File Nos. 37748, 37896, 37897

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE FEDERAL COURT OF APPEAL)

BETWEEN:

File Number: 37748

MINISTER OF CITIZENSHIP AND IMMIGRATION

APPELLANT
(Respondent)

- and -

ALEXANDER VAVILOV

RESPONDENT
(Appellant)

- and -

DANIEL JUTRAS and AUDREY BOCTOR

AMICI CURIAE

(Style of Cause Continues Inside Cover Page)

FACTUM OF THE *AMICI CURIAE*

(Rules 36 and 39 of the *Rules of the Supreme Court of Canada*)

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INTERVENERS

File Number: 37896

BELL CANADA

BELL MEDIA INC.

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(Appellants)

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RESPONDENT
(Respondent)

- and -

DANIEL JUTRAS and AUDREY BOCTOR

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- and -

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INTERVENERS

File Number: 37897

NATIONAL FOOTBALL LEAGUE
NFL INTERNATIONAL LLC
NFL PRODUCTIONS LLC

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RESPONDENT
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FACTUM OF THE *AMICI CURIAE*

PART I – OVERVIEW

1. Devising a framework for the judicial review of administrative action that is both principled and practical has proven to be one of the biggest challenges in modern Canadian administrative law. This should not come as a surprise to anyone: the proper scope of judicial review goes to the heart of the relationship between courts and the administrative state and touches upon issues that are fundamental to our legal and constitutional order. Reasonable people are bound to disagree on these issues. And they do.

2. Difficult as it is, the development of a principled and workable framework for judicial review is essential to the ongoing legitimacy and confidence that we place in administrative agencies. For millions of Canadians, administrative decision-making is the most immediate manifestation of the authority and power of the state. Courts must have clear guidance as to their role with respect to such decisions.

3. *Dunsmuir* was this Court's last attempt to articulate a comprehensive framework, built on the twin pillars of legislative intent and the rule of law. Based on its previous decisions, the majority set forth a blend of categories and contextual factors to guide reviewing courts and simplify their task. Since *Dunsmuir* was decided, a majority of this Court has moved toward privileging presumptive categories over a contextual approach, leading to the present state of the law where reasonableness is essentially the default standard of review, unless the nature of the question calls for correctness review. This delicate interaction between formal and contextual reasoning has, however, led to several deeply divided decisions from this Court over the past decade.

4. Despite ongoing disagreement and criticism, the foundations laid by *Dunsmuir* were sound, and they remain so today. The twin pillars on which *Dunsmuir* rested – the rule of law and appropriate respect for legislative choices about our structure of governance – must remain at the core of the law of judicial review. Methodologically, the default rule of deference that has since developed, paired with principled categories of correctness review, has much to offer in terms of clarity, effectiveness, and reasonable predictability.

5. This said, it has become necessary to reconnect the current methodological approach with the principles enunciated in *Dunsmuir*. The framework for judicial review cannot be defined exclusively in response to pragmatic calls for simplicity; it must be a principled one. Indeed, much of the present discord in the case law arises because the twin pillars underlying judicial review are not sufficiently articulated and may appear to be in conflict with the resulting framework. These two principles must be informed by a better, deeper understanding of the modern administrative state. This may require some departures from this Court's jurisprudence on judicial review. However, if a re-examination of first principles requires adjusting the framework, the law must move on.

6. A review of first principles leads us to the following conclusions about the future directions of the standard of review in administrative law.

7. **First**, we must take a step back and view legislative intent at an institutional level and not as a contest of expertise. Where a democratically responsible branch of government makes a legitimate decision to vest primary decision-making for certain matters with self-contained bodies that are not courts – specialized administrative institutions with a unique responsibility in governance – the courts must in turn respect this fundamental choice. Framed in these terms, respect for legislative intent leads to a default rule of deference.

8. An institutional, default rule of deference also signals that courts and administrative decision-makers each play a role in the administration of justice, but not the same role. Judicial reviews are not appeals and never have been. At the same time, the legislator is perfectly free to provide for appeals to the courts, in which case the administrative regime is no longer self-contained. Where the legislator does so, a coherent principled approach requires courts to also give effect to that equally valid institutional design choice and to treat statutory appeals on questions of law like ordinary appeals.

9. **Second**, we must properly account for the rule of law in all its dimensions and differentiate between the requirement that there *be* judicial review and the requisite *standard* of review. This distinction takes on particular importance where courts review for legality, namely to ensure that an action is authorized by law.

10. The principle of legality remains a key theoretical justification for much of substantive judicial review. However, because administrative decision-makers can only exercise delegated power, all questions they are called upon to answer necessarily condition the exercise of their authority: all questions are "jurisdictional" in one way or another. Canadian and other common law jurisprudence demonstrates that there is no principled distinction between questions that are "truly" jurisdictional and those that are not, and therefore no principled basis for singling out a subset of such questions for correctness review. The search for "true" questions of jurisdiction – as a distinct category subject to correctness review – should be put to rest.

11. At the same time, we must acknowledge that the rule of law is about more than just legality. It is a constitutional principle that requires a minimum amount of coherence and consistency in the law. As a result, judicial review is also mandated in some situations where the rule of law requires a definitive answer to a given question. These are: constitutional questions, including the scope of *Charter* rights; jurisdictional boundaries between competing tribunals; persistent discord that renders the law unintelligible; and, for one of the two *amici curiae*, questions of law of central importance to the legal system. In these instances, the rule of law requires "correctness" or, more accurately, non-deferential review.

12. **Finally**, all of the above is futile if reviewing courts and litigants are not able to differentiate between deferential and non-deferential review. A principled approach that puts the reasons first best respects administrative decision-makers and reinforces that reasoned decision-making is the lynchpin of institutional legitimacy. While reasons may not always be strictly required, we must acknowledge that when courts are obliged to supplement the reasons of administrative decision-makers, their doing so blurs the lines of institutional separation. In practice, in the absence of reasons, less deference is inevitable. Administrative decision-makers, to be full partners in the administration of justice, must do their share.

PART II – QUESTIONS IN ISSUE

13. The *amici curiae* make no submissions about the merits of the cases before the Court. The *amici curiae* will attempt to assist the Court's deliberations by addressing the following questions:

a. How did the current approach to judicial review of administrative action develop?

b. What are the principles underlying judicial review?

c. How should these principles guide the courts' approach to determining the applicable standard of review?

d. How should deferential review be conducted?

PART III – SUBMISSIONS OF THE *AMICI CURIAE*

A. Development of the Modern Approach to Standard of Review

i. Review for jurisdictional error in the early administrative state

14. It is a basic principle of Canadian Parliamentary democracy that all state action must be authorized by law. Judicial review of administrative action was traditionally understood as flowing from this fundamental premise. In order to ensure that state action is actually authorized by law, the statutory limits on delegated authority must be reviewed by an independent body. In Canada, this has been accomplished traditionally – although no longer exclusively – by the s. 96 superior courts.

15. When Parliament first began regularly delegating decision-making powers to administrative agencies in the 1920s and 1930s, superior courts' review of the exercise of these powers was done on the basis of "jurisdictional error".[1] This reflected the Canadian legal system's English heritage,[2] since the Royal Courts' power to review government action was historically based on their ability to issue prerogative writs, including the writ of *certiorari* to quash a government decision that was made without jurisdiction.[3]

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[1] Colleen M. Flood & Jennifer Dolling, "A Historical Map for Administrative Law: There be Dragons" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) 1 at 10 [**Flood & Dolling**], Book of Authorities of the *Amici Curiae*, hereinafter "**BOAAC**"**, Vol. II, Tab 20**; see also *BC Columbia Electric Railway v. Canada National Railway*, 1932 SCR 161; *Halifax (City) v. Halifax Harbour Commissioners*, 1935 SCR 215.

[2] *McMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at para. 29.

[3] Flood & Dolling at 17; Jones & De Villars, *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at 7-8, **BOAAC, Vol. III, Tab 23**.

16. Two observations are warranted. First, in Canada, it was always clear that courts reviewing administrative decisions were not exercising an appellate review function. Second, the common law had not yet developed judicial review on a standard of reasonableness. Review for errors of law was limited to errors *going to jurisdiction*, and this was an all-or-nothing proposition: errors in this narrow category were reviewed on a standard of correctness, and errors that could not fit into this category were not reviewable at all.[4]

17. The post-war expansion of the administrative state[5] challenged the courts' non-interventionism. Over time, "[w]ith greater government intervention in the private sector, increased social programs, and legislative derogation from the traditional jurisdiction of the courts came a rather different attitude on the part of the Canadian courts," which reacted defensively by increasing the frequency and scope of intervention in administrative decisions.[6]

18. When legislatures began inserting privative clauses into statutes, courts regularly circumvented them by characterizing most defects within an administrative decision as jurisdictional.[7] The concept of jurisdictional error "became so distorted that the courts were able to review administrative decisions just like they would review a lower court decision."[8] This was typically achieved by characterizing the legal question in issue as being preliminary to the decision-maker's ability to render a decision on the merits.[9]

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[4] Save for an inconsistently applied doctrine of "error of law on the face of the record". See Lord Denning in *R. v. Northumberland Compensation Appeal Tribunal* (1951), [1952] 1 KB 338 (Eng. CA), **BOAAC, Vol. I, Tab 8**, to the effect that judicial review on the basis of "errors of law on the face of the record" was an "important historical anomaly". See also the Hon. Joseph T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014) 66 SCLR 1, part IV, **BOAAC, Vol. III, Tab 30**.

[5] See generally Flood & Dolling, Chapter 1, **BOAAC, Vol. II, Tab 20**.

[6] J.M. Evans et al., *Administrative Law: Cases, Text and Materials*, 5th ed by David J. Mullan (Toronto: Edmond Montgomery, 2003) at 697 [**Evans et al.**], **BOAAC, Vol. II, Tab 18**.

[7] Evans et al. at 698, **BOAAC, Vol. II, Tab 18**.

[8] Flood & Dolling at 18, **BOAAC, Vol. II, Tab 20**; Evans et al. at 698, **BOAAC, Vol. II, Tab 18**.

[9] See e.g. *Bell v. Ontario (Human Rights Commission)*, [1971] SCR 756; *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] SCR 425.

19. In *CUPE v. New Brunswick Liquor Corporation,*[10] this Court struck a compromise.[11] On the one hand, it repudiated the tendency to brand all legal questions as "jurisdictional" and therefore subject to review for correctness. Dickson J. (as he then was) confined such questions as those relating to "the scope of the Board's capacity to hear and decide the issues before them" and thus to "enter upon an inquiry" in the first place.[12] To the extent the labour board under review was faced with a question on a matter "plainly confided to it", judicial restraint was required.[13]

20. At the same time, however, *CUPE* confirmed the principle that *all* legal determinations can be quashed on judicial review if they are "patently unreasonable" – meaning the decision-maker has *lost jurisdiction* by blatantly misinterpreting the provisions of its enabling statute, acting in bad faith, basing its decision on extraneous matters, or failing to take relevant factors into account such that the decision could not rationally be supported.[14] Thus, while *CUPE* restricted jurisdictional review on the standard of correctness, it greatly expanded jurisdictional review on the standard of patent unreasonableness.

ii. From jurisdictional error to legislative intent: The development of the pragmatic and functional test and three standards of review

21. Beyond stating, now-famously, that "courts should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so,"[15] Dickson J. did not provide a clear definition of what constituted a jurisdictional question for the purposes of correctness review, as compared to all other questions for which jurisdiction would be considered lost if the decision was patently unreasonable.

22. In subsequent cases, this Court developed the "pragmatic and functional analysis" to try to provide some guidance. In *Bibeault,* Beetz J. assessed whether a given question fell "within" the jurisdiction conferred on a labour tribunal – and was therefore subject to review for patent unreasonableness – by examining "not only the wording of the enactment conferring jurisdiction

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[10] *CUPE v. New Brunswick Liquor Corporation,* [1979] 2 SCR 227 [***CUPE***].
[11] See Mark Walters, "Jurisdiction, Functionalism, and Constitutionalism in Canadian Administrative Law" in Christopher Forsyth et al., eds., *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: OUP, 2010) 300 at 304, **BOAAC, Vol. IV, Tab 36**.
[12] *CUPE* at 234, 237.
[13] *CUPE* at 234, 236-237.
[14] *CUPE* at 237.
[15] *CUPE* at 233.

on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."[16] The issue was thus framed as a search for legislative intent.

23. Over the next decade, expertise and specialization came to be the dominant indicators of legislative intent, as the focus shifted away from a search for jurisdiction to a search for the amount of deference owed to the administrative actor's decision. In *Pezim*, for instance, Iacobucci J. stated that "even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise."[17]

24. In *Southam*, this Court added the intermediate standard of reasonableness *simpliciter*.[18] Iacobucci J. noted that "patent unreasonableness is principally a jurisdictional test" that was inapposite in the instant case because a statutory right of appeal gave the court more leeway to intervene.[19] Since the pragmatic and functional analysis revealed both indicators that deference was warranted and indicators that supported exacting review, Iacobucci J. held that "what is dictated is a standard more deferential than correctness but less deferential than 'not patently unreasonable'."[20] He ultimately concluded that *some* deference was warranted in that case because of "the expertise of the Tribunal, which is the most important consideration."[21]

25. Shortly thereafter, in *Pushpanathan*, the Court explicitly acknowledged that jurisdictional error had become *ex post* shorthand for *how much deference* the legislature intended for a given question. As Justice Bastarache stated, "[I]t should be understood that a question which "goes to

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[16] *U.E.S., Local 298 v. Bibeault*, [1988] 2 SCR 1048 at para. 122 [***Bibeault***].
[17] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 593 [***Pezim***] (emphasis added).
[18] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 at para. 58 [***Southam***].
[19] *Southam* at para. 55.
[20] *Southam* at para. 54 (emphasis added).
[21] *Ibid*.

jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based on the outcome of the pragmatic and functional analysis."[22]

26. The Court in *Pushpanathan* thus consolidated the pragmatic and functional analysis, which was now clearly devoted to establishing which of the three standards applied. Formulating the inquiry as "Did the legislator intend this question to attract judicial deference?", Bastarache J. established four factors that would be used to discern legislative intent: (1) the presence or absence of a privative clause; (2) the relative expertise of the tribunal vis-à-vis the court on a given issue (with an often probing examination of the nature of the tribunal's expertise); (3) the purpose of the act as a whole and the engaged provisions in particular; and (4) the nature of the problem.[23] These factors were intended to be "taken together to come to a view of the proper standard of review."[24]

iii. *Dunsmuir* and beyond

27. When applied to three standards of review, the pragmatic and functional analysis as set out in *Pushpanathan* caused more unpredictability and indeterminacy than it resolved.[25] *Dunsmuir*[26] attempted to simplify things by merging the standards of patent unreasonableness and reasonableness *simpliciter* and refining the framework for determining the applicable standard of review (now either reasonableness or correctness).

28. *Dunsmuir* emphasized a dual focus on rule of law and legislative intent: the majority stated that "the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is

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[22] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para. 28 [***Pushpanathan***]. The shift from a focus on jurisdiction to a focus on the degree of deference owed had been developing for some time: contrast *Bibeault* at 1082-1091, with e.g. *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722 at 1745-1746; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd*., [1993] 2 SCR 316 at 331-332; *Pezim* at 589-592.

[23] *Pushpanathan* at paras. 30-37.

[24] *Pushpanathan* at para. 38.

[25] See e.g. Lorne Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference – Revisiting the Standard of Review in Administrative Law" (2003) 27:4 Adv Q 478, **BOAAC, Vol. IV, Tab 32**.

[26] *Dunsmuir v. New Brunswick*, 2008 SCC 9 [***Dunsmuir***].

accomplished by establishing legislative intent."[27] The *Dunsmuir* standard of review analysis aimed to set clear benchmarks to determine which standard was to be applied in what circumstances, while striking an appropriate balance between these two (presumably competing) principles.

29. *Dunsmuir* crafted these benchmarks by attempting to synthesize the previous cases. Based on this synthesis, the majority directed that the standard of reasonableness would: (i) "usually apply automatically" to questions of fact, discretion or policy, and to questions of mixed fact and law;[28] (ii) "usually result" when a tribunal is interpreting its own statutes or statutes closely related to its function;[29] and (iii) "may also be warranted" where the decision-maker has developed expertise in the application of a general common law or civil law rule in relation to a specific statutory context.[30] Correctness would necessarily apply to: (i) constitutional questions; (ii) true questions of jurisdiction or *vires*; (iii) questions of law of both central importance to the legal system and outside the decision-maker's specialized area of expertise; and (iv) questions regarding the jurisdictional lines between two or more competing specialized bodies.[31]

30. *Dunsmuir* moreover directed reviewing courts to first ascertain whether the standard had been satisfactorily established in the case law, and if not, to conduct a contextual analysis akin to the *Pushpanathan* pragmatic and functional test to establish the standard of review.[32]

31. Since then, resort to the contextual analysis has been rare. In *Alberta Teachers*, the majority of this Court read *Dunsmuir* as establishing a presumption of deference whenever an administrative body interprets its home statute or a familiar statute.[33] This presumption can in theory be rebutted, but subsequent majorities have stated that this will be rare and have indeed rarely so concluded.[34]

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[27] *Dunsmuir* at para. 30.
[28] *Dunsmuir* at para. 53.
[29] *Dunsmuir* at para. 54.
[30] *Ibid*.
[31] *Dunsmuir* at paras. 58-61.
[32] *Dunsmuir* at paras. 62-64.
[33] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39 [***Alberta Teachers***].
[34] See e.g. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at paras. 24, 32-35 [***Edmonton East***]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 46 [***CHRC***].

32. On the whole, despite the significant efforts of the members of this Court, *Dunsmuir* and its progeny have not achieved the clarity that judges and litigants hoped for. Instead, the current jurisprudence has given rise to a variety of pragmatic and principled concerns.

33. Pragmatically, *Dunsmuir* has not been operationalized simply and efficiently.[35] Fault lines have emerged over the application and potential rebuttal of the presumption of reasonableness, notably relating to when a contextual approach is warranted;[36] what true questions of jurisdictions are and whether they even exist;[37] as well as what impact statutory rights of appeal should have.[38] Even where consensus on the standard exists, disagreement reigns over its application, particularly when it concerns judges reviewing decisions that are unsupported by reasons, or judges engaging in what many – including members of the Court – have called "disguised correctness review".[39]

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[35] See e.g. David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013) 42:1-2 Adv Q 1 [**Mullan**], **BOAAC, Vol. III, Tab 28**; Paul Daly, "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483, **BOAAC, Vol. II, Tab 16**; Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law: Reasonableness, the Rule of Law and Democracy" (2016) 62:2 McGill LJ 527, **BOAAC, Vol. II, Tab 17**; Alice Woolley & Shaun Fluker, "What has *Dunsmuir* Taught?" (2010) 47:4 Alta L Rev 1017, **BOAAC, Vol. IV, Tab 37**; Matthew Lewans, "Renovating Judicial Review" (2017) 68 UNBLJ 109, **BOAAC, Vol. III, Tab 25**; the Hon Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42 Queen's LJ 27 [**Stratas**] , **BOAAC, Vol. IV, Tab 35**; Andrew Green, "Can There Be Too Much Context In Administrative Law: Setting the Standard of Review in Canadian Administrative Law" (2014) 47:2 UBCL Rev 443, **BOAAC, Vol. II, Tab 21**; Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017) 68 UNBLJ 87, **BOAAC, Vol. II, Tab 11.** But compare Diana Ginn & William Lahey, "How the Lower Courts are 'doing *Dunsmuir*'" (2 March 2018), Administrative Law Matters, online: <https://www.administrativelawmatters.com/blog/2018/03/02/how-the-lower-courts-are-doing-dunsmuir-diana-ginn-and-william-lahey/>.

[36] See e.g. *Edmonton East* at para. 35 (Karakatsanis J.) vs. 73 (Côté & Brown JJ.); *CHRC* at paras. 46-47 (Gascon J.) vs. para. 73 (Côté & Rowe JJ.).

[37] *Alberta Teachers* at paras. 33-43 (Rothstein J.) vs. 78-89 (Binnie J.) vs. 102 (Cromwell J.); *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para. 23 (McLachlin C.J.) vs. paras. 63 (Côté J.), 114-120 (Brown J.) [***West Fraser Mills***]; *Québec (Attorney General) v. Guérin*, 2017 SCC 42 at paras. 36-36 (Wagner & Gascon JJ.) vs. 66-79 (Brown & Rowe JJ.) [***Guérin***]; *United Taxi Driver's Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40 at para. 61 [***Canadian National Railway***]; *CHRC* at paras. 31-41.

[38] See e.g. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 36-39 (Rothstein J.) vs. 169-179 (Abella J.); *Edmonton East* at paras. 27-31 (Karakatsanis J.) vs. 79-89 (Côté & Brown JJ.).

[39] See e.g. Mullan, at 76-81, **BOAAC, Vol. III, Tab 28**; Stratas, at 6-7, **BOAAC, Vol. IV, Tab 35**; see also *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 27 [***Wilson***]; *Teal Cedar*

Meanwhile, counsel still spend much of their time – and their clients' resources – arguing over the applicable standard of review.[40]

34. As a matter of principle, the *Dunsmuir* framework, based as it is on an amalgam of case law decided pursuant to evolving rationales, has become difficult to anchor to the first principles it announced. Legislative intent is at once presumed and contextualized, while clear markers of legislative intent such as rights of appeal are ignored. Rule of law is defined primarily as courts having the last word on jurisdiction,[41] which does not sufficiently account for the proper scope of judicial review and the role of courts in a constitutional democracy. At the same time, we still lack a robust conception of the place occupied by administrative decision-making in the overall structure of governance and the administration of justice in Canada. These problems are not simply doctrinal; they fuel much of the instability and conflict in operationalizing the framework that we have seen in recent years.

35. To remedy those problems, various proposals for reform have been articulated in both academic commentary and in jurisprudence. Others have been proposed to this Court by the parties and interveners in the present appeals. The *amici curiae* will not attempt to comment on each suggested approach individually. However, a few remarks are in order about the ways in which some of these proposals address the pragmatic and principled concerns raised by the post-*Dunsmuir* jurisprudence.

36. Some commentators and judges of the Federal Court of Appeal have suggested applying a variable standard of reasonableness review to all administrative decisions, where the degree of deference owed to a decision will depend on a variety of factors such as the nature of the decision and the importance or impact it has on the affected individual, with an "inverse correlation between the degree to which an administrative decision involves questions of law … and the degree to which a court will defer to an administrative decision."[42]

Products Ltd. v. British Columbia, 2017 SCC 32 at para. 99; *Groia v. Law Society of Upper Canada*, 2018 SCC 27 at para. 117 (Karakatsanis, Gascon & Rowe JJ., dissenting) [***Groia***].

[40] See Twila Reid, Amanda Whitehead & Jessica Habet, "A Practitioner's Innovative Response to Abella's Call to Reform Judicial Review" (2018) 69 UNBLJ 361 at 362-36, **BOAAC, Vol. III, Tab 29**.

[41] *Dunsmuir* at para. 30.

[42] Matthew Lewans, "Renovating Judicial Review" (2017) 68 UNBLJ 109 at 129, **BOAAC, Vol. III, Tab 25**; see also the Federal Court of Appeal cases cited therein.

37. This proposal raises several concerns. First, since it calls for a highly contextualized approach in which virtually everything may be considered in deciding how much deference is owed, the likelihood that indicators will point in opposite directions is even higher than under the former pragmatic and functional approach. Second, the possibility of infinite gradations of reasonableness makes it difficult if not impossible to predict how reasonableness review will be conducted. Finally, any efficiency-related advantages to such an approach are likely to be illusory, since the debate will merely have been shifted to another stage of the analysis.[43]

38. At the other end of the spectrum, the *Vavilov* respondents and certain interveners essentially propose adopting the appellate standards of review established in *Housen v. Nikolaisen*.[44] This proposal is attractive insofar as it would provide judges with a framework that is familiar and whose application would as a result likely be more straightforward and predictable. However, reviewing all discrete legal questions on a correctness standard – thus giving no deference to administrative decision-makers' legal interpretations – has never been held to be *mandated* by the rule of law in Canada, and would require courts to essentially ignore the legislative conferral of decision-making authority to administrative actors. Absent constitutional constraints, that choice must be respected. Failure to do so would moreover undermine the finality and efficiency that are sought by the creation of self-contained decision-making regimes.

39. Neither of these options is satisfactory. Ultimately, an intelligible and workable framework for judicial review should be based on a more robust theory of the administrative state, as well as a coherent approach to legislative intent and the rule of law. In our view, legislative intent must be detached from the present emphasis on expertise and should instead be viewed from the perspective of institutional design more broadly. In addition, the idea of jurisdictional oversight must be reconceived to better connect it to its roots in the rule of law. A re-examination of these first principles is therefore in order.

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[43] See e.g. *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 [***Bell* FCA**], where the majority's analysis conducted within the standard of reasonableness bears a striking resemblance to the *Dunsmuir* contextual factors.

[44] *Housen v. Nikolaisen*, 2002 SCC 33.

B. The Twin Pillars of Judicial Review: Legislative Intent and the Rule of Law

i. Legislative intent

40. Legislative intent has been called the "polar star" of the standard of review analysis[45] but the path forward has been far from clear. The contextual factors in their various permutations, discussed above, have proven to be indeterminate and unsatisfactory. At the same time, the post-*Dunsmuir* default rule of deference has been grounded in a controversial presumption of administrative decision-makers' expertise. This presumption is theoretically and empirically fragile. Expertise can readily be called into question in view of the wide array of existing administrative settings, creating both an unstable basis for the standard of review and an uncomfortable competition between courts and administrative decision-makers. Another way forward is needed.

41. A stronger, consistent, but underexplored grounding for legislative intent is the more basic "legislative intention that [a] matter lie in the hands of [an] administrative tribunal."[46] Most recently, for example, in *Canada Human Rights Commission,* Gascon J. stated that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review."[47]

42. From this perspective, judicial deference to administrative decision-making is ultimately rooted in an imperative of respect for the legislative choice to create a system in which decisions relating to certain matters are confided to self-contained entities that are not the courts. In short, it is deference based on institutional design.

43. Professor Lewans articulates a more robust account of the legitimacy of this approach, positing that "when a democratically responsible branch of government empowers an administrative official to decide a question of common concern, that legal instrument provides both subjects and judges with good reasons for respecting an administrative decision."[48]

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[45] *CUPE v. Ontario (Minister of Labour),* 2003 SCC 29 at para. 149.
[46] *Dunsmuir* at para. 35.
[47] *CHRC* at para. 50, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 29 [***Khosa***]. See also *Edmonton East* at para. 22.
[48] Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016) at 207, **BOAAC, Vol. III, Tab 24**.

44. Given the expansion of the administrative state in Canadian society over the latter half of the twentieth century,[49] rooting deference in institutional design acknowledges the increasingly cardinal function played by administrative actors in the Canadian legal system. The contemporary role of administrative bodies as the primary point of contact between the individual and the state, as well as the importance of the types of decision-making delegated to these bodies exclusive of the civil courts, together indicate that it is no longer appropriate to characterize the relationship between courts and administrative actors as one of vertical hierarchy. Administrative bodies, with their capacity to facilitate access to justice by diverting and formalizing state decision-making, operate in parallel with the courts as part of an expanded conception of executive and legislative action.[50]

45. In this light, deference is not a matter of relative expertise. The starting assumption is not that courts should defer when the administrative actor is an expert, and are otherwise free to intervene. Rather, the imperative of deference rests on the institutional design chosen by the legislator, which calls for coordination of administrative and judicial roles in the administration of justice. The starting point is that courts should defer, unless there is an imperative reason not to, or unless the legislature clearly intends a different institutional relationship.

46. While this Court has been moving toward this idea, at the same time, it continues to ground legislative intent for deference in a presumption that administrative decision-makers possess a particular expertise vis-à-vis the courts in resolving certain questions.[51] This approach is problematic in several respects.

47. First, expertise provides an insufficient account of the many reasons why legislatures invest administrative officials with decision-making authority. While expertise may be a very good reason to delegate the ability to make certain decisions to a discrete body, it is not the only, or inevitable, reason to do so. The choice to establish an administrative regime could equally arise

[49] Flood & Dolling at 6-12, **BOAAC, Vol. II, Tab 20**.
[50] See e.g. Kate Glover Berger, "Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames First Nation*" (2019) 88 SCRL (forthcoming) at especially Part II, **BOAAC, Vol. III, Tab 22**.
[51] See *Alberta Teachers* at paras. 32-48.

out of the desire to create a simplified, expedited, and less costly decision-making or policy-making process.[52]

48. Second, to the extent that courts are invited to assess expertise in a context-specific manner, there is no satisfactory way to ascertain whether it exists in fact. The case law in this respect has shifted considerably over the past decades. From *CUPE* to *Pushpanathan*, expertise was not presumed: it was something to be determined based on a fairly probing examination of the specific statutory language in question, the actual role of the decision maker, even the decision-maker's background and training.[53] Such an approach was unwieldy, giving way to the current method whereby a presumption of expertise exists irrespective of statutory language, a decision-maker's qualifications, the appointment process for that decision-maker, or any other elements used before *Dunsmuir* to characterize relative expertise.[54] Courts are now required to presume generally that an administrative decision-maker is expert in handling *all* issues that might arise from interpreting its home statute or related statutes. As some have noted, this makes the presumption of expertise essentially irrebuttable.[55] Cast so broadly, expertise turns into a fiction, and the very real expertise that probably does develop within many specialized bodies is undermined.

49. Third, the notion of relative expertise creates an unhealthy and unnecessary mindset of competition between courts and administrative decision-makers. It is simply not true that all administrative decision-makers, whether legally trained tribunal members or public servants rarely required to make any legal determinations, possess greater expertise than the courts in interpreting

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[52] On legislative choice to delegate to administrative bodies, see e.g. Matthew C. Stephenson, "Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts" (2006) 119:4 Harv L Rev 1035, **BOAAC, Vol. IV, Tab 33**; Matthew C. Stephenson, "Statutory Interpretation by Agencies" in Daniel Farber & Anne Joseph O'Connell, eds, Research Handbook on Public Choice and Public Law (Cheltenham, UK: Edward Elgar, 2010) 285 at 289, **BOAAC, Vol. IV, Tab 34**.

[53] See e.g. *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249 at para. 50; *Pezim* at 591-592; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 at paras. 28-32; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras. 28-29 [***Dr. Q.***]; *Southam* at paras. 50-53; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 SCR 1324 at 1336.

[54] See *Edmonton East* at para. 33.

[55] See e.g. *Edmonton East* at para. 85 (Côté & Brown J.J., dissenting).

the law.[56] At the same time, starting from the premise that administrative decision-makers have no expertise vis-à-vis courts on questions of legal interpretation, such that their reading of a statute should never be given any weight, results in a highly court-centric approach that would preclude deference to administrative decision-making on most if not all questions of law. Such an approach would compromise the integrity of what are often meant to be self-contained decision-making systems and is ultimately also incompatible with the primordial role the administrative state has come to play in Canadian society.

50. In short, while expertise is a good reason to confide certain decisions to administrative decision-makers, it does not provide a robust theoretical grounding for *requiring* courts to defer. The principle of deference must rest on a broader, sounder footing: the legitimate institutional design choice to confide decisions to self-contained administrative bodies. This approach provides a more coherent way forward and is the only expression of legislative intent that lends itself to presumption. At the same time, it allows – in fact requires – courts to give effect to clear markers of legislative intent to create a different institutional relationship between courts and administrative decision-makers by establishing the applicable standard of review by statute, or by creating a statutory right of appeal to the courts on questions of law.

ii. Rule of law

51. Legislative intent is not the end of the story. Administrative decision-making can never be completely independent from the courts because the rule of law – an essential component of our Constitution – requires that courts control the legality of administrative action. But the rule of law is broader than that, consequently mandating court intervention in certain other discrete situations.

52. Rule of law and Canadian constitutionalism are inseparably intertwined: the rule of law is "a fundamental postulate of our constitutional structure,"[57] "implicit in the very concept of a constitution,"[58] and one of the "vital unstated assumptions upon which the text is based."[59]

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[56] See e.g. *West Fraser Mills* at para. 129 (Rowe J., dissenting); *Bell* FCA at para. 92 (Rennie J.A., dissenting); *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 at para. 94 (Slatter J.A. concurring in result).
[57] *Roncarelli v. Duplessis*, [1959] SCR 121 at 142 [***Roncarelli***].
[58] *Re Manitoba Language Rights*, [1985] 1 SCR 721 at 750 [***Manitoba Reference***]; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 19 [***Christie***].
[59] *Reference re Secession of Québec*, [1998] 2 SCR 217 at para 49 [***Secession Reference***].

It is both expressly and implicitly acknowledged in the *Constitution Act, 1867* and the *Constitution Act, 1982*.[60] Moreover, because the adoption of the *Constitution Act, 1982* transformed the Canadian system of government "from a system of Parliamentary supremacy to one of constitutional supremacy,"[61] even unwritten constitutional principles "are capable of limiting government actions."[62] The rule of law thus independently imposes constitutional constraints on all actors within the Canadian federation. Understanding the substantive content of these constraints requires an examination of what this Court has articulated as the different elements of the rule of law.

53. The rule of law has been described as comprising three dimensions. First, there must be a system of laws, i.e. "the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[63] Second, all state action must be authorized by law, meaning "the relationship between the state and the individual must be regulated by law,"[64] and "the exercise of all public power must find its ultimate source in a legal rule."[65] Finally, there must be equality before the law: "the law is supreme over officials of the government as well as private individuals, and therefore preclusive of the influence of arbitrary power."[66]

54. Certain additional implications arise out of these three core principles. In its *BC Trial Lawyers* decision, this Court confirmed that the rule of law requires a basic level of access to the superior courts;[67] for as Dickson C.J. had stated earlier, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."[68] Thus, "[t]he s. 96 judicial function and the rule of law are inextricably intertwined";[69] the rule of law both mandates and is maintained through protection of the special role of the judiciary in the Canadian constitutional structure.[70]

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[60] *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 57; *Christie* at para. 19.
[61] *Secession Reference* at para. 72.
[62] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 54.
[63] *Manitoba Reference* at 749.
[64] *Secession Reference* at para 71.
[65] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 at para. 10 [***Provincial Judges Reference***].
[66] *Manitoba Reference* at 748.
[67] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at paras. 32-34 [***BC Trial Lawyers***].
[68] *BCGEU v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230.
[69] *BC Trial Lawyers* at para. 39.
[70] *Provincial Judges Reference* at para. 88; see also *Bibeault* at para. 126.

55. Considered together in the administrative law context, these different dimensions of the rule of law – the requirements that laws exist, that state action be authorized by law, and that individuals are equal before the law and maintain some right of access to the courts – underlie the existence of judicial review *generally speaking*. However, the requirement that there *be* judicial review does not dictate a particular *standard* of review in all instances in which judicial review is required.

56. This distinction is of particular relevance to the continuing hunt for elusive "true" questions of jurisdiction. All judicial review for legality relates to jurisdiction in one way or another, because it is ultimately about determining the existence of legal authority to act. The jurisprudence since *CUPE* reviewed above reveals that in Canada, courts have been controlling for most excesses of jurisdiction or legal authority on a deferential standard of patent unreasonableness (now reasonableness) for quite some time. The question that remains is whether there is a subset of such questions – "true" question of jurisdiction – that warrants a more exacting standard of review. In our view, this category is a relic of the prerogative writs and stems from an interpretation of *Crevier v. Québec (Attorney General)*[71] that must evolve in order to bring coherence to this aspect of judicial review.

57. The principle that all state action must be authorized by law historically justified the use of prerogative writs to quash decisions made without jurisdiction. In the modern administrative law context, however, the principle that all actions must be authorized by law is more immediately reflected in the supervisory role of superior courts that is guaranteed by s. 96 of the *Constitution Act, 1867*, as discussed by this court in *Crevier*.

58. In *Crevier*, this Court addressed the constitutionality of giving total effect to a full privative clause that precluded any form of review of decisions of Québec's Professions Tribunal. The Court held that the privative clause could not completely oust the supervisory role of the superior courts, because this would allow the protected administrative body to independently determine the scope of its own jurisdiction. Because s. 96 courts are the only bodies that possess an inherent jurisdiction whose scope they may determine themselves, "where a provincial Legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, the insulation encompassing jurisdiction, such provincial legislation must be struck down as unconstitutional by

[71] *Crevier v. Québec (Attorney General)*, [1981] 2 SCR 220 [***Crevier***].

reason of having the effect of constituting the tribunal a s. 96 court."[72] Judicial review could not be ousted to the extent that doing so would prevent superior courts from policing jurisdictional boundaries. In short, legislatures cannot, as a matter of constitutional principle, altogether abolish the supervisory role that was original to the s. 96 courts: the rule of law requires judicial review to be available *somewhere*.[73]

59. Insofar as it articulates the rule of law-based justifications for the *existence* of judicial review, *Crevier* is a crucial benchmark in Canadian administrative law. Yet courts have relied on the concept of jurisdiction that was central in *Crevier* not only to articulate the principle that judicial review must always be available, but also to underlie a category of "true" jurisdictional questions that must be subject to review on a standard of "correctness".[74] This twofold reliance on the notion of jurisdictional questions has led to significant difficulties in subsequent jurisprudence.

60. Notably, *Crevier* was decided in 1981, and thus largely predates the evolution in the case law away from a debate over jurisdiction and toward a focus on legislative intent. Since then, judges have found good reason to doubt whether a subset of jurisdictional questions *Dunsmuir* called "true" questions of jurisdiction actually exists,[75] with some even suggesting that the distinction is meaningless and can no longer be sustained as a matter of principle.[76] In *Canadian Human Rights Commission*, Gascon J. summarized the nature of the problem:

> The difficulty with true questions of *vires* is that jurisdiction is a slippery concept. Where decision makers interpret and apply their home statutes, they inevitably determine the scope of their statutory power. There are no clear markers to distinguish between simple questions of jurisdiction (i.e., questions that determine the scope of one's authority) and true questions of *vires* (i.e., questions that determine whether one has authority to enter into the inquiry). Such imprecision

[72] *Crevier* at 234.
[73] Of course, this Court has held that Parliament could validly transfer superior courts' jurisdiction with respect to judicial review of federal decision-makers to other judicial bodies, for instance the Federal Court. See *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 SCR 147 at 154; *Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 SCR 228 at 233; *Canada (Attorney General) v. TeleZone Inc*., 2010 SCC 62 at para. 45.
[74] *Pushpanathan* at para. 28; *Dunsmuir* at para. 59.
[75] See *Alberta Teachers*; *Canadian National Railway* at para. 61; *Guérin* at paras. 32-36 (Wagner & Gascon JJ.) vs. 66-79 (Brown & Rowe JJ., concurring); *CHRC* at paras. 31-41.
[76] See e.g. *Alberta Teachers* at paras. 34 (Rothstein J.) and 88 (Binnie J.).

> tempts litigants and judges alike to return to a broad understanding of jurisdiction as justification for correctness review contrary to this Court's jurisprudence. As a result, the elusive search for true questions of *vires* may both threaten certainty for litigants and undermine legislative supremacy.
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> For some, the continued existence of the category of true questions of *vires* may seem to provide conceptual value, at most. In his concurrence in *Alberta Teachers*, Cromwell J. wrote a spirited defence of the conceptual necessity of correctness review for jurisdiction given the courts' supervisory power over the bounds of jurisdiction, but even he conceded that the category of true questions of *vires* has little analytical value in the standard of review analysis. It remains an open question whether conceptual necessity can justify the resources that courts and parties devote to the attempt to define an inherently nebulous concept.[77]

61. The problem of distinguishing the existence of a power from the scope of that power was cogently articulated by the U.S. Supreme Court in *City of Arlington, Texas v. Federal Communications Commission*.[78] As the majority pointed out, this difficulty appears to stem in part from a conflation of different types of authority exercised by courts and administrative bodies:

> The misconception that there are, for *Chevron* purposes, separate "jurisdictional" questions on which no deference is due derives, perhaps, from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts. In the judicial context, there is a meaningful line: Whether the court decided correctly is a question that has different consequences from the question whether it had the power to decide at all. Congress has the power (within limits) to tell the courts what classes of cases they may decide. A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to *res judicata* effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not *ultra vires*.
>
> That is not so for agencies charged with administering congressional statutes. Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*. Because the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."[79]

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[77] *CHRC* at paras. 37-39 (emphasis added, citations omitted).
[78] *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013) [***City of Arlington***], **BOAAC, Vol. I, Tab 4.**
[79] *City of Arlington* at 6-7 (emphasis added, citations omitted), **BOAAC, Vol. I, Tab 4.**

62. Courts in other common law jurisdictions have likewise found it impossible to delineate a principled boundary between errors "within" jurisdiction and errors "going to" jurisdiction. In the United Kingdom, the jurisdictional/non-jurisdictional distinction was challenged in *Anisminic*.[80] In that case, Lord Reid reasoned that if a decision-maker mistook the applicable law, the decision-maker must have also asked itself the wrong question, one which it was not empowered to ask and which it had no jurisdiction to answer.[81] Since then, subsequent decisions have applied *Anisminic* as establishing "that there was a single category of errors of law, all of which rendered a decision *ultra vires*."[82]

63. Australian law recognizes various grounds of review, all of which are assimilated to errors of jurisdiction. Error of law is treated as an independent ground. This position is traced to a long-standing distinction in Australian jurisprudence between review for legality (where courts maintain a monopoly on saying what the law is) and review for "merits" (e.g. discretionary decisions or judgments made by those exercising public authority).[83]

64. The experience of these courts confirms what has been implicit in the development of our own jurisprudence, namely, that there is no durable division between questions of law that relate to the existence of a power and questions of law that relate to that power's scope. In both cases, we are concerned with whether the decision maker has gone beyond what the legislature permitted it to do. In that sense, *all* questions in an administrative law context are to some extent jurisdictional. The quest for "true" jurisdictional questions is therefore misguided, and it must be put to rest in Canada as it has been elsewhere.

65. Furthermore, concluding that all questions in an administrative law context are to some extent jurisdictional only serves to identify the principle of legality as a key justification for judicial review, including deferential review. The U.S. Supreme Court's conclusion that it is impossible to

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[80] See *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 AC 147 (HL), **BOAAC, Vol. I, Tab 1.**
[81] See *O'Reilly v. Mackman*, [1983] 2 AC 237 at 278, **BOAAC, Vol. I, Tab 7.**
[82] *R. (on the application of Lumba) v. Secretary of State for the Home Department (Justice and another intervening)* [2011] UKSC 12, [2012] 1 AC 245 at para. 66 (Lord Dyson), **BOAAC, Vol. II, Tab 9.**
[83] See *Attorney-General (NSW) v. Quin*, (1990) 170 CLR 1 at 35-36, **BOAAC, Vol. I, Tab 2**; see also *Enfield City Corporation v. Development Assessment Committee*, (2000) HCA 5**, BOAAC, Vol. I, Tab 5.**

distinguish jurisdictional questions from other legal questions has led it to hold that *all* legal interpretation by administrative agencies is entitled to deference from a reviewing court where the statutory language is ambiguous[84] – a doctrine known as "*Chevron* deference", after the case that originated this principle.[85] In the U.K., courts applying *Anisminic* start from the assumption that "the reviewing court will substitute judgment for that of the primary decision-maker on [all errors of law]."[86] Deferential review is reserved for discretionary decision-making,[87] questions of fact, and mixed questions.[88] In Australia, which does not have a distinct standard of review analysis, the independent ground of review for error of law is also subject to non-deferential review by the courts.

66. Clearly, each jurisdiction's reasons for adopting a more exacting standard of review in some contexts and not in others must lie elsewhere. We turn presently to what these reasons are in Canada.

C. Linking Principle to Practice: Establishing a Framework for the Standard of Review

i. Judicial review as a constitutional imperative, with deference as the default rule

67. In theoretical terms, an approach that reconciles the rule of law with legislative intent must start by recognizing the legitimacy of a legislative choice to delegate decision-making to bodies that are not courts. At the same time, the constitutional rule of law-based imperatives of legality and equality before the law preclude legislators from completely immunizing these bodies' decisions from any sort of judicial scrutiny.

68. Practically speaking, a workable equilibrium between fidelity to those first principles and ease of implementation can be achieved through maintaining the two existing standards of review,

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[84] See *City of Arlington* at 10, **BOAAC, Vol. I, Tab 4.** In Canada, Lamer J. made a very similar observation in *Blanchard v. Control Data*, [1984] 2 SCR 746 at 490-491, citing Paul Craig, *Administrative Law* (London: Sweet & Maxwell, 1983) at 302, **BOAAC, Vol. II, Tab 12.**

[85] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.* 467 US 837 (1984), **BOAAC, Vol. 1, Tab 3.** Note that the U.S. Supreme Court has recognized that "major questions" of significant political or economic importance are exempted from *Chevron* deference: *King v. Burwell*, 135 S. Ct. 2480 (2015), **BOAAC, Vol. I, Tab 6.**

[86] Paul Craig, *Administrative Law*, 8th ed (London: Thomson Reuters, 2016) at 472 [**Craig, 8th ed], BOAAC, Vol. II, Tab 14.**

[87] Craig, 8th ed at 567 ff., **BOAAC, Vol. II, Tab 14.**

[88] Craig, 8th ed at 567-570, **BOAAC, Vol. II, Tab 14.**

with a default rule and derogations from that default that reflect the fundamental requirements of the rule of law and show respect for clear signals of legislative intent. Such an approach does not place the rule of law in opposition to legislative intent; rather, these principles will be complementary.

69. First, respect for institutional design mandates that whenever courts sit in judicial review of the decisions of administrative actors, be they cabinet ministers or independent administrative tribunals, they must adopt a default posture of deference to these decisions. While judicial review must exist notably to ensure that public authorities do not exceed their statutory powers and thus make a decision that is not authorized by law, that review must be conducted on a standard of reasonableness in recognition of the fact that, to a constitutionally permissible extent, courts should refrain from intervening in these decisions. To give effect to this principle of deference, the default standard of review must be reasonableness.

70. While such a default rule might appear substantively identical to the presumption of deference for a decision-maker's interpretation and application of its home statute or related statutes that was established in *Alberta Teachers*, the theoretical foundation for this default rule is distinct: it is based not on an unstable presumption of expertise, but "in a respect for governmental decisions to create administrative bodies with delegated powers."[89]

71. The default rule accordingly requires deference to administrative decision-makers' determinations of (most) legal questions: giving full effect to the legislative choice to create non-judicial decision-making regimes requires permitting administrative actors to make all determinations, including legal ones, that are necessary to arrive at a decision.[90] Aside from rule of law-based constraints on the delegation of legal interpretation, there is no impediment to legislators doing so. Superior courts' inherent jurisdiction vis-à-vis administrative decisions does not historically or constitutionally encompass an *exclusive* ability to interpret the law in all circumstances.[91]

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[89] *Canada (Attorney General) v. Mossop,* [1993] 1 SCR 554 at 596 (l'Heureux-Dubé J., dissenting though not on this point).

[90] See Paul Craig, *Administrative Law*, 6th ed (London: Sweet and Maxwell, 2008) at 445, **BOAAC, Vol. II, Tab 13**; Paul Daly, "Deference on Questions of Law" (2011) 74:5 Mod L Rev 694 at 697, 715, **BOAAC, Vol. II, Tab 15.**

[91] See *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 SCR 626 at para. 38; *Re Residential Tenancies Act*, [1981] 1 SCR 714; *Attorney General (Québec) et al. v. Farrah*, [1978] 2 SCR 638.

72. Second, deference based on institutional design cannot be absolute. The different composites of the rule of law also require at a minimum that courts be the final and binding authority in certain discrete situations. While the legislator is always free to impose more judicial oversight and reduce the amount of deference that is owed to a given decision, there is a "floor" beyond which the legislator cannot reduce the courts' supervisory role. Because the focus is on defining the constitutional *requirement*, in practice, the circumstances in which courts must have the last word will be limited: although there may be pragmatic or value-laden reasons to prefer courts to have the final say on certain matters, there will usually be no constitutional imperative that they do so.

73. Third, at the same time, respect for legislative intent must remain primordial to the extent that constitutional considerations do not preclude it. This requires not only a recognition that the creation of administrative regimes itself militates for deferential review; it must also leave space for the alternative, namely the acknowledgment that derogation from the default rule is warranted in the presence of clear statutory language to this effect, including a statutory appeal clause on questions of law.

74. Thus, a default rule of deference would not alter the principle that "as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is "correct"."[92] . That said, the imposition of "correctness" – or, more accurately, non-deferential review – will be justified not because courts necessarily have a better sense than administrative actors as to what the *right outcome* is in a given situation, but rather because in some circumstances, rule of law-based considerations or clear legislative intent require that *the courts as an institution* have the last word on a matter.[93] We turn to those circumstances in the next section.

ii. Derogations from the default rule mandated by the rule of law and other constitutional principles

a) Constitutional questions

75. The Constitution is "a comprehensive set of rules and principles" that provides "an exhaustive legal framework for our system of government."[94] It sets the jurisdictional and substantive limits on

[92] *Alberta Teachers* at para. 94, Cromwell J. concurring (emphasis added).
[93] See the Hon. Yves-Marie Morissette, "What Is a "Reasonable Decision"?" (2018) 31 CJALP 225 at 236 ff., **BOAAC, Vol. III, Tab 27.**
[94] *Secession Reference* at para. 32.

state actors' behavior. State actors are bound by these rules unless they alter them through constitutional amendment via the mechanisms set out in Part V of the *Constitution Act, 1982*.[95]

76. The very nature of a constitution – the law that determines the permissible bounds of all other laws and state actions – dictates that constitutional standards must have a determinate and determinable meaning. State actors must know the limits of their constitutional authority in order to operate within them, and legislatures cannot amend the limits of their or any state actor's constitutional authority through delegated decision-making.

77. As a result, one of the bare minimum requirements of judicial review is that judges, not actors wielding power delegated to them by legislatures or the executive, have the last word on the meaning of our written and unwritten Constitution, determining what state action is constitutional and what is not.

78. This is a very basic and long-standing principle. The jurisprudence has consistently recognized that administrative actors' legal conclusions on constitutional interpretation are not owed any deference. As the majority put in *Dunsmuir*: "The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government."[96] Particularly when it comes to review of the validity of *laws* for constitutional compliance, this Court has repeatedly recognized the "position of prime importance in the constitutional pattern of [the] country" occupied by the s. 96 courts,[97] which has led to their recognition as the only courts in Canada that have the authority to strike down statutes pursuant to s. 52 of the *Constitution Act, 1982*.[98]

79. The necessary consequence of this is that courts must also have the last word on the interpretation of the *Charter*, as they do on the scope of any other constitutional rule. As McLachlin C.J. aptly stated her concurring reasons in *Law Society of British Columbia v. Trinity Western University*:

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[95] *Reference re Senate Reform*, 2014 SCC 32 at para. 28.
[96] *Dunsmuir* at para. 31.
[97] *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 SCR 307 at 327.
[98] See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570 at 599-600; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at 17; *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 at paras. 59-65.

> … the scope of the guarantee of the *Charter* right must be given a consistent interpretation regardless of the state actor, and it is the task of the courts on judicial review of a decision to ensure this. A decision based on an erroneous interpretation of a *Charter* right will be unreasonable. Canadians should not have to fear that their rights will be given different levels of protection depending on how the state has chosen to delegate and wield its power.[99]

80. For the same reason, courts must also have the final say as to whether a *Charter* right has been infringed and whether that infringement is proportionate in light of the statutory objectives underlying an administrative action. This may require a clarification of the *Doré/Loyola* framework.[100] In *Trinity Western*, a majority of this Court explained that "*Charter* rights are no less protected under an administrative law framework," and then properly noted that "[s]ince *Charter* protections are implicated, the reviewing court must be satisfied that the decision reflects a proportionate balance between the *Charter* protections at play and the relevant statutory mandate."[101] This is exactly right: it is the courts that must have the final say as to whether the balance struck is proportionate.

81. The notion of reasonableness is of course already built into the proportionality analysis, as it is under the *Oakes* framework. As the majority stated in *Loyola*, "[a] *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1"[102] But the reference to reasonableness in the *Oakes* framework should not lead to the conclusion that reasonableness is the appropriate standard of review in respect of whether a decision infringes the *Charter* and whether such an infringement is proportionate.

82. In short, just as administrative bodies cannot have the last word on the extent of federal or provincial jurisdiction, and thus on whether a law or decision infringes the constitutional division of powers, they cannot have the last word over the scope of a *Charter* right. The current language of deference where administrative decisions affecting *Charter* rights are concerned risks deference to interpretations of the scope of and impact on rights that favour the state actor at the expense of the individual, as well as the development of contradictory views as to the nature of the right in question.

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[99] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para. 116 (emphasis added) [***Trinity Western***].
[100] *Doré v. Barreau du Québec*, 2012 SCC 12; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 [***Loyola***].
[101] *Trinity Western* at paras. 57, 59 (emphasis added).
[102] *Loyola* at para. 40.

b) Competing jurisdictional lines between two or more specialized bodies

83. *Dunsmuir* recognized that courts must step in to settle jurisdictional boundaries between administrative tribunals. Although neither *Dunsmuir* nor the standard of review jurisprudence that precedes it explicitly justifies the requirement of non-deferential review for this category, its logic is sound: if courts were required to defer to a tribunal's interpretation of the scope of its jurisdiction where this interpretation would overlap with another tribunal's understanding of its own jurisdiction, litigants would not know where to turn to address a given issue, or could find themselves subject to conflicting orders from different tribunals or bodies.[103] This would ultimately lead to insurmountable incoherence in the law.

84. The rule of law imperatives that there be a system of laws and that the law apply equally to all both lead to a basic requirement of intelligibility: citizens must know where to turn and should not be confronted with contradictory legal rules. Where competing administrative tribunals are concerned, intelligibility requires a clear answer as to which body has authority over what matters, which can only be achieved by courts having the final say on the issue. In that regard, the courts' intervention in such circumstances is not ultimately about the courts providing the "correct" answer about the "accurate" scope of each administrative actor's jurisdiction. Rather, it is about providing litigants and administrative bodies alike with the predictability and finality that is required in answer to the question of which body has authority over whom and what.

c) Persistent discord leading to legal incoherence

85. The rule of law requirement of legal intelligibility has similar implications outside the context of competing tribunal jurisdiction. It implies a basic level of legal consistency generally speaking, so that there can be "one law for all".[104] A law that is vague or indecipherable to the point of incoherence cannot be tolerated when it becomes impossible to discern the nature of the rule that must be applied to everyone. In other words, fundamentally "[d]ivergent applications of legal rules undermine the integrity of the rule of law."[105]

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[103] See e.g. *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 SCR 739, dealing with conflicting decisions from different administrative decision-makers on similar logic.

[104] *Secession Reference* at para. 71.

[105] *Khosa* at para. 90 (Rothstein J., concurring).

86. Given the nature and institutional design of administrative justice, the principle that "like cases must be treated alike" is necessarily a qualified one. Absolute equality before the law cannot be achieved in this domain without undermining the goal of prompt and effective access to justice. On the other hand, equality before the law cannot be rendered illusory. To that end, the courts' role in ensuring finality, predictability, and coherence in the law calls for their intervention in the presence of persistent discord or contradiction in administrative actors' legal interpretations – even on legal questions that would ordinarily be owed deference.

87. The Court has thus far declined to permit intervention in such circumstances, based on several considerations that appear to support judicial restraint. First, our judicial system does not always yield perfection; "consistency in decision-making and the rule of law cannot be absolute in nature regardless of the context."[106] Inconsistent interpretations of statutes exist among superior courts, and while binding legal interpretations by appellate courts provide one way of addressing this problem, there is no guarantee that *every* inconsistent interpretation of a statutory provision will eventually be resolved on appeal – not least because a right of appeal is not automatic and can be subject to restrictions or preconditions.[107]

88. Moreover, in the administrative context, this Court held in *Domtar* that "[s]o far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals."[108] L'Heureux-Dubé J. noted that opening the door for courts to intervene in instances of inconsistent legal interpretation would eliminate the decision-making autonomy and specialized expertise of administrative tribunals, "in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision."[109]

89. These considerations have grounded this Court's conclusions in *Domtar* and, more recently, an implied conclusion by Abella J. in *Wilson*, that inconsistent legal interpretations by administrative decision-makers do not in and of themselves open the door for courts to impose their own view of the meaning of a statute.

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[106] *Domtar v. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 787-788 [***Domtar***].
[107] See e.g. Québec's *Code of Civil Procedure*, CQLR c C-25.01, arts. 30-32.
[108] *Domtar* at 788.
[109] *Domtar* at 797.

90. These conclusions must, however, be revisited. Deference as a manifestation of respect for legislative intent can only be justified insofar as it does not run afoul of the constitutional requirements of the rule of law, among which is the imperative of legal coherence or consistency as a means of ensuring equality. Moreover, we cannot let theory completely take the individual out of the picture. Speedy and efficient access to justice before administrative bodies is ultimately rendered meaningless if that form of justice appears arbitrary to those subject to it.

91. Yet arbitrariness is precisely what develops if inconsistent legal interpretations linger within the same administrative body. Where coexisting conflicting legal interpretations become the norm, the rule of law begins to break down: what the law means comes to depend on the identity of the decision-maker in question,[110] and legal predictability disintegrates as parties are forced to live with the improbable reality that a statute can *simultaneously*, and reasonably, mean "yes" and "no".[111] This is not a tolerable state of affairs. At some point, legislative intent to confer some questions to administrative decision-makers must give way to the need for consistency and stability. This is where the courts must step in.

92. Deciding at what point court intervention is necessary is admittedly not an easy task, but this should not dissuade this Court from attempting to find a solution. In their dissenting reasons in *Wilson*, Côté and Brown JJ. proposed a standard of "lingering disagreement on a matter of statutory interpretation between administrative decision-makers … where it is clear that the legislature could only have intended the statute to bear one meaning."[112] This is a sound starting point, when paired with this Court's recognition in *Domtar* that achieving absolute consistency of legal interpretations is not congruent with the nature and institutional design of administrative justice. Thus, the requirement that "the legislature could only have intended the statute to bear one meaning" must be read in the sense that it is impossible for the statute to mean "yes" and "no" at the same time, not in the sense that the meaning chosen by the courts is the only justifiable one. Second, courts should only intervene in the face of a truly *persistent* contradiction: the existence

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[110] See *Wilson* at paras. 85-87 (Brown and Côté JJ., dissenting); J. M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27 CJALP 101 at 105, **BOAAC, Vol. II, Tab 19**.
[111] E.g. the divergent interpretations of provisions of the *Canada Labour Code*: *Wilson* at para. 83.
[112] *Wilson* at para. 89.

of a single conflicting but reasonable decision does not necessarily undermine respect for the rule of law within the administrative state.[113]

93. This approach provides a benchmark by which courts may assess whether they must impose an answer in circumstances where deference would otherwise be required. While the contours of this category will need to develop over time, if the underlying principle is sound, courts have a responsibility to undertake this difficult task.

94. Finally, it is important to stress that the need for some degree of consistency in statutory interpretation does not necessarily imply that *courts* must always have the final say on such questions.[114] It is entirely possible for an acceptable measure of consistency to be achieved by administrative actors themselves, where there are appropriate mechanisms for resolving interpretive conflict and arriving at consensus.[115] To the extent that such mechanisms exist, and no other principles require the courts to impose their own view on a given question, reviewing judges must adopt a posture of deference to consensus positions achieved within the administrative framework.

d) Questions of central importance to the legal system as a whole

95. Finally, one of the two *amici curiae* takes the view that the imperatives of equality before the law, legal consistency, and legal intelligibility also require courts to have the final say on questions of central importance to the legal system as a whole.

96. In *Dunsmuir* and in the jurisprudence preceding and following it, this Court has recognized that beyond constitutional matters, certain legal questions require consistent answers. However, in keeping with the principled move away from expertise as a driving factor of the standard of review, the focus of this category must be on the rule of law-based considerations that oblige courts to have the final say, not on the presence of artificial relative expertise. The basic premise is that questions of central importance to the legal system must be decided definitively by the courts so as to "safeguard a basic consistency in the fundamental legal order of our country."[116]

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[113] *Ibid*.
[114] See Daly, "Deference on Questions of Law" at 711, **BOAAC, Vol. II, Tab 15**.
[115] See e.g. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paras. 8, 42 [***Irving Pulp & Paper***].
[116] *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 47 [***McLean***]; see also *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 22.

97. This category will necessarily be narrow, focused as it is on matters that lie "at the heart of the administration of justice,"[117] and that accordingly may apply in a wide range of judicial, quasi-judicial, and administrative settings. The issues that rise to this level will likely be structural, having an impact not just on individuals' rights or on the rights of parties subject to a particular regulatory regime,[118] but equally or even more primordially on the manner in which the justice system itself operates and on how participants in that system interact with it.

98. Examples of existing questions that this Court has expressly recognized as being of central importance to the legal system as a whole provide a benchmark moving forward for what other issues might require non-deferential review. Prior to *Dunsmuir* but in reasons endorsed in that decision,[119] this Court held in *Toronto (CUPE)* that complex common law rules going to "the body of law dealing with the relitigation of issues finally decided in previous judicial proceedings" (including questions of *res judicata* and abuse of process), which "call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions,"[120] qualify as questions of central importance to the legal system. Post-*Dunsmuir*, the Court has only accepted a handful of subjects as being clearly of central importance to the legal system: the scope of the duty of state religious neutrality;[121] solicitor-client privilege;[122] and, most recently, parliamentary privilege.[123]

99. All are issues whose scope and interpretation have a significant impact on the legal order or on the administration of justice. For instance, the attorney-client relationship, which requires full disclosure in complete confidence, could not function if information or documents were deemed to be privileged in one setting but not in another. Likewise, legislators in doubt about the scope of their parliamentary privilege could not risk taking an action that would be protected in one administrative context but not in another; such uncertainty might impede them from being able to properly carry out their constitutional role.

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[117] *Toronto (City) v. CUPE, Local 79*, 2003 SCC 63 at para. 15 [***Toronto (CUPE)***].
[118] See *Canadian National Railway* at para. 60.
[119] *Dunsmuir* at para 63.
[120] *Toronto (CUPE)* at para. 15.
[121] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at paras. 49-51 [***Saguenay***].
[122] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras. 21-22, 26.
[123] *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39; many on the Court consider that parliamentary privilege has a constitutional dimension: see *Chagnon* at paras. 64 (Rowe J.), 87 (Côté & Brown JJ.); see also *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at paras. 37 (Karakatsanis J.), 122, 140 (Brown J.).

100. It is not possible to exhaustively catalogue the questions that will fall into this category. Nevertheless, the available examples illustrate why it is clear that the category exists. While the presence of this category (or indeed, any category) will mean that litigants will test its boundaries in future cases, this is part and parcel of the development of the law.

101. The other *amicus curiae* takes the view that non-deferential (correctness) review is not constitutionally required in relation to so-called "questions of central importance to the legal system as a whole". The significance of administrative decisions rarely extends beyond the four corners of the dispute or the administrative regime within which they are rendered. In addition, the relatively indeterminate scope of the idea of "central importance to the legal system as a whole" offers multiple avenues to those who would seek to bypass the default rule of deference. In the post-*Dunsmuir* jurisprudence, this Court has identified a number of such issues, but consistently refrained from correctness review in deference to the decision-maker's expertise.[124] Freed from the restraint of expertise, this category contains an extraordinary potential for expansion that is incompatible with the thrust of the default rule of deference. It should be simply be abandoned. Non-deferential review on all constitutional questions, conflicting jurisdictional boundaries, and persistent contradictions, as described above, joined with deferential review on all other questions, offers a coherent framework that is sufficient to preserve the critical level of coherence dictated by the rule of law.

iii. Derogation based on clear markers of legislative intent

102. The focus on expertise has led to an asymmetrical approach to legislative intent. On the one hand, courts are instructed to defer to administrative bodies based on presumed legislative intent that is in turn based on presumed expertise, even in circumstances where such presumptions are not warranted. On the other, they are instructed to ignore the implications of statutory rights of appeal of administrative decisions on certain subjects directly to a court.

103. Expertise is often given as a justification for downplaying statutory rights of appeal.[125] However, once expertise is put into proper perspective, and institutional design is placed at the center of the analysis, it is no longer coherent to ignore this clear marker of legislative intent.

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[124] See e.g. *Groia* at para. 51.

[125] See *Edmonton East* at paras. 29-34; *Saguenay* at para. 38; *Dr. Q.* at paras. 17, 21, 27, 36; *McLean* at paras. 169-179 (Abella J., concurring); *Pezim* at 591-595.

104. As previously stated, legislators are always free to provide for *more* judicial oversight of administrative decisions. There are no rule of law-based considerations that would require courts to ignore or read down statutory indicators to this effect. Legislation that explicitly provides for correctness review in some circumstances is a clear example of this,[126] but there is no reason why courts should consider it to be the *only* instance of clear legislative intent that less deference be accorded to a given administrative decision.[127]

105. In that regard, if the creation of a distinct administrative regime indicates legislative intent to take certain types of decisions out of the hands of the courts, the creation of a right of appeal on discrete questions is surely the opposite. A statutory right of appeal on a question of law is a clear indicator – some say an "unequivocal sign"[128] – that the legislator intends for non-deferential review, subject to the ordinary standard of review on appeal.

106. Moreover, while the trend toward ignoring the implications of statutory rights of appeal on discrete questions is mirrored in the trend toward ignoring the implications of privative clauses, different considerations apply. *Crevier* established that even if privative clauses reflect legislative intent to shield *all* aspects of an administrative decision from judicial scrutiny, it is unconstitutional for courts to give full effect to such provisions – whereas provisions prescribing *less* deference are clearly permitted. Additionally, if deference on the basis of institutional design is the default rule, privative clauses have simply lost their relevance to the analysis.

107. Finally, a significant contextual consideration also militates for greater recognition of the importance of statutory appeal clauses. The existence of a right of appeal on certain questions does not preclude parties from pursuing a regular judicial review of the impugned administrative decision on matters not covered by the limited right of appeal.[129] This coexistence of appeals with judicial review, combined with the courts' reading-down of appeal clauses, risks making some appeal clauses entirely redundant.

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[126] See e.g. *Administrative Tribunals Act*, SBC 2004, c. 45, ss. 58 and 59.
[127] See e.g. *Bell* FCA at para. 192 (Nadon J.A., concurring in the result), discussing s. 31(2) of the *Broadcasting Act*, SC 1991, c. 11.
[128] *Bell* FCA at para. 190 (Nadon J.A., concurring in result).
[129] See *Edmonton East* at para. 78 (Côté & Brown JJ., dissenting); *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180 at para. 35; *Code of Civil Procedure*, art. 529, para. 2; see also *Trudel c. Re/Max 2001 MFL inc.*, 2013 QCCA 1396 at paras. 6-7, 13-15.

108. In *Edmonton East*, for instance, a statutory right of appeal with leave on questions of law was available from decisions of a municipal Assessment Review Board to the Court of Queen's Bench – the same court that would hear a judicial review on *any* question that arose from the ARB's decision. A majority of this Court chose not to give any weight to that right of appeal when it came to establishing the standard of review,[130] but the consequence of doing so was to render the right of appeal meaningless since the same standard – reasonableness – would apply regardless of whether the Court of Queen's Bench heard a judicial review or granted leave to appeal on a specific legal issue. But if a statutory appeal by leave on questions of law leads to the same analytical process for reviewing a decision as does judicial review, the statutory appeal becomes completely redundant – even though "*le législateur ne parle pas pour rien dire*."[131]

109. That said, not all rights of appeal are created equal. A variety of statutory appeals exists in the Canadian legislative landscape, providing for diverse procedural requirements as well as a wide range of implications for the court seized of the matter.[132] In that sense, in many cases the word "appeal" may be a misnomer. General rights of appeal on *all* aspects of an administrative decision, which do not distinguish specific types of questions, are better viewed as simply creating the procedural framework through which ordinary judicial review of the decision is to be carried out. Such provisions do not send a sufficiently clear signal that reviewing courts must have the last word. In contrast, where, as in *Edmonton East*, the statutory appeal singles out certain substantive types of questions for scrutiny – such as "questions of law or jurisdiction" – this *does* send a clear signal that such questions must be treated differently. While the exact contours of the distinction between procedural provisions and substantive rights of appeal may take some time to delineate in the jurisprudence, the distinction itself remains salient.

110. It is true that recognizing certain statutory rights of appeal as clear markers of legislative intent that courts, not administrative decision-makers, have the final say on some matters would represent a significant departure from the jurisprudence that has developed in this Court since even before *Dunsmuir*. However, the Court must accept such a departure where it is justified in principle

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[130] *Edmonton East* at paras. 27-31.
[131] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 at para. 142.
[132] Robert Macaulay, *External Review of Administrative Decisions: Petitions to cabinet, appeals to court, and judicial review* (Toronto: Thomson Reuters, 2016) at 27C-17 to 27C-18, **BOAAC, Vol. III, Tab 26.**

and necessary in practice to bring some coherence back to the state of the law. In the present case, a reconsideration of the existing jurisprudence on statutory rights of appeal is not only warranted but required if the search for legislative intent is to be more than an empty catchphrase affixed to the beginning of any analysis of standard of review.

111. That said, regardless of whether this Court agrees with this conclusion, it should in all cases provide clear guidance to legislators as to what sort of statutory language *would* suffice. For instance, if the sole expression of legislative intent that this Court will accept is an explicit spelling out of the standard of review applicable to a given question, as found in statutes such as British Columbia's *Administrative Tribunals Act*,[133] then this Court should say so and give legislatures an opportunity to react accordingly.

iv. Courts should review questions of procedural fairness applying *Baker*

112. A brief mention of review for procedural fairness is warranted. While this Court confirmed in *Khela* that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness'," [134] some courts have suggested that the presumption of deference, and thus reasonableness review, should be extended to assessing whether the criteria of procedural fairness have been met.[135] Others have proposed that the standard of review analysis is ill-suited to review for procedural fairness.[136] Insofar as these decisions and commentary seem to be injecting uncertainty into the law, this Court could provide a welcome clarification.

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[133] *Supra* note 125.
[134] *Mission Institution v. Khela*, 2014 SCC 24 at para. 79.
[135] See e.g. *Syndicat des travailleuses et travailleurs de ADF – CSN c. Syndicat des employés de Au Dragon forgé inc*., 2013 QCCA 793; *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59 at paras. 49-63; *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at paras. 70-77.
[136] See e.g. *Brooks v. Ontario Racing Commission*, 2017 ONCA 833 at para. 5: "no standard of review analysis is necessary" in assessing procedural fairness. See also Edward Clark, "Reasonably Unified: The Hidden Convergence of Standards of Review in the Wake of *Baker*" (2018) 31 CJALP 1 at 8–9, **BOAAC, Vol. II, Tab 10**; the Hon. Simon Ruel, "What is the Standard of Review to Be Applied to Issues of Procedural Fairness?" (2016) 29 CJALP 259 at 268, **BOAAC, Vol. IV, Tab 31**.

113. Because what fairness requires varies and will inevitably depend on the statutory context,[137] some deference to legislative or administrative procedural choices is already built into the *Baker* framework – at the point of determining whether the degree of procedural fairness owed in a given situation is high, and what specific procedural rights are guaranteed.[138] Yet this does not imply that once these choices have been taken into account at the stage of determining what fairness requires, the reviewing court should further defer to an administrative actor's assessment of whether these requirements have been met. This conceptual distinction, which seems to be missed in the line of cases militating for deference on questions of procedural fairness, was cogently articulated by Rennie J.A. in a recent Federal Court of Appeal decision:

> The deference that may be shown to tribunals to make procedural choices does not mean that the ultimate question of whether the proceedings were, on a whole, fair is assessed on a reasonableness standard. This argument equates the contextual factors which are directed to determining *the content* of fairness (e.g., the sufficiency of a written versus an oral hearing) with the ultimate question – *whether* the party knew the case they had to meet, had an opportunity to respond and had an impartial decision maker consider their case fully and fairly. To contend that the standard of review is correctness with an element of deference thus marries two discrete questions.[139]

114. In short, a process is either fair or it is not. In that sense, the better view is that a standard of review analysis and the reasonableness/correctness delineation that applies to substantive decision-making is, indeed, simply not a helpful way of approaching a problem that is procedural in nature. Just like no standard of review analysis applies to determining whether a decision-maker fettered its discretion or improperly delegated its authority – reviewing courts step in and decide these (essentially procedural) questions themselves – the same should hold true when establishing whether individuals received the procedural safeguards they were owed.

D. Conducting Deferential Review

115. A framework to determine the standard of review only takes us so far. Deferential review must also be carried out, or the framework becomes meaningless. These appeals give this Court the opportunity to provide further guidance on how to conduct deferential review.

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[137] *Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653 at 682.
[138] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 27.
[139] *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 41.

116. In *Dunsmuir*, the Court held that deference is an attitude or posture of respect. With regard to the mechanics of deference, it specified that reasonableness "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process."[140] This would seem to place the focus of reasonableness review primarily on the reasons given in support of a decision, although whether the decision falls within a range of reasonable outcomes cannot be ignored. This is sound in principle, in the sense that while even intelligible reasons could not support a decision that falls outside of the range of acceptable outcomes, an outcome that *could* be acceptable must nevertheless be quashed if the reasons reveal that the decision was made on improper grounds (e.g., where discretion was exercised abusively, as in *Roncarelli*).

117. However, post-*Dunsmuir* several jurisprudential developments have shifted from a focus on reasons to an almost-exclusive focus on outcome. First, in *Newfoundland Nurses,* Abella J. held that inadequacy of reasons is not a standalone basis for quashing a decision, and that reviewing courts must read reasons together with the outcome in an "organic exercise" to establish reasonableness.[141] The reviewing court must moreover "seek to supplement [the reasons] before it seeks to subvert them" by considering the record as a whole as well as the submissions of the parties.[142] Subsequently, in decisions where *no* reasons were provided for a particular decision, the majority has crafted its own reasons that "could have been offered" to justify that decision.[143] Further complicating matters, even where reasons for a decision are available, the majority of the Court has sometimes undertaken its own independent analysis of the legal question at issue.[144] This has, perhaps inevitably, given rise to the criticism that reviewing judges are paying lip service to deference and are simply engaging in *de novo* review to impose their own opinion of what the appropriate outcome should be.[145]

118. The *amici curiae* submit that where reasons are available, they must always be the starting point of deferential review of a decision's reasonableness. Instead of looking first to statutory text or context to justify a decision, the reviewing court must engage with the explanation provided by

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[140] *Dunsmuir* at para. 47.
[141] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 14
[142] *Ibid* at paras. 11-12, 17-18.
[143] *Alberta Teachers*; *Edmonton East*.
[144] See e.g. *Dionne v. Commission scolaire des Patriotes,* 2014 SCC 33 at paras. 39, 43.
[145] See e.g. *supra* note 40.

the decision-maker to determine whether there are any flaws in *that* explanation that are fatal to the decision's legality. Concretely, where the impugned decision involves statutory interpretation, the reviewing courts should hew to the interpretive process followed in the reasons to safeguard against significant flaws, rather than embarking on an independent interpretive process. That said, where reasons reveal that the decision was based on improper grounds, the decision should not be upheld even if it might otherwise fall within the range of reasonable outcomes.

119. We note that this Court has often stated that reasonableness "takes its colour from the context."[146] This has been interpreted by some lower courts as countenancing a sliding scale of deference, as described in the proposals discussed above. In our view, the idea of more or less exacting standards of reasonableness was compellingly laid to rest in *Dunsmuir* and *Khosa* and should not be revived now. Taking colour from the context merely means that the decision must be reasonable in relation to the statutory scheme and the facts at issue. There are multiple paths to reaching a reasonable decision, and deference means that courts should not intervene even if they might have taken a different path.

120. Several rulings of this Court illustrate how deferential review that starts with the reasons provided is feasible in practice. In *Igloo Vikski*, Brown J. turned his assessment of the reasonableness of the Canadian International Trade Tribunal's interpretation of the *Customs Tariff* on the reasons offered by the CITT, analysing the alleged errors with that analytical process rather than engaging in *de novo* interpretation of the *Tariff*.[147] Gascon J. likewise conducted a reasons-based analysis in *Canadian Human Rights Commission*, searching for flaws within the Commission's reasoning as opposed to undertaking an independent interpretation of its enabling statute.[148] These decisions provide a workable template and illustrate that where reasons are present, deferential review that focuses on the *actual* justification for the decision is possible.

121. That said, there will be instances when reasons are not provided, or at least not for every aspect of a decision. However, although procedural fairness will not *always* require reasons, the cases in which an absence of reasons will be acceptable should be few and far between. Reasoned decision-making is essential to institutional legitimacy – of both the courts and the administrative

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[146] *Khosa* at para. 59.
[147] *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 at para. 30-50.
[148] *CHRC* at paras. 56-65.

state – and when a reviewing court is forced to provide reasons in the administrative actor's stead, it undermines the administrative actor's role as the front-line decision-maker. Moreover, any form of review of a decision that is not buttressed by reasons is problematic in the sense that it does not permit a court to assess whether a decision was made based on appropriate considerations or inappropriate motives.

122. From a practical and analytical perspective, the absence of reasons makes true deference difficult if not impossible. Where reasons are not provided, the reviewing court will often have little choice but to undertake its own analysis to determine if the outcome falls within the range of acceptable outcomes on the basis of what is available in the record. In such circumstances, there may simply be no practical distinction between deferential review and *de novo* analysis. An alternative open to the reviewing court might therefore be to return a matter to a decision-maker for redetermination with reasons.[149] However, this in turn raises problems of efficacy and access to justice for the litigant who is forced to wait even longer for a final determination of the question in dispute.

123. If providing reasons for a decision can orient courts into a truly deferential approach to review, it may be that administrative actors themselves bear some practical responsibility for ensuring that this occurs.

PART IV – SUBMISSIONS AS TO COSTS

124. The *amici curiae* do not seek costs and ask that no costs be ordered against them.

PART V – ORDER SOUGHT

125. The *amici curiae* do not seek any order from this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

[149] See e.g. the approach suggested by Stratas J.A. in *Bonnybrook Indusrial Park Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136 at paras. 87-95.

Montréal, November 5, 2018

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PART VI –TABLE OF AUTHORITIES

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