn Growers*, supra note 4.  
125 Ibid. at 1349.
In my view … the only issue which this Court may consider, once it accepts that the interpretation of a given provision is a matter that falls within a tribunal’s jurisdiction, is whether the Tribunal’s interpretation of the provision is “so patently unreasonable that its construction cannot be rationally supported by the relevant legislation.”

These comments restrict patent unreasonableness review to issues of statutory interpretation (or what may be termed “pure” statutory interpretation), leaving evaluation of evidence as well as the application of law to facts as matters that are off limits on review. On applying this approach, Wilson J. takes a resolutely acontextual approach to the language of the disputed provision, determining in short order that it “certainly cannot be said to preclude the ‘broader’ interpretation … that the Tribunal favoured.”

The competing approach of Gonthier J. proceeds from the following argument:

In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis. Such was the case in the C.U.P.E. decision where it was found that the Board’s interpretation of the legislation at issue was reasonable even though it was not the only reasonable one. Similarly, understanding of the issues raised by the appellants herein as to the reasonableness of the Tribunal’s decision requires some analysis of the relevant legislation and the way in which the Tribunal has interpreted and applied it to the facts.

In practice, Gonthier J. tracked the tribunal’s reasons closely, breaking the decision down into a set of discrete judgments. These included its decision to refer to the General Agreement on Tariffs and Trade to assist in interpreting the disputed provision, its interpretation of that provision, and its subsequent finding of “material injury” in the circumstances of the case. In response to Wilson J.’s concerns, Gonthier J. wrote:

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126 Ibid.
127 Ibid. at 1352.
128 Ibid. at 1370.
With respect, I do not understand how a conclusion can be reached as to the reasonableness of a tribunal’s interpretation of its enabling statute without considering the reasoning underlying it, and I would be surprised if that were the effect of this Court’s decision in *C.U.P.E.*\(^{129}\)

However, he added that such probing “must be undertaken in light of the overall question for determination, namely, whether or not the interpretation ultimately arrived at is patently unreasonable.”\(^ {130}\)

The approach of Gonthier J. may be said to have ended up mostly winning out in the case law on applying a patent unreasonableness (and for that matter, reasonableness) standard. In the first place, in the review of questions of fact, examination of the record to determine whether the standard of “no evidence” is met has assumed the status of a generally acknowledged necessity.\(^ {131}\) Second, and more generally, approval of the position of Gonthier J. was eventually crystallized in widely-approved comments of Iacobucci J. in *Southam*, which elaborated upon the patent unreasonableness standard as follows (after noting that a patently unreasonable error, unlike mere unreasonableness, should not take “significant searching or testing” to expose):

> This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge is able to grasp the dimensions of the problem.\(^ {132}\)

\(^{129}\) *Ibid.* at 1383.

\(^{130}\) *Ibid.*

\(^{131}\) See *OSSTF*, *supra* note 107, and D. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004) 17 Can. J. Admin. L. & Prac. 59 at 92. [“The Struggle for Complexity?”] That said, this inquiry was traditionally understood to be conducted on a correctness standard: if there was “no evidence”, that was an error of law.

\(^{132}\) *Southam*, *supra* note 23 at para. 57.
That said, there remained within the patent unreasonableness jurisprudence (and this is also registered in Southam) a notable strain of resistance to close oversight on this standard. This was expressed, upon the adoption of a tripartite menu of standards, by way of efforts to distinguish patent unreasonableness from reasonableness review on the basis of the “immediacy or obviousness” of the defect and so the depth of probing required to reveal that defect.

In any case, the concluding comment of Gonthier J. noted above, on subordinating the careful examination of tribunal reasoning to a more general assessment of the decision’s patent unreasonableness, was subsumed into later statements on the conduct of review for reasonableness simpliciter in a manner that may be said to have gone some distance toward reconciling his position and that of Wilson J.:

[N]ot every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.133

Statutory purposes revisited

Perhaps the most persistent controversy in the case law on applying the patent unreasonableness standard – which has transmitted its legacy to our post-Dunsmuir future – is that identified above with reference to CUPE, on the division of labour between courts and tribunals in characterizing the purposes of the enabling statute or a contested provision thereof. Here it may be noted once again that while the case law ultimately

133 Ryan, supra note 24 at para. 56.
rejected the suggestion that deferential review must start by determining the right answer, it remains that the decision and/or reasoning of the decision-maker must be gauged against some expectation of legality. The question is: how is that expectation set?

A typical reference point is the purpose of the statute and/or the disputed provision, the analysis of which may fundamentally orient the determination of whether a given instance of statutory interpretation does or does not evince “patent unreasonableness”. This is so particularly where the charge is made that, in the exercise of interpretive discretion, the tribunal took into account irrelevant factors or failed to take into account relevant factors.134 This suggests that even on the most deferential standard, there remains (or remained) an outer limit of correctness style reasoning. But is it consistent with deference for a reviewing court to assess the purposes – and with this, the values, and interests -- at stake in a given statutory regime and/or case arising within that regime, independent of the tribunal’s reasoning? Alternatively, might the reviewing court be expected to defer to (not the same as blindly adopt) tribunals’ assessments of statutory purposes, and with this, the factors relevant or irrelevant to their decisions?

A final case that brings into focus these questions about the analysis proper to patent unreasonableness review – and more broadly, the analysis proper to deference -- particularly where what is in issue are broadly worded statutory powers conferring significant interpretive discretion, is CUPE v. Ontario (Minister of Labour).135 That case involved patent unreasonableness review of a ministerial exercise of discretion. As Geneviève Cartier has recounted,136 discretionay powers have fairly recently been drawn

136 See Chapter 10, Administrative Law in Context, supra note 4.
into the fold of the standard of review analysis, with the *Baker* case. Yet it appears that the traditional grounds of review of discretion continue to drive the inquiry on review, including the ground of failure to take into account a relevant factor.\textsuperscript{137} At issue in *CUPE v. Ontario (Minister of Labour)*—typically referred to as the *Retired Judges* case—was a decision under a section of Ontario’s *Hospital Labour Disputes Arbitration Act* that stated that where parties fail to agree upon the third member of an interest arbitration panel, “the Minister shall appoint … a person who is, in the opinion of the Minister, qualified to act.”\textsuperscript{138} For nearly 20 years, the Minister (or a delegate) had exercised this power by choosing from a roster of recognized labour arbitrators or others who were “skilled and experienced in interest arbitration” and recognized as such by both unions and employers.\textsuperscript{139} The dispute concerned the Minister’s decision to restrict these appointments to retired judges. The unions sought judicial review, on the apprehension that this class of appointees would be unsympathetic to their interests.

The majority decision, written by Binnie J., concluded that the Minister’s decision was patently unreasonable. This conclusion was based in great measure on a close examination of the statute in its historical and legislative context. Notably, that analysis is positioned in Binnie J.’s judgment prior to his determination of the standard of review. Here we may ask: Should there have been any canvassing of the bases of deference prior to the construction of statutory purposes? Binnie J. defends his approach with a statement from Lord Reid in a 1968 House of Lords case: “[T]he policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of

\begin{footnotes}
\item[137] *Retired Judges*, supra note 135 at 21 (per Bastarache J.), citing *Suresh*, supra note 108 at para. 41.
\item[138] *R.S.O. 1990, c. H.14, s. 6(5) [HLDAA]*.
\item[139] *Supra* note 135 at para. 67.
\end{footnotes}
law for the court.” Binnie J. further draws out the rule of law rationale for this principle, namely: “The Court’s mandate on judicial review is to keep the statutory decision maker within the boundaries the legislature intended.”

Having adopted this methodology, Binnie J. concludes that the purpose of the HLDAA is to achieve “industrial peace by substituting compulsory arbitration for the right to strike or lockout.” As such, the legislative scheme is dependent upon securing the “trust and confidence of the parties.” Further consideration of the statute and the historical record leads Binnie J. to conclude that the factors essential to securing that trust in the context of HLDAA arbitrations are “impartiality, independence, expertise and general acceptability in the labour relations community.” In other words, these are mandatory relevant factors. Binnie J. then determines that the Minister’s decision was patently unreasonable because of its failure to take these factors into account.

But with this we should pause and ask: What work is the patent unreasonableness standard doing in this decision? Here we may detect a foretelling of the approach to be taken to application of a deferential standard of review after Dunsmuir, wherein such factors as the nature of the question or purposes of the statute may be understood to affect the scope of possible outcomes of reasonable decision-making. That is, Binnie J. reasons in the Retired Judges Case that the deference due under the patent unreasonableness standard is qualified or constrained by the statutory purposes he has identified, leaving “a

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141 Or one may class this rationale as specifically expressing an understanding a conception of the rule of law and more generally the constitutional order in which judges sit “at the apex,” as Dyzenhaus puts it.
142 Retired Judges, supra note 135 at para. 98.
143 Ibid. at para. 94.
144 Ibid. at para. 109, quoting the factum of the intervener National Academy of Arbitrators.
145 Ibid. at para. 110.
relatively narrow context”146 within which the Minister’s discretion may operate. Still, despite this correctness-style setting of legal limits to the Minister’s discretion, the language of patent unreasonableness is used, as Binnie J. characterizes the defect in the decision as “both immediate and obvious.”147 Ultimately, Binnie J. relies on the principle, present in the substantive review jurisprudence prior to CUPE – and indeed, prior to the explicit drawing of discretionary decisions into the fold of the standards of review -- that while deferential review does not admit the reweighing of factors taken into account by a statutory decision-maker, the court is nonetheless “entitled to have regard to the importance of the factors that have been excluded altogether from consideration.”148 In this case, concludes Binnie J., there was no indication that the relevant factors in question, which went to the “heart” of the legislative scheme, were taken into account.149

Bastarache J. in dissent agrees that the review of discretion “requires that we [the Court] determine the relevant criteria for exercise of the discretion, or at least whether the Minister relied upon irrelevant criteria or failed to consider a relevant and important criterion.”150 Yet he plays up the broad executive discretion accorded in this case: the fact that the statutory language clearly referred to “the opinion of the Minister” as to whether persons are “qualified to act.”151 Moreover, he disagrees with the proposition that the flaw in decision-making identified by the majority is either immediate or obvious. He states: “Given how much work it takes to identify the factors at issue in this appeal … and to imply them into s. 6(5), I am reluctant to conclude that weighing them less heavily

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146 Ibid. at paras. 153-56.
147 Ibid. at para. 184.
148 Ibid. at para. 176.
149 Given that there were no formal reasons for the Minister’s decision, this finding relies in part on evidence of a senior adviser that neutrality was the sole criterion in play at the stage of searching for retired judges to take up this role. Ibid. at para. 182.
150 Ibid. at para. 28.
151 Ibid. at para. 30.
than another factor, also unwritten (judicial experience), vitiated the appointments as patently unreasonable.”152 That is, it took “significant searching” on the part of the majority to find the factors deemed of mandatory relevance. Finally, Bastarache J. further characterizes the majority as smuggling in, under the auspices of a “failure to consider,” impermissible reassessment of the weight to be accorded the considerations relevant to these appointments.

Bastarache J. takes pains to respond to the charge that his critique implies an abandonment of the judicial duty to uphold the rule of law and to keep executive power within legal limits. His deferential approach, he claims, would serve to contain “extreme examples” of abuse of the appointment power—for instance, should the Minister decide “to appoint only members of his own political caucus, hospital CEOs, or union business agents.”153 But we may wonder what the analysis of the limits of discretion would look like in such a case. How would such protections be afforded, taking into account Bastarache J.’s critiques?154

In concluding this look at patent unreasonableness review, let us recall the two imperatives we have seen are associated with this standard: (1) the prohibition on seeking the “right answer” and measuring the tribunal’s decision against that, rather than attending to whether there is a rational basis for the tribunal’s decision; and (2) the prohibition on undue probing. Both flow from the idea that substantive review threatens to illegitimately impose foreign judicial values and perspectives on localized

152 Ibid. at para. 36.
153 Ibid. at para. 40.
administrative values and perspectives. Yet that perception of the threat of judicial review runs up against the countervailing perception that judicial vigilance is required to ensure that administrative decision-makers do not exceed their legal mandates. An attempt to mediate these competing concerns informs the traditional division of labour whereby judges have exclusive capacity to identify the factors relevant to a decision (the legal limits of the decision) and administrators have exclusive capacity to weigh or balance those factors (the merits of the decision).

But is this a workable distinction? Aside from its potential manipulability, the question that emerges with increasing force in the unfolding law on the application of deference – the question at the heart of the cases taken up in Chapter 2 (Dunsmuir and after), and also Chapter 3 (Starson) -- is whether judges can, or should, refrain from engagement with the weight placed by decision-makers on competing factors under a deferential standard of review, and indeed, what if any difference there is in any given case between revisiting weight and declaring a “failure to consider”. Is it better that judges’ background assessments of weight be explicitly stated and subjected to public scrutiny (e.g., through the importation of proportionality analysis into substantive review), so alleviating the possibility of such factors’ covert operation? Which approach is more expressive of the rule of law? On the other side, should judges give weight to administrative decision-makers’ assessments of the factors that are and are not of mandatory relevance to their decisions? In what circumstances, if any? These matters take on increasing importance with the recognition that all statutory interpretation involves some measure of judgment, or discretion – i.e., that there are a “range of reasonable alternatives” typically admissible in law-interpretation and application,
although the ambit of admissibility may vary depending on the statutory purposes and more generally the decisional context.

With that, we turn to the final standard representative of the pre-\textit{Dunsmuir} jurisprudence -- one that may appear, in hindsight, to have been inscribed with a certain manifest destiny — reasonableness \textit{simpliciter.}

\section*{iii. A Third Way: Reasonableness Simpliciter}

\subsection*{1. Reasonableness Simpliciter in Theory}

In introducing the reasonableness standard in \textit{Southam},\textsuperscript{155} Iacobucci J. acknowledges the conflicting signals elicited by the pragmatic and functional analysis in that case: in particular, its featuring both a statutory right of appeal and an expert tribunal. In response, Iacobucci J. determines that “what is dictated is a standard more deferential than correctness but less deferential than ‘not patently unreasonable.’” He thus characterizes this standard as a “middle ground,” arrived at as “almost a necessary consequence of our standard-of-review jurisprudence.” The new standard is then described (in a sentence much cited in subsequent case law) as follows: “An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination.”\textsuperscript{156}

\textsuperscript{155} Supra note 23 at para. 54.
\textsuperscript{156} Ibid. at para. 56.
From the start, this form of review is characterized as taking as its focus the quality of the reasons for a given administrative action or decision. Iacobucci J. elaborates as follows:

Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence. An example of the latter kind would be a contradiction in the premises or an invalid inference.\(^{157}\)

While this depiction of reasonableness review plays up the important concern, often revisited in the case law, for sufficiency of evidence, it may be said that its preoccupation with adherence to basic principles of practical reasoning or logic is perhaps less illustrative of the sorts of controversies that would preoccupy courts under this standard – namely, as in the case law on patent unreasonableness described above, normative controversies going to the deemed reasonableness or unreasonableness of the decision-maker’s construction of statutory purposes (the values or ends the statutory regime aims at advancing). At the same time, the concern of the patent unreasonableness jurisprudence with depth of probing may be said to recede. That is, despite the characterization of this form of review as “somewhat probing,” there is no significant effort in Iacobucci J.’s judgment in *Southam* to identify limits upon examination of the record or upon inquiry into the tribunal’s reasoning process. Indeed, the permissible level of probing or scrutiny is extended in the further suggestion of Iacobucci J. that while a patently unreasonable decision will be “apparent on the face of the tribunal’s reasons,”

apprehension of an unreasonable defect may take “some significant searching or
testing.” 158

Iacobucci J. adds to these comments some reflections linking the reasonableness
standard to a conception of deference that is contingent upon both expertise 159 and
reason-giving. He writes: “In the final result, the standard of reasonableness simply
instructs reviewing courts to accord considerable weight to the views of tribunals about
matters with respect to which they have significant expertise.” 160 To this he appends an
extended citation to the effect that unless experts are able to explain “to a fair-minded but
less well-informed observer, the reasons for their conclusions,” then “they are not very
expert” and no deference is commanded. 161

In a later case, Ryan, Iacobucci J. emphasizes (as Dickson J. had done in CUPE)
that, “[u]nlike a review for correctness, there will often be no single right answer to the
questions” 162 subject to review for reasonableness. Here he directly engages problems of
statutory construction hinging on the prioritization of competing statutory purposes:

For example, when a decision must be taken according to a set of objectives that
exist in tension with each other, there may be no particular trade-off that is
superior to all the others. Even if there could be, notionally, a single best answer, it is not the court’s role to seek this out when deciding if the decision was
unreasonable. 163

158 Ibid. at para. 57.
159 Expertise has its day in the sun in the standard of review analysis promulgated by Southam and also
Pushpanathan, wherein this factor is deemed the “most important” of the factors comprising the “pragmatic
and functional” analysis for ascertaining the standard of review. Dunsmuir arguably displaces the primacy
of expertise with a renewed emphasis upon the nature of the question (although that shift in emphasis is
potentially a subtle one, and may be discerned in a number of pre-Dunsmuir cases as well). See Southam,
supra note 23 at para. 50, Pushpanathan, supra note 16 at para. 32, Dunsmuir, supra note 1 at paras. 53-64.
160 Southam, supra note 23 at para. 62.
161 Ibid., citing R.P. Kerans, Standards of Review Employed by Appellate Courts (Edmonton: Juriliber,
1994) at 17.
162 Ryan, supra note 24 at para. 51.
163 Ibid.
While this statement affirms the general principle that deferential review must avoid second-guessing administrators with respect to the weight or priority they assign competing statutory purposes, we will see that this issue is not entirely settled in the jurisprudence on this standard.

The positive side to the prohibition against seeking the “right answer” on reasonableness review is the imperative stated in Ryan to the effect that judges must “stay close to the reasons” for an administrative decision, while searching for a “line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.”164 Here Iacobucci J. renews the principle that “a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.”165 A further principle of reasonableness review stated in Ryan and reminiscent of the case law on patent unreasonableness review is that judges are to assess the “basic adequacy of a reasoned decision,” while refraining from “seiz[ing] on one or more mistakes or elements of the decision which do not affect the decision as a whole.”166

Finally, as noted above, in Ryan, Iacobucci J. puts paid to the idea that since the introduction of the reasonableness standard in Southam, further and finer gradations of deference are now implicitly registered on the spectrum of the standards of review. This is a debate that we will see is revisited in and after Dunsmuir, though repositioned at the stage of applying the standard. The persistence of the controversy is understandable.

164 Ibid. at paras. 49, 55.
165 Ibid. at para. 55.
166 Ibid. at para. 56. See also Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157 at paras. 48–49.
For if the reasonableness standard was forged in an attempt to better calibrate reviewing practices to the diversity of administrative contexts, then more standards would seem to mean even finer calibration. However, in *Ryan*, Iacobucci J. offers the pragmatic response that this would merely afford increased manipulability of the standards in accordance with judges’ opinions of the merits of decisions, while distracting judges from the central work of “explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.” This statement is notable for its candour in acknowledging that while the factors surveyed in selecting the standard of review are important, judges must take care lest the business of calibrating the standard to match up to the institutional and statutory context becomes a merely formalistic exercise, displacing attention from a context-sensitive assessment of the decision in issue. Post-*Dunsmuir*, we will see a renewed emphasis on ensuring that the factors of relevance to the standard of review analysis are supportive of (and potentially directly appealed to in the course of) a more context-sensitive assessment of the decision at the stage of applying the standard.

In these statements in *Ryan* and in *Southam* on the meaning and conduct of reasonableness review, Iacobucci J. makes efforts to resolve some of the uncertainty and contestation that had beset patent unreasonableness review: both the idea that deferential review must begin with ascertainment of the correct decision (then allowing for a certain “margin of error”), and the idea that deference connotes a blunt prohibition on oversight of administrative reasoning. In sum, what animates Iacobucci J.’s characterizations of reasonableness *simpliciter* – marking its subtle interposition between correctness and

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167 *Ryan*, *supra* note 24 at para. 46.
patent unreasonableness review -- is a confidence in reason. This confidence is expressed on the one hand in the idea that judges are capable of appreciating the reasons of administrative decision-makers (though they must work to do so, by turning their mind to the statutory and wider institutional bases of deference revealed through the pragmatic and functional analysis), and, on the other hand, in the idea that administrative decision-makers can communicate the reasonableness of their decisions to reviewing judges (though they too must work at this, by articulating their decisions in a manner that is sensitive to the demands of public justification).

2. Reasonableness Review in Practice

Iacobucci J.’s judgment for the Court in Southam provides a good example of what he appears to be getting at in his characterizations of reasonableness review. In that case, the decision under review was the BC Competition Tribunal’s determination that Southam’s purchase of certain community newspapers (while it continued to control a number of “daily” papers) had caused a “substantial lessening in competition” in the real estate print advertising market in the lower mainland, but that the same could not be said of the retail print advertising market. At the stage of selecting the standard, the nature of the question was characterized as mixed fact and law. As such, the tribunal’s application of the law to the facts was clearly in issue. Also in characterizing the question, Iacobucci J. specifically rejected Southam’s claim that the tribunal had failed to “accord adequate weight to certain factors.” Here, in a pre-Baker acknowledgment of the discretion implicit in at least some decisions subject to review for reasonableness, Iacobucci J. cast the
requisite gauging of a “substantial lessening in competition” as involving a “balancing test” involving “things that are not readily quantifiable.” He continued:

The problem with [Southam’s] suggestion is that it is inimical to the very notion of a balancing test. A balancing test is a legal rule whose application should be very subtle and flexible, but not mechanical. … The most that can be said is that the Tribunal should consider each factor; but the according of weight to the factors should be left to the Tribunal.168

On applying the reasonableness standard, Iacobucci J. addressed findings at the Court of Appeal that the tribunal had failed to consider evidence essential to the analysis called for under the statute. These factors included, on the one hand, evidence of the identical market-related function of the daily and community papers and, on the other, evidence (from Southam’s own expert) that the relevant papers had functioned as competitors. On the first point, Iacobucci J. found that the tribunal did not fail to consider but rather accorded minimal weight to the evidence in question. He concluded: “While I might not agree, as a matter of empirical ‘fact’ [that the tribunal’s analysis on these points] is exhaustive, I think that it is not without its reasons.” He added: “Fortunately for the Tribunal, its decision need only be reasonable and not necessarily correct.”169

On the second point—the conflict between aspects of the evidence on record and the tribunal’s finding that there remained “competition in fact” after Southam’s purchase— Iacobucci J. again indicated that he was less than convinced by the tribunal’s conclusion. But this did not justify overturning the decision on a reasonableness standard. He writes:

It is possible that if I were deciding the case de novo, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam’s own expert … identified the community newspapers as the source of Southam’s difficulties in

168 Southam, supra note 23 at para. 43.
169 Ibid. at para. 68.
the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal’s finding is difficult to accept. However, it is not unreasonable.170

Iacobucci J. here appears genuinely prepared to put aside his sense of whether the tribunal’s conclusions constitute the best construction of the evidence and argument available on the record. Instead, he rests content with the minimal finding that there was some evidence for those conclusions, and that the inferences therefrom were not illogical. As such, the decision in Southam may be taken to epitomize the idea of reasonableness review as a form of oversight that (as we have seen stated also of patent unreasonableness review) refrains from revisiting the weight placed by the decision-maker upon discrete points of evidence or argument.

Dr. Q.171 is also instructive in this regard. This judgment serves as an incisive corrective to the re-evaluation of evidence undertaken by a first-instance reviewing judge. The judge had quashed a decision of an inquiry committee of the BC College of Physicians and Surgeons finding Dr. Q. guilty of “infamous conduct” (having taken “physical and emotional advantage of one of his patients”). This ruling followed the judge’s independent assessment of the evidence, including evidence going to witness credibility. McLachlin C.J. writes: “[W]hen the standard of review is reasonableness, the reviewing judge’s role is not to posit alternate interpretations of the evidence; rather, it is to determine whether the Committee’s interpretation is unreasonable.” In response to the judge’s specifically doubting the complainant’s “ability to describe distinct bodily markings suggesting an intimate relationship,” McLachlin C.J. states: “With respect,

170 Ibid. at para. 79.
171 Supra note 25.
when applying a standard of reasonableness simpliciter, the reviewing judge’s view of
the evidence is beside the point; rather, the reviewing judge should have asked whether
the Committee’s conclusion on this point had some basis in the evidence.”172

Both these decisions therefore indicate a reluctance to interfere with tribunal
assessments of evidence on a reasonableness standard; more generally, Iacobucci J. in
*Southam* suggests that courts should not interfere with the weight assigned to competing
factors under a term of a statute requiring the decision-maker to enter into a “balancing
process.” Yet in *Baker*,173 the message seems to be different on the latter point—or
rather, the decision in *Baker* is perhaps more careful to distinguish those statutory
regimes that allow decision-makers free rein on entering into such balancing processes,
and those that do not. In her majority judgment in that case,174 L’Heureux-Dubé J. set
aside a ministerial decision to refrain from exercising discretion to exempt Mavis Baker
from deportation. The discretion depended on the Minister’s being “satisfied” that an
exemption was warranted “owing to the existence of humanitarian and compassionate
considerations.”175 Baker’s application was based in part on the argument that deporting
her would be contrary to the interests of her children.

On applying a reasonableness standard to the Minister’s (or rather, the Minister’s
delegate’s) exercise of discretion, L’Heureux-Dubé J. determined that the notes of the
junior officer eventually held out as reasons in the case were inconsistent with “the values

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172 *Ibid.* at para. 41. Query whether inquiry under a reasonableness simpliciter standard into whether a
decision had “some basis in the evidence” is different than inquiry under a patent unreasonableness
standard into whether a decision is based in “no evidence.” (See *OSSTF, supra* note 107 at para. 44.)
173 *Supra* note 11.
174 Iacobucci and Cory JJ. agreed on the disposition but differed on the proper approach to be taken to
international treaties that have been ratified but not incorporated into domestic legislation.
underlying the grant of discretion.” In this, L’Heureux-Dubé J. indicates that the values that underlie or set reasonable limits to discretionary powers issue not only from a decision-maker’s enabling legislation and associated regulations, but also from instruments of soft law (that is, departmental policies and guidelines), the common law (“the principles of administrative law”), the constitution (“the principles of the rule of law” and “the principles of the Charter”), international law, and even what are rather tantalizingly (and, depending on one’s perspective, perhaps worryingly) held out as the “fundamental values of Canadian society.” In Baker, consultation of the relevant sources (the statute, an international convention ratified but not incorporated into domestic legislation, and ministerial guidelines) indicated that “the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the ‘humanitarian’ and ‘compassionate’ considerations that guide the exercise of the discretion.” Because the officer’s notes serving as reasons failed to reflect that the decision-maker was “alive, alert, or sensitive to the interests of Ms. Baker’s children,” the decision failed to meet a reasonableness standard.

Following the ruling in Baker, commentators and courts alike were concerned to settle the matter of whether this decision was a straightforward example of the tradition of vitiating a discretionary decision for failure to consider a relevant factor at all (the children’s interests). Or was it perhaps a departure from the traditional approach, amounting to a revisiting of the weight placed on a particular factor (those interests)? The

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176 Baker, supra note 11 at para. 65.
177 Ibid. at paras. 56, 67.
178 Ibid. at para. 73.
179 Ibid.
comments of L’Heureux-Dubé J. leave some uncertainty. At one point she writes that the officer’s notes were “completely dismissive of the interests of Ms. Baker’s children,” suggesting failure to give any consideration to a relevant factor. But in the next sentence, she writes, “the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion.” Further uncertainty arose from L’Heureux-Dubé J.’s suggestion that, depending on the circumstances, a discretionary decision-maker may be accorded deference in connection with the factors he or she deems relevant to a given decision, and not merely in connection with the weight he or she gives to mandatory relevant factors. As noted above in my account of patent unreasonableness review, this is to suggest a major departure from the traditional approach to substantive review, even where a deferential standard is deemed to be warranted – a departure anathema to the Diceyan view of the mandate of courts to patrol the limits of administrative jurisdiction.

In Suresh, the Court responded to some of these uncertainties, at least in part. Baker, it stated, “does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or other patently relevant factors.” But the possibility that certain

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180 Ibid. at para. 65. See the discussion of how these statements might be reconciled, in D. Mullan, “Defence from Baker to Suresh,” supra note 100 at 31-37. Among the more convincing interpretations is that which suggests that the factor in question (the children’s interests) is properly read in light of the statute, the applicable ministerial guidelines, the Convention and international law more broadly, as necessarily carrying with it “elements of weight or degree”. That said, the element of weight necessarily imputed to this factor does not amount to determinative weight – i.e., an act of judgment is nonetheless required.

181 Baker, supra note 11 at para. 56: “In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the ‘proper purposes’ or ‘relevant considerations’ involved in making a given determination.”

182 Suresh, supra note 108 at para. 37.
factors may be deemed by courts to demand prioritization (or “serious weight and consideration”) in light of statutory and other legal sources is left open. Moreover, the Court in *Suresh* does not specifically address the proposition advanced by L’Heureux-Dubé in *Baker* that some discretionary decision-makers may receive deference in relation to the factors they deem to be relevant to their decisions.

The multiple complex messages in *Baker*—endorsing on the one hand the idea that deference may be accorded even decision-makers’ assessments of statutory purposes, and on the other the idea that those decision-makers must conform with the “values underlying the grant of discretion,” even necessarily placing significant weight on one or another of these where the reviewing judge deems that to be required by the statutory text or context—express a tension that is arguably basic to reasonableness review, at least on the romantic account. This tension is inherent in the idea of “deference as respect” advanced by David Dyzenhaus and explicitly endorsed by L’Heureux-Dubé J.183 Such respect places confidence in the capacity of decision-makers to discern the limits of their legal mandates in a nuanced, context-sensitive fashion, while at the same time insisting that this capacity be exercised reasonably. That is, deference under this standard carries with it an expectation of reasonableness—an expectation that decision-makers can and will identify, and evince appropriate sensitivity to, the values (including, most central in *Baker*, the significant individual interests) that should inform the exercise of their statutory powers. But, we may ask: is this really so different from correctness review? Is this just an old-time assertion of the courts’ “jurisdiction” – and so of judges having the

183 “Deferece as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”: *Baker*, supra note 11 at para. 65, citing “The Politics of Deference,” *supra* note 5 at 286.
last word on matters given to tribunals to decide -- but with a kindly human rights-regarding demeanour? If not, how exactly is it different?

IV. Conclusion

In concluding with the above discussion of reasonableness *simpliciter*, we may recall the importance of this standard to the romantic account of substantive review, as the central mechanism for reconciling judges and administrative decision-makers through a common commitment to public justification. Indeed, with the rise of the reasonableness standard, positioned as if on a continuum between the extremes of correctness and patent unreasonableness, what used to be a binary opposition of irreconcilable modes of review is brought under an overarching conception of administrative legitimacy. 184 That is, while the logic of the reasonableness standard is drawn out of the tradition of patent unreasonableness review, it plays up the attentiveness to tribunal reasons and emphasis on tribunal reasonableness that was otherwise suppressed or placed on the defensive in the patent unreasonableness case law. At the same time, the logic of reasonableness renders suspect the tendency toward strict non-engagement with tribunal reasons on correctness review. Reasonableness review thus attempts to reconcile the concern of Gonthier J. in *National Corn Growers*185 to ensure the justifiedness of administrative decisions, with the concern of Wilson J. in the same case that judges may exercise their

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184 See D. Dyzenhaus, “David Mullan’s Rule of (Common) Law” in *Inside and Outside*, supra note 33 at 474-75. [“David Mullan’s Rule”] Dyzenhaus argues that reasonableness *simpliciter* “shears the correctness standard off the continuum of the standards of review.” Also see “Constituting the Rule of Law” *supra* note 12 at 495.

185 *Supra* note 4.
powers of oversight in too meticulous a fashion, thereby losing sight of the bases of legitimacy of the decision as a whole.

Some see in the romantic conception of reasonableness a new threat of judicial supremacy, with administrators now more than ever under the sway of judges through the mediation of judge-made “fundamental values.” In response, as noted above, Dyzenhaus and others have argued that reasonableness review, and with it the concept of deference as respect, may be understood to express a pluralist model of the constitutional order, in which the legislature, judiciary, and executive—as well as the persons directly affected by administrative decisions—stand as interactive participants in the common project of identifying and giving expression to fundamental values. And so we must ask, as we turn to more recent developments in the ongoing story of the rise of reasonableness: is that model—the romantic model of substantive review—convincing, as either a description or an aspiration of the administrative state? To narrow the questions raised in this chapter to some final points for reflection: Is it more or less expressive of respect for administrative decision-makers (those exercising broad discretionery powers as well as those engaged in narrower acts of statutory interpretation) to expect them to identify and bring to bear on their reasoning the values, or sources of values, that L’Heureux-Dubé J. draws upon in *Baker*? Are such expectations consistent with, or perhaps even a necessary expression of, the rule of law?

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186 See Geneviève Cartier, “Administrative Discretion as Dialogue: A Response to John Willis (or: From Theology to Secularization)” (2005) 55(3) ULTJ 623 at 644-656; and see D. Dyzenhaus, “Constituting the Rule of Law,” *supra* note 12 at 451: “Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to those underlying values.”
And more: the story so far has been occupied in the main with the respective roles of the three branches of government -- most directly, administrative decision-makers and courts. While we have seen, in cases such as Baker,\textsuperscript{187} Pushpanathan,\textsuperscript{188} and Mossop,\textsuperscript{189} matters arising on review which have placed in issue the respective roles of administrators and courts in working out the significance of human rights to the work of justification, we have as yet not attended to the place of the individual directly affected by a prospective decision in this work. This is a question I take up, if briefly, in my concluding chapter. But first, we must traverse the final, indeed the longest stretch of our tour, wherein we consider the significance of Dunsmuir\textsuperscript{190} for the law on substantive review, and in particular, for the unfolding significance of reasonableness review.

\textsuperscript{187} Supra note 11.
\textsuperscript{188} Supra note 15.
\textsuperscript{189} Supra note 26.
\textsuperscript{190} Supra note 1.
I. Introduction

In this chapter, I inquire into the import of certain shifts in the law on substantive review heralded in the 2008 Supreme Court of Canada judgment in Dunsmuir,\(^{191}\) or more specifically, the import of these shifts for the developing conception of the nature and purpose of the standards of review (in particular, deferential review) explored in chapter 1 under the descriptor “the rise of reasonableness”. Chapter 1 delivered what may be termed a romantic account of the developments in the jurisprudence on the meaning and application of the standards of review since Justice Dickson’s 1979 judgment in CUPE.\(^{192}\) That account was informed by a purposive-aspirational understanding of this area of law (and of law more generally), centring upon the idea that governance under the rule of law implies a commitment to forging reciprocity as between legal authorities and those subject to authority – specifically, through the vehicle of public justification. On application to administrative law, this account foregrounds the distinct competencies of and interrelationships among the legislative, executive, and judicial branches of government – and moreover the persons directly subject to state action – or the ways that these roles and relationships contribute to the normative work required to claim a legitimate mode of governance under law.

Here it is of note that, just as CUPE was the watershed substantive review judgment for its time – positing, if implicitly, a deep relationship between the pragmatic rationales for deference and the expectations of reasonableness placed on administrative

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\(^{191}\) Supra note 1.
\(^{192}\) Supra note 9.
decision-makers -- so Dunsmuir may be understood to position itself as the watershed common law administrative law judgment for our times. And so we may wish to observe some specific points of likeness and difference as between these decisions. Viewed from the ground up, it is perhaps notable that Dunsmuir arose out of the same province as did CUPE; moreover, both originated in a dispute arising out of the public employment setting in that province, and specifically the statute laws relating thereto.\textsuperscript{193} Of course, the differences at the origins of these judgments are also significant, CUPE having concerned a dispute involving a statutory provision governing labour disputes between government and unionized public employees, while the dispute in Dunsmuir concerned the rights of a non-unionized public servant upon dismissal: though these were rights also rooted in contested terms of the relevant statutory scheme.

Viewed in terms of their broader implications, Dunsmuir (which, unlike CUPE, forges changes both to the law on procedural fairness and the law on substantive review)\textsuperscript{194} may in the first place be understood to contract the ambit of procedural fairness review: specifically it removes public employees from the ambit of procedural fairness guarantees relating to dismissal from employment. In this, Dunsmuir stands in tension with developments in the case law contemporaneous with CUPE – in

\textsuperscript{193} As noted in Chapter 1, CUPE involved a dispute about interpretation of a provision of New Brunswick’s Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25. Dunsmuir involved a dispute about the interaction of certain provisions of that Act and those of another Act also regulating the public employment setting (specifically a provision of the Civil Service Act, S.N.B. 1984, c. C-5.1, preserving common law employment law in non-unionized public employment settings).

\textsuperscript{194} In “Process/Substance,” supra note 20, Dyzenhaus and Fox-Decent compellingly trace out the complementarity of the developments in CUPE with those forged on the front of procedural fairness in the contemporaneous case Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311 [Nicholson]. In short, while CUPE appears to newly circumscribe the reach of common law administrative law review in matters involving review of substance, and Nicholson appears to expand that reach in matters involving review of process, both may be understood to endorse a responsive, context-sensitive coordination of administrative decision-making with the foundational commitment to the rule of law, which imports a specific commitment to respect for the dignity of the individual legal subject. See “Process / Substance” at 197-218.
Nicholson\textsuperscript{195} and also Knight\textsuperscript{196} – which developments had expanded the ambit of (a now contextually-calibrated) procedural fairness review to expose a wider swath of decisions to such review.\textsuperscript{197} On the substantive front – my direct concern herein – Dunsmuir may be understood to make contributions to the law on substantive review, and specifically review on a deferential standard, that arguably register as a renewed commitment to CUPE’s implicit project of reconciling deference and the rule of law. Yet that is a claim that involves interpretation, and that requires defending – indeed one that might be said to rest, in some measure, on faith. For as I will show, the key statements that Dunsmuir delivers to the future of substantive review are open to the critique that they are highly uncertain in their import for the developing relationship of judges and administrative decision-makers as structured and enacted through this area of law.

Despite the not-insignificant tensions in Dunsmuir and moreover between Dunsmuir and CUPE, I suggest in what follows that the developments this judgment introduces into the common law on substantive review may in important respects place substantive review more squarely onto the path of reasonableness – where reasonableness is understood (indeed, I propose, in increasingly refined form) as the touchstone standard of substantive legality. That is, Dunsmuir opens up new possibilities for establishing reasonableness review as a practical and meaningful mechanism for structuring the expression of deference, and in this, for bringing to fruition the aim of reconciling deference with the rule of law which may be said to have animated this area of Canadian common law (if in on-again, off-again fashion) since CUPE. Or, at least the Dunsmuir decision has that potential. The actual import of the decision for the project of

\textsuperscript{195} Ibid.
\textsuperscript{196} Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653. [Knight]
\textsuperscript{197} See “Process/Substance”, supra note 20 at 205, 208-218.
substantive review, and particularly for deferential review, is only slowly registering in the law – and demands clarification.

The question I ask here, then, with reference to *Dunsmuir* and selected subsequent decisions of the Supreme Court, is: does *Dunsmuir*, or the shifts in substantive review recorded therein, represent the proper culmination of the romance of reasonableness that describes the dominant understanding or self-understanding of the law on substantive review since *CUPE*? In exploring this question, I suggest we consider carefully the implications of *Dunsmuir*’s collapsing the two standards of deferential review in play since *Southam*[^23] to one unified standard of deference -- in addition to carefully reflecting upon the potential within the statements in *Dunsmuir* which elaborate, if in sibylline fashion, upon the import of reasonableness review. Yet we must also consider the arguments for the other side: for the position that *Dunsmuir* is just as likely to prove a convenient vehicle for the resurgence or retrenchment of judicial formalism -- and with this, for exacerbating the instability between attitudes of judicial supremacy and judicial abdication that has long characterized the conduct of substantive review. The bases for these competing interpretations of *Dunsmuir* or its significance for the law on substantive review, and moreover, the direction in which the jurisprudence might go in order to stave off the exacerbation of crisis predicted by the *Dunsmuir* critic, are among the matters that I take up herein.

The chapter is divided into four sections. In Part Two, I describe the dispute in *Dunsmuir* in preliminary terms, and the general shifts in approach that the judgment announces for the law on substantive review. In Part Three, I probe the statements in *Dunsmuir* on the changes wrought to review on a deferential standard: *Dunsmuir*’s

[^23]: *Supra* note 23.
launching of a revised or reformed standard of reasonableness review. There I begin to build the argument that development of this standard should aim toward explicitly making space for the normative components of legality, so as to overcome the traditional resistance of substantive review to review of the “merits”. Yet this argument must confront the question of how such a development might be coordinated with the commitment to deference. Part Four explores the resources for building a more structured model for integrating the commitment to reasonableness and the commitment to deference, specifically entertaining the suggestion that this might be accomplished through integration of proportionality analysis into the law on substantive review. In this I draw upon jurisprudence speaking to the structure of justification proper to administrative and constitutional review, as well as selected examples of academic commentary thereon. Part Five then undertakes a brief examination of how the revised reasonableness standard has been applied in Dunsmuir and in selected post-Dunsmuir cases. It argues that these cases evince the instability between judicial supremacy and judicial abdication that has marked this area of law since CUPE. Yet it also discerns some movement in the case law toward a more stable integration of the commitment to reasonableness and the commitment to deference. Specifically, this potential is located in judicial efforts to apply Dunsmuir’s ethic of respectful attention to tribunal reasoning, and in particular, to identify and respectfully consider the normative bases on which the law-interpretation and law-application elements of administrative decision-making rest.

II. Dunsmuir: A Watershed Judgment for Our Times?

i) Background

The Supreme Court of Canada’s decision in Dunsmuir was met with what might
be termed guarded approval on the part of legal academics and practitioners in Canada. That is, while the decision may be said to have raised as many questions about the future of substantive review as it resolved, it was welcomed insofar as it registered a clear will on the part of all the judges of the Court to break the grip of a standard of review jurisprudence that had, in the opinion of many, too long transfixed this area of law with unwieldy and unpredictable efforts at parsing matters preliminary to engagement with the merits of the case at hand. Among the primary problems addressed in *Dunsmuir* was the attempt registered in the previous case law to distinguish between progressive standards of deference (“reasonableness” and “patent unreasonableness”): an exercise that *Dunsmuir* characterizes as both conceptually incoherent and constitutionally suspect.\(^{199}\) To this was added a critique of the four-pronged “pragmatic and functional” analysis for selecting the standard of review – in *Dunsmuir*, portrayed as a rigid, ultimately formalistic exercise in “law office metaphysics”.\(^{200}\) In rejecting these interrelated projects – the one, the project of distinguishing ever more finely as between reasonableness and patent unreasonableness review, and the other, the project of encouraging ever more refined analyses in the attempt to calibrate the standard of review -- the majority followed the lead of LeBel J. in his *cri de coeur* (declaiming the state of the law on substantive review) registered in two concurring opinions in 2003 and 2004.\(^{201}\) The question that remained, however, was what sort of guidance could be provided in the resulting jurisprudential vacuum.

In what follows, I briefly outline the changes that *Dunsmuir* signals for this

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\(^{199}\) *Dunsmuir*, supra note 1 at paras 41-42. I develop this point below.

\(^{200}\) Ibid., per Binnie J. at para 122.

\(^{201}\) Toronto (City), supra note 103; and *Voice Construction*, supra note 102 (Deschamps J. concurring in both opinions). See Sheila Wildeman, Chapter 9, *Administrative Law in Context*, supra note 4 at pp. 247-248.
jurisprudence, before turning to a closer consideration of the specific implications of the decision for the conduct of deferential review.

ii) The dispute in *Dunsmuir*

The *Dunsmuir* case arose out of an employment-related dispute between a New Brunswick public servant (a court clerk) and the New Brunswick government. Mr. Dunsmuir sought to contest his dismissal under the terms of the provincial statutory scheme governing the employment rights of public servants, and moreover, in light of the common law of procedural fairness (understood at the time, and at least since *Knight*,202 to regulate the relationship between government and public office holders).

On the procedural front, an arbitrator vested with statutory authority to decide the matter determined that Mr. Dunsmuir’s dismissal with pay in lieu of notice following a series of formal reprimands had failed to accord with principles of procedural fairness (*i.e.*, he should have been afforded a hearing). In addition, the arbitrator decided -- in the aspect of the decision ultimately revisited by way of substantive review -- that the statutory scheme applicable to this public employment relationship not only afforded non-unionized public servants like Mr. Dunsmuir the right to contest the adequacy of notice / pay in lieu (as would accord with the common law of employment, preserved in its application to non-unionized public servants by the *Civil Service Act*),203 but in addition, extended those public servants an opportunity to argue that an ostensibly no-cause dismissal had in fact been for cause.204 The latter claim, if made out, would open

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202 Supra note 196.
203 Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, stated that “[s]ubject to the provisions of this Act and any other Act” termination of an employee “shall be governed by the ordinary rules of contract”.
204 The latter interpretation was based upon the interaction of ss.97(2.1) and s.101.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25.
the way, under the terms of the *Public Service Labour Relations Act*, for a challenge to the sufficiency of the grounds for dismissal – which challenge could potentially result in the remedy of damages and/or reinstatement. In this, the arbitrator’s view of the proper construction of the statutory scheme stood in clear tension with the government’s claim to a right to dismiss its non-unionized employees in accordance with the private law of contract (again, explicitly preserved under one of the two Acts regulating this public employment environment). This was a tension, we will see, that proved intolerable to the courts on substantive review.

The Supreme Court of Canada quashed the arbitrator’s ruling on both procedural fairness grounds and on the ground of substantive unreasonableness. Along the way, the Court took the opportunity to weigh in on matters central to each of the two branches of administrative law: on the one hand significantly narrowing the procedural fairness rights of public office holders (a matter I leave aside herein), and on the other, setting out a decided shift in approach to substantive review, or more specifically to the standards of review.

### iii) Mapping the shifts in approach

The majority in *Dunsmuir* introduced a few apparently sweeping (though some argue they are in fact nominal) changes to the law on substantive review. The first was to reduce the standards of review from the tripartite set canvassed in Chapter 1, which the Supreme Court of Canada had endorsed since the early 1990s, to just two: correctness

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206 I discuss the majority judgment’s application of a reasonableness standard to the arbitrator’s decision near the end of this Chapter.

207 The N.B. Court of Queen’s Bench had held that a correctness standard of review applied to the arbitrator’s construction of the statute laws in issue in this case (see *Dunsmuir*, supra note 1 at para 18). This was possibly one of the factors contributing to the Supreme Court of Canada’s decision to take *Dunsmuir* as its platform for launching a broad re-examination of the standards of review.
and reasonableness. In this, the *Dunsmuir* court effectively adopted, and sought to respond to, critiques raised by LeBel J. in his concurring judgments in *Toronto (City)*\(^{208}\) and in *Voice Construction*.\(^{209}\)

In brief, the critiques driving the Court’s shift in approach to the standards of review in *Dunsmuir* were as follows. The first was that adherence to two separate standards of deferential review was conceptually incoherent (it is as meaningless to speak of gradations of irrationality as it is to speak of gradations of illegibility).\(^{210}\) Related to this was the critique that the distinction between the standards yielded no practical guidance: whether distinguished by way of the “magnitude of error” required to invalidate the decision or by the “depth of probing” admissible on review, then, the jurisprudence on deferential review thus far had provided little by way of structuring the judgments of either administrative decision-makers or judges on review.\(^{211}\) The further critique was that the distinction between reasonableness and patent unreasonableness review, with its implications of preserving decisions that bore some (but not a “patent”) mark of irrationality, was inconsistent with a commitment to the rule of law.\(^{212}\)

Yet in effectively collapsing patent unreasonableness and reasonableness *simpliciter*, the question was: how were we now to understand and apply the remaining deferential standard? This will be my primary focus in the section that follows.

\(^{208}\) Supra note 103.

\(^{209}\) Supra note 102.

\(^{210}\) Per LeBel J. in *Toronto (City)*, supra note 103 at para 127: “In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the “illegible” and the “patently illegible”. While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible — whether its illegibility is evident on a cursory glance or only after a close examination — the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.” And see *Dunsmuir*, supra note 1 at para 41.

\(^{211}\) *Dunsmuir*, supra note 1 at paras 40-41.

\(^{212}\) Ibid. at para 42.
The second critique adverted to in *Dunsmuir* went not to the characterization of the standards, but rather to the analysis adopted in order to identify the appropriate standard. This analysis, the majority judgment of the Court opined (and in this it was joined by both concurring judgments) was in need of “simplification”. Drawing on a set of judgments -- and again, in particular on critiques raised by Justice LeBel, here questioning “the applicability of the “pragmatic and functional approach” to the decisions and actions of all kinds of administrative actors” -- the Court in *Dunsmuir* suggested that this analysis had become overly formalistic and rigid in its application.

In response, the majority in *Dunsmuir* relabeled the “pragmatic and functional analysis”: now to be referred to as “the standard of review analysis”. Yet as with the collapse from three to two standards, this change is intended to signal something more fundamental. While I am primarily concerned with the statements in *Dunsmuir* relevant to the application stage of substantive review, I will briefly note the changes to the standard of review analysis which provides some context for inquiry into (indeed, the analysis at this initial may ultimately be understood to inform, or in the words of a recent judgment to “colour”) the application stage, particularly on deferential review.

To the extent that the *Dunsmuir* majority initiates a change to the standard of review analysis (i.e., a shift from the four-factor analysis deemed obligatory in *Pushpanathan* and also *Dr. Q.*), this change consists in an increased willingness to short-circuit that analysis in a variety of ways. This may be done, in the first place, on

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213 Ibid. at para 33.
215 Ibid. at para 63.
216 *Khosa*, supra note 37 at para 59 per Binnie J. (for the majority).
217 See the discussion of this analysis as it developed from *Bibeault* to *Pushpanathan*, supra note 16.
218 Supra note 16.
219 Supra note 25.
the basis that prior jurisprudence “has already determined in a satisfactory manner the
degree of deference to be accorded with regard to a particular category of question”.220

At first glance, that statement may be taken as a reference to the principle of *stare decisis* – and so to refer to identification of a precedent on all fours with the case at hand. Yet what, exactly, would constitute a precedent “on all fours” for this purpose is a not inconsiderable question.221

Alternatively or additionally, the appeal to prior jurisprudence may be taken to reference the set of presumptions -- drawn from or distilling elements of the existing case law—which are recited in the judgment of the majority. That is, as noted in Chapter 1’s discussion of correctness review, the majority in *Dunsmuir* sets out a series of propositions or presumptions that open the possibility of short-circuiting a contextual analysis. On the one side are certain presumptions of correctness review, mostly centring upon the nature of the question222 (with one – whether the question on review is of “central importance to the legal system as a whole” and beyond the expertise of the tribunal223 – additionally engaging statutory purposes and tribunal expertise). On the other side, some guidance is offered in respect to selection of a reasonableness standard through a set of presumptions that may be said (in contrast to those stated under the

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220 *Dunsmuir, supra* note 1 at para 62: “In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.”


222 Correctness review presumptively applies where the question on review is a “constitutional question”, a “question of true jurisdiction or *vires,*” a question engaging the respective jurisdiction of distinct agencies, or a question “of central importance to the legal system as a whole” and outside the agency’s expertise. See *Dunsmuir, supra* note 1 at paras 58-61.

presumptions of correctness) to reach beyond the nature of the question to span the traditional four factors – i.e., whether there is a privative clause, the nature of the question, and the matter of relative expertise (which necessarily brings into play the purposes of the statutory scheme). The difference from the Pushpanathan-style “pragmatic and functional” analysis is that each of these terms is stated as grounding a presumption of reasonableness in relative isolation from the rest.224

According to the majority in Dunsmuir, it is only if the standard applicable to the case at hand is not determined by “prior jurisprudence” (which, as noted, may be understood to mean: only if none of the presumptions stated at the outset is deemed determinative) that a move to a wider canvassing of the traditional four factors is in order.225 That said, it would seem that the implicit possibility of rebutting the presumptions urges some consultation of some or all of the traditional four factors beyond that which is captured in any single presumption.

In sum, it would seem that the primary objective of the statements of the majority on the standard of review analysis in Dunsmuir – or those statements canvassed so far -- is to carve out a streamlined framework, informed by the case law and more broadly by principles deemed to be implicit in the work of substantive review, whereby judicial discretion in determining whether deference is or is not warranted may be equipped with tools for balancing the imperatives of efficiency and context-sensitivity.

224 The majority states that a privative clause is a “strong indicator” of the need for deference, and that in the face of certain types of question – questions of fact, mixed fact and law, or “discretion or policy” -- “deference will usually apply automatically” (ibid. at para 53). Additionally – and most notably for those who discern in Dunsmuir a strike for increased deference – the majority states that “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity,” and “may be warranted” even where the tribunal is engaged in “the application of a general common law or civil law rule in relation to a specific statutory context” (at para 54).
225 Ibid. at para 62. See Goltz, supra note 221 at para 25, and Heckman, supra note 221 at para 28.
Since the initial aftershocks registered in response to Dunsmuir, commentary on the significance of this judgment to the standard of review analysis continues to be mixed. On the one hand, there has been approval in principle of the drive toward simplification, including the provision of means for forestalling a full four-factor analysis and so retraining attention to the work of overseeing the specific decision in issue.\(^2\) Moreover, there has been acknowledgment that insofar as Dunsmuir allows for a short-circuiting of the full four-factor analysis, this may serve the ends of deference, given the statements of the majority indicating that reasonableness review presumptively applies where a tribunal is interpreting a question of law arising from its home statute, or a related, commonly-encountered statute -- or even a principle of common law to be applied within the context of the tribunal’s statutory mandate.\(^2\)

It was inevitable, however, that Dunsmuir’s changes to the standards of review would attract the concern that, despite the judges’ protestations to the contrary,\(^2\) substantive review under the post-Dunsmuir regime would expose tribunals once protected by the patent unreasonableness standard to increased intervention. That is, even if deference is still required in cases that had formerly attracted the now-defunct standard, the apprehension of some in the wake of Dunsmuir is surely that this will be

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\(^2\) Goltz’s paper (supra note 221) is a good example of approval in principle (i.e., approval for the project of simplification), but critique as to the means by which the Dunsmuir court sought to advance that principle. David Mullan’s early response to the decision may be understood to award some residual acknowledgement of the positive potential for simplification of the standard of review analysis, despite his mostly critical assessment of the decision ("Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let’s Try Again!" (2008) 21 Can. J. Admin. L and Prac. 117). [“Let’s Try Again!”] I have seen no commentary that congratulates the Court outright for having offered an analysis that will clearly achieve its aims. Heckman is circumspect: supra note 221 at para 59: “My review of appellate cases shows that Dunsmuir has served to simplify the standard of review analysis in certain respects.”

\(^2\) Dunsmuir, supra note 1 at para 54.

\(^2\) Ibid. at para 48: The elimination of patent unreasonableness review “does not pave the way for more intrusive review by the courts.”
“deference with a difference”:\textsuperscript{229} review of a more searching or rigorous kind than was previously the case. To this may be added the concern that correctness review may be assigned where once deference might have been – \textit{i.e.}, the concern that \textit{Dunsmuir} might heighten tendencies throughout the case law to short-circuit such contextual analysis of tribunal expertise as may reveal pragmatic bases for deference (in particular, accomplishing such short-circuiting through exclusive emphasis on the ‘nature of the question’). The complementary apprehension that may trouble those concerned to check administrative discretion is that \textit{Dunsmuir}’s presumptions (along with uncertainty about the newly-unified deferential standard) might short-circuit inquiry into the bases for insisting upon a more searching inquiry into substantive legality, concerned with the comportment of administrative decision-making with the normative commitments inscribed within the legal order.

These worries coalesce in the general concern: Might \textit{Dunsmuir} initiate a regressive formalist turn in the substantive review jurisprudence, whereby judges need merely declare “the nature of the question” or fasten upon some other discrete element of the decision on review -- not only on the way to identifying the standard of review, but moreover, as the focus of their inquiries into the matters salient to assessing substantive legality? This prospect goes to the possibility that, despite \textit{Dunsmuir}’s urging a renewed attentiveness to the indicia of reasonableness, there is something about the standard of review analysis proposed that is inconsistent with the commitment to public justification. The alternative critique is simply that the standard of review analysis in \textit{Dunsmuir} is unlikely to simplify or short-circuit the standard of review analysis at all, but rather, and

even because of the concerns I have just noted, is more likely to open the way for even more cumbersome legal argumentation, first directed at staving off attempts to establish the applicability of one or more of the noted presumptions, and then turning to rebuttal of those presumptions in light of the traditional four factors.²³⁰

A final expression of the concern that the statements in Dunsmuir on the front of the identification of the standard of review may provoke something of a formalist turn goes specifically to the majority’s characterization of “true questions of jurisdiction”. That is, the majority in Dunsmuir stated that among the matters warranting a presumption of correctness were “true questions of jurisdiction or vires”,²³¹ including questions wherein the tribunal is forced to “explicitly determine whether its statutory grant of power [gave] it authority to decide” the matter brought before it.²³² The worry was that this amounted to a re-opening of the formalistic and manipulable category of the jurisdictional question (after Pushpanathan’s ostensibly putting to rest this category of question and its power to automatically invite correctness review),²³³ in a manner that risked compromising the commitment to deference registered in other parts of Dunsmuir’s majority judgment. Professor Mullan raised this concern in pointed fashion in a commentary released soon after the Dunsmuir decision,²³⁴ specifically pointing out the potential for the statements of the majority on the relevance of identification of a jurisdictional question to inspire a resurgence of the type of reasoning informing the “low watermark of deference” on substantive review marked by the case Bell v. Ontario Human Rights Commission.²³⁵

²³⁰See Goltz, supra note 221 at para 25.
²³¹Dunsmuir, supra note 1 at para 59.
²³²Ibid.
²³³Pushpanathan, supra note 16 at para 28.
²³⁴“Let’s Try Again!” supra note 226 at 126-130.
²³⁵1971 SCR 756 [Bell]. And see “Let’s Try Again!” ibid. at 129-130. In Bell, the Supreme Court of Canada adopted a correctness standard of review in determining that a human rights tribunal had no
That said, it is important to note both the Supreme Court majority’s explicit expression in *Dunsmuir* of a will to adopt a “narrow” approach to jurisdictional questions, and the affirmation of that point in subsequent Supreme Court decisions. Indeed the Court implicitly rejects the approach taken in *Bell* in its decision in *Canada (Citizenship and Immigration) v. Khosa*. Moreover, the imperative that the category of the “true jurisdictional question” be interpreted narrowly, and moreover, that agency interpretation of the home statute (at least where the statute denotes a discrete and specialized regime) requires deference, is strongly registered in the judgment of Justice Rothstein in *Nolan v. Kerry*. These developments may provide some limited comfort

jurisdiction over a claim going to discrimination in provision of rental accommodations. Specifically, the Court decided that the question of whether the residence at the centre of the claim met the statutory description of a “self-contained dwelling unit” went to the tribunal’s jurisdiction. Here, correctness review was indeed deemed to be justified on the basis that interpretation of this provision involved the tribunal in “explicitly determin[ing] whether its statutory grant of power [gave] it authority to decide” the complaint. The critics’ response was that the human rights tribunal in *Bell* was far better placed to decide the question in issue – once the relevant facts had been put before it (the case never did proceed to that stage). In any case, it made little sense for the Court to proceed as if its analysis of this matter could benefit not at all from attentiveness to the tribunal’s interpretation of how the relevant social and material facts affected interpretation and application of the provision in question.

236 *Supra* note 1 at 59: “We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. “Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.”

237 *Supra* note 37. In *Khosa*, the majority makes note of *Bell* in its statements on the proper interpretation of s.18.1(4)(b) of the *Federal Courts Act*. That is, it states that, in enacting this provision -- restricting judicial review of errors of fact to decisions “made in a perverse or capricious manner or without regard for the material before [the tribunal]” – the legislature sought to reject, as overly interventionist, the sort of common law developments exemplified in *Bell* (cases deemed to fall under the class of “jurisdictional fact-finding”). The majority states (at para 45):

Parliament clearly wished to put an end to the tendency of some courts to seize on a “preliminary fact” on which the administrative agency’s decision was said to be based to quash a decision. In *Bell*, the “jurisdictional fact” was whether the residential accommodation in respect of which a prospective tenant claimed rental discrimination was a “self-contained dwelling unit”. The Court disagreed with the Human Rights Commission, which had “based” its decision on this threshold fact. Viewed in this light, s. 18.1(4)(d) was intended to confirm by legislation what Dickson J. had said in *New Brunswick Liquor Corp.*, namely that judges should “not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so”.

to those who have identified this element of Dunsmuir’s reformed regime of analysis as potentially expanding opportunities for formalist interventionism.

Ultimately, as Heckman has suggested, it may be that the effect of Dunsmuir’s statements on the standard of review will be to confirm and even exacerbate the pre-existing tendencies of judges, who may now cherry-pick from its presumptions in order to confirm the standard that best supports their views of the proper relationship of administrative decision-makers and courts, or the specific implications of the supervisory mandate of the court for the case at hand.

With that in mind, I turn to my primary concern, which goes to the significance of Dunsmuir’s consolidation of the formerly bifurcated concept of deferential review into a unified standard of reasonableness. What does the new two-standard regime indicate about the proper relationship between judges and administrative decision-makers, specifically where the substance of administrative decisions is challenged? What, in particular, does this new regime tell us about the conceptual and practical significance of deference on (reasonableness) review?

III) The New Reasonableness, in Theory

i) What’s left of correctness

As noted in Chapter 1, Dunsmuir leaves intact the existing standard of correctness review. In this, the decision of the majority took no heed of the argument that the logic of reasonableness review results in shaving correctness review off the spectrum. The majority states:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of

239 Heckman, supra note 221 at para 59.
240 Cf Dyzenhaus, supra note 184.
correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law.  

Neither does the guidance on the process of review for correctness vary from past jurisprudence: the court is to “undertake its own analysis of the question” and “decide whether it agrees with the determination of the decision maker.” In the event of disagreement, the reviewing court may “substitute its own view and provide the correct answer.”

Below, I consider the ways that a correctness standard continues to hedge review even of decisions deemed to warrant deference. While I do not pursue this further here, I would argue that the Court in Dunsmuir fails to clearly indicate the rationale for maintaining a distinct standard of correctness review, in the face of a form of reasonableness review which is intended to integrate deference to (as respect for) tribunal reasoning with the commitment to legality or the rule of law.

ii) A revised reasonableness

As to the revised standard of reasonableness, here we see a notable attempt to provide a more solid foundation for deferential review of substantive legality than has hitherto obtained: and more specifically, to fill the vacuum left by the new irrelevance of the attempts, in the case law since Southam, to define the reasonableness standard in terms of its distinctiveness from patent unreasonableness review. Thus in place of the prior case law’s gestures to depth of probing and magnitude of error come tentative attempts to add specificity to the conceptual and practical significance of this standard.

241 At para 50.
242 Dunsmuir, supra note 1 at para 50.
243 Ibid., at para 46.
244 Supra note 23.
In this, the majority in *Dunsmuir* may be understood to build upon the same base that provided the main inspiration for Justice Iacobucci’s descriptions of reasonableness review in *Southam* and in *Ryan*\(^{245}\); indeed a base laid down in Justice Dickson’s judgment in *CUPE*\(^{246}\) that where deference is warranted, the decision-maker’s interpretation of law should stand unless “its construction cannot be rationally supported by the relevant legislation”\(^{247}\) and/or evidentiary foundation. That said, as noted in Chapter 1, the case law on -- and more specifically that ostensibly applying -- deferential review since *CUPE* evinces tensions, indeed at times wild mood swings, as between judicial supremacy (setting strict limits of jurisdiction or legality within which deference is closely hedged) and judicial abdication (expressed in the refusal to peer “too deeply” into the reasoning or evidentiary record, or otherwise adopting the position that the decision is beyond the competency of the courts except where the most common-sensically obvious errors are concerned).

What the majority in *Dunsmuir* adds by way of conceptual and practical guidance on the principles and practical conduct of reasonableness review may be said to raise more questions than are answered. Yet these additions are nonetheless of a nature that may, over time, come to enrich the understanding of deference within the case law – indeed, to support the potential for reconciling the commitment to reasonableness and to deference within this area of law, and so to contribute to the project of administrative legitimacy.

**iii) Deference as respect**

\(^{245}\) *Supra* note 24.
\(^{246}\) *Supra* note 9.
The passages in Dunsmuir offering guidance on the revised standard of reasonableness are explicitly rooted in the concept of deference “as respect” – or to quote the passage from Dyzenhaus’s work on which the majority relies: deference as “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.”

The longer passage in which the majority adopts this descriptor of deference, with its orientation to the notion of “respectful attention” to the reasons “in support of” or justifying a decision – as opposed to deference as “submission” or abdication of responsibility -- is worth reproducing here:

The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-Southam formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference “is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers” (Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554, at p. 596, per L’Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of “deference as respect” requires of the courts “not submission but a respectful attention to the reasons offered or which could be offered in support of a decision”[.]

In this statement, deference is said to be rooted “in part” in respect for legislative intent, as registered in the conferral of decision-making powers on administrative actors. But behind this is implicit acknowledgement of the pragmatic rationales (rooted in decision-making expertise) for deference. Indeed, in a further statement, following close upon the foregoing, the majority takes specific account of the pragmatic rationales for

248 Dunsmuir at para 48, citing Dyzenhaus, “The Politics of Deference,” supra note 5 at 286. As noted above the passage is also cited with approval in Baker, supra note 11 at para. 65 per L’Heureux-Dubé J.

249 Ibid.
according deference to administrative decision makers, even on questions involving interpretation of law (or such laws as are implicated in the carrying out of the tribunal’s mandate). Here the majority cites Mullan for the insight that according deference to tribunals recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime.\textsuperscript{250}

The majority concludes with a statement of the diverse foundations for, and expressions of, “deference as respect” inscribed in the modern law on substantive review. These include:

\begin{quote}
respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences [of administrative decision-makers], and for the different roles of the courts and administrative bodies within the Canadian constitutional system.\textsuperscript{251}
\end{quote}

This statement goes beyond the (grudging) acknowledgment of parliamentary supremacy expressed in some strains of the earlier jurisprudence – \textit{i.e.}, where the determinative factor in warranting deference was existence of a privative clause – to recognize the distinct roles and competencies of each of the three branches in forging the administrative state, and moreover in securing “the Canadian constitutional system” as a coherent normative order.

These pronouncements on the purposes of substantive review and specifically the purposes of deference on review – grounded in an understanding of the background roles and competencies of the three branches – are posed by the majority by way of

\textsuperscript{250} \textit{Ibid.} at para 49. The quoted passage is from Mullan, “The Struggle for Complexity?” \textit{supra} note 131 at 93.

\textsuperscript{251} \textit{Dunsmuir, supra} at para 49.
supplementary commentary upon a point going to the nature of statutory interpretation. Here we may recall a claim advanced in Chapter 1 herein: that statutory interpretation is the engine of substantive review – indeed of administrative law more generally -- and that the theory of statutory interpretation held by a given judge or court is likely to have profound influence on the conduct of review.\(^{252}\) In *Dunsmuir*, the majority echoes and may be said to press further the key premise behind the attitude of deference taken to law-interpretation – or at least, to *some* law-interpretation -- in *CUPE* and in subsequent case law: namely, the premise that “certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.”\(^{253}\) This statement of the *Dunsmuir* majority gestures toward the place of judgment, or discretion, in (at least *some* instances of) statutory interpretation. This is an acknowledgement that opens the way for displacement, or partial displacement, of judicial claims to overriding authority on disputed questions of law. Thus the above-noted statement on the nature of or possibilities within statutory interpretation is followed by the statement that in view of the fact that a range of possible, reasonable decisions may be yielded under contested statutory terms, administrative decision-makers are owed a “margin of appreciation within the range of acceptable and rational solutions” to interpretive problems.\(^{254}\)

Looking ahead to Part IV of this chapter, here it is of note that the language of a “margin of appreciation” is reminiscent of pronouncements under the proportionality analysis of s.1 of the *Charter*,\(^{255}\) specifically where government is called upon to justify

\(^{252}\) Chapter 1, *supra* at pp. 22-29.
\(^{253}\) *Dunsmuir*, *supra* note 1 at para 47.
\(^{254}\) *Ibid.*
\(^{255}\) See Part IV, *infra.*
fiscal or social policy choices.\textsuperscript{256} There, too, judges are reminded to acknowledge the limits of their competency, particularly where elements of politics or polycentricity – involving negotiation of multiple competing interests in contrast to the bipolar framework of traditional adjudication – are in issue. Yet there, too, the relationship between politics and law is such that a clear division of labour has proven elusive.

\textit{iv) The process / substance divide within reasonableness review}

The \textit{Dunsmuir} majority’s recognition of the potential for multiple reasonable interpretations of statute law and related statement that decision-makers should be accorded a “margin of appreciation” in selecting among interpretations preface a brief indication of how a court is to conduct itself on adopting a standard of reasonableness on review. First comes the statement: “A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.”\textsuperscript{257} This is elaborated upon in the following manner:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.\textsuperscript{258}

In this, the \textit{Dunsmuir} majority suggests a dual analysis -- oriented on the one hand to the \textit{process} of reasoning and on the other to whether the conclusion falls within “a range of possible, acceptable outcomes.”

\textsuperscript{257} Dunsmuir, supra note 1 at para 47.
\textsuperscript{258} Ibid at para 47.
A number of questions may be raised as to the nature of, and the apparent separability of inquiry into, the reasoning process and the conclusion. Here we may recall the exhortation in *Ryan* \(^{259}\) to “stay close” to the reasoning of the tribunal on review \(^{260}\) – an exhortation that confirms the rejection, within the modern jurisprudence on deferential review, of the idea that courts should first determine the “correct” answer and then determine how close to or far from that conclusion the tribunal’s decision stands. Indeed, the implication of the jurisprudence since *CUPE* (operating from the premise that there may be a range of reasonable interpretations) is that a reviewing court should begin by attending to the reasons of the decision-maker. For in this act of attentiveness, the court may find considerations that it would not, in its distance from the particular area of administrative activity, have identified as relevant, or as weighty. Only following such attentiveness should a reviewing court consider whether the decision as concluded falls within a range of reasonable interpretations. I return to this point below, on considering more carefully the possibilities for expansion upon the *Dunsmuir* majority’s criterion of “justification”.

Further questions are raised by the above-stated description of reasonableness review, and in particular, its distinction between review of the reasoning process and review of the outcome. For instance: given that reasons may not be required at common law where neither a significant individual interest nor a right of appeal is engaged, \(^{261}\) there may be situations in which only the latter question (the reasonableness of the

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\(^{259}\) Supra note 24.

\(^{260}\) Ibid. at para 49: “[Southam] signals that the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision.”

\(^{261}\) That hypothesis rests on how broadly or narrowly one interprets the duty set out in *Baker, supra* note 11 at para 43.
outcome) applies. But where reasons are provided and are flawed, may a defect in the reasons be “cured” by the decision’s nonetheless falling within a range of reasonable options? How are we to square the Dunsmuir majority’s separation of the reasoning process and reasoning outcome with, say, the statement in Ryan that it is the “tenability” of “the reasons, taken as a whole” that should be appraised -- and its less-forgiving dictum that minor defects in the reasoning should not be taken to invalidate the whole?

Moreover, how are we to square the prospect that a reasonable decisional outcome might cure unreasonable reasons with the independent value that is attributed to reason-giving in the contemporary common law justifications for imposing this duty upon decision-makers? For instance, in Baker, L’Heureux-Dubé J. grounds the duty in a concern to support better decision-making and reduce arbitrariness, to advance the value of transparency and encourage public confidence in the fairness of administrative systems, and to allow parties to assess their chances – and moreover to allow judges to make informed decisions -- on appeal. Are these ends adequately advanced by a doctrine that would allow the “curing” of ill-conceived reasons (e.g., reasons oriented by purposes deemed by a court to be wholly alien to the statutory scheme, in the manner of Roncarelli v. Duplessis)? Additionally, L’Heureux-Dubé J. states that, particularly where significant individual interests are at stake, “[i]t would be unfair for a person

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262 Cf Mullan, “Let’s Try Again!” supra note 226 at 136.
263 Ryan, supra note 24 at para 56: “This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.”
264 Ibid.
265 Supra note 11.
266 Ibid. at paras 38-39.
subject to a decision [. . .] which is [. . .] critical to their future not to be told why the result was reached. The latter observation may be understood to speak to the relationship of state-subject reciprocity that Dyzenhaus and others have argued grounds state legitimacy.\textsuperscript{269} That is, reason-giving arguably has, in addition to its instrumental value, the inherent value of conveying to the legal subject the decision-maker’s commitment to taking his/her critical interests into account in the purposive-interactive work of interpreting and applying law.

Here it should be noted that in \textit{Khosa},\textsuperscript{270} the majority hearkens back to the \textit{Dunsmuir} majority’s adoption of Dyzenhaus’s “deference as respect” with a qualifying statement that emphasizes the importance of administrative reason-giving:

\textit{Dunsmuir} thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court. Although the \textit{Dunsmuir} majority refers with approval to the proposition that an appropriate degree of deference “requires of the courts ‘not submission but a respectful attention to the reasons offered or which could be offered in support of a decision’” (para. 48 (emphasis added)), I do not think the reference to reasons which “could be offered” (but were not) should be taken as diluting the importance of giving proper reasons for an administrative decision, as stated in \textit{Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 43}.\textsuperscript{271}

While the stated commitment to the importance of reason-giving may be regarded as at the heart of the modern law on both substantive and procedural review, it does not clarify the import of the process/outcome distinction in \textit{Dunsmuir}’s depiction of deferential review – or specifically, the question of what import flawed reasoning might

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\textsuperscript{268} \textit{Ibid.} at para 43.  And see the supporting statements at para 39: “Reasons also allow parties to see that the applicable issues have been carefully considered, and . . . [t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given.”
\textsuperscript{270} \textit{Khosa, supra} note 37.
\textsuperscript{271} \textit{Ibid.} at para 63.
\end{flushright}
have for deferential review. Arguably the majority in *Dunsmuir* cannot mean (without turning back the clock on the significance of deference) that the outcome of decision may be or should be appraised in a manner that is wholly independent of the reasons for it – a prospect that begins to shade into the court’s making an independent assessment of the correct answer. From the other side, it seems unlikely that the reasoning process may be adequately appraised without reference to the outcome – i.e., without directly confronting the question of whether the reasons support or justify the outcome. The possibility that reasoning may be adequate but the outcome unreasonable suggests a marked gap in logic difficult not to attribute to a failure of reasoning, or of reasonableness.

Ultimately, *Dunsmuir*’s brief statements advising attentiveness to the reasonableness of reasons and of outcomes does not clearly indicate the bases for invalidating a decision either because of a flaw in the reasoning process or in the outcome. Or in any case, it does less than one might hope to indicate how exactly the criteria of reasonableness intersect with both the outcome-independent value of reason-giving and the further institutional values served by deference to decisional outcomes.

That said, *Dunsmuir* does state certain criteria of reasonableness with which it seeks to guide the assessment of decisions on a deferential standard of review. In this, it puts in place of the prior preoccupation with depth of probing and magnitude of error three conceptual touchstones of reasonableness: namely, “justification, transparency, and intelligibility”. Yet these concepts are stipulated more than explained – referred to almost in passing– and in this, presented more as a gesture toward the future, or toward the horizon of future interpretations, than was the case with the crystallization of accreted jurisprudence that marked *Dunsmuir*’s pronouncements (however desultory) on

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272 *Dunsmuir*, supra note 1 at para 47.
identification of the standard of review. I direct the reader’s attention once again to the passage quoted above, wherein the terms in question are stated:

In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.273

Here the three terms appear to be embedded in the “process” side of reasonableness review (i.e., positioned as specifically applicable to review of the reasoning process). Yet clearly the idea of “outcomes which are defensible in respect of the facts and the law” reprises at least the criterion of “justification.” Indeed, the application of all three criteria to both “stages” or foci of reasonableness review is suggested in the subsequent majority judgment in Khosa.274 That is, in one passage in that judgment, the majority places both dimensions of the decision on review under the sway of Dunsmuir’s threefold criteria of reasonableness, stating that, on application of this standard: “as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.”275

The reasons of LeBel J. for the Court in Montreal (City) v. Montreal Port Authority276 similarly indicate that the three stated criteria apply (though perhaps not on equal terms) to both dimensions of reasonableness. LeBel J. writes:

The concept of “reasonableness” relates primarily to the transparency and intelligibility of the reasons given for a decision. But it also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process.277

273 Ibid.
274 Supra note 37.
275 Ibid. at para 59.
276 2010 SCC 14.
277 Ibid. at para 38.
This statement conveys an understanding of reasonableness review that, like the statement of the *Dunsmuir* majority that it seeks to elucidate, explicitly favours the “process” side over the “quality” side of the putative reasoning divide. That is, again reasonableness review is said to be concerned “primarily” with the process (and not the outcome) of administrative reasoning – moreover, adds LeBel J., it is concerned mostly with judging administrative reasoning in light of the more process-infused criteria of reasonableness (transparency and intelligibility). Meanwhile, the criterion of “justification” is translated into a vague “quality requirement” applicable to both reasons and decisional outcomes.

But again, we return to the question: does the asserted divide between reasons and outcomes – or for that matter, the criteria stated as touchstones for evaluation of one or both sides of that divide -- translate into a workable conceptual or practical schema for guiding the efforts of judges on review? What, if anything, do these statements contribute to the enterprise of clarifying the objectives and methods of deferential review? I explore that further in what follows. But as a background observation, I suggest that new pathways for argumentation are opened by the very fact that none of the *Dunsmuir* majority’s stated criteria for adjudging administrative reasonableness is readily subjected to a single controlling interpretation, even as each of these criteria calls up norms already implicit in the unfolding of the modern jurisprudence both on substantive review and procedural fairness.

\[v\]  \textit{Transparency and intelligibility: straddling the process / substance divide}

In this section, I hazard a few tentative comments on two of the *Dunsmuir* majority’s stated criteria of reasonableness – transparency and intelligibility -- before
moving on to consider the third ("justification") more closely.

Transparency

I begin with the criterion of "transparency," which may be said to fall closest to the process side of the (increasingly fluid) process/substance divide. Indeed transparency may be identified as one of the core values animating review for procedural fairness. In this it describes that element of the legal norm of publicity that requires not merely conveyance of legal ordinances, but moreover exposure of the inner workings or machinations of governing authorities: in particular, exposure of the bases on which public decisions rest, so that individuals are better equipped to understand and also to contest those decisions, and with this, better equipped to hold decision-makers to account, whether in court or at the ballot box.

Yet transparency is in Dunsmuir positioned as a criterion of substantive reasonableness. In this we may detect an integration of procedural and substantive values: indeed, an integration proper to the norm of reason-giving, which has in the Canadian case law particularly since Baker278 come to occupy a central place in both procedural and substantive review.279 The value of transparency may be said to have been central in effecting the gradual incursions made over the years upon the common law rule that administrative decision-makers (indeed adjudicators generally) have no duty to give reasons.280 But again, while transparency may in a certain sense stand at the meeting-point of procedural and substantive review, in what sense is it meaningful as a

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278 Supra note 11, and see the discussion at notes 265-269 supra.
280 See the discussion of the emergence of the duty in British and Canadian law in Baker, supra note 11 at paras 35-44.
Arguably the criterion of transparency is distinct from that of intelligibility, specifically in conveying an element of adequacy between the reasons given and the actual considerations on which the decision was based. Yet on noting this, it is not clear how such adequacy may be tested as a matter of substantive review. That is, while as noted it is certain that transparency is an important value that animates the imperative of reason-giving, it is not evident how it may operate as a distinct criterion for assessing the substantive adequacy of reasons -- at least, viewed from the vantage of the traditional grounds on which decisions have been invalidated heretofore (e.g., failure to consider a relevant factor, consideration of irrelevancies, lack of evidence of conclusions reached, or failure to ground the decision in a defensible interpretation of the statute). And so we may ask: What would be required in order for a decision to be invalidated on the basis it is not “transparent” to the affected parties, and/or the public at large? Or is transparency less an independent basis of invalidation and more an element in a cumulative evaluation of reasonableness?

Here it is of relevance to explore slightly further the way that the line between review of reasons under the substantive criterion of reasonableness and review of reasons under the procedural criterion of sufficiency or adequacy is one that is increasingly placed under strain (or perhaps, on the romantic account, we may term this a happy collapse) in the modern jurisprudence. In general, substantive review of reasons for their adequacy to the standard of reasonableness?  

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281 Here it is worth noting that while the value of transparency may not be easily positioned as a distinct criterion for assessing reasonableness, in grounding the duty to give reasons rather than no reasons at all, it may be understood as playing a key role in transforming the substantive principles registered in, and substantive outcomes of, administrative decision-making. See M. Taggart, “Proportionality, Deference, Wednesbury” (2008) NZ Law Review 423 at 464 [Taggart]. (“The wide-ranging statutory duty to give reasons on request dates back only a quarter of a century. It is well established that this ‘transparency’ is affecting doctrines such as public interest immunity and driving the making of exceptions to the common law rule against giving reasons.”)
reasonableness is said, per *Dunsmuir*, to involve evaluation of the adequacy of the reasoning and/or outcome in light of the evidence and applicable law. On the other side, review of the adequacy of reasons as an element of procedural fairness is grounded in a more explicitly “functional” concern\(^\text{282}\) with whether the reasons are adequate to the purpose of equipping the individual and/or a reviewing court with sufficient information to understand the bases on which the decision was made, and with this, to determine whether to rest content with or to challenge the decision. It is arguable that the latter purposes are more clearly rooted in the value of transparency than are the former.

A further difference between the two analyses of reasons (as between review of substance and review of procedure) is that adequacy of reasons as a matter of procedural fairness is assessed on a standard of correctness (the standard traditionally deemed to hold sway in matters of procedural fairness),\(^\text{283}\) while of course the former is rooted in and expressive of a standard connoting deference. However, this distinction may be something of a formality in light of the fact that both the expectations against which the (procedural) adequacy of reasons are judged, and – particularly post-*Dunsmuir*, as I suggest near the end of Part IV -- those against which the (substantive) legality of reasons are judged, are to be set by way of a multi-factor “contextual” analysis.\(^\text{284}\) Specifically, inquiry into sufficiency of reasons as an element of procedural review is a context-sensitive analysis that recognizes that reasons may be offered in more or less comprehensive form depending on such factors as the significance of the interests at stake, whether the decision-maker has developed its own formal procedural norms, etc.\(^\text{285}\)


\(^{283}\) Ibid., at paras 22-24, citing and discussing *Dunsmuir*, supra note 1 per Binnie J at para 129.

\(^{284}\) Baker, supra note 11 at paras 21-28, & 44.

\(^{285}\) Baker, Ibid.
What will count as reasons may vary depending on these factors, and in some institutional settings, reasons may apparently be produced with rather minimal effort on the part of decision-makers (or, as in Baker, even persons other than the assigned decision-maker).\footnote{Supra note 11 at paras 5 & 44. However, in Suresh (supra note 108), a case that engaged the procedural protections guaranteed under s.7 of the Charter, the threshold expectation of the duty to give reasons required that those reasons “articulate and rationally sustain” the bases of decision and “emanate from the person making the decision rather than take the form of advice or suggestion”. (at para 126).}

In the Ontario Court of Appeal case Gray v. Ontario (Director, Disability Support Program),\footnote{Ibid. at 364. Indeed the statements adopted follow closely the principles stated in a 1979 case (also applying a statutory duty to give reasons, this time under the Alberta Administrative Tribunals Act): Northwestern Utilities Ltd. and al. v. Edmonton, [1979] 1 S.C.R. 684 at 687-688.} a case in which the duty to give reasons had been asserted by way of a regulation under the governing statute, the Court adopted statements of the Federal Court of Appeal (also elaborating upon a statutory duty to give reasons) which state the criteria for sufficiency or adequacy of reasons in the following comprehensive fashion:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.\footnote{Supra note 282.}

While this statement is admirable in its clarity, it may be noted that the final requirement stated (that the decision maker set out his/her reasoning process in a manner that reflects “consideration of the main relevant factors”) suggests an analysis that overlaps in significant respect with the traditional concerns of substantive review.

In Clifford v. Ontario Municipal Employees Retirement System,\footnote{Ibid. at 364. Indeed the statements adopted follow closely the principles stated in a 1979 case (also applying a statutory duty to give reasons, this time under the Alberta Administrative Tribunals Act): Northwestern Utilities Ltd. and al. v. Edmonton, [1979] 1 S.C.R. 684 at 687-688.} the Ontario Court of Appeal again elaborated upon the requisites of sufficient reasons as a matter of procedural fairness review, now in a manner that specifically sets out to distinguish this
evaluation from the work of substantive review. In this its comments integrate into the
administrative law jurisprudence recent statements on the requisites of reasoning in
criminal law cases, as stated by the Supreme Court of Canada in \textit{R. v. R.E.M.}\textsuperscript{290} Thus in

\textit{Clifford} Justice Goudge, writing for the Court of Appeal, states:

In the context of administrative law, reasons must be sufficient to fulfil the
purposes required of them, particularly to let the individual whose rights,
privileges or interests are affected know why the decision was made and to
permit effective judicial review. . . [T]his is accomplished if the reasons, read
in context, show why the tribunal decided as it did. The basis of the decision
must be explained and this explanation must be logically linked to the decision
made.\textsuperscript{291}

Here there is a demand (as a matter of procedural fairness) for a “logical link”
between the reasons and the outcome: a requirement that the majority in \textit{Dunsmuir} is
rather coy about in comparison from the vantage of review for reasonableness. Yet
Goudge J.A. adds that review for sufficiency of reasons “does not require that the tribunal
refer to every piece of evidence or set out every finding or conclusion in the process of
arriving at the decision.”\textsuperscript{292} That is, “the ‘path’ taken by the tribunal to reach its decision
must be clear from the reasons read in the context of the proceeding, but it is not
necessary that the tribunal describe every landmark along the way.”\textsuperscript{293} At the same time,
the further point is made, again in comments that draw upon the Supreme Court judgment
in the criminal case \textit{R.E.M.}, that attentiveness to the particular circumstances of the case
is required in order to identify what must be adverted to in order to “show that the
tribunal grappled with the substance of the matter”:

\textsuperscript{290} 2008 SCC 51, [2008] 3 S.C.R. 3 \textit{[R.E.M.]}, esp. paras. 15 to 35.
\textsuperscript{291} \textit{Clifford}, supra note 282 at para. 29
\textsuperscript{292} \textit{Ibid.}
\textsuperscript{293} \textit{Ibid.}
The assessment of whether reasons are sufficient to meet the legal obligation must pay careful attention to the circumstances of the particular case. That is, read in the context of the record and the live issues in the proceeding, the fundamental question is whether the reasons show that the tribunal grappled with the substance of the matter.\(^{294}\)

From this statement it appears that if sufficiency of reasons is indeed to be understood in light of the value of transparency, the transparency in issue is in turn best understood as going not merely to exposure of the bases on which the tribunal actually did decide, but also, to the sort of mental furniture (the content or substance of reasons) required to minimally count as reasons in law.

The Ontario Court of Appeal in *Clifford* further seeks to distinguish the criteria on which reasons are evaluated under the terms of procedural versus substantive review in a manner that relies upon the value of “intelligibility,” positioned as specifically relevant to the adequacy of reasons as a matter of procedural fairness. Thus inquiry into sufficiency of reasons is said to require assessment of the reasons “from a functional perspective to see if the basis for the decision is intelligible.”\(^{295}\) This is contrasted with inquiry into substantive legality, which requires assessment of “whether the outcome and the reasoning supporting it are reasonable or correct,” depending on the applicable standard of review.\(^{296}\) Here intelligibility is positioned in terms of the ability of the affected individual, and potentially, a reviewing court, to discern the reasons for decision. In contrast, the concern for substantive legality is characterized as reaching beyond mere intelligibility to further (implicit?) criteria of reasonableness.

*Intelligibility*

\(^{296}\) *Ibid.* at para 32.
Moving then more directly to “intelligibility”, one may ask: in what sense does this criterion, employed in Dunsmuir to describe a dimension of substantive reasonableness, convey a distinct requirement from that of transparency – or for that matter, justification? And in what sense is it relevant to substantive review?

On the one hand, as indicated in the above-cited passage from Clifford, intelligibility may be understood to denote a minimal baseline of reason-giving, or adherence to certain formal constructs identified with the process of legal reasoning. In this, it is conceivable that we may isolate the expectation of intelligibility from more fully-stated expectations of substantive legality: from “good” legal reasoning, judged, for instance, in light of the adequacy of the interpretive and/or normative premises on which such reasoning is based (e.g., premises going to the purposes, or the relative importance of the various purposes, of a given statutory scheme). That is, at least on a minimalist construction of the term, inquiry into intelligibility does not reach such typical considerations on review (for reasonableness) as whether the decision-maker has failed to take account of a relevant factor, or otherwise grounded the decision in a rationally defensible, as opposed to merely communicable, interpretation of the evidence and the law. But then how, if at all, is inquiry into adequacy to the criterion of intelligibility as a matter of substantive review different from inquiry into what is examined above under the criterion of “sufficiency” of reasoning as a matter of procedural fairness?

The minimalist conception of intelligibility as a criterion of substantive review may be fruitfully compared (to draw upon a subject that briefly takes on relevance in my concluding chapter) with a criterion for assessment of individuals’ capacity to make decisions about medical treatment promulgated in an intervention in the literature on that
subject in 1981. Benjamin Freedman, in his paper “Competence, Marginal and Otherwise”, 297 proposed that this form of decisional capacity (which goes to the root of the individual’s autonomy-based legal status) be adjudged on a standard of “recognizable”, rather than “rational” or “reasonable”, reasons. Freedman’s argument was advanced in terms that echo the jurisprudence of the same era promulgating the patent unreasonableness standard as a mechanism for preserving a zone of administrative autonomy from judicial incursion. That is, he argued that adopting a minimal standard of ‘recognizable’ reasons may stem the possibility that assessors298 may invalidate others’ treatment decisions on the basis of differences in personal values: i.e., matters going not to decisional adequacy or basic competency, but rather to contestable judgments about the proper ends or aims of the individual’s life (properly left to the individual’s own discretion). This minimal standard of “recognizability” has some resonance with common law administrative law review of reasons, which may be said, not only on the process side of the process/substance divide but also in the concern with intelligibility as a criterion of substantive legality, to attempt to isolate a purely formal quality expressive of minimal decisional adequacy from the normative dimensions of reason-giving.

Yet, arguably, in both the assessment of individual decisional capacity and in the review of tribunal reasonableness, it is impossible to strictly delimit the merely formal from the normative dimensions of reason-giving. Or at least it is the case that, in order to be adequate even to a minimal threshold of recognizable (or intelligible) reasons, those reasons must proceed from recognizable (or intelligible) premises, i.e., not premises –

298 The assessors implicated in Freedman’s analysis are properly regarded as exercising delegated powers to assign treatment decision-making incapacity status.
including normative premises -- that others would regard as “patently false.”

This tracks the line of analysis in the case law reaching to CUPE, wherein administrative decisions may be invalidated because of a lack of a rational grounding in statutory purposes, i.e., because based in a construction of the statutory purposes so deeply in conflict with a perspective deemed to represent minimal legal adequacy as to be the administrative equivalent of a delusion or “patently false belief”.

In any case there is more to the expectation of legality (and so to the criterion of intelligibility viewed as a property of the expectation of legality), than a minimal expectation of “recognizable” reasons conveys. Or rather, what is recognizably legal about legal reasons, what makes them intelligible as legal reasons and not, say, reasons for action in the minimal sense of reasons inhering in subjective preference or desire, includes an element of normativity or adequacy to certain normative expectations. This is something I wish to unpack further with reference to the criterion of intelligibility, before turning to the final criterion of reasonableness stated in Dunsmuir which may be said to more squarely take up considerations of the normative adequacy of reasoning: justification.

Intelligibility fit for law

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299 This point is brought out in the literature on treatment decision-making capacity by Louis Charland, in a paper that seeks to build on Freedman’s “recognizable reasons” standard: “Is Mr. Spock Mentally Competent? Competence to Consent and Emotion,” (1998) 5:1 Philosophy, Psychiatry, & Psychology 67.

300 To say that mere preference or desire may serve as a reason, or reason for action, is to employ the category of “reasons” in a way that is merely explanatory, rather than justificatory. This distinction is put to use in the s.1 judgment of the Supreme Court of Canada in Vriend v. Alberta, [1998] 1 S.C.R. 493. Specifically, the Court (Major J. dissenting on the remedy only) indicated that the Alberta government’s explanations of their failure to include sexual orientation among the prohibited grounds of discrimination in provincial human rights legislation did not even establish a “pressing and substantial objective.” That is, the government’s arguments, (e.g., that social attitudes towards gays and lesbians were unlikely to change even if the impugned human rights legislation were to include the argued-for protection) were structured more in the way of explanations than justifications rooted in principled commitments or aimed at advancing the common good (at paras 113-114). The s.1 judgment in Vriend also drew upon the observation that justification of rights-infringements cannot rely upon discriminatory or stereotypical premises (at para 116).
On the view expressed so far, intelligibility represents a minimal criterion of reasonableness, not as such approaching the full span of the requisites of legality recognized in the existing jurisprudence on substantive review. But what is bracketed or set aside in the attempt to distinguish the (merely intelligible) form from the (justificatory) content of reasoning is precisely the normativity of reasoning or specifically of reason-giving in law: the value-laden content of legal reasoning, including the value judgments informing the weight assigned one or another factors put into play by law-interpretation and/or -application and those informing selection of the factors deemed relevant. In this, it may be that the work being asked of intelligibility, and also transparency, on inserting these values among the criteria of substantive reasonableness, is to direct judges to exercise restraint, in the traditional understanding of restraining substantive review to review of legality and not the merits: to keep normative evaluation at bay and concentrate on the rough workmanship, as it were, of administrative reasoning. And yet if this is the case, how is the commitment to “justification” to be integrated with the other two values or criteria of reasonableness stated in Dunsmuir?

Before turning to that final criterion linked with reasonableness review in Dunsmuir, we might consider how the concern for intelligibility might be bridged with the concern for justification – specifically, by developing the aforementioned argument that the intelligibility (or for that matter the transparency) of legal reasoning as legal reasoning may imply elements that are absent from intelligibility simpliciter. That is, we may inquire into whether or how intelligibility dovetails with justification by asking what it is that makes legal reasoning intelligible as legal reasoning, and not merely as a matter of sketching a discernible reasoning path.
There are precedents for this line of inquiry: arguments advancing the thesis that intelligibility is a far more potent component of legality than the minimalist conception of intelligibility (or of legality) would acknowledge. Below I briefly consider how David Dyzenhaus and Diana Young have, in different ways, attributed a significance to intelligibility in law that transcends the point that laws, and/or legal reasoning, must be minimally comprehensible or “legible” in order to guide the conduct of the legal subject.

Dyzenhaus’s argument comes in the course of an account of legality, or the rule of law, that seeks to counter the positivist idea that such publicity as may be said to be inherent to law as law encompasses only the task of transmitting content capable of guiding conduct. Drawing on Lon Fuller’s purposive-interactive model of law or legal ordering, Dyzenhaus argues that legality, and with it the rule of law, denotes a commitment to “ensur[ing] that a relationship of reciprocity exists between ruler and ruled that works in the interests of the latter.” This conception of law or the rule of law stands in opposition to a positivist conception centring upon validity, as established by reference to a rule of recognition or set of such rules whereby officials may identify the authoritative sources of law. On the Fullerian view, the positivist conception of law as a rule rooted in an authoritative source degrades law to the status of mere command or managerial directive: a “one-way projection of authority originating with government and


303 Ibid. And see Evan Fox-Decent’s account of state-subject reciprocity (as animated by the moral logic of fiduciary relationship, rather than the premises of social contract theory), in “Is the Rule of Law Really Indifferent to Human Rights?” (2008) 27 Law and Philosophy 533 at 539-550. Fox-Decent’s account is of particular interest for its effort to ground the inherent features of legality promulgated by Fuller in a form of fiduciary legal relationship whereby government is obliged to act in a manner consistent with that status.
imposing itself on the citizen”.\(^{304}\) Dyzenhaus (with Fuller) argues that this model does not accord with the social and normative significance of law as an institution of public ordering and moreover public justification. On the one hand, the model lacks sensitivity to the discretionary element that always, to greater or lesser degree, informs the exercise of legal judgment. On the other hand, and more pressingly, it lacks sensitivity to law’s normativity. By this is meant the status of law (or of legitimate law, as conceived by legal subjects) as a source of norms carrying justificatory potential – and inherently susceptible to challenge based in inadequacy to legal-justificatory standards.

Against the background of the positivist model, Dyzenhaus argues that the intelligibility of law “as” law

has to do not with mere understanding, but with communication by legal authority to legal subject in a way that makes sense to the subject of her subjection to the law; that is, her subjection is necessary to establish the relationship of reciprocity that serves the interests of the subject.\(^{305}\)

Dyzenhaus adds: “A law that tells one that one can be deprived of liberty without justification, or that one is not equal before the law because of one’s race, is not intelligible on this understanding of intelligibility, because one’s subjection to the law is so manifestly against one’s interests.” In such instances, law devolves to mere command, or to transmission (or attempted transmission) of the will of the powerful.

The question I wish to raise by way of adverting to Dyzenhaus’s argument is: what if any bearing does this heightened conception of intelligibility -- devised as a way of elucidating the inherent properties of legality -- have for working out the significance of \textit{Dunsmuir}’s newly unified standard of reasonableness? Arguably, in drawing attention to the deep connection between intelligibility and normative adequacy in describing the

\(^{304}\) \textit{The Morality of Law}, supra note 301 at 207.

\(^{305}\) “The Legitimacy of the Rule of Law” \textit{supra} note 269 at 46.
inherent features of legality, Dyzenhaus suggests the impossibility of ever fully severing legal substance from legal process, and with this, legality from merits. In this the wider claim is that the purposes animating legal ordering, including administrative state ordering under law, are rooted in the imperative of enacting state-subject reciprocity – which imperative has necessary and correlative participatory and justificatory elements. From this vantage the question is: how may we ensure that the expectations of administrative reasonableness are expressive of legality so conceived? At the same time, how may we ensure that the vital function of administrative decision-makers in securing state-subject reciprocity is supported, or enhanced – rather than undermined or distorted – through the institutional structures of judicial review?

Diana Young comes at intelligibility from a slightly different vantage – but one which arguably coheres with that of Dyzenhaus in important ways. Young engages with this concept in the course of an argument about the state’s obligation to seek out the reasons, or perspectives, of those whose significant interests are imperiled by prospective state action. Here Young’s point extends in a slightly different direction than Dyzenhaus’s arguments that law’s intelligibility necessarily carries a component of taking account of the subject’s interests. That is, Young seeks specifically to confront what she argues are the inherent limitations of the conception of individual autonomy, positioned exclusively as rational agency, which characterizes liberal legal models of the rights-bearing subject. In this, Young argues that the identification of autonomy with rational agency, and moreover the subsequent prioritization of autonomy as the core value informing our laws and legal institutions, tends to obscure elements of individual experience -- including structural conditioning of attitudes and behavior -- that may have

deep significance to an individual’s opportunities for choice and/or action. Recognition of such structural features of individual choice and behavior, Young argues, stands in tension with the tendency to assign blame (e.g., in criminal law) based in “rigid application of universal rules.”

In proposing an alternative model of the subject with which to orient legal reasoning, Young draws on Jennifer Nedelsky’s conception of “embodied autonomy” – “a model of autonomy that is developed through relationships with others and through ‘creative interaction with the environment’,” and with this, the thesis of Sarah Hoagland that “intelligibility [is] a form of judgment” distinct from the assignment of praise and blame. Against this background, Young makes a case for increased attentiveness to the criterion of intelligibility in legal judgment, to be achieved by way of increased attentiveness or sensitivity, on the part of adjudicators, to the individuals who are subject to legal judgment:

[w]hen people’s circumstances or experiences vary a great deal from our own, we may be too quick to see their responses as irrational or immoral. On the other hand, an open communication might help to show how these responses were rational or even morally correct in the circumstances. Intelligibility results from this process of inquiry into context and understanding the reasons for people’s choices.

On both Dyzenhaus’s and Young’s accounts, then, it may be argued that intelligibility (both the intelligibility of law to the subject, and the intelligibility of the subject to the law) constitutes an essential component of justification. That is to say that even though it may and indeed has been suggested that both transparency and

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307 Ibid. at 85.
309 Young, supra note 306 at 85.
intelligibility are criteria imported as it were from procedural review, so infusing substantive review on a deferential standard (or at least that component that examines the reasoning process) with a decidedly procedural cast, there is an alternative reading of these criteria of reasonableness. The alternative reading seeks to draw out the substantive or specifically the normative dimensions of these process-infused criteria. That reading is arguably consistent with the broad project of reconciling the commitment to deference and the commitment to reasonableness – through the insight that ultimately, both deference and reasonableness are grounded in the value of reciprocity: that is, the enacting of state-subject relationships expressive of concern and respect for the condition and views of those who are subject to law. In positive terms, I suggest that this reading of transparency and intelligibility through the lens of reciprocity calls into question the isolation of contemplation of legality from contemplation of law’s normativity, and so impels us to interrogate the longstanding legality/merits distinction -- and all that follows by way of prohibition upon inquiry into the value/policy judgments implicit in administrative decisions. That is, attentiveness to the normative dimensions of legality impels us to question whether it is or should be possible to restrict the review of reasons (and so the expectations embedded within administrative reasonableness) to the surface features of the reasoning process, or the formal dimensions of reason-giving only.

IV. Justification and/as proportionality

Turning more squarely to the final – most-freighted – criterion of reasonableness articulated in Dunsmuir, we may ask in particular whether “justification” stands at the ready as a kind of portal for infusing administrative oversight, and with this,
administrative decision-making, with more explicitly normative models of reason-giving or reasonableness. As Michael Taggart has quipped, the common law – and here we may note in particular, *Dunsmuir* with its pronouncements on the criteria of reasonableness – “does not come with an owner’s manual.”310 But perhaps there are some further tools that may be located within the jurisprudence (and also the commentary upon the jurisprudence) by way of providing clearer guidance to judges and administrative decision-makers on how their decisions should be structured in order to achieve the objectives of this area of law – or more broadly, to satisfy the criteria of legality embedded in the commitment to public justification. For instance – to take up a line of argument which has become increasingly popular in the last decade or so, in and beyond Canada -- perhaps the tool of “proportionality” analysis may go some distance toward structuring the judgments of administrative decision-makers and judges on review beyond the successive generations of descriptors of deference and/or reasonableness recounted in Chapter 1.

Here we may note that the term “justification” employed as the third and final descriptor of reasonableness in *Dunsmuir* may be said to import into the law on reasonableness review an accretion of Canadian jurisprudence specifically structuring the justification of government action through a form of proportionality analysis. That is, the term has a certain resonance with the established justification analysis (rooted in the 1986 judgment of Dickson J. in *R. v. Oakes*311) under s.1 of the *Charter*.312 In the section that follows, I remind the reader of that analysis, and moreover its unique integration of concerns going to reasonableness and concerns going to deference (or to granting

310 Taggart, supra note 281 at 440.
311 [1986] 1 S.C.R. 103 [*Oakes*].
312 Supra note 76.
government a “margin of appreciation” in the means taken to achieve important public purposes), before moving on to consider whether or how proportionality analysis might be integrated into the common law on substantive review.

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Section one of the Canadian Charter of Rights and Freedoms: surfacing the deep structure of public justification

We may note, first, that inquiry into whether government action is or is not “justified in a free and democratic society” under the terms of s.1 of the Charter is formally triggered only where a Charter rights claimant has succeeded in establishing that a protected right has been breached. That is, it is only at this point that s.1 comes into play (and therefore in many a Charter judgment, s.1 does not come into or out to play at all). The text of the section reads as follows:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This important passage of constitutional text situated at the entry to Canada’s entrenched bill of rights313 may be understood to signal the deep normative structure of the document as a whole – indeed, one might hazard, of the constitutional order as a whole: this, in its providing for circumscription of the Charter’s guaranteed rights and

313 Indeed s.1 sits at the entry to the Canadian Charter historically as well as textually, having served as one of the important “dealmakers” between the federal government and the mostly Charter-resistant provincial governments in the heated negotiations preceding patriation of Canada’s constitution in 1982 (the deal ultimately being struck, of course, with all provinces except Quebec). The other historical dealmaker was section thirty-three (the “notwithstanding clause”), which allows Parliament or the provincial legislatures to statutorily override certain Charter-protected rights. While section thirty-three was most heatedly insisted upon by the provinces, or those provinces most nervous about what they discerned as the inevitable transfer of power (from the legislature and executive to the judiciary) effected by an entrenched bill of rights, that section has ultimately proven to be far less significant, politically or legally, than the other key federal-provincial “bargaining chip”, section one.

freedoms by “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. That is to say that section one frames the Charter within a structure of justification whereby government infringement of Charter-protected rights may nonetheless be established to be consistent with the fundamental commitments of the political and legal order that recognizes those rights. Section one (and with it, the Charter more broadly) is as such expressive of a dual commitment to rights and democracy, and moreover, to coordination of the diverse range of fundamental values that inevitably come into conflict in the course of political and legal ordering.

The mode through which such coordination is enacted, according to the interpretive jurisprudence on section one beginning with Oakes,R is rooted in the analytical tool of “proportionality”. Indeed, the logic of proportionality may be understood to be inscribed within the tensions, and unexpected intersections, animating the text of section one: in and among its touchstones of reasonableness (“reasonable limits”), public justification (“as may be demonstrably justified”) autonomy, and democracy (“in a free and democratic society”). In addition, again viewed simply from the vantage of a preliminary textual analysis, s.1 may be understood to register both a threshold element of formal legality (“prescribed by law”) and a more substantive normative interior (“reasonable limits . . . demonstrably justified in a free and democratic society”). Indeed, as I note below, the jurisprudence on the threshold question of whether the impugned limit upon a Charter right is or is not “prescribed by law” has tended to be

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314 Justice Dickson stated the point as follows (in Oakes, supra note 311 at para 64): “The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.”

315 As I explain infra, there is controversy within the jurisprudence and commentary on the interpretation and application of this arm of the s.1 analysis where challenges to administrative decision-making (or specifically administrative discretion) are in issue.
susceptible to a certain formalism – particularly where review of administrative (or specifically discretionary) action is in issue.

To turn more carefully to the case law, then, the section one analysis elaborated in *Oakes*\(^{316}\) (and built upon in subsequent jurisprudence) runs as follows. As noted, following a claimant’s establishing that his/her *Charter* right is infringed, government is given the opportunity – and, if it takes that opportunity, is placed under an onus\(^{317}\) -- to establish that the limitation upon the right imposed by the actions it wishes to defend is “demonstrably justified in a free and democratic society”. Or rather, again as noted, in fact the s.1 analysis properly begins with a threshold inquiry into whether the impugned decision or action meets the criterion expressed in the phrase “prescribed by law.” Susan Gratton\(^{318}\) and Robert Leckey\(^{319}\) have each undertaken careful exegeses of the intense controversy and uncertainty in the case law and commentary on this threshold question under s.1 -- or specifically its application in cases involving administrative discretion. That controversy initially arose out of a lack of fit between early interpretations of the phrase “prescribed by law” -- as requiring, in order to enter further into the justificatory enterprise (and so to avoid immediate passage to the remedies stage) that the impugned

\(^{316}\) *Supra* note 311.

\(^{317}\) *Oakes*, *ibid.*, at para 66: “The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.”

\(^{318}\) Susan L. Gratton, “Standing at the Divide: The Relationship Between Administrative Law and the *Charter* Post-*Multani* (2008) 53 McGill L.J. 477 [“Standing at the Divide”]: “Twenty-six years after the introduction of the Charter, the jurisprudence on the meaning of the prescribed by law condition remains undeveloped and confused. There is no clear consensus on how the courts should apply the condition in the case of a limitation on Charter rights caused by the exercise of administrative discretion. The prevailing approach is that a discretionary decision is prescribed by law for the purpose of section 1 when the decision is statutorily authorized. However, a minority view – that discretionary decisions are, by definition, never prescribed by law – persists.” (at 488-489). Also see pp.506-07 for a cogent description of the dissention among academic commentators on the point of how to resolve cases involving uncertainty as to the proper target of *Charter* scrutiny, as between legislation, a discretionary decision taken under legislation, and/or administrative instruments without the status of subordinate legislation (soft law).

law set an “intelligible” standard -- and cases wherein the Charter challenge was directed in whole or in part at an exercise of administrative discretion. 320

Here it should be noted that the majority decision in Multani v. Commission scolaire Marguerite-Bourgeoys321 draws upon the case law rooted in Slaight Communications v Davidson322 to confirm that discretionary decisions do qualify for s.1 justification as long as 1) the source of the impugned limitation is not properly constructed as inhering in the legislation323 and 2) the exercise of discretion falls within the scope of the statutory mandate.324 But despite this and other judgments on point, there is continuing dissention (reflected in and beyond Multani) on whether or how discretion is a fit object of s.1 justification.325 In great part, the locus of contemporary dispute goes to the difficulty of rendering more determinate the source of an alleged Charter limitation where there is uncertainty as between the alternatives of legislation, a statutory decision-maker, or soft law.326

While I am concerned herein with the relationship between the Charter analysis under s.1 and the administrative law analysis of substantive reasonableness, I do not

320 Initially, this criterion was elaborated in part with reference to the requirement that the law in question set an “intelligible standard”. See Irwin Toy Ltd. v. A.G. Que., [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577: “Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law". (D.L.R. at 617)

Gratton examines the confusion that has arisen in the case law under s.1 in the attempt to apply the Irwin Toy analysis to cases involving administrative discretion. See “Standing at the Divide”, supra note 318 at 490-491, esp. fn. 50.


322 [1989] 1 S.C.R. 1038 [Slaight Communications].

323 Multani, supra note 321 at paras 21-23.

324 Ibid. at para 22.

325 See for instance the judgment of Deschamps and Abella JJ. in Multani, ibid., at paras 112-125.

326 See “Standing at the Divide”, supra note 318 at 502-507.
undertake to explore further let alone resolve the controversy specific to the “prescribed by law” criterion. Further on in this chapter, I take issue with the broader point of doctrine advanced in the majority judgment in *Multani*: namely, that cases wherein administrative decision-making has central bearing upon a *Charter*-protected right are to be decided by way of a direct *Charter* challenge (and so will attract a proportionality analysis per s.1), while cases without such central bearing are to be decided according to the principles of common law substantive review (i.e., are to be situated on the administrative law side of the *Charter*/administrative law divide). With Geneviève Cartier and David Mullan, as well as Justice LeBel in his concurring judgment in *Multani*, I ask whether the majority’s analysis imposes an overly rigid distinction between the normative domain of the *Charter* challenge and the more formalist preserve ascribed to substantive review under the principles of common law administrative law. Yet this critique is not necessarily at odds with (indeed, I would suggest it is entirely consistent with) the majority’s narrower conclusion that administrative discretion should not be categorically excluded from s.1 *Charter* justification.

Typically, the work of s.1 justification is focused at the subsequent two stages beyond the “prescribed by law” inquiry. The first of these requires government’s

327 In this I take issue with Gratton’s approach to the wider question of how best to coordinate administrative and constitutional law, which turns upon her assessment of the distinct objectives and modes of justification proper to each. That assessment is more inclined to a separate-spheres account of these domains of law/public justification than I seek to advance in this Chapter. See “Standing at the Divide”, *ibid.*, at 511:

The purposive relationship between the concerns of the Charter and administrative law is implicit throughout the majority decision [in *Multani*]. Charter review is intended to identify rights violations, aside from the form of government activity responsible. Administrative law review is intended to determine whether statutory delegates are acting within the scope of their authority, aside from the impact of this action on Charter rights.

I question the consistency of this account with the observation, expressed *e.g.* by L’Heureux-Dubé in *Baker*, that review of administrative discretion (and with this, review of such discretion as shades into the work of law-interpretation and application) is concerned with the adequacy of the exercise of discretion to “the values underlying the grant of discretion” -- including (and exceeding) those consolidated in the *Charter*. See *Baker*, *supra* note 11 at paras 53, 65, & 68.
establishing that the impugned measures were designed to achieve a “pressing and substantial objective” – the focus here being the importance of the stated objective from the vantage of a “free and democratic society”. Following this, the “proportionality” stage of the analysis stated in *Oakes* is triggered.\(^{328}\) This stage encompasses attentiveness to 1) whether there is a rational connection between the means adopted and end pursued, 2) whether the means are minimally impairing of the claimant’s right (a consideration that, as I note below, has been established in the post-*Oakes* case law as requiring a contextual analysis, aimed at determining whether a “margin of appreciation” should be extended to government), and 3) whether, in view of the preceding analysis, the ends sought outweigh the harm to the right in pursuing them.\(^{329}\) The third stage of the analysis has been elaborated since *Oakes* as requiring attention to the actual salutary effects of the government action under scrutiny in comparison to the actual deleterious effects upon the claimant or claimant group.\(^{330}\)

I will come back to section one’s proportionality analysis, specifically raising the significance of such an analysis for common law review of administrative decisions, further on herein. But first I wish to close in upon an element or sub-element of the analysis articulated in the jurisprudence under s.1, going specifically to the tensions

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\(^{328}\) While I summarize the test in the main body of my text, Justice Dickson’s statement of it in *Oakes* (at para 70) is admirable in its precision, and so I cite it in full here:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

\(^{329}\) *Oakes*, supra note 311 at paras 62-71.

between or more generally the internal relationship of justification and deference within that jurisprudence – and more broadly within the project of constitutional ordering. This is a theme that we will see opens onto some direct comparisons with developments in the contemporary law on substantive review: again developments grounded in Dunsmuir – though now most firmly in Justice Binnie’s concurring judgment therein. In this, I suggest the potential for further efforts at mutual interrogation between the modeling of deference and also reasonableness in the law under s.1 of the Charter and through the emerging common law principles of review for reasonableness.

ii. **Section one of the Charter and deference: setting the “margin of appreciation”**

Throughout its jurisprudence on s.1, and particularly that dealing with the minimal impairment stage, the Supreme Court has emphasized that the s.1 analysis must be conducted in a way that is sensitive to the context of the dispute,\(^{331}\) including indicia going to the limits of the courts’ institutional competence. Thus while Justice Dickson in Oakes expressed the view that the s.1 analysis would necessarily import a “stringent standard” of justification, that commitment has arguably been softened, or one may argue, complicated, in the subsequent jurisprudence.\(^{332}\) The softening or complicating of

\(^{331}\) See the passage cited from Oakes, supra, at note 328; also see Thomson Newspapers, ibid at para. 87: “context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right”.

\(^{332}\) In “The Increasing Irrelevance of Section 1 of the Charter,” (2001) 14 S.C.L.R. (2d) 175, Christopher Bredt and Adam Dodek argued that the commitment to a “stringent standard of justification” expressed in the judgment of Dickson J. in Oakes (Oakes, supra note 311 at 138-39, para 65) was subsequently eroded by a set of developments. These included “the development of internal balancing tests” within the analysis of specific rights -- as such staving off the requirement of a s.1 justification and the shifting of onus accompanying this -- and with this, the rise of “context or right-specific adjudication” within s.1. The latter point rests on the recognition within s.1 jurisprudence that “a particular right or freedom may have a different value depending on the context” (Bredt and Dodek at 184). Such recognition is expressed in part
the inquiry into justification or proportionality under s.1 has been effected in particular through the introduction of contextual analysis aimed at informing the court’s assessment of whether to grant a “margin of appreciation”\textsuperscript{333} to government – or what that margin should be -- in determining what counts as a justified (and in particular, minimally impairing) limit upon a Charter-protected right. This jurisprudence includes statements linking the requirement of deference to the need to refrain from being overly fastidious in second-guessing government policies -- for instance where those policies are based in evidence subject to scientific or social-scientific controversy, and/or involve allocation of scarce resources across competing interests.\textsuperscript{334}

Depending on the context,\textsuperscript{335} then, the case law under s.1 suggests that there may

\textsuperscript{333} For instance, see Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381 at paras 83-84:

[L]he Oakes test recognizes that in certain types of decisions there may be no obviously correct or obviously wrong solution, but a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives, and . . . the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make. Thus, for example, in Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, La Forest J. stated for the Court, at para. 85:

It is also clear that while financial considerations alone may not justify Charter infringements . . . governments must be afforded wide latitude to determine the proper distribution of resources in society . . . This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups . . .

It is therefore recognized that in such cases governments have a large “margin of appreciation” within which to make choices. It seems evident that the scope of that “margin” will be influenced, amongst other things, by the scale of the financial challenge confronting a government and the size of the expenditure required to avoid a Charter infringement in relation to that financial challenge.

\textsuperscript{334} See McKinney, supra note 256 at 285 (per La Forest J.):

“In assessing proportionality and particularly the issue whether there has been a minimal impairment to a constitutionally guaranteed right, it must be remembered that we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values. In the case of broadly based social measures like these, where government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is to be struck. . . The approach taken to these cases has been marked by considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters.”

\textsuperscript{335} As I discuss below, the majority judgment in Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016 [Dunmore v. Ontario] reprises the contextual factors that Thomson Newspapers (supra note 330) stated to be of importance to a s.1 analysis as including: “whether the legislature has (1) sought a balance between the interests of competing groups, (2) defended a vulnerable group with a subjective apprehension
be a range of reasonable or justifiable alternatives open to government in order to achieve its pressing and substantial purpose – and, depending on the circumstances, it may not be appropriate for judges on review to demand the “least impairing” alternative. However, the Supreme Court has also been careful to state that attentiveness to the factual complexity or uncertainty, or for that matter the polycentricity of a matter put to government for decision, must not translate to judicial abdication of the duty to protect the rule of law or the duty of putting government to the test of justifying an infringement of protected rights. Here comments from the decision of McLachlin J. in *RJR-Macdonald Inc. v. Canada (Attorney General)*\(^\text{336}\) are apt, and indeed may be seen to resonate with the principles, explicit and arguably also implicit, in the common law on reasonableness review of administrative decisions:

As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.\(^\text{337}\)

Here comments from the majority decision on the s.1 issue in *M v. H*,\(^\text{338}\) also going to the limits to or the proper place of deference at the stage of government

\(^{336}\) [1995] 3 S.C.R. 199 [*RJR-MacDonald*].


justification of infringement of Charter rights, are also apt for informing inquiry into the place of deference within proportionality analysis – again, a matter I suggest to be of potential relevance to the potential for informing the common law on substantive review with elements drawn from the jurisprudence under s.1. In the passage in question, Justice Iacobucci, writing for the majority, indicates that a context-sensitive calibration of deference is integral to – not separate from - the assessment of justification:

This Court has often stressed the importance of deference to the policy choices of the legislature in the context of determining whether the legislature has discharged its burden of proof under s. 1 of the Charter . . . However, it is important to note that deference is not a kind of threshold inquiry under s. 1. As a general matter, the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make. The simple or general claim that the infringement of a right is justified under s. 1 is not such a decision. As Cory J. stated in Vriend, supra, at para. 54: “The notion of judicial deference to legislative choices should not . . . be used to completely immunize certain kinds of legislative decisions from Charter scrutiny.”

This statement parallels the insistence within the law on substantive review, as it has developed over the past few decades and (as I suggest in the section that follows) particularly since Dunsmuir, that deference is not the same as abdication of the judiciary’s supervisory role. In this, as is the case under the s.1 jurisprudence, the range of alternatives (or “margin of appreciation”) to be deemed consistent with legality is not determinatively set at the threshold of inquiry – i.e., by the simple determination of deference / no-deference – but rather through specific engagement with the legal and factual context of the dispute, including (in the administrative law context) with the reasons (if any) of the decision-maker.

It is worth examining a further passage from M v. H, wherein the proper scope and limits of deference as contemplated within the s.1 analysis – and moreover, the

339 Ibid. at para 78.
importance of the onus on government at this stage – are adverted to:

Under s. 1, the burden is on the legislature to prove that the infringement of a right is justified. In attempting to discharge this burden, the legislature will have to provide the court with evidence and arguments to support its general claim of justification. Sometimes this will involve demonstrating why the legislature had to make certain policy choices and why it considered these choices to be reasonable in the circumstances. These policy choices may be of the type that the legislature is in a better position than the court to make, as in the case of difficult policy judgments regarding the claims of competing groups or the evaluation of complex and conflicting social science research: *Irwin Toy, supra*, at p. 993, *per* Dickson C.J. and Lamer and Wilson JJ. Courts must be cautious not to overstep the bounds of their institutional competence in reviewing such decisions. The question of deference, therefore, is intimately tied up with the nature of the particular claim or evidence at issue and not in the general application of the s. 1 test; it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis.\(^{340}\)

This statement indicates that, while deference under s.1 is in part based on an assessment of relative institutional competency, it is not limited to such considerations, but rather requires careful calibration according to the nature and context of the specific claim. Ultimately, evidence that the decision in question requires “difficult policy judgments” is relevant to, but not determinative of, the range of reasonable or justifiable options deemed to be available to government at the minimal impairment stage.

This again is a statement that has relevance, or potential relevance, to the inquiry into reasonableness under the remaining deferential standard of review after *Dunsmuir*. Or this is particularly so, given the increasing recognition in the case law that calibration of the reasonableness standard, or as such identification of the range of reasonable alternatives consistent with reasonableness, is both necessary and not exclusively determined by the (newly streamlined) factors going to calibration of deference / non-deference.\(^{341}\) Among the questions arising for the emerging jurisprudence are: what

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\(^{340}\) Ibid. at para 79.

\(^{341}\) I discuss this aspect of the emerging law on reasonableness review below.
elements of “context” are or should be relevant to setting identifying the range of reasonable alternatives consistent with reasonableness or with legality in the circumstances? To what extent, if any, should the nature of the decision maker (e.g., a Minister of the Crown) or the nature of the decision (e.g., decisions of law, fact, discretion) inform this analysis? And what role, if any, does the administrative decision-maker (and/or the party challenging the decision) have in identifying the range of reasonable alternatives – given that this work occurs following selection of a deferential standard? Finally, might these considerations going to deference and/or identifying the ambit of legality be integrated within a wider inquiry into proportionality akin to that which I have suggested marks out the overarching justificatory structure of s.1 of the Charter?

I conclude this part with reference to a judgment that reflects upon the requisites of justification under s.1 in terms that may prove fruitful as we turn more directly to the possibilities for informing reasonableness review with a proportionality-based model of justification. The case Dunmore v. Ontario\footnote{Supra note 335.} offers a useful s.1 counterpoint to Justice Dickson’s 1979 judgment in CUPE\footnote{Supra note 9.} and for that matter the majority judgment in Dunsmuir, given that Dunmore, too, concerned the legal relationship between government and a set or sector of employees concerned with employment-based rights. Yet in Dunmore, the employees in question were not unionized or even non-unionized public employees, but rather agricultural workers, ousted as a class from collective bargaining legislation. The claimants challenged this exclusion as contrary to s.2(d) of the Charter (freedom of association). In the result, the Supreme Court of Canada held

\footnote{Supra note 335.}{Supra note 335.}
\footnote{Supra note 9.}{Supra note 9.}
\footnote{Supra note 1.}{Supra note 1.}
that Ontario’s Labour Relations Act, 1995345 (and legislation related thereto) infringed s.2(d) in denying agricultural workers the opportunity to unionize. The majority further held that this legislative exclusion was not saved by s.1.

As is the case with the other s.1 decisions I have drawn upon herein, Dunmore did not concern review of administrative decision-making, and so is by no means illustrative of the unique pressures that may be put on review of administrative decision-making through integration of s.1-style inquiry into proportionality. Yet if we take the legislature to be engaged in a form of discretionary state action (circumscribed, as are administrative decisions, by the Charter), we may proceed nonetheless to seek some lessons from Dunmore. In particular, the majority’s s.1 analysis is worth a look for the way that it dealt with Ontario’s arguments that it should be accorded a wide margin of appreciation, or significant deference, because of the highly political or polycentric nature of its legislative decision:

The Attorney General claims, rightly in my view, that to exclude a given occupation from the LRA “involves a weighing of complex values and policy considerations that are often difficult to balance” and that this balancing “will in large part depend upon the particular perspective, priorities, views, and assumptions of the policy makers, as well as the political and economic theory to which they subscribe”. Similar statements have been made about labour relations generally, which have been described as “an extremely sensitive subject” premised on “a political and economic compromise between organized labour -- a very powerful socio-economic force -- on the one hand, and the employers of labour -- an equally powerful socio-economic force -- on the other” (Alberta Reference, [1 S.C.R. 313], per McIntyre J., at p. 414). Policy choices are based on value judgments. This Court will only interfere with such choices where a more fundamental value is at stake and where it is apparent that a free and democratic society cannot permit the policy to interfere with the right in the circumstances of the case.346

The statement that “policy choices are based on value choices” is one that, in the

345 S.O. 1995, c. 1, Sched. A, s.3(b).
346 Dunmore v. Ontario, supra note 335 at para 57. (emphasis added)
universe of common law substantive review, has traditionally grounded an ethic of deference (as non-interference), and with this, the distinction between review of legality and (common law prohibited) review of the merits. Yet in this constitutional case, the limit to deference is identified in a way that specifically indicates that courts may not disengage from the work of normative judgment on review, even as they demonstrate respect for the normative / policy judgments of the other branches. That is, courts must intervene or “interfere with” policy choices of government “where a more fundamental value is at stake.”

Of course, the Charter doubter (a close cousin of the substantive review skeptic) will observe that it is, after all, the judges who have the last word on what counts as a “more fundamental” value. And that is the very sort of substitution of subjective (and common law steeped, individualist) judicial opinion for (welfarist) administrative law opinion that the critics argue necessitates the administrative law prohibition on merits review. Yet in response it may be noted that there are certain structural constraints upon judicial intervention, beyond the imperative stated above of intervening only to protect a more fundamental value. In the constitutional (as in the statutory) setting, such constraints arise in part from the constitutional text. But text alone does not suffice in order for the judge to identify a “more fundamental value” in accordance with the proportionality assessment under s.1 – i.e., more is required than mere identification of a right enjoying explicit protection. Rather, the analysis requires judging the value to be attributed to that right in the circumstances or context of the specific dispute -- and then weighing it against the competing values. And this is an exercise of judgment that must be “demonstrably justified” as according with the values of the political order.
That said, there remains in (and beyond) the law on s.1 continuing tensions between the court’s authority to revisit government’s policy choices and recognition of the limits of its institutional competence. This becomes clearer further on in the same passage from Dunmore. In this passage, the court asserts its supervisory role, even in respect to what it terms policy choices:

The basis for the policy choice must be questioned strictly. It is not the motive of the legislature that is at issue, but the foundation for its policy. What is justified is that which is based on a general public purpose, is practically necessary and has a rational basis that can be supported after a normative evaluation of the area of intervention.347

Yet the Dunmore majority supplements this description of the court’s role in entering into a normative evaluation of the competing values, including those underlying a policy-intensive or polycentric decision, with an exploration of the factors relevant to setting the “margin of deference” to government. In the context of this case, the “margin” in issue is concluded to be narrow, despite the clear polycentric status of the decision:

Given the delicate balance between interests that is required here, as well as the added complexity of protecting the character of the family farm, one might be tempted to conclude that a wide margin of deference is owed to the enacting legislature when applying the minimum impairment test (see Thomson Newspapers, supra, at paras. 111-15). However, as outlined in Thomson Newspapers, political complexity is not the deciding factor in establishing a margin of deference under s. 1. Rather, the margin will vary according to whether legislature has (1) sought a balance between the interests of competing groups, (2) defended a vulnerable group with a subjective apprehension of harm, (3) chosen a remedy whose effectiveness cannot be measured scientifically, and (4) suppressed an activity whose social or moral value is relatively low.348

On applying those factors to the case in Dunmore, the majority concludes that “a strict

347 Ibid.
348 Ibid.
application of the minimum impairment test” is in order.\textsuperscript{349}

Here it is clear that the fact that a matter is polycentric or involves government in the work of regulation across competing interests does not in itself ground “a wide margin of deference” under the s.1 jurisprudence. The further factors for informing this assessment as stated in \textit{Dunmore} include whether government has sought to take account of (and “balance” – here suggesting an imperative of proportionality assessment in government’s policy-formation efforts) the competing interests at stake in the case. Moreover the factors going to the calibration of deference include the constitutional adjudicator’s taking account of the (“social or moral”) value to be assigned to the activity or interests that stand to be limited by government action, as well as competing interests (\textit{e.g.} inquiring into whether government seeks to protect a vulnerable group from perceived harm). Finally, deference and/or the margin of appreciation is further said to be calibrated in light of the quality of the available evidence as to the likely salutary versus deleterious effects of the impugned government action. Again, all these considerations are said to inform the range of reasonable options (or minimally-impairing options) recognized as such under the s.1 analysis.

We may compare this multi-staged model of justification under s.1 of the \textit{Charter} to what is arguably a much simpler form of proportionality analysis at the origins of the modern jurisprudence on substantive review: that deployed by Dickson J. in \textit{CUPE}.\textsuperscript{350} In Chapter 1, I described Justice Dickson’s application of a patent unreasonableness standard in reviewing the disputed decision in that case. I further suggested that the rationale for deference informing Justice Dickson’s judgment in \textit{CUPE} rested in part in

\textsuperscript{349} \textit{Ibid.}
\textsuperscript{350} \textit{Supra} note 9.
the existence of a formal legislative signal aimed at limiting judicial intervention (the
privative clause). But the more persuasive or compellingly-stated rationale for deference
identified in Justice Dickson’s judgment rested in a pragmatic acknowledgement of the
relative expertise or competency of the administrative decision-maker (New Brunswick’s
Public Service Labour Relations Board) in interpreting the terms of its home statute.

That said, Dickson J.’s identification of the Board’s relative institutional
competence in *CUPE* may be understood to have been a background observation,
supported or bolstered in determinative fashion by the Board’s demonstration of its
expertise in the context of the case. That expertise was specifically demonstrated in the
Board’s purposive interpretation (specifically adverted to by Dickson J.)\(^{351}\) of the public
service labour relations statute in issue in the case. Indeed, in its interpretation, the Board
may be understood to have engaged in a form of proportionality analysis: this, as an
expression of its inquiry into the legislature’s intention. That intention, on the Board’s
reading, was closely bound up with the work of balancing the competing interests and
values at stake in this field of administration. That is to say that in the Board’s reasons,

\(^{351}\) *CUPE, supra* note 9 at pp. 231-232, 242. At pp. 231-32 Dickson draws on the Board’s reasons in a
fashion that brings out the very construction of statutory purposes that he later surfaces by way of
independent verification of the rationality of the Board’s decision. In a key passage, Dickson J. notes that,
in rejecting the argument of the employer that the proper construction of the disputed statutory phrase was
consistent with management’s replacing striking workers, the Board had indicated
that when the Legislature saw fit to grant the right to strike to public employees, it intended
through the enactment of s. 102(3) to restrict the possibility of picket—line violence by
prohibiting strikebreaking, on the one hand, and picketing, on the other. This apparent intention,
the Board held, would be frustrated if the words "with any other employee" were to be interpreted
as modifying "replace" as well as "fill their position", "for in that case there would be nothing to
stop the Employer from replacing the strikers with anyone not coming within the definition of
"employee" in the *Public Service Labour Relations Act* ... . The result of such an interpretation
would be that the strikers would have been deprived of their right to picket, but the employer
would not have been deprived of the right to employ strike—breakers."
Moreover, this passage adverts to the Board’s explicit recognition of the practical consequences of
decision: the harm that would come to the employer’s position by adopting the purposive construction the
Board deemed most consistent with the statutory purposes:

The Board recognized the reach of their decision: "In coming to this conclusion we have been
mindful of the fact that the result of our decision will force the Employer to close down some of
the operations which are now being carried on and that this may have far reaching effects." (ibid.)
unlike the arguments of the employer or those advanced by the Court of Appeal, there is a specific effort to advert to the historic compromise or “quid pro quo” inscribed within this legislative regime. In this the Board (and ultimately, also Justice Dickson) identifies as the overarching statutory purpose that of achieving a publicly defensible balance between the interests (or competing values represented by the interests) of the public employer -- the Liquor Corporation -- on the one hand, and the unionized public employees on the other.

That sketching of the purposes of the legislation, and so of the broad factors to be taken into account in this interpretive exercise, did not in the administrative law setting of the CUPE decision end in a s.1-style conclusion as to whether the values of a free and democratic society were best advanced by favouring the interest of the public employer (i.e., maintaining relatively uninterrupted operations during a lawful strike), or that of the public sector union (i.e, ensuring some level of labour disruption in order to equalize relations in a collective bargaining context depriving workers of the right to picket). However, the Board explicitly grounded its conclusion on the contested matter of statutory interpretation in a judgment about the “balancing” of values proper to this statutory setting. Indeed the normative cast of the Board’s justificatory efforts may be regarded as having enabled the court (as exemplified in the judgment of Dickson J.) to recognize its decision as indeed “rationally grounded in the legislation”, despite its counter-intuitiveness from the vantage of “private sector experience”. Again it is worth emphasizing that while Dickson J. ultimately enters into what appears an independent construction of the statutory purposes, this construction may be understood

352 Ibid. at 240.
353 Ibid. at 242.
to retrace the steps – and as such, to illuminate the normative grounds of -- the tribunal’s reasoning.

In this way, the Board’s characterization of the competing interests and values in the background to the legislative regime and the particular dispute in *CUPE*, in such a way as to surface the normative judgment at the root of its decision, may be understood to have functioned to illuminate the reasonableness of its decision for the reviewing court. While Dickson J. does exercise critical oversight (and so does not relinquish his supervisory responsibility) – specifically, taking care to reflect upon the “historic compromise” invoked by the Board and whether the associated purposive analysis of the disputed provisions was sustainable -- that oversight takes the form of an open and respectful process of reflection upon the premises that the Board had advanced. Whether the court would have arrived at a similar line of reasoning independent of the tribunal’s decision is an open question.

The point, then, is that one can see in *CUPE*, both in the precedent reasoning of the Board and in the “watershed” judgment of Justice Dickson for the Court, a form of normative analysis – here framed as an analysis of legislative intent – aimed at identifying the values and competing interests at stake in the substantive dispute, and so at answering the question: how may the work of statutory construction required in this case best contribute to achieving the “historic trade-off” sought by the legislative enactment? Arguably, the way that this question is asked and answered in the interaction of the Board and court constitutes just the sort of dialogue, rooted in a concern to identify and publicly justify the implications of government action in light of the values or value-

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354 The language aptly describes the statutory purposes in issue in *CUPE*, although I take the phrase from *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890 at para 25, where it is used to describe the quid pro quo effected through worker’s compensation laws.
laden objectives animating the legal order, that informs the jurisprudence under s.1 of the

Charter.

Near the end of this chapter, I take up the way that reasonableness review is conducted at the application stage of the majority decision in Dunsmuir\(^{355}\) – as noted, another dispute arising in the public sector employment context (though now the non-unionized public sector employment context). There, I will suggest that the concern for proportionality, or for bringing to the surface the normative judgments implicit in the dispute that was evident in CUPE, is not in evidence in Dunsmuir. Rather, the Dunsmuir approach to reasonableness review, as modeled in the reviewing practice of the Dunsmuir majority, takes the form of a decidedly positivistic inquiry into the statutory scheme – or rather an inquiry with the sheen of positivism (conveying the impression that there is a single determinate interpretation of the contested statutory text), even as it is rooted in an exclusive focus on one side (the common law of employment side) of the “historic trade-off” discernible in the statutory scheme in issue in the case. That approach did not end well for Mr. Dunsmuir -- and it does not bode well for the future of reasonableness review.

But before turning to that moment of the Dunsmuir decision, and the question of where the jurisprudence on reasonableness review may be headed, I wish to mine a little deeper into the conceptual apparatus of Dunsmuir’s revised reasonableness standard, in order to illuminate certain positive prospects within it for reconciling deference and reasonableness -- and so for reconciling judges and administrative decision-makers under a common commitment to the rule of law. For the object of this chapter, indeed of this thesis, remains that of exploring the prospects for a happy ending to the romance of

\(^{355}\) Supra note 1.
reasonableness discernable in the modern law on substantive review.

Fittingly, those prospects begin with a rainbow.

iii. Justice Binnie’s rainbow\textsuperscript{356}: the internal relationship of justification and deference, or, making sense of reasonableness

In this section I wish to frame what remains of my inquiry into the tensions between and potential reconciliation of deference and legality in the law on reasonableness review with a few remarks about a development rooted in the Dunsmuir case that my earlier discussion, rooted as it was in the judgment of the majority, did not take up. I suggest that by attending specifically to the characterization of Dunsmuir’s revised standard of reasonableness in the concurring opinion of Justice Binnie in that case, we may attain further insights into the possibilities in store for reasonableness review – including the possible relevance of proportionality analysis of the sort briefly surveyed in connection with s.1. The central thrust of Justice Binnie’s reflections – which has subsequently been taken up and endorsed by a majority of the Court\textsuperscript{357} -- is that review of administrative decision-making on a unitary reasonableness standard will require a context-sensitive calibration of the expectations placed upon the reasoning process and/or outcome of the decision, viewed from the vantage of substantive legality.

\textsuperscript{356} The “rainbow” formulation was specifically adopted as a description of the reasonableness standard of review in the concurring judgment in Dunsmuir penned by Deschamps J (ibid. at para 167). But it is a fitting symbol for Justice Binnie’s more sustained efforts at elaborating upon the nature of the newly-consolidated standard. Justice Deschamps writes (ibid.): “The problem with the definitions [of the reasonableness standard] resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word “deference” to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word “reasonableness” concerns the decision.”

\textsuperscript{357} In Khosa, supra note 37 at para 59.
These developments in the law on substantive review may be said to echo, even as they promise to add new depth and complexity to, the case law under s.1 of the *Charter*, in particular those analyses aimed at setting a “margin of appreciation” at the minimal impairment stage of the s.1 justificatory enterprise.\(^{358}\)

Justice Binnie’s comments on the possibilities and complexities inhering in *Dunsmuir*’s unified standard of reasonableness are advanced in the general spirit of retraining the attention of judges and lawyers from the (now streamlined, or ostensibly so) standard of review analysis to the more direct work of appraising the substantive legality of the decision at hand. His comments centre, however, upon the potential bottomlessness of the enterprise of seeking to elucidate the justificatory structure of reasonableness review – suggesting that, in its context-spangled complexity, reasonableness must perhaps elude precise or exhaustive theoretical or doctrinal encapsulation. This is not just a theoretical but also a practical concern. That is, Binnie J. suggests that the strenuous efforts once directed at calibrating the standard of review are, with the forging of a unified standard of deference, now poised to shift to the work of giving content to the expectations of reasonableness appropriate to the decision at hand. And while this redistribution of the labour of substantive review is perhaps welcome analytically, it is at the same time a worry, as it threatens to open new sinkholes for speculation contrary to the interests of those seeking administrative justice and the interests of administrative agencies in just and efficient administration. These ideas are launched with the expansive statement:

“Reasonableness” is a big tent that will have to accommodate a lot of variables that inform and limit a court’s review of the outcome of administrative decision

\(^{358}\) See Part III.ii, infra.
This is followed by an effort to lend further specificity to the variables for informing and limiting reasonableness review:

... a single “reasonableness” standard will now necessarily incorporate both the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness simpliciter, and an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the “reasonableness” standard.

On this view, reasonableness review is at once expressive of deference (contentiously phrased in terms of the “degree of deference” – but in any case, assumedly a matter going to relative institutional competence, calibrated prior to engagement with the specific decision under review), and at the same time, a decision-specific concern to identify “the range of options” consistent with legality. The latter concern requires direct engagement with “the circumstances” of the decision, viewed “in light of the reasons for the decision.”

Justice Binnie adds to this the statement that reasonableness “must be calibrated to fit the circumstances,” illustrating this with the comment that a “driving speed that is ‘reasonable’ when motoring along a four-lane interprovincial highway is not ‘reasonable’ when driving along an inner city street.” In developing this idea, Binnie J. invokes the observation of Rand J. in Roncarelli that “[T]here is always a perspective . . . within which a statute is intended [by the legislature] to operate.” He then brings this statement into contact with the project of calibrating reasonableness review, first in a

359 Dunsmuir, supra note 1 at para 144 (per Binnie J.).
360 Ibid. at para 149.
361 Ibid. at para 150.
362 Supra note 267 at 140.
manner that asserts a necessary (or “obvious”) connection between the “perspective” (of legality, here positioned as a matter of legislative intent) to which Rand J. refers and the traditional factors orienting the identification of the standard of review. Binnie J. writes:

How is that “perspective” to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs.363

The passage suggests that at least one function of consulting the traditional four factors is to expose the scope of discretion properly attributed to the decision-maker. In this, the work of calibrating reasonableness or adjusting the expectations of legality appears at least in part to turn upon the distinction between decisions that are policy-intensive (i.e., decisions requiring a balancing of multiple competing interests) and adjudication-intensive (i.e. determining individual entitlements by considering evidence in light of a legal test). Notably, however, one factor that is not included (it was generally absent from the “pragmatic and functional” analysis, although it could be imported by way of consulting statutory purposes)364 is the significance of the interests (or values) at stake. Is this also relevant to calibrating the substantive expectations placed upon administrative decisions? The passage continues:

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

363 *Dunsmuir*, supra note 1 at para 151 (per Binnie J.).
advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many “contextual” considerations as the court considers relevant and material.\textsuperscript{365} It is difficult to see how this language may be rendered consistent with the traditional prohibition (called into question in \textit{Baker} and then reaffirmed in \textit{Suresh})\textsuperscript{366} whereby courts on review are to refrain from reweighing the factors relevant to an exercise of discretion. Moreover it is not clear just how the work of “calibrating” deference in light of relative institutional competencies will affect or be integrated with the assessment of proportionality – though here we may recall the mutual operation of such considerations in the jurisprudence under s.1, particularly at the minimal impairment stage.

Binnie J. concludes his observations with a cautionary statement about the need to ensure that the substantive imperatives of reasonableness (\textit{e.g.}, as we have seen, a concern for proportionality in at least “some” (which?) cases wherein the decision affects individual rights and interests) do not cancel out the institutional imperative of deference:

That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the “reasonableness” of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single “reasonableness” standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.\textsuperscript{367}

In sum, Justice Binnie’s observations on the changes afoot with the shift to a unitary standard of reasonableness review reflect the tensions inherent in that shift, which draws together an ethic of non-interference and an ethic of justification. Just how the

\textsuperscript{365} \textit{Dunsmuir}, \textit{supra} note 1 at para 151.
\textsuperscript{366} See Chapter 1, \textit{supra} at pp. 75-77. See esp. \textit{Suresh}, \textit{supra} note 108 at paras 34-38. Indeed as I note in the final section of this Chapter, Justice Binnie’s majority judgment in \textit{Khosa} (\textit{supra} note 37) turns in part on the principle that a reviewing court must not (or should not in the circumstances of that case?) “reweigh the evidence” (at para 61) – or as he then indicates, must not reweigh interpenetrating matters of fact and “immigration policy” (at para 64).
\textsuperscript{367} \textit{Ibid.} at para 155.
complex array of contextual factors that Justice Binnie claims must now inform the calibration of reasonableness will be identified and manipulated in the developing jurisprudence remains an open question. However, lest one fear that these remarks on the “big tent” of reasonableness represent but a roadside attraction in that developing jurisprudence, it should be noted that the principle that a contextual analysis should inform identification of the “range of reasonable alternatives” available to the decision maker has been confirmed by a majority of the Supreme Court. Thus in Khosa (wherein Justice Binnie writes for the majority), the majority contemplates a set of rationales for attributing to the decision-maker a broad discretion -- in effect a wide margin of appreciation -- in resolving the dispute before it, prefacing this with the statement: “Reasonableness is a single standard that takes its colour from the context.”

As yet, then, the reasonableness “rainbow” is rather sketchy. In a paper published in 2007, Flood and Sossin may be understood to have anticipated these developments, observing that the factors that should inform the calibration of deference in judicial review of administrative decision-making should include and exceed those stated under the traditional four headings of the pragmatic and functional approach. In particular, they argued that the calibration of deference (like the calibration of procedural fairness guarantees per Baker) should reflect contemplation of the significance of any individual interests directly affected by the decision. In this, they suggest reframing the traditional question orienting courts to the project of substantive review as follows:

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368 Khosa, supra note 37 at para 59.  
369 “The Contextual Turn”, supra note 364.  
370 Ibid. at 601-602.  
371 Flood and Sossin discuss Baker’s 5-factor analysis for calibrating procedural fairness at pp. 599-601; the factors are cited at ftn. 53 (and see Baker, supra note 11 at paras 21-28).
[I]nstead of ‘Why defer?’ [we suggest] asking, ‘Should a court interfere with this decision?’ The starting place, then, should be a justification on the part of the appellate court as to why it should or should not interfere, not why an administrative tribunal is worthy of deference. The goal of the analysis should be not the classification of tribunals but the elaboration of the general relationship between the tribunal and the court in the context of the particular case at bar.\textsuperscript{372}

It appears that this is an idea whose time has come. Yet its time has come not by way of a description of deference, but rather a description of reasonableness – as the decision-specific responsiveness of a standard of legality which takes its colour or content from the factual and normative context of the decision. As the jurisprudence develops, however, reasonableness review may arguably benefit from a more determinate method of structuring the “colouration” process – and with this, from more careful thought on whether or how the traditional factors relevant to identification of the standard (or to calibrating “the degree of deference,” per Binnie J.) may be rationally integrated with the normative considerations informing analysis on the model of “proportionality”.

So far, we have seen the rough outlines of the s.1 proportionality analysis, including the space reserved within that analysis for contemplation of the “margin of appreciation” to be extended to government (where its actions trench upon fundamental rights) -- even as government is put to the task of demonstrably justifying its actions as consistent with the values of a free and democratic society. Yet it is not clear whether or how that analysis might inform the developing law on reasonableness review. In the following section, I reflect further on the possibilities for integrating the proportionality analysis associated with human rights law into administrative law doctrine on substantive review.

iv. \textit{Proportionality and Reasonableness: Happy together?}

\textsuperscript{372} \textit{Ibid.} at 602-603.
In this part I seek to turn more directly to the question: what does (or what might) the justification analysis exemplified under s.1 of the Charter – an analysis centred upon the model of “proportionality” -- contribute to an understanding of reasonableness, or a unified standard of reasonableness review directed at assessing the substantive legality of administrative decisions?

a) Background developments

Proportionality analysis has in the last couple of decades made marked incursions into the common law on judicial review of substantive administrative decisions in the U.K. and in other common law countries. Indeed, the analysis that is making inroads in other jurisdictions has tended to be conducted in terms that parallel, even where they are not strictly equivalent to, Canada’s Oakes test. In 2005, Guy Régimbald canvassed these developments out of a concern for the lack of structured analysis informing the application of the (then-extant) patent unreasonableness standard of review. Régimbald ascertained that three types of administrative decision had been subjected to


374 Here it is worth noting that in fashioning the analysis in Oakes, Justice Dickson may have drawn in turn upon jurisprudence under the European Court on Human Rights. See Robert J. Sharpe & Kent Roach, Brian Dickson: A Judge’s Journey (Toronto: University of Toronto Press, 2003) at 334.

Dieter Grimm writes (in “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57(2) UTLJ 383 at 384:

The question of whether Chief Justice Dickson, in writing the Oakes opinion, was aided by foreign examples or developed the test completely on his own appears open. . . [In Germany] the proportionality test has been applied since the late 1950s, whenever the Constitutional Court has had to review laws limiting fundamental rights, or administrative and judicial decisions applying such laws. From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe.

Of particular relevance to the present inquiry, Grimm adds:

The [German] proportionality test . . . was first developed by German administrative courts, mainly the Prussian Obervwaltungsgereicht, in the late nineteenth century and applied to police measures that encroached upon an individual’s liberty or property in cases where the law gave discretion to the police or regulated police activities in a rather vague manner. Here the principle of proportionality served as an additional constraint on police action . . .
proportionality analysis on review in English and European Community law. These were: “cases where a fundamental human right is limited, cases involving a penalty, and cases where the decision maker must consider a myriad of issues under a policy laden enabling statute.”

Régimbald suggested that, given that the Charter applies directly to the first sort of case, “[t]he only question that remains as to the appropriateness of a proportionality test in Canadian administrative law is as to its application in the other two types of cases, namely those where the review is of a decision which imposes burdens (penalties and levies), and the review of policy laden discretionary decisions.” Ultimately, in Régimbald’s assessment, introduction of a structured proportionality analysis into the law on application of the patent unreasonableness standard would bring much-needed analytical rigour to that standard in the last two types of cases. Yet he added the deference-inspired caution that, particularly in matters in which “political and economic issues have been considered,” “[t]he proportionality inquiry . . . could be confined to a particular aspect of the decision, or as exemplified in E.U. law, a less intensive review can be utilized in these cases.”

Here it is important to note that the introduction of proportionality analysis into the common law on substantive review of administrative decisions in legal systems such as the U.K., New Zealand and Australia has been undertaken as part of a general infusion of human rights norms into legal systems lacking entrenched bills of rights, and moreover, jurisdictions that have only fairly recently enacted statutory human rights

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375 Regimbalt, supra note 373 at para 80.
376 Ibid. at para 83.
377 Ibid. at para 86, referencing Paul P. Craig, Administrative Law, 5th ed, (London: Sweet & Maxwell, 2003) at 624-625. I do not propose to explore the latter proposition herein, although it is clearly a relevant line of inquiry.
protections comparable to Canada’s statutory human rights (non-discrimination) models. As Michael Taggart observes: “In a legal system without a ‘capital C’ constitution, such as the United Kingdom and New Zealand, rights-based adjudication takes place, by default, mainly through administrative law proceedings. Consequently, administrative law is in the throes of adjusting to that new role.”

In contrast, it may be argued that in Canada, much of the work of adjudicating human rights (at least where these are affected by government action) is or may be conducted by way of direct application of the Charter. As such, the Charter may be regarded as siphoning off pressure to change the common law on substantive review by way of infusion of a proportionality analysis. This gives rise to the question: why would Canada infuse the common law on substantive review with proportionality analysis when the appropriate (or: the most clearly appropriate) cases are already subject to such analysis under the Charter? In brief, the answer is that which is suggested in the reasoning of Justice L’Heureux-Dubé in Mossop, and also Baker – as explored in Chapter 1. It is grounded in the claim that there is no bright-line distinction between the

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378 E.g., the U.K.’s Human Rights Act 1998. Michael Taggart writes: “In the United Kingdom, many hoped the arrival of the HRA in 1998 would herald the displacement of Wednesbury unreasonableness by proportionality at least in cases involving the ECHR [European Convention on Human Rights] rights incorporated into United Kingdom domestic law. The Wednesbury ground was symbolic of judicial restraint – of deference to a high degree – that was thought to be inappropriate to the domestic judicial enforcement of human rights instruments like the ECHR.” Supra note 281 at 436.


380 Once again we may add the possibility of bringing a discrimination complaint under provincial human rights instruments. The relationship between the justificatory models under these instruments and s.1 of the Charter, and the relevance of that relationship to the questions pursued in this section, merits a separate paper.

381 Supra note 26.

382 Supra note 11.
normative or values-based foundations of legality animating judicial review under the
*Charter* and the normative or values-based foundations of legality animating judicial
review in administrative law. Yet this is a claim that is sure to attract the deep skepticism
of contemporary *Charter* doubters and old guard administrative functionalists alike:
skepticism rooted in concerns about democratic legitimacy, institutional capacity -- and
the fate of deference. In what follows, I consider some key arguments going to whether
or how reconciliation of concerns for legality and concerns for deference may be
accomplished through integration of proportionality analysis into the common law
principles of substantive review -- before revisiting the question of why *Charter*-based
proportionality is not enough.

So, let us briefly take up the question to which much of this chapter has been
building, which is: what, if anything, might proportionality analysis (reviewed above in
its s.1 *Charter* expression) contribute to the common law on substantive review, and in
particular, to our understanding of the import of the concern for “justification” as one of
the touchstones of *Dunsmuir*’s unified reasonableness standard?

The question of what proportionality analysis has to offer the common law on
substantive review was taken up in an important U.K. judgment prior to the formal
incorporation of the human rights recognized in the *European Convention on Human
Rights* by way of the U.K. *Human Rights Act*. In his judgment in *C.R. (on the
application of Daly) v. Secretary of State for the Home Department*, Lord Steyn
commented upon the merits of a three-stage proportionality analysis for reviewing
government action affecting individual rights -- or specifically, for determining “whether

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383 See Taggart, *supra* note 281 at 437.
384 [2001] 2 AC 532 (HL) at paras 27, 30. [*Daly*]
a limitation (by an act, rule or decision) is arbitrary or excessive.”\textsuperscript{385} The three-stage inquiry to which Lord Steyn adverted in his judgment (drawn from a judgment of the Privy Council) required determination of whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.\textsuperscript{386}

In citing the terms of this inquiry with approval, Lord Steyn’s statements on the proportionality analysis echo those of Justice Dickson in \textit{Slaight Communications}\textsuperscript{387} some 20 years before -- to the effect that proportionality analysis offers a “more precise and more sophisticated”\textsuperscript{388} model for assessing the legality of government action impinging on protected rights than is offered by extant common law resources for detecting unreasonableness.\textsuperscript{389}

Lord Steyn hedges this observation with the further observation that while “most cases would be decided in the same way” regardless of the approach adopted, “the intensity of review is somewhat greater under the proportionality approach”.\textsuperscript{390} Here “intensity” connotes a simultaneity of meticulousness of analysis and stringency of the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{385}]
\item \textit{Ibid.} at para 27, citing \textit{de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing} [1999] 1 AC 69 per Lord Clyde at p 80.
\item \textit{Ibid.}
\item \textsuperscript{Supra} note 322, per Justice Dickson at 1074: The precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would \textit{Charter} review. While patent unreasonableness is important to maintain for questions untouched by the \textit{Charter}, such as review of determinations of fact . . . in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the \textit{Charter}. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis.
\item \textit{Daly, supra} note 384 at para 27.
\item I leave aside the distinctions to be made between the “standard” of patent unreasonableness contemplated in \textit{Slaight} and the “ground” of \textit{Wednesbury} unreasonableness contemplated in \textit{Daly, ibid.}
\item \textit{Ibid.}
\end{enumerate}
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threshold of legality against which impugned state action is judged. In elaborating upon this claim, Lord Steyn endorses the proportionality model’s structured assessment of the relative weight accorded to competing “interests and considerations” – here suggesting that common law review for unreasonableness (even under a standard of “variegated” Wednesbury unreasonableness, whereby a “more searching reasonableness test” may be applied in cases involving human rights) risks missing the normative dimensions of illegality where human rights are in issue.

Assuming that one agrees that proportionality is a more sophisticated model for assessing the substantive legality of cases involving human rights – precisely because of the model’s sensitivity to the element of weight – how might that model be coordinated with the commitment to deference? More specifically: can, and should, proportionality analysis accommodate attentiveness to the factors traditionally probative of deference in the Canadian law on substantive review (i.e., the four factors going to relative institutional competency regarding the matter on review) – as suggested in the concurring judgment of Binnie J. in Dunsmuir? Should the factors traditionally probative of deference have bearing, say, upon the “margin of appreciation” or range of reasonable options and/or considerations deemed permissible on review – as with the law under s.1 of the Charter? Or does proportionality analysis redirect attention from those traditional factors, instead placing exclusive priority on legality, conceived in terms of the weighing up of competing considerations or values in light of the wider commitments of the legal order as well as the narrower commitments of the administrator’s mandate?

391 See Taggart, supra note 281 at 433.
392 As discussed in the preceding section.
These are among the questions addressed in the work of Trevor Allan. Allan has argued that proportionality analysis accommodates just the sort of attentiveness to context that is required in order to assess the substantive legality of government decision-making -- even as such analysis deflects or redirects judicial attention from the traditional factors going to deference or non-deference, (i.e., the inquiry into relative institutional competencies and/or legislative signals going to those competencies). In this, Allan’s account of the purposes of substantive review places a priority upon protection of individual rights -- such that the factors traditionally informing deference doctrine in Canadian law (nature of the question, relative expertise, privative clause or right of appeal, purposes of the statute and particular provision and the relevance of these to relative expertise) lose the priority that they have enjoyed in the Canadian common law on substantive review. While Allan admits of a residual relevance proper to institutional competency (namely, as constituting the broad background rationale for allowing government the final decision where more than one reasonably justified option is identified by way of proportionality analysis), this consideration is clearly secondary to determination of whether the decision under review is justified, i.e., whether the decision-maker has demonstrated its institutional competency in the case at hand.

Allan’s opinion that “[t]here is little, if anything, that a doctrine of deference can add to the constraints on adjudication built into the ordinary grounds and principles of judicial review” must attract the concerns of those, such as Mullan, who have long

394 Allan (2010), ibid. at 43.
395 Ibid.
noted the tensions between the traditional grounds of review (“asking the wrong question,” etc.) and the commitment to recognition of the pragmatic rationales for deference to administrators on matters given them to decide. But at the same time, Allan elaborates his views in a manner that may be understood to bear a deep connection to the logic of deference as expressed in Dunsmuir’s brief account of reasonableness review (and as expressed in the wider jurisprudence giving rise to the articulation of this standard of review) – and to the jurisprudence under s.1 of the Charter. Allan writes:

What is really needed is a reminder that even a proportionality test need not (and generally should not) amount to the substitution of a judicial view for the public body’s opinion on the merits. In other words, there is usually more than one decision compatible with the complainant’s rights, and it is for the public body rather than the court to choose between them.\(^\text{397}\)

Allan advances this vision of integrating proportionality analysis and deference under the idea of “procedural rectitude”: a standard of legality that he suggests may be coordinated with or subsumed within the conceptual framework supplied by “the ordinary common law grounds of review”.\(^\text{398}\) He elaborates upon this idea in terms that (in accordance with the traditional grounds) centre upon the reasoning, rather than the outcome of decision:

Whatever the decision, it must be the reasoned outcome of an appropriately rigorous procedure in which all relevant considerations are duly attended to and irrelevant ones duly ignored. Relevant considerations must, of course, be given an

\(^{396}\) David Mullan, “A Blast from the Past: A Surreptitious Resurgence of Metropolitan Life?”(1992) 5 Admin. L.R. (2d) 97. Mullan subjects to critique certain grounds of review that the Canadian courts imported (as matters of jurisdictional error) from the House of Lords case Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 at 171 (H.L.). See Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Assn. [1975] 1 S.C.R. 382 at 389, where the stated grounds comprehend “acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or so misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it”. As Mullan points out, Anisminic’s list of grounds was also relied upon in Canada’s equivalent low watermark of deference, Metropolitan Life Insurance Co. v. I.U.O.E., Local 796, [1970] S.C.R. 425

\(^{397}\) Allan (2010), supra note 393 at 43.

\(^{398}\) Ibid. at 45.
appropriate weight: it is not enough to pay lip-service to constraints that have no appreciable effect on the outcome; and when rights are in issue they must be given an effect consonant with their true weight.\textsuperscript{399}

These are of course not simply the traditional grounds, but the traditional grounds \textit{plus} – the added element being adequacy to the “weight” of relevant considerations and moreover the “true weight” of rights. Yet Allan qualifies this statement in two important ways. First, he adds that the reasoning process of an administrative decision-maker need not, in order to meet the standard of “procedural rectitude”, match that expected of a court. This is a point that parallels, on the front of substantive review, that made by L’Heureux-Dubé in \textit{Baker} on the potential for variable means of conforming with the reasons requirement as a matter of procedural fairness.\textsuperscript{400} Allan writes:

Since a public agency has a kind of responsibility to advance the general public interest that a court does not have, it must be allowed some latitude in its choice of mechanisms for seeking to reconcile the various rights and interests affected.\textsuperscript{401}

Second, Allan indicates the importance of the administrative decision-maker’s reasoning to the justificatory work that is essential to law, and in this, to the courts’ exercise of their supervisory role. That is -- in terms reminiscent of arguments that Dyzenhaus has advanced, on the inconsistency of correctness review as conceived in Canadian administrative law with the recognition that administrative reasoning adds value even to the adjudication of fundamental rights\textsuperscript{402} -- Allan argues that the courts on review must necessarily rely upon (are “dependent” upon) the process, in particular the

\textsuperscript{399} \textit{Ibid.} at 45
\textsuperscript{400} \textit{Baker}, supra note 11 at para 44: “Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary . . . when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways.”
\textsuperscript{401} Allan (2010), supra note 393 at 46.
\textsuperscript{402} “David Mullan’s Rule of (Common) Law” in \textit{Inside and Outside}, supra note 33 at 474-75. Also see “Constituting the Rule of Law” supra note 12.
reasoning process, of the front line decision-maker. Yet this is not an abject but a (respectfully) critical dependence. That is, where the decision-maker engages in such reasoning as demonstrates his/her expertise on the matters directly relevant to the legality of the decision, it is more likely that a court will be impressed by or convinced of the reasonableness of its decision. Allan writes:

The quality of the administrative process, insofar as it can be demonstrated, will enhance the court’s confidence that the ultimate outcome (where there is scope for reasonable differences of judgement) falls within the permitted range. For the court is inevitably dependent, in large part, on the inquiries and deliberation undertaken by the authority; and the closer the correspondence between the type of inquiry conducted by the authority and the style of analysis appropriate for courts, the more readily the court can be satisfied that all relevant considerations have been duly taken into account and properly weighed or assessed.\(^{403}\)

In this, Allan agrees with Murray Hunt that

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\text{[T]he degree of respect which is due to a measure should be influenced by the seriousness of the engagement with the proportionality question by the primary decision-maker, and the opportunities which have been afforded to the various interests in the process leading to the decision.}\(^{404}\)
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Thus on the one hand, Allan rejects the approach to deference taken in the Canadian law on substantive review – which continues to begin with the threshold question “Who should (presumptively) decide?”, to be answered in light of such factors as the nature of the decision / decision-maker, relative expertise, etc. Such inquiries may go to

the qualifications or general suitability of the public agency, by comparison with the court or other agencies, but do not directly engage its attempt to reconcile the complainant’s rights and the public interest in all the circumstances of the particular case. . . .\(^{405}\)

\(^{403}\) Allan (2010), \textit{supra} note 393 at 47.


\(^{405}\) Allan (2010), \textit{supra} note 393 at 51.
Instead, on Allan’s view, “The court should bow to superior expertise, for example, only to the extent that such expertise is demonstrated by the provision of evidence or argument that survives challenge and scrutiny.”

Yet at the same time, Allan’s emphasis upon the dependency of the courts on the reasoning (and hearing) processes of administrative bodies – and his assertion that the more intensive the decision-maker’s engagement with the competing interests or values in issue, the more respect that decision will command – asserts what is arguably a retooled conception of deference. This conception turns upon a generalized imperative that courts attend to and moreover respond to (i.e. justify their own decisions in light of) the reasoning of administrative decision-makers, even or especially where those decisions involve fundamental human rights.

This is to read Allan’s account through the lens of Dyzenhaus’s conception of deference as “respect” for rather than “submission to” administrative decisions. The overarching claim is that integration of proportionality analysis into the expectations of substantive legality placed upon administrative decision-makers ultimately affirms the role of those decision-makers -- as partners in the work of giving content to (and so defining the scope and limits of) the law, including the background values informing law-interpretation and –application.

On turning to the Canadian context, we may ask: should the analysis proper to reasonableness review (or more radically, all instances of substantive review) throw off the emphasis on institutional competence, and turn instead to the work of encouraging

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406 Ibid. Allan adds: “Not only will the various factors in play generally point in different directions; they should not in any case permit a dubious decision to prevail when, after thorough scrutiny of the decision-making process, the court thinks that, on balance, the complaint is justified.” (ibid at 52)

407 See the discussion herein at notes 13 & 183, infra. Allan explicitly draws on Dyzenhaus for this idea in his essay (Allan (2010), supra note 393 at 47 n.16).
administrators to demonstrate institutional competence – *e.g.*, by way of proportionality analysis? Would such a move properly be regarded as extending an invitation to administrative decision-makers to join with the courts in the work of public justification? Or would it more properly be regarded as an invitation to the courts to substitute their judgments (their rights-centric manner of resolving disputes) for those of administrative decision-makers?

*b) Justification and/as proportionality: The view from Canada*

The view that proportionality analysis should be integrated into the Canadian common law on substantive (or at least, reasonableness) review has been propounded by a few key commentators: I have already noted Guy Régimbald;408 also of importance are the contributions of Evan Fox-Decent,409 David Mullan,410 and Geneviève Cartier.411 These scholars argue that proportionality analysis is already implicit in the jurisprudence on substantive review, or at least in certain exemplary decisions (e.g., the *Baker* case)412 applying a reasonableness standard. The choice for the jurisprudence, on this view, is a choice between the *status quo*, which leaves unstated and untested the full set of background normative considerations conditioning substantive legality, and the prospect of bringing these considerations to the surface -- so as to render this area of law more adequate to the commitment to public justification that stands as a central feature of

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408 Régimbald, *supra* note 373.
409 Fox-Decent, *supra* note 373.
410 Mullan (2010), *supra* note 373.
412 The essays of Cartier and Fox-Decent (like that of Mullan noted supra at note 100) in the volume in *The Unity of Public Law (ibid.)* take as their shared theme the contributions of Justice L’Heureux-Dubé in *Baker* in illuminating the coherence of administrative and constitutional law.
constitutional ordering.

1. Fox-Decent: the inherent justificatory structure of administration

Evan Fox-Decent has argued that administrative decision-making necessarily imports “a certain structure of justification” which includes and exceeds proportionality analysis.\footnote{Supra note 373 at 149.} The justificatory structure that he identifies is drawn from exemplary legal judgments (including Baker) which he argues operate so as to expose the criteria of legality proper to administration. Fox-Decent advances nine characteristics of the justificatory structure implicit in the commitment to administration under law.\footnote{Ibid. at 157-163.} These may be understood to particularize four broad imperatives: namely, 1) to undertake consultation with the affected individual or group, and to attend to any evidence and argument put forward through such consultative processes;\footnote{This encompasses the fourth and fifth criteria stated by Fox-Decent (ibid. at 159-60): “Fourthly, there must be an effective consultation with the potentially affected individual or group . . .”; “Fifthly. . . the decision-maker must consider seriously the views and arguments of the affected individual”.} 2) to attend to the values put into play by the interests or arguments of those affected (this may demand consultation of a range of sources illuminating the values relevant to legal judgment, including statute law, constitutional law, common law, international law and/or soft law);\footnote{This encompasses the first, as well as the seventh, eighth and ninth criteria: “[T]he first principle . . . [is to undertaking] a careful analysis and characterization of the right or interest at stake” (ibid. at 157); (“Seventhly . . . the decision-maker should show an alert and attentive regard for fundamental values that inform the legal context in which the decision is made” (ibid. at 160); “Eighth . . . the decision-maker must take account of the norms and provisions contained in any relevant international human rights instrument” (ibid. at 161); “Lastly . . . the decision-maker [should take account of soft law, including] relevant policy guidelines, directive and practices, and . . . justify divergences from them.” (ibid. at 163).} 3) to attend to the normative significance of the public purposes that may stand as counterweights to the individual rights or interests at stake in a given case (and moreover, to whether there is a “rational connection” between the impugned decision and
the stated purposes); to inquire into the proportionality or relative importance of the public purposes implicated in the decision over against the harm to competing values, rights or interests.

Fox-Decent argues that on this model, the distinction between legality and merits – including the traditional expression of that distinction through the rule restricting judges from re-weighing the various factors relevant to a decision – is preserved, except where “fundamental values or explicit constitutional rights are in play”. Departure from the traditional rule in such cases is justified by reference to the essential commitment that Fox-Decent (here joining Lon L. Fuller, and David Dyzenhaus) takes to be implicit in legal ordering. This is the commitment to justification of state action in light of the perspectives and interests of legal subjects -- whose purposes the state is established to coordinate and advance. That is to say that Fox-Decent’s criteria of reasonable administration are derived from an understanding of law and so decision-making under law that is purposive rather than positivistic: an understanding of law (and so the criteria of legality) as the interactive enterprise of advancing and coordinating the critical interests (most critically, according to Fox-Decent, the autonomy, or dignity) of legal

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417 This encompasses the second and seventh criteria: “The second principle is that any administrative decision which adversely affects interests critical to a person’s future must be shown to be based on a policy which is compelling and substantial in light of the legislative purpose . . . At a minimum, we would expect there to be a rational connection between the administrative policy and the purpose of the legislation” (ibid. at 158); the seventh criterion, stated in note x above, includes exhibiting “sensitivity to human dignity” by “clearly identifying the public good to be secured at the expense of the value” expressive of dignity (ibid. at 161).

418 This encompasses the third, second, and sixth criteria: “Thirdly, the policy on which the decision is based must satisfy a narrow proportionality requirement which ensures that the cure is not worse than the disease the policy is intended to remedy.” (ibid. at 159); the second criterion includes consideration of rational connection, as noted above; “Sixthly, a reasonable decision should minimally impair the important interest of the individual subject to it.” (ibid. at 160).

419 Ibid. at 149 n.31.

420 Ibid. at 145: “In short, Baker holds out the promise of a conception of the rule of law that is at once democratic, substantive and equitable. Underlying and uniting these three elements is a profound
subjects.

On Fox-Decent’s account, then, a form of proportionality analysis – specifically evaluating the relative importance of the competing considerations implicated in a decision made as a matter of public law -- is required of reasonable administration. Or again, this is at least the case where a decision at public law potentially affects the “critical interests” of the individual: a category that Fox-Decent argues reaches beyond the rights explicitly protected under the Charter to encompass a wider set of individual interests and social values prioritized at common law, in statutes, and in the policies and guidelines articulated by administrators in light of their legal mandates.421

That said, like Allan, Fox-Decent argues that there is some flexibility built into the duty of administration to evince reasonableness according to the criteria he has identified:

Naturally, it is implausible to think that administrators must always produce reasons that are as nicely packaged as I suggest. That is why the full structure of justification is triggered only if important interests are at stake, interests critical to the lives of those affected. And even then, the test is not simply what reasons are in fact produced, but what reasons could be produced in defence of the decision. . . ‘W]hen lesser interests are at stake, the decision must still be justifiable, but the primary decision-maker’s duty to articulate its justification may be less onerous. . .’422

Fox-Decent’s position is broadly comparable to Allan’s, in that its emphasis is not upon checking the “external” indicia of institutional competence but rather upon ensuring that the stringency of justification matches the relative importance of the interests at stake. Like Allan, too, Fox-Decent is concerned to retain a place for the traditional prohibition on merits review (i.e., revisiting the weight accorded to completing

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421 Ibid. at 153 (on the relevance of “soft law” to the internal morality of administration).
422 Ibid. at 161 fn.67
considerations) -- specifically by reserving this supervisory responsibility for matters involving “fundamental values or explicit constitutional rights”. 423 In sum, Fox-Decent’s determinate yet flexible model of administrative reasonableness offers a way of structuring the insight that reasonableness is “a single standard that takes its colour from the context”. 424 The important features of the model extend beyond the imperative of engaging in proportionality analysis where administrative decisions affect “critical interests,” to address the processes whereby those critical interests may be identified -- at the front lines of administration. In this, Fox-Decent’s model is not preoccupied with giving form or content to reasonableness review in light of background indicia of relative institutional competence. Rather, the guidance that his account offers goes to structuring administrative reasoning practices, while offering courts a means of overseeing these practices in a manner that may avoid the traditional extremes of supremacist disregard for administrative reasoning or submissive disregard for the values that may be said to animate administrative law.

2. David Mullan: A Crisis in Substantive Review

Recently, David Mullan has offered some important observations on the potential for proportionality analysis to rescue the Canadian law from a post-Dunsmuir crisis of “reasonableness”. 425 In this he joins with Régimbald and Fox-Decent in calling for integration (or partial integration) of proportionality analysis into the common law on substantive review. Mullan’s immediate concern is the deep uncertainty about the nature or conduct of reasonableness review that he identifies among the fallout from

423 Supra note 419.
424 Khosa, supra note 37 at para 59 (cited herein in the text at n.368).
425 Mullan (2010), supra note 373.
That is, while *Dunsmuir* urges reviewing courts to deem unreasonable those decisions the outcomes of which fail to fall within “the range of acceptable outcomes,” it offers no guidance on “how to discern which outcomes are unacceptable because they are unreasonable.” Such guidance is essential, Mullan argues, if we are to avert a crisis in administrative law, and specifically in the exercise of deferential or purportedly deferential review. In this his main concern is that the courts will fill the unstable or uncertain space of *Dunsmuir*’s revised reasonableness review with old habits of entering into correctness-style review under the cover of deference.

In taking up the *Dunsmuir* majority’s statements on the nature or process of review for reasonableness, Mullan states:

> Mandating articulate and intelligible reasons in itself contributes massively to the project of ensuring reasonable decision-making, by forcing decision-makers to be more reflective and attentive to those whose interests are at stake. Such reasons also provide a basis on which applications for judicial review can be conducted much more effectively and efficiently. Decisions supported by this kind of reasoning process may also legitimately attract a presumption of reasonableness. However, even when qualified by the adjective ‘intelligible’ or described by reference to ‘lines of reasoning’, reasons are part of process. They are not, even in this form, a necessary guarantee of reasonableness, unless reasonableness is defined solely by reference to formal reasons requirements.

Mullan’s point is that review for reasonableness is at risk of devolving into a requirement merely for “bare” reasons, or reasons only minimally recognizable as such. Moreover, the examples that he draws from the case law in order to illustrate his concerns suggest that, when confronted with such a minimalist or merely formalist standard, courts will tend either to abdicate their responsibility to ensure substantive

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426 *Supra* note 1.
427 Mullan (2010), *supra* note 373 at 251-52.
428 Mullan makes this point most directly with reference to the decision of the Supreme Court of Canada in *Montreal (City) v. Montreal Port Authority* 2010 SCC 14, *supra* note 276 at 252-53.
429 Mullan (2010), *supra* note 373 at 251.
430 Cf. the discussion in this Chapter, *infra* at pp. 109-125.
legality or to assert outright supremacy by way of correctness-style review. (I return to this point on attending to a few examples from the post-Dunsmuir case law, below.)

What is required in order to right this instability, Mullan argues, is more reflection on the substantive dimensions of substantive review:

> What makes an outcome reasonable demands a substantive conception of what constitutes reasonableness in particular statutory contexts and by reference to the grounds of review that the applicant or appellant is asserting. Indeed...it also should be recognized that within the now very large tent of reasonableness review, giving content to the concept of unreasonableness and deploying an appropriate intensity of review will often require returning to the four standard of review factors that dictated the outcome of the choice between correctness and reasonableness review in the first place. 431

In this statement, Mullan (tracking in part the reasoning of the concurring opinion of Binnie J. in Dunsmuir)432 proposes that the vacuum that has opened up in the case law in this area may be filled in part with reference to the purposes of administrative ordering in specific statutory settings, the traditional grounds of review, and the traditional factors going to relative institutional competency. Each of these inquiries, he suggests, has the potential to unearth factors of relevance to the form that judicial review of substantive legality should take in the circumstances.

Moreover, Mullan additionally prescribes integration of proportionality analysis into the law on reasonableness review. Here, drawing upon the authors of De Smith’s Judicial Review, 433 he takes note of the doctrinal trends mapped in that text, now extending “beyond conceptions of reasonableness as principally concerned with process, in the narrow sense of reasons that are logical and responsive to the issues raised, to more

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431 Mullan (2010), supra note 373 at 251.
432 Supra note 1 at paras 119-157, discussed in this Chapter, infra at pp. 146-152.
substantive conceptions of the indicia of reasonableness.” Mullan suggests that these developments have “the potential to provide fertile ground for Canadian judges faced with the determination of whether a decision comes within the range of reasonable alternatives, and also avoid the trap of conducting correctness review under the guise of reasonableness.” Most fertile, he suggests, are those “categories of unreasonableness [which] engage conceptions or elements of proportionality,” that is:

[t]hose held invalid because they manifestly failed to balance one or more (relevant) consideration, and those where the decision was held to be unreasonably onerous or oppressive. Under the first of these, the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. Under the second, the courts consider whether there has been a disproportionate interference with the claimant’s rights or interests.

Yet here – implicitly in answer to the deference concerns that arise upon commencing flirtation with proportionality – Mullan offers a few concrete observations intended to clarify the proper scope and limits of proportionality review. In this, he seeks first to trace the proper ambit of proportionality review by reference to the nature of the decision: the conventional classification of administrative decisions into law, fact, mixed law and fact, and discretion. Mullan writes:

In the search for criteria on which to evaluate whether a decision comes within the range of reasonable alternatives, proportionality as a concept does not provide a complete panacea by any stretch. To the extent that in Dunsmuir and commonly in Canadian judicial review applications, the focus of the challenge is a pure question of law or statutory interpretation, the notion of proportionality will not

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434 Mullan (2010), supra note 373 at 254. See the important list of “categories of unreasonableness” that Mullan recounts, ibid. at 253. These include, first, “process unreasonableness”: “decisions that do not meet the standards of justification, transparency, and intelligibility specified in Dunsmuir,” “those where the evidence is inadequate,” and those “based on considerations which have been given manifestly inappropriate weight.” A “second category” includes decisions in conflict with the “underlying principles of the English common law constitution, some of which are now explicitly recognized in the Human Rights Act 1998.” The last category includes “decisions that impose hardships beyond what can be justified under a fair reading of the relevant statute.” (footnotes omitted).

435 Ibid.

436 Ibid. at 254, citing De Smith's, supra note 433 at 585 (footnotes omitted).
be particularly useful in the identification of the range of reasonable alternatives. Similarly . . . [and despite concerns Mullan raises to the refusal to revisit the weight accorded to fact-intensive considerations in the post-Dunsmuir case, Khosa] proportionality would not aid much in reasonableness review of factual findings or even the fact/law application or integration process.\textsuperscript{437}

Thus it seems that “pure” questions of law, as well as questions of fact and mixed law and fact, are not or not typically conducive to inquiry into legality by way of proportionality analysis. Mullan adds:

\begin{quote}
However, where discretionary powers are in issue, review for proportionality is a potentially much more comfortable fit and one that could readily be incorporated into Canadian judicial review theory and practice as a specific example or category of unreasonableness review. It could provide a more concrete basis in that general context for evaluating whether a decision comes within the range of reasonably acceptable alternatives or responses to the triggering of the discretionary power in question.\textsuperscript{438}
\end{quote}

So on this account, proportionality analysis is likely to be integrated into the substantive review of discretionary decisions, which by definition involve deciding in light of competing considerations which cannot be entirely specified or weighed in advance.

Yet one must consider whether conditioning the application of proportionality analysis upon the nature of the question – and in particular limiting it to the category of discretion – risks inviting a re-injection of judicial formalism at a stage prior to that of consulting the values placed in issue by a given instance of law-interpretation or -application. Indeed, as L’Heureux-Dubé affirmed in \textit{Baker}, arguably interpretation of law cannot be surgically separated from considerations of fact and policy, and as such, from weighing competing factors and above all, competing values -- the traditional signature of the discretionary decision.\textsuperscript{439}

That said, Mullan is careful to point out that certain alternative possibilities for

\begin{flushright}
\textsuperscript{437} \textit{Ibid.} at 254.  \\
\textsuperscript{438} \textit{Ibid.} at 254-55.  \\
\textsuperscript{439} \textit{Baker, supra} note 11 at paras 53-54. 
\end{flushright}
delimiting or circumscribing the proper ambit of proportionality analysis may be overly formalistic. In particular, he rejects the proposition – which we may associate with the model advanced by Fox-Decent, discussed above – that proportionality analysis be applied on review only where the decision implicates “constitutional and [or] other fundamental rights”. In this, Mullan sides with Murray Hunt on the point that so limiting proportionality analysis would impose “a very broad and uncertain margin” for distinguishing the cases in which the analysis should and should not apply. Moreover, he affirms Hunt’s further point that “other public law values” may have “a strong claim to evaluation by reference to principles of proportionality”. Here Mullan singles out the values of “consistency, legitimate expectation, and, in general, principles of sound administration.”

Thus, on Mullan’s proposal, it need not be the case that a recognized individual right or otherwise an individual interest recognized at law as of fundamental importance be in issue in order to attract proportionality analysis as a means of review of discretion on a reasonableness standard.

Here we may return to the argument, briefly contemplated above, that in Canada the application of proportionality analysis is defensibly limited to direct challenges to public decision-making under the Charter. Specifically, we may note the reasoning of the majority in the 2006 Supreme Court of Canada decision Multani, which establishes that where the “central issue” in a challenge to an administrative decision is that the

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440 Although this depends upon what is brought in by Fox-Decent under the heading of “fundamental values”. See supra, note 423.
441 Ibid. at 258.
443 Ibid.
444 Ibid.
445 Supra note 321. And see Evan Fox Decent’s discussion of this case (and the complexities of the associated case law) in Chapter 7 of Administrative Law in Context, supra note 4.
decision infringes a Charter-protected right, then judicial review should proceed by way of a Charter challenge (such that the question of whether the decision is justified is judged under s.1). While there may be important elements of disagreement on the details, Mullan’s position may be said to resonate broadly with that of LeBel J. in his concurring judgment in Multani. That judgment centres upon the critical observation that even as the case at hand gave rise to an issue of constitutional law, viewed comprehensively, it “involve[d] diverse legal concepts that, although belonging to fields of law that are in principle separate, are still part of a single legal system the coherence of which must be adequately ensured.”

446 Supra note 321. The majority draws on the reasoning of Lamer J. in Slaight Communications, supra note 322, for the following principle:

where the legislation pursuant to which an administrative body has made a contested decision confers a discretion (in the instant case, the choice of means to keep schools safe) and does not confer, either expressly or by implication, the power to limit the rights and freedoms guaranteed by the Canadian Charter, the decision should, if there is an infringement, be subjected to the test set out in s. 1 of the Canadian Charter to ascertain whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society. If it is not justified, the administrative body has exceeded its authority in making the contested decision. [at para 23].

447 That statement builds upon arguments present in LeBel J.’s concurring judgment in Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44 [Blencoe]. The overall objective of judicial review of administrative action is to “verify whether an administrative act is consistent with the fundamental normative order.” (Multani, supra note 321 per LeBel J. at para 152). Yet LeBel J.’s analysis nonetheless reflects a schism as between a concern for vires (under traditional administrative law principles) and a concern for fundamental values (in adjudicating claims involving Charter rights). Where an administrative decision affects Charter-protected rights the approach recommended by LeBel J. is 1) to determine whether the exercise of authority is consistent with the delegation of power, according to traditional administrative law principles. (In Multani, no such arguments had been raised by the parties). If no illegality is established on that analysis, then 2) the decision should be reviewed “in light of constitutional guarantees and the values they reflect” (ibid.). This last analysis need not proceed under s.1 of the Charter, suggests LeBel J. Here the suggestion is that a more flexible analysis (also potentially more deferential, viewed for instance in terms of the onus) – aimed, for instance, at delimiting the scope of multiple competing rights -- may be in order, particularly where there are multiple competing interests in play versus a bipolar opposition of public authorities and individual rights. See ibid. at paras 144-155.

448 The case involved review of a decision of school authorities to prohibit a student from wearing the Sikh religious symbol, the kirpan, to school on grounds of safety.

449 Multani, supra note 321 at para 141: “The case as it stands before this Court therefore appears to involve an issue of constitutional law. I readily acknowledge that it is better, where problems arise in such circumstances, to begin by attempting to solve them by means of administrative law principles. I do not think that it is always necessary to resort to the Canadian Charter or, in the case of Quebec, the Quebec Charter when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power.”
Mullan’s arguments on the integration of proportionality analysis into common law administrative law review also derive from a concern for the coherence of administrative and Charter norms. Specifically, Mullan puts forward two key rationales for refraining from reserving proportionality analysis for Charter challenges only. The first goes to arbitrariness. On the one hand, this argument rests on the “no bright line” thesis noted above – that is, as Mullan points out, the difference between the rights explicitly entrenched in the Charter and those, for instance, recognized in statutory human rights instruments such as the federal Bill of Rights (including, e.g., property rights), and/or the “unwritten or underlying principles of the Canadian constitution,” is not so significant as to warrant fundamentally different approaches on review. And on the other hand, the argument from arbitrariness draws on the observation that the failure of a case to proceed as a Charter claim rather than an application for judicial review may turn upon contingencies far removed from the substance of the dispute: e.g., failure to give Notice to the appropriate Attorneys-General. In such cases, the stark divide between Charter review (wherein judges and/or other public authorities are charged with weighing the seriousness of the interests at stake against competing interests or values) and administrative review (wherein, whether on an analysis of vires / jurisdiction, or deferential review of discretion, there may be no revisiting of the weight accorded one or another “relevant factor”) is difficult to justify.

Mullan’s second rationale for resisting the restriction of proportionality review to administrative decisions challenged through direct application of the Charter returns us to the concerns expressed by LeBel J. in Multani. In this, Mullan draws upon the work of

450 S.C. 1960, c. 44.
451 Mullan illustrates this point with reference to Mercier v Canada (Correctional Service) 2010 FCA 167.
452 Mullan (2010), supra note 373 at 240-41, 258-59.
Geneviève Cartier on the relationship of constitutional and administrative law, or the normative bases for arguing (and fashioning doctrine in order to best express) the unity of public law. Cartier specifically elaborates the thesis that, without allowance for direct contemplation of the values at stake in challenges to administrative action by way of common law judicial review – and in particular, without allowance for contemplation of the place of fundamental values in the analysis of substantive legality at common law – the common law will be “stunted” or cut off from the sources of its vitality and relevance, even as the Charter will similarly be deprived of a key source of elaboration upon the core values that it guarantees.

In asserting the positive potential for interactivity as between the common law and constitutional law, Cartier draws upon the principle articulated by L’Heureux-Dubé J. in Baker to the effect that the exercise of discretion is necessarily delimited by the values underlying the grant of discretion – including values demarcated by statute law, the constitution (including the Charter), international law and soft law (elaboration of law through agency policies and guidelines), as well as the “fundamental values” of Canadian society. In this, Baker illuminates the internal relationship between constitutional and administrative law. That is, on the one hand, “the Charter stimulates the courts to exercise their role in alerting the legislature and the public to important values in the common law.” And on the other hand, the common law, along with the institutions of the administrative state, contributes to the articulation of the values.

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454 Ibid. at 74.

455 Supra note 11.

456 Cartier (2004), supra note 453 at 72, citing Baker, supra note 11 at para 54.
protected under the *Charter* and the constitution more broadly. Ultimately, then, on Cartier’s account, the work of identifying and exploring the significance of fundamental values is not restricted to the courts. Rather,

all institutions in the state, and the individual as well, have a say in this matter . . . [T]here can be reconciliation between judicial review on the basis of value and judicial deference if one admits that the task of value articulation is shared between institutions and is not the monopoly of courts. So to control discretion on the basis of its compatibility with values would not necessarily reduce deference.  

Yet the question remains how this reconciliation is to be effected, and specifically how deference may be coordinated with attentiveness to the fundamental rights or values implicated in a given administrative decision. So far we have seen that Mullan argues for the application of proportionality analysis to discretionary decisions, not limited to decisions affecting *Charter* rights and indeed extending to decisions involving competing considerations beyond individual rights. The approach to integrating proportionality analysis into the review of discretion that Mullan proposes admits of a certain flexibility, allowing for variable forms of analysis where the values at stake are rooted not (or not directly) in individual rights but in other institutional values proper to administrative law. Specifically, Mullan suggests that if an administrative decision has central bearing upon constitutionally-protected rights, then a full proportionality analysis conforming to Supreme Court jurisprudence under s.1 may be applied. Moreover, “the same sort of structured review” may be undertaken where “the interests at stake are not

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457 Cartier (2004) *supra* note 453 at 80. As Cartier notes, this is a principle that Dyzenhaus has advanced, including in the Introduction to the volume in which Cartier’s essay is located (“Baker: The Unity of Public Law?” in *The Unity of Public Law*, supra note 453 at1, esp. 1-3. And see Dyzenhaus, “Constituting the Rule of Law,” *supra* note 12 at 451:

Legislatures and administrative tribunals have a role in the determination of the values considered fundamental to the Canadian social, political and legal order, as do the parties who challenge the state to show that its exercises of public power are accountable to those underlying values.”

458 Mullan (2010), *supra* note 373 at 261.
constitutionalized”. However, in such cases, the analysis might be applied “in a way that places the onus upon the person asserting the right or interest, as opposed to the State or decision-maker having to justify the apparent violation as in Charter cases”.

Finally, Mullan suggests that a further class of cases may be identified wherein the court is unlikely to “[condone] structured proportionality review,” but wherein a dimension of proportionality may nonetheless inform (in a more “constrained” manner) “the application of particular discrete categories” of illegality – e.g., allowing for inquiry into whether the decision-maker has accorded “manifestly disproportionate weight” to one or another consideration.

3. Proportionality and post-Dunsmuir reasonableness: the future?

And so apparently there is burgeoning support on the part of the administrative law scholars as well as judges, in and beyond Canada, for integration of proportionality analysis into the common law principles on substantive review. Such analysis is held out as offering a more rigorous or more direct vehicle for canvassing the normative dimensions of illegality than is possible under the traditional grounds of review – or in contemporary Canadian law, than is likely under the as-yet uncertain terms of Dunsmuir’s newly-unified reasonableness standard. At the heart of proportionality analysis is the work of normative judgment: assessing the relative weight of competing considerations being intimately bound up with identification and prioritization of competing values. And while this may appear to be in stark conflict with the traditional prohibition on re-weighing not only evidence but all forms of competing considerations properly before administrative decision-makers, one response is that judges already

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459 Ibid.
460 Ibid.
engage in contestable value judgments (re-weighing) on review, even if they do so on the pretext of the decision-maker’s “failure to consider” a relevant factor, etc. To carve out an explicit place (or places, as Mullan suggests) for proportionality analysis in reasonableness review – while inquiring into the implications of deference or relative institutional competence for that analysis, in the manner, say, of the s.1 inquiry into “minimal impairment” -- would mean bringing the values informing the judgments of administrators and judges alike to the surface, where they may be publicly contemplated and challenged.

Still, the question remains how to ensure that the integration of proportionality analysis into the doctrine of reasonableness review does not devolve into a renewed bid for judicial supremacy, and with this, the blunt substitution of individualistic values for public / social welfarist purposes? Allan, Fox-Decent, and Mullan each argue that the expectations placed upon administrative decision-makers by proportionality factors will vary depending on the context (leaving aside the points of likely disagreement about which elements of context should be relevant, and just how expectations should vary). In this the same challenge that has informed the law on substantive review since CUPE remains in place: the challenge put to judges to take seriously, or view respectfully, the decisions and so the reasons of administrative decision-makers – while communicating the expectation that those decisions be legally justified. Ultimately, each of the arguments canvassed on the integration of proportionality into substantive review may be said to affirm the key place of the administrative state in advancing and testing the values of the constitutional order as these are worked out in law or legal judgment.
4. Proportionality and administrative integrity

In closing this section we might briefly consider whether there is a difference in the capacities or functions of administrators and judges that would warrant resistance to the idea that administrators should be cognizant of and in some cases should explicitly integrate proportionality analysis into their judgments – or more broadly, resistance to the idea that there are certain requirements (of reasonableness) implicit in legality, or specifically, in public justification, which set an expectation that administrators are or should be engaged in the same basic project as judges: *i.e.*, that of advancing the fundamental values of the legal order, as opposed to advancing only the more discrete values or purposes of their respective statutory regimes. One base of resistance to recognition of the capacities and duties of administrators to engage in the work of law-interpretation in light of the fundamental values inhering in our legal traditions is expressed by Sullivan:

> Although administrative interpretation may be informed by a distinct perspective or special expertise, it has some potential drawbacks. Most non-judicial interpreters have little training in legal interpretation. Their focus tends to be narrow and coloured by the concerns and possibly by the biases of their own professional culture. They may have particular interests to promote on behalf of their department or agency or they may have strong views respecting the groups or problems regulated by their legislation. This may put them in an adversarial relationship with other interested parties. It may even distort their reading of the legislation.\(^{461}\)

Margaret Allars, too -- in her careful inquiry into the dissonance registered between administrative decision-making and judicial review thereof on the one hand, and Dworkin’s account of law as integrity on the other\(^{462}\) -- writes that “tribunals engaging in broad policy-making” do not evince “any need to seek coherence with existing policy or

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\(^{462}\) “On Deference to Tribunals, With Deference to Dworkin” (1994-95) 20 Queen’s L.J. 163. [Allars]
indeed with principles drawn from a variety of areas in the law." Even among more adjudicative tribunals, she writes,

[a] tribunal member will have a conception of the role of the tribunal as an institution within the social order, of its mandate to pursue certain social goals and more immediate policy objectives, of the procedures its members regard as acceptable, and of the expressed viewpoints of its clientele. In the case of legally trained tribunal members, that conception will be guided by the immediately relevant statutory provisions governing the operation of the tribunal and the benefits or burdens they allocate.

Therefore, suggests Allars – here drawing less on structured empirical investigation than on hypotheses based in an understanding of these institutional roles - “the reasoning process of a tribunal member bears no resemblance to the judicial reasoning process.” She continues: “Policies and organizational and informal norms which structure specialized areas of administrative decision-making are not part of the picture of law [held by judges], except insofar as policies underlying legislative history enter into interpretation of the statute.” Moreover, the “political justifications” of administrative decision makers “will often differ from the tenets of integrity [drawn upon by judges] (fairness, justice and procedural due process) which emphasize individualism rather than collectivism.”

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463 Ibid. at 204.
464 Ibid. at 206.
465 Allars notes the lack of serious engagement with the practical reasoning of administrative decision-makers in the exercise of their discretion – i.e., the lack of efforts to develop a model of administrative rationality comparable to Dworkin’s judge-centred model of law as integrity. Jerry Mashaw has more recently called for closer study of administrative reasoning, in "Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise" (2005) 55 UTLJ 497 at 524-525, 533. [Mashaw] My sense is that Mashaw’s judgment reflects in part a U.S.-centric state of affairs not immediately or simply transplanted to Canada (e.g., given the differences in the structuring of executive power, and different conventions on the use of legislative history). However, his essay raises a number of considerations that may fruitfully be taken as starting points in exploring not only the distinctiveness of administrative and judicial reasoning or interpretive practice, but potentially also the overlaps.
466 Allars, supra note 462 at 206.
467 Ibid. at 211.
These observations on the different interpretive practices of courts and administrative decision-makers may be taken, at the very least, to raise the challenge of initiating a more structured inquiry into specific administrative settings, with an eye to confirming or disproving these claims.\(^\text{468}\) But a further question is: might it be possible, in view of the rise and systemic integration of the unified standard of reasonableness as a touchstone for administrative decision-making, for these differences in orientation to shift? Might it be possible, that is, to instill practices of reason-giving, both in administrators and in the judges charged with reviewing administrative decisions, that would contribute to the realization of a more complex, less judge-centric model of constitutionalism fit for administrative law?

These are the broad challenges raised by the rise of a unified standard of reasonableness in the law on substantive review, and moreover, the infusion of constitutional values throughout the legal system, even to the farthest reaches of the administrative state. And so here again it is important to recall that the jurisprudence on substantive review urges judges, for their part, to acknowledge that the collective objects and values that may be reflected in administrative decision making are worthy of respect, and so cannot automatically be overridden by privileging individual rights. The possibility of integrating these concerns within a workable proportionality analysis is arguably the deep challenge of the next generation of common law development on the principles of substantive review.

V. Same old story? Locating reasonableness review between judicial supremacy and judicial abdication

I have noted David Mullan’s observations on the uncertainty registered in the case

\(^{468}\) See Mashaw, supra note 465.
law since *Dunsmuir* on the proper conduct of reasonableness review. We saw that his major concern was that the uncertainty opened up within reasonableness review following the collapse of the standard of “utmost deference”, patent unreasonableness, may constitute rich ground for the reassertion of old judicial habits of conducting correctness-style review under cover of deference. Yet the same case law that Mullan examines (and that which I examine in what follows, by way of a few instructive judgments) is perhaps more fully described in terms of a deep instability or vacillation as between correctness-style attitudes of judicial supremacy and patent unreasonableness-style attitudes of judicial abdication. In what follows I look to the conduct of reasonableness review in two judgments which stand at each end of this spectrum: first *Dunsmuir* itself (as an example of judicial supremacy) and then *Khosa*469 (as an example of judicial abdication). I close by noting a judgment that goes some distance toward tracing the “middle way”, *i.e.*, a more defensible variety of reasonableness review.

**iv. *Dunsmuir*: Supremacy in Practice**

We have seen that the central issue for substantive review in *Dunsmuir* was whether an arbitrator’s interpretation of certain statutory provisions governing the employment relationship between public servants and the government of New Brunswick was or was not reasonable. Yet despite the majority’s commitment, in its background discussion of the standards of review, to deference to administrative decision-makers’ field-sensitive interpretations of statutes which they encounter on a frequent basis470 -- and despite the heady introduction of new touchstones for reasonableness review (intelligibility, transparency, justification) -- on applying the standard in this case, the

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469 *Supra* note 37.
470 *Dunsmuir*, *supra* note 1 at para 54.
majority proceeded fairly quickly to its conclusion that the interpretation adopted was unreasonable and so an illegality. Most disturbing, as suggested by David Mullan,\(^{471}\) is that what drives the court’s reasoning on this point – more than any clear commitment to deference -- is what may be regarded as a blunt prioritization of traditional common law values (and invisibilization of other values). That is, in *Dunsmuir*, the reasoning of the court may be understood to inhere in a privileging of freedom of contract over the competing values that the administrator may arguably have discerned, and privileged, on consulting the applicable statutory regime.

For the majority of the Supreme Court in *Dunsmuir*, the arbitrator’s determination that the two statutes of relevance to the case could be read so as to give a non-unionized public employee a right to inquire into whether ostensibly no-cause dismissal was in fact dismissal for cause (again, potentially triggering greater protections and a greater range of remedies than would the common law of employment) was simply insupportable. In defense of this thesis, the majority enters briefly into an analysis of the statutory scheme – focused primarily upon the term of the *Civil Service Act* preserving the common law of contract in the public employment relationship -- and concludes that the statutory scheme yields just one reasonable outcome. That is, to allow a non-unionized employee to go behind ostensible no-cause dismissal would disrupt the statutory guarantee of an employment relationship structured in accordance with private law, in the absence of a clear statutory basis for such disruption.\(^{472}\)

In the face of this reasoning, Mullan asks: was the arbitrator’s decision rightly described as outside the range of reasonableness, gauged either in terms of the reasoning

\(^{471}\) “Let’s Try Again!” *supra* note 226 at 137-140.

\(^{472}\) *Dunsmuir, supra* note 1 at paras 72-76, esp. para 74.
exhibited or the outcome of decision?\textsuperscript{473} Or did that decision instead fail to pass muster because of its starkly different weighting of the purposes reflected in the statutory scheme than that preferred by the Supreme Court? The arbitrator’s ruling may be understood to have expressed (if only implicitly) a favouring of the interests of non-unionized public employees over the interests or expectations of their employer.\textsuperscript{474} In this, there is an argument to be made that the interpretation he adopted expanded the remedial purposes of the legislation to the furthest extent possible while, as Mullan points out, still giving effect to the terms of both relevant Acts.\textsuperscript{475} That is, on the approach taken, s.20 of the \textit{Civil Service Act} (preserving the private law of employment) still had important effect – namely, the employer could continue to undertake no-cause dismissal on the basis of contract law rules of notice or pay in lieu. But, where dismissal was in fact for cause, a grievance challenging the cause could be mounted – even (and here was the primary thrust of the arbitrator’s ruling) where the employer had sought to convert for-cause into no-cause to avoid such a challenge.

Revisited in this manner, it is arguable that \textit{Dunsmuir} might have been better decided if the normative dimensions of the reasoning -- the values or prioritization among values driving the case -- had been made explicit both at the administrative / arbitration level and at the level of judicial review -- rather than left as background assumptions to be dimly discerned behind reasons propounded as if identifying a singular law-interpretive truth. In this, \textit{Dunsmuir} serves as an example of law-interpretation that

\textsuperscript{473} “Let’s Try Again!” supra note 226 at 139.
\textsuperscript{474} Mullan asks whether the arbitrator’s interpretation may have been one “that is more expansive in its protection of the rights of non-unionized employees, but one that is also consistent with a statutory objective of trying to achieve a satisfactory balance between the common law rights of employers and protecting the employment interests of non-unionized employees in a largely unionized workforce?” \textit{Ibid.}
\textsuperscript{475} \textit{Ibid.}
belies the thesis that proportionality analysis, or more broadly such analysis of substantive legality as centres upon the values or competing values implicated in a given case, is not relevant where the decision turns upon a “pure” question of law.

v. Khosa: Still Battling the Weight Problem

Yet if Dunsmuir stands at one extreme of review under its newly-revised reasonableness standard – the extreme of judicial supremacy – the 2009 Supreme Court decision in Khosa⁴⁷⁶ arguably stands at the other extreme. In this, Khosa, too, forces us to reflect on the distance between aspiration and reality in the unfolding law on reasonableness review.

This case originated in an Immigration Appeal Division [IAD] decision denying Mr. Khosa humanitarian and compassionate relief from the legal consequence of removal from Canada based on his conviction on charges of criminal negligence causing death. In upholding that decision on review (and so overturning the decision of the federal Court of Appeal), the majority judgment of the Supreme Court made reference to the legal test setting out the mandatory considerations relevant to such decisions, and closely tracked the decision of the tribunal in light of that test as follows:

The majority [of the tribunal] considered that the last four Ribic factors were not particularly compelling for or against relief. As to the first two factors, the offence in question was “extremely serious” (para. 14) and the majority expressed particular concern over Khosa’s refusal to accept without reservation the finding that he had been street racing. The IAD majority considered that this refusal “reflects a lack of insight into his conduct” (para. 15). As to Khosa’s prospects for rehabilitation, the majority decided that there was insufficient evidence upon which to make a finding one way or the other (paras. 15 and 23). However, even if Khosa had good prospects for rehabilitation, “balancing all the relevant factors, . . . the scale does not tip in [Khosa’s] favour” (para. 23). Accordingly, “special relief” was denied.⁴⁷⁷

⁴⁷⁶ Supra note 37.
⁴⁷⁷ Ibid. at para 8. At para 7, the Khosa majority writes:
In this way, the majority of the Supreme Court adverted to the bases on which the IAD had grounded its decision to deny humanitarian and compassionate relief to Khosa. At the same time, it explicitly took account of Dunsmuir’s exhortations to defer to administrative exercises of discretion – and moreover, (in its brief reasons at the stage of applying the standard)\footnote{Ibid. at paras 59-67.} also the line of jurisprudence (which it roots in Southam\footnote{Supra note 23.}) prohibiting revisiting the weight assigned to one or another of the factors to be considered by an administrative decision-maker. With these principles in the background to its analysis, the majority of the Court found no basis on which to disturb the decision of the IAD. In particular, it stated: “[t]he weight to be given to the respondent’s evidence of remorse and his prospects for rehabilitation [one of the set of factors deemed relevant under the Ribic analysis] depended on an assessment of his evidence in light of all the circumstances of the case.”\footnote{Khosa, supra note 37 at para 66.}

Fish J.’s dissent in Khosa centred upon his assertion that the principles of “justification, transparency and intelligibility”\footnote{Ibid. at para 156 (per Fish J.): “The majority’s inordinate focus on racing and its failure to consider contrary evidence do not “fit comfortably with the principles of justification, transparency and intelligibility” that are required in order to withstand reasonableness review.”} inherent to reasonableness per

The majority of the IAD recognized (at para. 12) that its discretionary jurisdiction to grant “special relief” on humanitarian and compassionate grounds under s. 67(1)(c) of the IRPA should be exercised in light of the factors adopted in Ribic v. Canada (Minister of Employment and Immigration), [1985] I.A.B.D. No. 4 (QL), and endorsed by this Court in Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84, at paras. 40, 41 and 90, namely:

1. the seriousness of the offence leading to the removal order;
2. the possibility of rehabilitation;
3. the length of time spent, and the degree to which the individual facing removal is established, in Canada;
4. the family and community support available to the individual facing removal;
5. the family in Canada and the dislocation to the family that removal would cause; and
6. the degree of hardship that would be caused to the individual facing removal to his country of nationality.
Dunsmuir had not been adhered to by the tribunal – this, given the inordinate focus in its reasons on what it termed Khosa’s “lack of insight”: his non-admission of street racing in the wake of his conviction. That undue emphasis upon one element of the evidence was argued by Fish J. to have effectively depleted all other evidence of its significance, in particular that evidence which was clearly in Khosa’s favour. Fish J. writes:

While Mr. Khosa’s denial of street racing may well evidence some “lack of insight” into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of probabilities — all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence. 482

In support of this claim, Fish J. makes specific mention of the considerable evidence in Khosa’s favour accepted by the trial judge (i.e., the judge presiding over Khosa’s criminal case). Fish J. argues that the IAD failed to justify its departure from those evidentiary findings:

The majority at the IAD made repeated reference to the denial. Toward the end of its decision, it stated that in light of Mr. Khosa’s “failure . . . to acknowledge his conduct and accept responsibility for . . . street-racing . . ., there is insufficient evidence upon which I can make a determination that [Mr. Khosa] does not represent a present risk to the public” (para. 23 (emphasis added)). I find that this conclusion is not only incorrect, but unreasonable. There was ample evidence suggesting that he posed no risk. The majority decision of the IAD simply disregarded virtually all of that evidence. 483

Imputation of legal error to the tribunal on the basis of its failure to consider -- or to consider seriously -- the evidence in tension with its conclusions is also reflected in the following passage from the judgment of Fish J.:

The IAD’s cursory treatment of the sentencing judge’s findings on remorse and the risk of recidivism are particularly troubling. While findings of the criminal courts are not necessarily binding upon an administrative tribunal with a distinct statutory purpose and a different evidentiary record, it was incumbent upon the IAD to consider those findings and to explain the basis of its disagreement with the decision of the sentencing judge. The majority decision at the IAD

482 Ibid. at para 149.
483 Ibid. at para 154.
mentions only in passing the favourable findings of the criminal courts and does not explain at all its disagreement with them. 484

The response of the Khosa majority is to impute to Fish J. the (as yet) doctrinally-insupportable move of reweighing the evidence. 485 Now here it is important to mention that the approach taken by Fish J. is pressed by him not as a matter of re-weighing, but rather as a determination that the tribunal’s inordinate emphasis on one aspect of the evidence amounted to ignoring the bulk of the evidence. That is, the error that Fish J. imputes to the tribunal begins to take on the character of a “failure to consider” relevant factors (or specifically, relevant evidence), 486 effectuated by way of an irrational preference for evidence that was not clearly probative of the central matters in issue.

In general terms, Khosa may be read to confirm those statements in Dunsmuir indicating the importance of deference to expert tribunals on the matters falling within their expertise. The majority’s unwillingness to second-guess the tribunal’s exercise of its broad discretion to exempt individuals from the ordinary operation of the statute in Khosa (i.e., in a situation where the “margin of appreciation” may be said to be broad, given attentiveness to the traditional legislative signals supporting deference) 487 is reminiscent of Iacobucci J.’s strong warnings in Southam 488 against revisiting expert tribunals’ weighing up of relevant factors. However, one of the questions raised

484 Ibid. at para 150.
485 Ibid. at para 61 (per Binnie J. for the majority): “I do not believe that it is the function of the reviewing court to reweigh the evidence.” And see para. 64: “It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts.”
486 Ibid. at para 159 (per Fish J.): “To be sure, the majority at the IAD stated that even if it were to have found that Mr. Khosa did not present a risk to the public “in balancing all the relevant factors, I determine the scale does not tip in [Mr. Khosa’s] favour and decline to exercise favourable discretion” (para. 23). This sort of conclusory statement, however, cannot insulate the IAD’s decision from review when the rest of its reasons demonstrate that its decision rests on an unreasonable determination of central importance, as in this case.”
487 See the decision of the majority, ibid. at para 62.
488 Supra note 23.
throughout this survey of the rise of reasonableness review is precisely whether that
dictate of substantive review may be adhered to – or how – without coming into deep
conflict with the priorities of constitutionalism, by which I mean to invoke not a judge-
centric but ideally, or aspirationally, a pluralist model of constitutionalism. Fish J.’s
reasons may be understood to draw upon the principle foregrounded in Fox-Decent’s
model of “reasonable administration”: namely, decision-makers must demonstrate that
they have been alert to the critical interests of those affected by their decisions. This
principle invites oversight of the weight accorded to those critical interests, attracting
imputation of illegality where the weight accorded to competing considerations or values
is simply (normatively) unsupportable.

vi. Celgene: A Middle Way?

Before closing, I will note a further case, this time arguably exemplary of the
potential for reconciliation of concern for deference and for legality in reasonableness
review – even though the case arrived at the Supreme Court on the assumption that the
proper standard of review was correctness. I refer to Celgene Corp v. Canada (Attorney
General).489 That case involved judicial review of a decision of the Patented Medicine
Prices Review Board involving interpretation of its home statute (the Patent Act). The
disputed decision went to whether a pharmaceutical product distributed by Celgene Corp.
from its base in the U.S. to Canadian purchasers in Canada could be construed as a drug
“sold in any market in Canada”. The Board determined that the statutory condition was
satisfied, with the consequence that it had authority to demand pricing information to
determine whether the prices were “excessive”.

In upholding the Board’s decision, a unanimous Supreme Court of Canada

489 2011 SCC 1. [Celgene]
(Abella J. writing) framed the issue as one of statutory interpretation.\textsuperscript{490} While the proceedings below had been conducted on a standard of correctness, the Supreme Court decision indicated that reasonableness was the appropriate standard for reviewing the Board’s interpretation of its home statute.\textsuperscript{491} And indeed, the judgment of Justice Abella for the Court is arguably exemplary in its close and respectful attention to the reasoning of the Board – a matter of particular importance, given that the Board’s interpretation turned specifically on a departure from ordinary principles of commercial law.\textsuperscript{492}

Abella J.’s inquiry into the substantive legality of the decision is framed by the following remark in reference to the relevant provisions of the statutory scheme: “I acknowledge that these words may lend themselves to different interpretations. The question is whether the one selected by the board is justified.”\textsuperscript{493} The Attorney General, in defence of the Board’s interpretation, had argued that the words “sold in any market in Canada” were amenable to a broad, purposive interpretation, while Celgene argued that these words, and specifically the word “sold”, yielded a “precise and unequivocal” meaning – indeed constituted “a legal term of art that should presumptively be given its private law, commercial meaning” (i.e., “a commercial contract of sale occurring in Canada”).\textsuperscript{494} In stating a preference for the Attorney-General’s approach – or rather, in stating the opinion that inconsistency with the commercial construal of this term “does not mean that the Board misinterpreted the words ‘sold’ and ‘selling’,” Abella J. writes:

In rejecting the technical commercial law definition, the Board was guided by the consumer protection goals of its mandate, concluding that Celgene’s approach would undercut these objectives by preventing the Board from protecting

\textsuperscript{490} Ibid. at para 1.
\textsuperscript{491} Ibid. at para 34.
\textsuperscript{492} Ibid. at para 1.
\textsuperscript{493} Ibid. at para 20.
\textsuperscript{494} Ibid. at para 22.
Canadian purchasers of Thalomid and other foreign-sold SAP patented medicines.\footnote{Ibid. at para 25.}

It is only after this explicit reference to the Board’s purposive interpretation of the values animating its statutory mandate that Abella J. inquires into the legislative history and other bases of support for this construction. She prefaces this with the statement: “The Board’s interpretive choice is supported by the legislative history.”\footnote{Ibid.} The reasoning that follows is reminiscent of Justice Dickson’s excavation of the statutory scheme in \textit{CUPE}, in drawing upon dimensions of the legislative history that illuminate the connection between the values prioritized in the Board’s reasoning and those identified at various moments in the enactment and reform of the statutory base of its authority.\footnote{Ibid. at paras 26-28.}

The final paragraphs of the judgment evince close attention to the interpretation of “sold” or “selling” relied upon by the Board. Here the court cites the Board’s statements about its statutory mandate – statements that evince a form of proportionality analysis, in identifying and assigning relative priority to the various interests or values engaged in that mandate. The passage cited starts off with the Board’s observation that its mandate “includes balancing the monopoly power held by the patentee of a medicine, with the interests of purchasers of those medicines.”\footnote{Ibid. at para 29.} It concludes with an emphasis upon the objective of ensuring “that the prices of patented medicines in Canada are not excessive.”\footnote{Ibid.} It is against this background that Abella J. affirms the reasonableness of the Board’s conclusion that

in order to comply with that mandate, sales ‘in any market in Canada’ for the purposes of the relevant provisions, should be interpreted ‘to include sales of

\footnote{Ibid. at para 25.}
\footnote{Ibid.}
\footnote{Ibid. at paras 26-28.}
\footnote{Ibid. at para 29.}
\footnote{Ibid.}
medicines that are regulated by the public laws of Canada, that will be delivered in Canada, to be dispensed in Canada, and where, in particular, the cost of the medicine will be borne by Canadians – patients or taxpayers, as the case may be.\textsuperscript{500}

In sum, while the \textit{Celgene} case is not a case involving individual rights (which may be said to be the prototypical site of proportionality review), but rather involves review of the exercise of a regulatory mandate requiring negotiation of competing social priorities and values, this judgment nonetheless arguably provides an exemplary instance of integration of proportionality analysis into reasonableness review. That is, both the reasoning of the Board (which throughout informs and enriches the judgment of the Court) and the reasoning of the Court (which engages with yet nonetheless critically reflects upon the reasons of the Board) demonstrate a commitment to justification of a form that explicitly draws out the normative dimensions of the matter brought for decision. These justificatory efforts are rooted in the tribunal’s identification and relative prioritization of the values underlying its statutory authority. In this, \textit{Celgene}, like \textit{Dunsmuir} (read against the grain – \textit{i.e.}, for what it does not say), reminds us that the normative work of proportionality analysis is not only relevant to discretionary decision-making, traditionally characterized, but also to decisions rooted in statutory interpretation (indeed, disputes such as that which underlay our originary case, \textit{CUPE}).

In short \textit{Celgene} presents us with the prospect of an integration of proportionality analysis and deference in a revised or reconceived form of reasonableness review. This prospect is not one wherein the court may abdicate its supervisory position or as such forego inquiry into the consistency of the tribunal’s reasoning with evidence and argument about the statutory mandate. But its supervisory authority must be exercised in

\footnote{\textit{Ibid.} at para 30.}
a manner that is sensitive to and responsive to the considerations driving the tribunal’s reasoning. Of course, it helps if, as in Celgene, the tribunal has been explicit about the values and value-laden priorities driving its interpretations and resultant decisions.

In moving to my conclusion, however, I wish to dampen the celebratory spirit of the preceding remarks, so as once again to signal the importance of continuing attentiveness to the tensions or challenges embedded in the prospect of reconciling proportionality analysis -- or more broadly, reconciling a concern for the normative or value-laden dimensions of legality – with the traditional concern for deference on substantive review as we move forward into a new era of reasonableness review. Again, the question for the future of this jurisprudence is: how is the commitment to deference – and specifically, deference to the field-sensitivity of those deemed expert in the interpretation and/or application of laws touching on areas of social practice remote from the experience of many judges – to be reconciled with the commitment to ensuring that the fundamental values of the social and legal order (and with this, the important interests and moreover perspectives of the legal subject) are adequately attended to? How may the pluralist model of the constitutional order make good on its promise to integrate – to centre upon, even as it places in context – the individual who stands as author and subject of law, without grievously de-centring the public aims of the administrative state?

VI. Conclusion: Administrative Reasonableness and the Project of Public Justification

In this chapter, I have examined statements in the Supreme Court’s decision in Dunsmuir on the nature and process of common law substantive review under the newly-unified standard of review for reasonableness. In particular, I have inquired into how the
values of “justification, transparency and intelligibility” may be given more precise significance for informing the work of substantive review, and most specifically, the conduct of deferential review. I have examined in particular certain arguments for informing the concern for “justification” through an integration of proportionality analysis into the common law principles of substantive review.

In the end, the controversies that have preoccupied the bulk of this chapter – in particular, controversies around inserting or integrating proportionality analysis into the common law on substantive review -- reprise the divides at the origins of administrative law, as between an orientation to individual rights (grounded in the common law tradition) and an orientation to the public interest. Yet arguably the objective of administrative law, as of proportionality analysis, is to reconcile -- or to ensure that there is a defensible balance between -- these values (the values of “a free and democratic society”).

Of course there remain important efficiency-based concerns raised by the prospect of informing common law judicial review with proportionality analysis, in addition to concerns that once administrators begin expressing their judgments on the model of, or in any case in light of the standard of, proportionality, this will alter those judgments in favour of a judge-centric appraisal of the importance of individual rights, or in any case render those judgments more susceptible to rights-based correction in a way that, say, was not the case under a standard of patent unreasonableness. Such concerns may be heightened in domains such as immigration and refugee claims administration, wherein the sheer volume of cases urges efficiency, and moreover, wherein the public interest has long been expressed in a manner that favours the interests of recognized citizens over
non-citizens so as to overshadow concerns about the fundamental values urging respect for the interests of the latter. That is, introduction of proportionality as the model of reasonableness – as the structured justificatory analysis in light of which the reasoning processes and/or the range of reasonable outcomes of administrative decision-making are to be assessed -- may be said to pull the world of administration (or some of it) through the looking-glass, as it were: depositing the administrative decision-maker into a normative setting that (even as judges and academics assert that this is the world righted, and so finally adequate to the aspirations of the rule of law) may register as a marked and disorienting shift in the expectations proper to administrative legality.

Yet, the argument that reasonableness calls for the integration of proportionality analysis into substantive review – and more: the argument that reasonableness demands that public decision-makers be “alert, alive and sensitive”\(^\text{501}\) both to the interests and arguments at stake in their decisions, and to the intersection of those interests and arguments with the fundamental values of the social and legal order -- is simply this. It is that public decision-makers must ensure that their decisions are publicly justified. That is to say that the work of administrative decision-making imports a duty to justify those decisions in terms that directly reference the interests of those whom the state purports to represent, and moreover, the fundamental norms or values to which those legal subjects may be understood to be committed. This is not inconsistent with the claim that judges on review must be sensitive to the public policy elements of administrative decisions (\textit{i.e.}, the sector-specific values served thereby) – particularly those that have been carefully articulated by way of administrative policies or reasoning. Yet in this, a key question for the future of review for reasonableness remains the capacity of judges to express respect

\(^{501}\) Baker, supra note 11 at para 75 (per L’Heureux-Dubé J.).
for the capacity of administration to identify and elaborate upon the public purposes animating their mandates. And here we must carefully consider: Is the integration of proportionality into the expectations proper to reasonableness likely to enrich, or to stultify or condemn to regulatory boilerplate, the normative dimensions of administrative decision-making?

I will add a final note on the implications of the materials studied in this chapter for the question of the proper relationship between administrative and constitutional law. Doubtless the increasingly intense flirtation of administrative scholars and judges with proportionality analysis is likely to attract the skeptic’s critique that that the constitutionalization of administrative law amounts to its illegitimate colonization – this, despite the principled claim that such integration exemplifies the overarching commitments of, indeed marks out the manifest destiny of, the fundamental commitments of the constitutional order. The skeptic’s critique, as I have suggested, stems from longstanding concerns about the potential for individualist values to swamp the important public purposes that animate the administrative state, whether through \textit{Lochner}-era-style clampdowns on welfarist measures or through contemporary challenges to the security state. Moreover, the skeptic’s critique likely includes the specific worry that a s.1-style framework may interfere not only with the flexibility of analysis traditionally accorded to administrators, but in addition, with the flexibility of remedies proper to common law substantive review – a flexibility that may be understood to track concerns about relative institutional competence, and so to embed acknowledgement of the independent validity and utility of administrative expertise and judgment.

In response to these critiques, one may perhaps simply observe that the writing is
on the wall: the manifest destiny of constitutionalization is already inscribed, e.g., in the judicial recognition of the ability and indeed duty of a broad swath of administrative decision-makers to make Charter determinations and moreover to grant remedies under s.24(1) of the Charter. Indeed, the latter development confirms the importance -- both at a system-wide and sector-specific level – of ensuring a place for administration in breathing life into the norms deemed fundamental within our constitutional order. Yet, as I have noted with reference to the arguments of Dyzenhaus, Mullan, Fox-Decent, Cartier, and others, this function cannot be divorced from the work of common law substantive review, or as such, from the concern for reasonableness across the full spectrum of administrative decision-making. Ultimately, the controversies that inhere in the concern for justification at administrative law must be resolved in a manner that acknowledges the normative function of administration – its function not only in advancing the cause of efficient or effective achievement of statutory mandates, but moreover, in contributing to the interactive justificatory efforts of administrators, judges, and the legal subjects directly affected by state action.

See R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765; Nova Scotia (Workers’ Compensation Board) v. Martin, 2003 SCC 54, [2003] 2 S.C.R. 504. Despite the disappointing outcome on specific Charter remedy requested in Conway (owing to the Court’s conclusions about the circumscription of its remedial discretion by legislative intent), the Court concludes with a statement that goes some distance toward recognizing the common normative base proper to review under the Charter and at administrative law (at para 103):

Remedies granted to redress Charter wrongs are intended to meaningfully vindicate a claimant’s rights and freedoms . . . Yet, it is not the case that effective, vindicatory remedies for harm flowing from unconstitutional conduct are available only through separate and distinct Charter applications . . . Charter rights can be effectively vindicated through the exercise of statutory powers and processes . . . In this case, it may well be that the substance of Mr. Conway’s complaint about where his room is located can be fully addressed within the framework of the Board’s statutory mandate and the exercise of its discretion in accordance with Charter values. If that is what the Board ultimately concludes to be the case, resort to s. 24(1) of the Charter may not add either to the Board’s capacity to address the substance of the complaint or to provide appropriate redress.”
CHAPTER THREE

Conclusion*

I have argued that one may trace in the Canadian common law jurisprudence on review of the substance of administrative decisions the gradual recognition of reasonableness as the anchoring concept of that jurisprudence, bringing together its core commitments to deference and legality in a unified approach to substantive review. This is a phenomenon that I have described on the model of romance. Yet perhaps the better reference is to comedy -- in the Shakespearean, rather than satirical, sense: \textit{i.e.}, the romantic comedy, wherein relationships are struck, strained, tested, sometimes devolving to outright antagonism (typically reflecting fundamental misunderstandings about one’s role or purposes, or about another’s role or purposes) before culminating in reconciliation: typically, a wedding.

But the common law on substantive review in Canada in 2011 is not yet at the stage of sending out invitations. In this concluding chapter, I wish briefly to take stock of the journey traversed in the foregoing chapters, and then, again if only briefly, to look ahead to some further challenges to the unified and unifying conception of reasonableness that I have suggested stands as the hallmark of legality, and so state-subject reciprocity, in the contemporary administrative state.

\textit{Reasonableness and the Securing of State-Subject Reciprocity}

A conclusion is not the place to lay the foundations for what came before. But in the spirit of taking stock, let us revisit the idea or ideal of state-subject “reciprocity” which has been woven through the foregoing chapters, and moreover through the primary
literature on which they draw, like a golden thread. What is the relationship between reasonableness and reciprocity?

David Dyzenhaus has argued that the modern jurisprudence on substantive review is best understood to express a deep commitment to public justification. This commitment is characterized, in Dyzenhaus’s work (and here he draws on the work of Lon L. Fuller), not as a contingent feature of legal culture but a constitutive one, communicating the purposive-interactive nature of legal ordering. The model of law or legality that is advanced under the aegis of public justification rests in part on an understanding of law-interpretation and -application as a social practice that, given the impossibility of strict or positivistic transmission of legal rules, is always-already opened out to a community of interpreters and so always-already an interactive project. In this, the commitment to public justification as a core feature of legality proceeds from the insight that law does not take the form of fixed and determinate rules, but rather consists in ongoing interactive processes that are in essence normative, or aspirational. That is to say that on this account, law or legal ordering is not, at least not in the first place, aimed at securing compliance, but instead describes the efforts of a society to identify and jointly coordinate the diverse ends of its members, and in this, to identify, and lay open for scrutiny and challenge, the values they hold in common as they advance together through the processes of historical and social change.


504 See, e.g., “The Legitimacy of the Rule of Law” supra note 269.
The commitment to public justification as an animating feature of the constitutional order or of legality per se is registered in L’Heureux-Dubé J.’s judgment in *Baker*,\(^{505}\) and implicitly informs much of the account of substantive review taken up in this thesis. As discussed in the previous chapter, the duty to give reasons which *Baker* imposed as a principle of procedural fairness has a deep and inherent relationship with the duty to evince reasonableness. And both dimensions of reason-giving express the commitment to public justification that we may recognize as, in turn, an expression of an even deeper or prior commitment: to the value of reciprocity, as instituted in the relationship between legal authorities and legal subjects. Reciprocity, on the conception that animates the account of reasonableness review offered herein, describes the relationship that a state must enact with its subjects in order to merit recognition as instituting legitimate governance. In this, it is closely bound up with, indeed is conditioned by, the values of justification, transparency, and intelligibility. Indeed as I suggest in Chapter 2, on Dyzenhaus’s account, even “intelligibility,” viewed as a characteristic of reason-giving at law,

has not to do with mere understanding. It also has to do with communication by legal authority to legal subject in a way that makes sense to the subject of her subjection to the law; that is, her subjection is necessary to establish the relationship of reciprocity that serves the interests of the subject.\(^{506}\)

Again, this claim is reflected in the recognition of a duty to give reasons in Canadian administrative law – a duty imposed in explicit recognition of the thesis that reason-giving has not only instrumental value but also the inherent value of conveying to the legal subject the decision-maker’s commitment to taking his/her critical interests into account.

\(^{505}\) *Supra* note 11. See the discussion of *Baker* herein at pp.26, 74-76, 176-77.

\(^{506}\) “The Legitimacy of the Rule of Law” *supra* note 269 at 46.
The final move in connecting the dots between justification, reasonableness, and reciprocity goes to what I have described in the preceding chapters, again following Dyzenhaus, as a pluralistic, or democratic, model of constitutional ordering – as opposed to one that centres upon either Parliamentary or judicial supremacy. As Dyzenhaus describes it, this is a model of law or of legal ordering in which “the content of law is viewed in terms of a relationship of reciprocity between legislature and subject, so that interpretive authority is shared between the institutions of the legal order, including the subject who as citizen contests the law within the domain of its application to him.” The idea or ideal of reciprocity invoked herein again describes a necessary feature of legitimate governance; that is, a condition for laying claim to justified authority.

Ultimately, the commitment to public justification on a model of constitutional pluralism presses for institutional norms, such as reason-giving, that will enhance the interactive efforts of each branch of government – and moreover, the individual who stands as both author and subject of law -- in working out the scope and content of the norms of legality. That is, on this account, legal ordering is regarded as inherently concerned with perfecting the mechanisms whereby legal authorities may be, and may demonstrate themselves to be, “alert, alive and sensitive” to the interests and perspectives of those in relation to whom they claim legitimate authority.

It is against the background of this model of the interactive-purposive engagement of legal authorities and legal subjects in working out the terms of the constitutional order that the romance of reasonableness is staged. Here it becomes clear why Dyzenhaus’s work has called into question the appropriateness not only of the now-debunked patent

unreasonableness standard, but of the correctness standard as well, at least as traditionally understood.\(^{508}\) That is, Dyzenhaus’s account of the principles underpinning judicial review of administrative legality – centring in the principle of deference as “respectful attention to,” not submission to, administrative reasoning -- is at odds both with the idea that some administrative decisions may be hived off from meaningful legal oversight (an idea recognized in \textit{Dunsmuir}\(^{509}\) to have been latent in patent unreasonableness review), and the idea that some legal questions, in particular constitutional questions, attract a mode of review that negates altogether the relevance of attention to tribunal reasons (an idea whose time, it appears, has not yet come). Both these modes of review represent a form of unilateralism which negates the purposive-interactive conception of law or legal ordering that I have described – and so, in the name of law, defy the animating values that give rise to legal ordering. The alternative to unilateralism in exercise of the judiciary’s supervisory powers is reasonableness review – understood as inherently committed to enacting justificatory relationships, not only as between courts and administrative decision-makers, but moreover, as between those decision-makers and the legal subjects who seek administrative justice.

Thus in defense of a single standard or ethic of review, defying both the extremes of judicial supremacy and judicial abdication, Dyzenhaus suggests that all instances of substantive review—as well as procedural review\(^{510}\)—should be conducted with sensitivity to the complex factual, institutional, and normative considerations that have bearing on administrative decisions. In this, the commitment to public justification – and

\(^{508}\) See “David Mullan’s Rule” \textit{supra} note 184 at 474-75; “Constituting the Rule of Law” \textit{supra} note 12 at 495.

\(^{509}\) \textit{Supra} note 1.

more broadly, to enacting reciprocity as between legal authorities and legal subjects -- is most supportive of a single, context-sensitive standard of reasonableness;\textsuperscript{511} for only under such a model are practices of justification expected and respected across all sectors of administrative action.\textsuperscript{512} That is to say that the romantic account of the standards of review finds its happiest ending in the standards’ dissolution into a general expectation of reasonableness on review.

But, as I hope to have shown over the course of this thesis, the question of whether it is better to have one, two, or three standards quickly opens onto more concrete questions about how the assessment of substantive legality is appropriately conducted in any given case. That is, substantive review necessarily requires negotiation of such issues as which of the competing approaches to statutory interpretation is best adopted in a specific case or in general; whether or how deferential review might avoid assessing substantive legality against some form of correctness-style limit; whether there need be any restrictions on the objects or methods of scrutiny where deference is called for; whether reassessment of the weight placed by the decision-maker on relevant factors is to be permitted; and whether deference is ever to be accorded to decision makers’ assessments of which factors are and are not relevant. Here we may take special note of the suggestions of Régimbalt, Fox-Decent and Mullan that the evaluation of substantive

\textsuperscript{511} Compare Lahey & Ginn, “After the Revolution,” supra note 48 at 329: “[A] more generalized reliance on review for simple unreasonableness might allow and encourage judges to spend more time thinking about what is actually reasonable in particular contexts, and why, rather than grappling with attempts to explain why they have chosen one of the deferential standards over the other, or what the difference between the two actually is. … [T] it may even be worthwhile to consider whether it is possible to move to a single standard of review—contextualized reasonableness—or at least to ask what the draw-backs of such an approach might be. We have just begun to ask ourselves the questions that such a development might raise, particularly relative to such issues as the implications for and from section 96 of the Constitution Act, 1867, for the interpretation and application of privative clauses, the judicial review of the decisions of human rights adjudicators, and so on.”

\textsuperscript{512} Of course, expectations of reasonableness under the law on substantive review are now closely bound up with the duty to give reasons under the law on procedural fairness, as articulated in Baker. See my discussion above, at pp.109-118. Compare “Process/ Substance,” supra note 20.
legality on a reasonableness standard, at least where important interests are in play, may require a more structured analysis than has yet emerged in the Canadian jurisprudence -- perhaps on the model of proportionality. Drawing on these and other sources, we may continue to contemplate the horizon of meaning for substantive review that is registered in the terms intelligibility, transparency, and justification.

And yet, as we have seen, these terms are, or are potentially, loaded – with even the two terms falling more to the “process” side defensibly regarded as raising fundamental challenges to the traditional schema of substantive review, or in particular of deference. Those traditional schema are grounded not in a concern for legitimacy as enacted through public justification, but rather a concern for legitimacy as enacted through the separation of powers. In shifting the focus of legitimacy concerns from generalized questions of institutional competency to case-specific questions of justification, the primary locus of pressure on existing common law principles, as I have sought to relay above, is likely to be the vexed prohibition of review of the merits, or of the relative weight placed upon competing considerations in the exercise of administrative judgment. That is, that prohibition, while a longstanding bulwark against judicial unilateralism, is necessarily placed under threat by a unified standard of reasonableness which resists the assumption that legality and merits, or law and values, must or may be analytically separated.

With Dyzenhaus, then, I hope to have illustrated – if only by way of a picaresque tour of selected common law developments -- that the model of constitutional pluralism, combining a normative approach to statutory interpretation and a pluralist understanding of the constitutional order (i.e., recognizing the complementary roles of diverse
constitutional actors in testing and consolidating public values through shared participation in the work of legal ordering), is most consistent with administrative state legitimacy. Or at least this is the case where one accepts that legitimacy is best understood as inhering in the securing of reciprocity as between legal authorities and those subject to their authority.

Even still, these claims about the overarching purposes of administrative or constitutional ordering ultimately open onto the hard work of identifying the scope and limits of administrative legality, now under the constitutional pluralist model. While I have suggested that that work has been advanced, at least in preliminary fashion, in recent Canadian jurisprudence featuring renewed interrogation of administrative reasonableness, clearly the work has only just begun.

By way of conclusion – now in the spirit not of taking stock but of gesturing toward the future -- I suggest that we probe further into reasonableness, and so into the multivalent criteria of intelligibility, transparency, justification, in order to confront a further core value at the core of law’s legitimacy: the value of inclusion. In deference to the common law that has served as the source of and foil for my account of the rise of reasonableness so far, I will make this point by referencing a final case: Starson v. Swayze.

Making Space for Starson

Starson is a pre-Dunsmuir decision of the Supreme Court of Canada, indeed one

\[513\] See S. Viner, “Fuller's Concept of Law and Its Cosmopolitan Aims” (2007) 26(1) Law and Philosophy 1 at 23-25:

With regard to who is to be included in the moral community, Fuller states that the morality of aspiration "speaks in terms fully" as an "imperative." More specifically, Fuller states that this imperative is: "we should aspire to enlarge that community at every opportunity and to include within it ultimately, if we can, all men of good will." (at 23, citing Fuller, The Morality of Law, supra note 301 at 183).

\[514\] Supra note 10.
marked with certain familiar tactics of judicial supremacism that are called into question in *Dunsmuir*: *e.g.*, hiving off a tribunal’s interpretation of its home statute from its application of that statute to the facts, and subjecting the former to correctness review. Yet the case nonetheless illustrates some key challenges on the way to making good on a unified standard of reasonableness: challenges that may be said to arise upon bringing the commitment to reciprocity that animates this standard into contact with the “real world” of the contemporary administrative state — *i.e.*, a state marked by profound disparities in power and opportunity, including disparities in the opportunity to participate meaningfully in a culture of justification. On my reading, *Starson* opens onto the claim that the project of enacting a culture of justification in and through law, and specifically, in and through the administrative state, is not isolable from inquiry into the social conditions — the material and attitudinal bases — of reciprocity.

I have described elsewhere the complex facts and arguments placed in issue in the *Starson* case, including those relayed in the tribunal decision and in other, subsequent legal decisions arising from Starson’s ongoing interactions with state and specifically psychiatric authorities.\(^{515}\) My intention here is simply to relay a few points about the Supreme Court’s decision, focusing on the implications of the majority judgment for the emerging model of administrative legality that I have been exploring under the aegis of the romance of reasonableness.

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The dispute at the origins of Starson arose out of a psychiatrist’s declaration (under the terms of Ontario’s Health Care Consent Act)\(^{516}\) that Starson was incapable of making a decision about whether to accept or refuse proposed psychiatric treatments: specifically, antipsychotic medications, anti-anxiety medications, and anti-Parkinsonians (to counter the effects of the anti-psychotics). At the time, Starson was involuntarily in psychiatric hospital following a determination of Not Criminally Responsible on charges of uttering threats. On admission to hospital, he had refused the antipsychotic medications prescribed – leading to Dr. Swayze’s assessment and declaration of his incapacity to make that decision. That declaration was subsequently confirmed by the tribunal responsible for hearing appeals from such declarations: Ontario’s Consent and Capacity Board.

The definition of capacity to make treatment decisions under the Health Care Consent Act is framed against a presumption of capacity which applies to all adults (including those involuntarily in psychiatric hospital). It features two elements: the ability to “understand” the information relevant to the decision, and to “appreciate” the consequences of the decision or lack of decision (i.e., its implications for one’s own situation).\(^{517}\)

In his testimony before the Board, Starson took the position that, while he acknowledged that he had some history of mental and/or social problems, he was content – indeed, positively “enthusiastic”\(^{518}\) – about his unusual mental processes. This attitude was based mainly on Starson’s appraisal of his past accomplishments in the field of theoretical physics – a field in which he had published and until just prior to his

\(^{516}\) 1996, S.O., c.2, Sched. A. [Health Care Consent Act]

\(^{517}\) Ibid., s.4(1), 4(2).

\(^{518}\) Starson, supra note 10 at para 94, per Major J. (for the majority).
hospitalization had participated in advanced seminars, despite a lack of formal education in that field.\textsuperscript{519} Starson’s testimony registered a singular drive to continue to apply himself to challenges in that field – a mission that he claimed was incompatible with adherence/subjection to psychiatric medications. And yet these claims underlay a fundamental conflict between Starson and his doctors, going to the question of whether he possessed sufficient understanding or appreciation of his condition in order to make a treatment decision.

Starson’s account of his resistance to antipsychotic medications rested upon two claims. First, he stated that his past experiences with antipsychotic medications had been among the most “horrible” experiences of his life: placing him in a state akin to a “struggling-to-think-drunk,”\textsuperscript{520} disrupting his work and relationships and generally making him feel profoundly unwell. This argument, however, was subsidiary to his main point, which was that even if the hospital psychiatrists were to succeed in bringing his thought processes closer to the norm, this would in itself constitute a profound loss for him. To be made “normal,” asserted Starson in his testimony before the Board, would for him be a sort of death: it would be a fate “so boring it would be like death.”\textsuperscript{521}

Starson’s doctors, for their part, recounted their concerns that Starson’s high estimation of his special mental powers – and with this, his optimism about his prospects

\textsuperscript{519} \textit{Ibid.}, at para 2, per McLachlin J. for the dissent (consistent with the evidence of Starson’s psychiatrists, accepted by the Board, the dissent describes Starson’s accomplishments in theoretical physics as wholly in the past); but compare para. 62, per Major J. for the majority (the majority takes a decidedly more enthusiastic and presentist view: “Although he lacks any formal training in the subject, it is beyond dispute that his driving passion in life is physics. He has published several papers in the field: see a paper co-authored with Professor H. P. Noyes of Stanford University, entitled “Discrete Anti-Gravity” (1991). Professor Noyes is said to have described the respondent’s thinking as “ten years ahead of his time”. Although the respondent is not by university training a professor, his peers in the academic community allow him to use the title as recognition of his accomplishments.”).

\textsuperscript{520} \textit{Ibid.} at para 102.

\textsuperscript{521} \textit{Ibid.}
for making significant contributions in theoretical physics in the future -- was part of a broader pattern of self-aggrandizement and refusal to adjust his self-assessment to reality or the opinions of others. That is, the doctors’ claim was that Starson lacked “insight”. 522

In this, perhaps the most powerful claim of Starson’s doctors – but ultimately, a claim that is undercut (in the opinion of the majority of the Supreme Court) by failings in the evidentiary and moreover the participatory dimensions of the case – was that Starson’s failure to admit illness specifically affected his ability to appreciate that the consequences of refusing medication may include marked deterioration of his condition.

The Consent and Capacity Board accepted the position of Starson’s doctors – centring its decision in Starson’s failure to admit that he was mentally ill and to recognize the dire or devastating consequences that the non-admission was having and would continue to have upon his life. 523 That is, the Board concluded that Starson lacked the capacity to make the decision put to him, due to his failure to acknowledge (or to adequately acknowledge) that he was mentally ill.

The Board’s decision was overturned in a decision of the Ontario Superior Court, which decision was upheld by the Court of Appeal and ultimately the Supreme Court of Canada. The Court of Appeal made particular mention of Starson’s resistance to what he termed the “catch-22” of authorities’ putting to him the question of whether or not he was mentally ill. 524 His “logical but unresponsive” answer was that he could not answer – for admitting illness would, in his opinion, attract efforts at treatment, while denying illness

522 The term is not used in the Supreme Court of Canada judgment, but it is used at the Court of Appeal in reproducing Starson’s testimony about what he regarded as the central issue in the case. See Starson v Swayze, (2001) 201 DLR (4th) 123 [Starson, OCA], at para 9. Starson argues, at the relevant part of the record, that if he fails to admit illness he will be deemed to have “no insight into my mental illness,” whereupon “I’m going to maybe then [be] found incompetent in some way and they’re going to be forcing to treat me.” CCB hearing transcript [on file with author].
523 TO-98/1320 (24 January 1999).
524 Starson, OCA, supra note 522 at para 9.
would attract the label of failed “insight” and so incapacity / forced treatment.

This “catch-22” identified by Starson and foregrounded by the Court of Appeal may be understood to be a central moment in the reasoning on review: a moment informed not or not directly by the reasoning of the Board, but rather by the reasoning of the individual subject to the Board’s decision (as the Court reaches into the transcript of proceedings to draw out his testimony). In this, the Court’s reasoning may be said to operate so as to expose the lack of reciprocity, or lack of space for entertaining the views of the individual in a manner “alert, alive and sensitive” to his/her perspectives on the facts and also the norms in issue. Or at least, what is exposed is Starson’s own perceptions of that lack of reciprocity: his sense that he has been subjected to an expert-insider’s view of failed “insight” that he simply cannot be heard to deny.

The Supreme Court of Canada issued a 6-3 judgment upholding the decision on appeal (and so confirming the invalidity of the Board’s decision). The judgments of the dissent and the majority reflect deep divisions of opinion on both the adequacy of the evidence led and the Board’s application of the legal test. Both judgments assessed the question of whether the Board had properly interpreted the legal test under a standard of correctness, while they assessed the Board’s application of the law to the facts on a standard of reasonableness.

On applying a correctness standard to the decision of the tribunal, there were two discrete bases on which the majority deemed the tribunal to have erred. The first was its determination that Starson was unable to appreciate the consequences of treatment refusal – which determination Justice Major suggests rested on the simple finding that he had failed to appreciate those consequences, without inquiring further into whether this

\[525\] Starson, supra note 10.
failure reflected an inability or incapacity. Here Justice Major specifically suggests that the evidence did not show that Starson had been properly informed of those consequences.\textsuperscript{526} The second target of correctness review went to “the tenor” of a statement made by the tribunal near the start of its reasons for decision. There the tribunal states that “[b]efore commenting with respect to the specific criteria required for an individual to be capable,” it wished to mention that “it viewed with great sadness the current situation of the patient,” and moreover wished to register its dismay at the chain of circumstances whereby “his life has been devastated by his mental disorder.” As Justice Major points out, these reflections stood in strict opposition to the way that Starson had portrayed his life and prospects. More importantly, he adds, these statements indicated that the Board had “strayed from its legislative mandate to adjudicate solely upon the patient’s capacity.”\textsuperscript{527} That is, according to the majority, the comments in question supported the inference that the Board was implicitly, and improperly, guided by concern to advance Starson’s best interests rather than adjudge his decisional capacity in isolation from best interests-based concerns.

Arguably, both these points establishing the incorrectness of the Board’s interpretation or application of the legal test go to its failure to make space for, or to attend sensitively or respectfully to, Starson’s testimony. That is, these bases on which the Board decision was quashed are arguably grounded less in a supremacist moment of the Court’s undertaking its own independent reasoning-process than in a concern about the Board’s failure to engage with the reasoning of the individual affected by the decision.

\textsuperscript{526} \textit{Ibid.} at para 111.
\textsuperscript{527} \textit{Ibid.} at para 112.
Similarly, the conclusion of the majority in Starson that the Board’s application of the law to the facts was unreasonable is grounded in instances wherein the Board is found to have failed to adequately attend to, or to adequately demonstrate that it had attended to, the stated position or reasons of Starson himself.\textsuperscript{528} The central determination of the majority on applying a reasonableness standard involved canvassing a set of bases on which the tribunal decision had rested, and concluding in each instance that there was no clear basis in the evidence warranting inferences as to Starson’s incapacity. In particular, the majority concluded that there was “no evidence” for the key findings that Starson “lacked awareness of his condition or that he failed to appreciate the consequences of treatment.”\textsuperscript{529} In this, the majority advanced the position that the Board (and moreover, the dissenting judgment at the Supreme Court) had been both insufficiently sensitive to the evidence given by Starson as to the reasons for his treatment refusal, and too ready to fill the gaps in the evidence with best-interests based observations.

Here one might observe that this part of the majority’s reasons reflects an implicit favouring of a form of proportionality model of analysis – along the lines of that implicitly animating the dissent of Justice Fish in Khosa.\textsuperscript{530} That is, on a set of discrete factors essential to the application of the legal test, the majority finds that the Board failed to accord the evidence appropriate weight, or such weight as properly reflected the critical nature of that evidence. Or then again, perhaps it is more proper to say that the weight assigned did not reflect the critical nature of Starson’s interests – or again, the values (specifically, the value of autonomy) lending his interests their particular

\textsuperscript{528} See my discussion of the reasoning of the majority in “The Supreme Court of Canada at the Limits of Decisional Capacity” supra note 515 at 274-279.
\textsuperscript{529} Starson, supra note 10 at para 106.
\textsuperscript{530} Supra note 37.
normative and so legal significance – this, even as the majority may be said to rely on the traditional ground of “failing to consider a relevant factor”.

The dissent in Starson firmly rejects each of the conclusions of the majority on the matter of substantive illegality in the Board’s interpretation of the legal test and its application of that test to the facts. In this, it foregrounds, indeed closely tracks, the reasoning of the Board and also the testimony of the doctors relied upon by the Board, which testimony (in the dissent’s view) illuminates the consistency of the Board’s decision with the evidence as well as its adherence to the question of Starson’s decisional capacity rather than his best interests.531 Ultimately, the dissent suggests that the majority overstepped the proper function of a court on review, and substituted its opinions about the more compelling evidence or argument for the opinions of the Board. In a word, for the dissent, the majority opinion in Starson represents a failure of deference.

Elsewhere I examine the divergences in the ways that the majority and dissent frame their judgments, specifically with reference to the overarching purposes of the Health Care Consent Act.532 I note that while both advert to the tensions between liberty and welfare that are embodied in the Act, the majority places an explicit emphasis upon the value of individual autonomy (as specifically secured through the right to refuse unwanted anti-psychotic medications), while the dissent places an emphasis on individual and also public welfare (as secured through timely treatment of the vulnerable mentally ill). On another reading, the difference between the fundamental normative orientations of the majority and dissent involves competing conceptions of autonomy – the majority’s

531 Starson, supra note 10 at para 58.
532 “The Supreme Court of Canada at the Limits of Decisional Capacity” supra note 515 at 271-273.
grounded more in a conception of negative freedom, and the dissent’s in a concern for provision of the positive conditions for exercising autonomy.

Yet here one might argue that the dissent is faithfully tracking the normative priorities implicitly or explicitly in play in the Board’s reasons, while the majority is – what? – substituting its values or its relative prioritization of the values implicated in the statutory scheme for the judgment of the Board. And one might wonder: is the majority in a position to do so? It is not difficult to contemplate the concerns of the judicial review skeptic at the prospect that in the end, the shift away from the normative orientation (and with this, the orientation to the facts and arguments) of the Board, which deals with persons subject to psychiatric hospitalization on a regular basis, is displaced by the normative orientation of the Court – or by the outcome of a vote among the assembled judges.

Yet an alternative means of defending the majority judgment in Starson is available – and with this, I begin to move from the concern with proportionality as a mechanism whereby judges may have the last word on the controlling norms of administrative decisions, to a concern with proportionality – or more generally, reasonableness – as a mechanism for advancing the dual commitments of administrative law, and of legality more broadly: i.e., the values of participation and justification. For these values may be said to have been at the centre of the majority’s decision. On this reading, the majority decision in Starson draws out these core values of administrative legality, even as it reminds us of the deep challenges that inhere in the project of enacting those values in the concrete circumstances of administrative decision-making arenas.

Here we must further contemplate for a moment the deep divides of power and
perspective that characterize the setting of involuntary psychiatric hospitalization in which this case arose. It goes without saying that the challenges of enacting a relationship of reciprocity in this setting are extreme. Yet I close my discussion of Starson by noting two principles stated by the majority: principles that may be said to set that challenge – not only to this administrative decision-making arena, but to the administrative state more broadly.

I allude to two statements of the majority in Starson on the core principles that should animate the assessment of psychiatric treatment capacity. The first is stated as follows:

A patient is not required to describe his mental condition as an “illness,” or to otherwise characterize the condition in negative terms. Nor is the patient required to agree with the psychiatrist’s opinion regarding the cause of that condition. Nonetheless, if the patient’s condition results in him being unable to recognize that he is affected by its manifestations, he will be unable to apply the relevant information to his circumstances, and unable to appreciate the consequences of his decision.533

Taken broadly, this passage speaks to the imperative that administrative decision-makers (here, front-line doctors as well as members of the Consent and Capacity Board) sensitively attend to the evidence and argument of those whose interests are at stake in their decisions. While this is a familiar enough imperative for administrative law, its practical application in Starson arguably registers a particular challenge – this, given the potential for stark differences of opinion (on matters here framed as value-laden rather than simply matters of fact) as well as the realities of stark disparities in power in the administrative setting in issue. Moreover, given the prevalence of historical discrimination and stigmatization of those deemed mentally ill, the imperative carries

533 Ibid. at para 79. Emphasis added.
with it a strong implication that decision-makers should reflect upon their attitudinal predispositions – *i.e.* engage in reflection aimed at becoming more aware of one’s implicit biases.\(^{534}\) Given that such reflective engagement is not necessarily possible or practicable on one’s own, the imperative may be read to carry with it an obligation upon public authorities to provide educational supports aimed at instilling such awareness of one’s own and others’ attitudinal predispositions and other commitments that may interfere with the work of administrative judgment.

The second principle follows close upon the first. The majority indicates the process that capacity assessment should take, beginning in a manner that sticks closely to the statutory test:

> [i]n practice, the determination of capacity should begin with an inquiry into the patient’s actual appreciation of the parameters of the decision being made: the nature and purpose of the proposed treatment; the foreseeable benefits and risks of treatment; the alternative courses of action available; and the expected consequences of not having the treatment.\(^{535}\)

Yet then the majority adds the key observation: “However, a patient’s failure to demonstrate actual appreciation does not inexorably lead to a conclusion of incapacity.” For, the passage continues: “The patient’s lack of appreciation may derive from causes that do not undermine his ability to appreciate consequences.” One example of such causes is offered: namely, “the attending physician’s failure to adequately inform the patient of the decision’s consequences.”\(^{536}\)

\(^{534}\) I discuss this dimension of the *Starson* decision with reference to the work of Jennifer Nedelsky on judgment, and practices aimed at instilling an “enlarged mentality,” in my paper “Insight Revisited: A Relational Approach to Supporting and Assessing Persons’ Capacity to Make Treatment Decisions in Involuntary Psychiatric Hospitalization Settings,” *supra* note 515.

\(^{535}\) *Starson*, *supra* note 13 at para 80.

This point reflects the majority’s determination that in Starson’s case, the psychiatrist(s) and/or Board failed to direct his attention to the negative consequences that might follow a refusal of treatment and to canvas his response, rather than simply assuming that he would not attend to this information. But we can see that this passage also asserts a general imperative to look, in all cases, beyond the subject’s actual appreciation – his/her instantiation or rather non-instantiation of the ability to apply and weigh the relevant information – to the background conditions that might explain a person’s apparent inability to meet the standard.

Read broadly, this second imperative is arguably the more radical one. That is, this imperative -- to ensure that institutional or relational contingencies not disable the subject’s ability to demonstrate the requisite legal capacity -- may be understood to reach beyond traditional conceptions of administrative legality to impose duties upon decision-makers, and the state more broadly, to ensure that the conditions are in place for the enacting of state-subject reciprocity, and so the enterprise of public justification. I suggest, here clearly reaching beyond the intended ambit of the principles stated in Starson, that among these conditions are the material and social supports required to enable legal subjects to participate, on equal terms with others, in the institutions of law and governance on matters affecting their fundamental interests.

Here I would draw on Joel Handler’s work, which has long been concerned with power relationships manifesting in the administrative state, and with practical means for reforming those relationships in ways that may enhance the responsiveness and so the autonomy-supportiveness of administrative decisions.\textsuperscript{537} Handler’s analysis of the

\textsuperscript{537} See, e.g., “Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community” (1988) 35 U.C.L.A.L.Rev. 999 [“Dependent People”]
shortcomings of bureaucratic rationality centres upon the failures (and occasional successes) of administrative design to identify and redress the radical disparities of power that separate decision-makers embedded in the social welfare state and those subject to their authority. It is specifically in response to such disparities that Handler undertakes to identify, at the specific sites wherein these challenges arise, “procedures for settling conflicts that facilitate communicative action.”\textsuperscript{538} The key to ensuring that those affected by administrative state action stand not as mere objects of state manipulation but rather as meaningful participants, and so agents, in the project of identifying and serving their significant interests, is identification and remediation of the structural challenges to and opportunities for reciprocity – or as Handler terms it, for “dialogue”.\textsuperscript{539}

In short, the two principles from Starson canvassed above may be regarded as reorienting the assessment of treatment capacity in psychiatric hospital settings from implicit reliance on the model of insight or failed insight to a relational model. That is, these principles, in requiring attentiveness to background conditions potentially interfering with one’s ability to meet the legal standard, and, moreover, in requiring respectful attentiveness to non-dominant values or interpretations of unusual psychological or psycho-social experience, shift the focus from the individual to relationships – or to an account of both treatment capacity and insight as functions of

\textsuperscript{538} Ibid. at 1045.
\textsuperscript{539} “Changes in procedure have not been enough. The issue of power has not been addressed, and . . . dependent people are not able to participate. The incentives of the bureaucracy are able to distort and ultimately nullify the legal procedural changes. [A]s far as the powerless [are] concerned, there is monologue, not dialogue.” (ibid. at 1012)
interpersonal as well as wider institutional and cultural relationships or processes of interaction.\textsuperscript{540}

More broadly, I suggest that \textit{Starson} alerts us to the complex interpenetration of facts and norms that arguably characterizes much administrative decision-making, and with this, the challenges put to judges on review -- and to administrative decision-makers in the first instance -- where the imperative of deference comes into tension with that of giving due weight to the individual’s critical interests, and moreover (as a matter that precedes and indeed gives meaning or content to those interests) the individual’s perspective on the way his/her interests intersect with fundamental values. Finally, \textit{Starson} alerts us to dimensions of the challenges of enacting a culture of justification that are not as yet on the radar of reasonableness: going to the state obligation to provide the material and other supports to enact reciprocity, and so to support the participatory and justificatory aspirations of law or the administrative state under the rule of law.

As such, I argue that \textit{Starson} (or a frankly radical reading of that case) provides a glimpse into the wider aspirations of administrative law, viewed under the aegis of reciprocity. These aspirations may be understood as directed, on the one hand, to enabling the capacity of administrative decision-makers -- and also judges -- to engage in the work of hearing and deciding disputes in a manner reflective of the commitment to reciprocity. On the other hand, they may be understood to be concerned with enabling the capacity of legal subjects -- particularly, though not exclusively, those vulnerable to attitudinal and material forms of disadvantage: marginalization or exclusion -- to participate in administrative proceedings and so in the work of testing and refreshing

\textsuperscript{540} This passage too is take from my paper “Insight Revisited: A Relational Approach to Supporting and Assessing Persons’ Capacity to Make Treatment Decisions in Involuntary Psychiatric Hospitalization Settings,” \textit{supra} note 515.
fundamental values, i.e., enacting the relationship of reciprocity from the vantage of the individual who stands as author and subject of law.

With Starson, then, I draw this story to a close – only to open it onto the discrete challenges that this decision raises for the evolving model of the aims and principles of substantive review examined herein. Primary among these is: how is the commitment to deference – and specifically, deference to the field-sensitivity of those deemed expert in the interpretation and/or application of laws touching on areas of social practice remote from the experience of many judges – to be reconciled with the commitment to the rule of law, most specifically on the fronts of ensuring both meaningful participation in and meaningful justification of decisions affecting the important interests of the legal subject? And more: how might administrative decision-makers, and administration more generally, take account of the broad structural mechanisms through which the processes of public justification may be enacted (or obstructed)?

The challenges contemplated herein are the challenges of translating the arenas of the administrative state from “lawless zones” – in theory and in practice -- to fields shot through with legality. Yet the story of the rise of reasonableness, and so the enactment of state-subject reciprocity in the doctrine and moreover the lived arenas of the administrative state, is one that continues to be written. In this, the challenges raised to this story, and more generally to the law on substantive legality, by the idea of a rule of law that “speaks in many voices”541 are arguably only beginning to be felt. As this jurisprudence develops, I suggest we attend more carefully to the question of whose voices are, and are not, being heard.