The Problem with the Presumption of Expertise on a Home Statute Interpretation

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Abstract:

Judicial review of decisions made by administrative decision-makers serves as a safeguard to ensure that public decision-makers are operating, both substantively and procedurally, within the law. The scope of judicial review on substantive grounds involves quantifying the amount of deference the court will give to a public decision-maker when reviewing a decision.

The application of deference on a decision-maker's home statute interpretation was at the centre of the Supreme Court of Canada's debate in the July 2016 decision, *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 (an unjust dismissal complaint under the *Canada Labour Code*, RSC 1985, c L-2, s 240). The Court provided four sets of reasons on the meaning and application of the standard of reasonableness in administrative law. The dissent in *Wilson* concluded that the standard of review should be correctness, even though the decision-maker was interpreting its home statute, because in this case, to apply the reasonableness standard of review would "abandon rule of law values in favour of indiscriminate deference to the administrative state."[1]

This paper will be guided by the question of whether adherence to the presumption of expertise by way of a reasonableness standard of review whenever a decision-maker is interpreting a question of law within its home statute, forsakes the rule of law and accords an indiscriminate amount of deference to the administrative decision-maker. This paper will discuss the standard of review analysis established in *Dunsmuir* and analyze the jurisprudence on how the courts have subsequently conducted such an analysis. The *Wilson* decision and dissent will then be analyzed. This will raise issues such as the importance of defence, how to quantify a decision maker's expertise and how that impacts the amount of deference a decision-maker should be given by the courts on judicial review.

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Introduction

The study of administrative law involves an analysis of the rules and principles that apply to public decision-makers, the exercise of their power and how this decision-making power affects the individual. Understanding these rules and principles naturally involves an analysis of the legal structuring and regulation of sovereign authority in the context of the principles of fundamental justice, democracy and the rule of law.[2]

Judicial review of administrative action serves as a safeguard to ensure that public decision-makers are operating, both substantively and procedurally, within the law.[3] The scope of judicial review on substantive grounds involves quantifying the amount of deference the court will give to a public decision-maker when reviewing a decision. The courts have struggled with how to determine the appropriate level of deference in a case. Over 75 years, the jurisprudence has developed four different standards of review under the former 'pragmatic and functional' approach.[4] From the least amount of deference to the greatest amount of deference accorded to

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[2] Gus Van Harten et al, *Administrative Law Cases, Texts, and Materials*, 7th ed (Toronto: Emond Montgomery Publications Limited, 2015) at 3-4 [Van Harten].

[3] *Ibid* at 31.

[4] *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048.

the decision-maker, the standards have been: correctness, reasonableness simpliciter, reasonableness, and patent unreasonableness.

The approach to judicial review changed in 2008 with the Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*.[5] *Dunsmuir* modified the 'pragmatic and functional' approach to judicial review and coined the analysis as the 'standard of review analysis.' The goal was to simplify the process by which courts quantify deference and accordingly determine the standard of review.[6] *Dunsmuir* narrowed the standards of review into two categories: reasonableness and correctness, with reasonableness affording some deference to the decision-maker and correctness providing no deference to the decision-maker.[7] The majority in *Dunsmuir* said "reasonableness is one of the most widely used and yet most complex legal concepts."[8] In an effort to clarify the confusion surrounding the application of reasonableness in judicial review, the majority in *Dunsmuir* set out a number of categories to determine when the issue being reviewed fell within the scope of the reasonableness standard or if the correctness standard should instead be applied. One category of question that triggers a presumption of reasonableness is the interpretation of a decision-maker's home statute or a related statute that requires the "expertise of the administrative decision-maker".[9] The jurisprudence demonstrates, however, that while *Dunsmuir* simplified the process in some ways, there remains uncertainty on how to balance the two competing values of respect for legislative intent and the rule of law when

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

[6] *Ibid* ¶ 32-34.

[7] *Ibid* ¶ 34.

[8] *Ibid* ¶ 46.

[9] *Ibid* ¶ 128.

ascertaining whether to afford deference to an administrative decision-maker's interpretation of the law within its home statute.

The issue of deference and which standard of review should be applied when a decision-maker is interpreting its enabling statute was at the centre of the Supreme Court of Canada's debate in the July 2016 decision, *Wilson v Atomic Energy of Canada Ltd*[10] (an unjust dismissal complaint under the *Canada Labour Code*[11]). The court provided four sets of reasons on the meaning and application of the standard of reasonableness in administrative law. The major criticism by Justices Moldaver, Côté and Brown in their dissent was that the deferential approach of applying the standard of reasonableness on the grounds that the labour adjudicator was interpreting its home statute "abandon[s] rule of law values in favour of indiscriminate deference to the administrative state."[12] The dissent in *Wilson* concluded that the standard of review in the case should be correctness, despite the fact that the decision-maker was interpreting its home statute.

The fact that the Supreme Court of Canada in 2016 has divided in four over which standard of review applies shows that the issue of the standard of review analysis in cases in which an administrative decision-maker is interpreting questions of law within its home statute requires greater clarification. This paper will be guided by the question of whether the presumption of expertise when a decision-maker is interpreting its home statute sacrifices the rule of law at the altar of deference.[13] *Wilson* will be used as a case study to analyze the jurisprudence post-

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[10] *Wilson*, *supra* note 1.

[11] *Canada Labour Code*, RSC 1985, c L-2, s 240 [*Canada Labour Code*].

[12] *Wilson*, *supra* note 1 ¶ 79.

[13] *Ibid* ¶ 79-81.

Dunsmuir to demonstrate that the contextual factors of a case may rebut the presumption of expertise and thereby undermine the basis for deference on questions of law within a home statute interpretation. In these circumstances, to apply the reasonableness standard because the issue involves a home statute interpretation, "abandon[s] rule of law values in favour of indiscriminate deference to the administrative state."[14] An analysis of the relative nature of the concept of expertise supports the conclusion that where the contextual factors of a case rebut the basis for deference on a decision-maker's interpretation of the law within its home statute, a correctness review is needed to uphold the rule of law.

I. The Standard of Review Analysis

The standard of review analysis necessarily requires the consideration of the roles of the three branches of government: the legislature, the executive, and the judiciary. The legislature enacts a statute and empowers an administrative tribunal to implement the administration of that enabling statute. This process establishes the administrative tribunal as part of the executive branch of government. [15] The role of the judiciary is to interpret and apply the law.[16] A tension arises when an administrative tribunal's enabling statute requires it to interpret and apply the law because this muddles the separation of powers between the executive branch and the judiciary. Furthermore, when the legislature has crafted the statute in an effort to shield the tribunal from judicial review, the question becomes, who has the final word on the interpretation and

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[14] *Ibid* ¶ 79.

[15] David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 Queen's LJ 445 ¶ 17 [Dyzenhaus, 'Constituting the Rule of Law'].

[16] *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 ¶ 2-3 [*Cooper*].

application of the law, the administrative tribunal or the courts?[17] The disagreement at the Supreme Court of Canada in *Wilson* is rooted in determining how courts should quantify and afford deference to administrative decision-makers who have interpreted the law within their home statute. *Wilson* thus highlights the tension of the separation of powers in the context of judicial review. A brief review of the evolution of the standard of review analysis is needed in order to comprehend the extent of the challenge the courts have faced in attempting to create a coherent standard of review framework that balances respect for legislative intent and the rule of law in cases where these two democratic values seem to be incapable of coexisting. Accordingly, the following paragraphs will first discuss the standard of review analysis prior to *Dunsmuir*. The *Dunsmuir* decision and the current standard of review analysis will then be explained.

A. Pre-*Dunsmuir* Standard of Review Analysis

Historically in judicial review, the approach applied by the courts was one of judicial supremacy. In the late 1960s, the House of Lords created the category of "intra-jurisdictional errors of law".[18] If an administrative decision-maker made an error interpreting the law, this constituted a jurisdictional error and consequently the decision could be overruled by the courts. On judicial review, the court could impose its own decision, even if a statute prescribed that the decision was not reviewable by the courts.[19] This judicial supremacy was exhibited in

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[17] Dyzenhaus, 'Constituting the Rule of Law', *supra* note 15 ¶ 17-18.

[18] *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 (HL) [*Anisminic*].

[19] Paul Daly, "The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317 ¶ 3 [Daly, 'Form Over Substance'].

Metropolitan Life Insurance v International Union of Operating Engineers[20] in which the Supreme Court of Canada corrected an 'error of law' on the grounds it was within the court's jurisdiction to do so, despite a statutory provision to the contrary.[21] This non-deferential approach to judicial review was strongly criticized in the 1970s. However, by the late 1970s, the jurisprudence demonstrated a shift toward a deferential approach to judicial review.[22]

The shift toward a deferential approach was documented in 1979 in *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation* [*CUPE*].[23] This case demonstrates the tension of the separation of powers between the legislature, executive and judiciary: during an employee strike, the Public Service Labour Relations Board interpreted its enabling statute to determine whether management could take over the work of the striking employees. The privative clause in the enabling statute protected the tribunal from judicial review. The issue on judicial review necessarily involved quantifying the deference to give to the decision-maker's interpretation of its home statute. The court determined that this interpretation was at the "core"[24] of the tribunal's expertise and jurisdiction and accordingly the decision could not be quashed unless it was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" [emphasis added].[25] This case established the 'patent unreasonableness' standard of

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[20] *Metropolitan Life Insurance v International Union of Operating Engineers*, [1970] SCR 425, 11 DLR (3d) 336 [*Metropolitan Life Insurance*].

[21] Daly, 'Form Over Substance', *supra* note 19 ¶ 3.

[22] *Ibid* ¶ 6-7.

[23] *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corporation*, [1979] 2 SCR 227 [*CUPE*].

[24] Dyzenhaus, 'Constituting the Rule of Law', *supra* note 15 ¶ 19, citing *CUPE*, *supra* note 23.

[25] *CUPE*, *supra* note 23 at 9.

review and is "commonly considered the starting point for the acceptance of the notion of deference in Canadian administrative law."[26] *CUPE* demonstrates a departure from a rigid application of the separation of powers[27] and a move toward a deferential approach in which the courts recognize that in cases involving an application of a home statute, a tribunal is entitled to interpret the law and that interpretation is owed deference on judicial review.

Despite the trend toward a deferential approach in *CUPE*, the jurisprudence continued to demonstrate how the courts struggled to conceive and apply deference, particularly on questions of law. The 1996 decision in *Cooper v Canada (Human Rights Commission)*[28] illustrates the lack of harmony at the Supreme Court on issues involving interpretations of the law: proponents of judicial supremacy would argue that interpretations of the law must be left to the judiciary in order to uphold the rule of law. On the other hand, proponents of legislative intent would argue that the judiciary must respect the legislature's choice to empower the tribunal to interpret and apply the law and thus the tribunal is entitled to deference. The majority of the court ruled in favour of judicial supremacy. The majority held that a formal separation of powers exists in Canada between the executive branch and the judiciary and held that the interpretation of the law is "categorically reserved"[29] to the judiciary. The implication of this rigid separation of powers was that the courts had exclusive authority to declare legislation invalid on constitutional grounds.[30] The majority decision in *Cooper* resembles the judicial supremacy discussed above in

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[26] Daly, 'Form Over Substance', *supra* note 19 ¶ 7, citing The Honourable Mr. Justice Louis LeBel, "Some Properly Deferential Thoughts on Deference" (2008) 21:1 Can J Admin L & P 1 at 2.

[27] Dyzenhaus, 'Constituting the Rule of Law, *supra* note 15 ¶ 20.

[28] *Cooper, supra* note 16.

[29] Dyzenhaus, 'Constituting the Rule of Law', *supra* note 15 at 445.

[30] *Ibid* ¶ 11.

Metropolitan Life Insurance. The minority in *Cooper*, however, supported a deferential approach to judicial review. The minority said that unless the legislature has expressly removed the tribunal's power to do so, a tribunal is entitled to decide on questions of law which necessarily includes deciding on constitutional issues.[31]

The minority's deferential approach to judicial review in *Cooper* was reflected, only two years later, by the majority at the Supreme Court of Canada in *Pushpanathan v Canada (Minister for Citizenship and Immigration)*.[32] The fact that the minority decision from *Cooper*, and not the majority, was reflected in *Pushpanathan* highlights how the courts have oscillated between the need to protect the rule of law and respect for legislative intent. *Pushpanathan* involved the interpretation of the United Nations *Convention Relating to the Status of Refugees* by the Convention Refugee Determination Division of the Immigration and Refugee Board.[33] *Pushpanathan* is useful because it clearly highlights the three standards of review that existed in the late 1990s; correctness (as discussed above in *Metropolitan Life Insurance*), patent unreasonableness (as addressed above in *CUPE*) and reasonableness simpliciter.[34]

In *Pushpanathan*, the court outlined four factors which, when considered together, govern which standard of review should apply in each case. The factors, which would ultimately be adopted in *Dunsmuir*, are as follows:

1. *The Presence or Absence of a Privative Clause*. The presence of a "full privative clause is compelling evidence that the court ought to show deference to the

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[31] *Ibid* ¶ 15.

[32] *Pushpanathan v Canada (Minister for Citizenship and Immigration)*, [1998] 1 SCR 982 [*Pushpanathan*].

[33] *Ibid* ¶ 1-6.

[34] A reasonableness simpliciter standard was applied in *Canada (Director of Investigation & Research) v Southam Inc*., [1997] 1 SCR 748 ¶ 28 [*Southam*]: "a court, in reviewing the Tribunal's decision, must inquire whether that decision was reasonable. If it was, then the decision should stand. Otherwise, it must fall."

tribunal's decision, unless other factors strongly indicate the contrary."[35] However, if the statute contains the right to an appeal from an administrative decision, this is a factor which suggests the court can accord less deference to the decision-maker.[36]

2. *The Expertise of The Decision-Maker*. Expertise "must be understood as a relative, not an absolute concept."[37] The evaluation of expertise involves the following analysis comprised of three components; the court must ascertain the expertise of the tribunal, the court must compare its own expertise on the issue to the expertise of the tribunal and the court "must identify the nature of the specific issue before the administrative decision-maker relative to this expertise."[38] A highly specialized tribunal should be given a high degree of deference and the court should accordingly apply the deferential standard of patent unreasonableness. Conversely, where the tribunal has a "lack of relative expertise" on the issue as compared to the reviewing court, such a situation is a "ground for a refusal of deference."[39]

3. *The Purpose of The Act As a Whole, and the Provision In Particular*. Where the nature of the statutory scheme is specialized and, for example, is structured to empower the decision-maker with dispute-settlement mechanisms, such a scheme demonstrates the legislature's intent to provide considerable discretion to the decision-maker. Such a situation attracts a high degree of deference on judicial review. Where, however, an issue is "polycentric" insofar as it involves "a large number of interlocking and interacting interests and considerations", such an issue attracts a lower standard of review and accordingly the court may afford less deference to the decision-maker. [40]

4. *The Nature of the Problem: A Question of Law or Fact?* The application of deference on questions of law is determined according to legislative intent. Where the statutory scheme demonstrates that the legislature intended for the decision-maker to be owed deference on questions of law, the courts owe deference to the decision-maker in such a circumstance. However, where "other factors leave that intention ambiguous, courts should be less deferential of decisions which are pure determinations of law."[41] The court should apply the standard of correctness in

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[35] *Pushpanathan*, *supra* note 32 ¶ 30.

[36] *Ibid*.

[37] *Ibid* ¶ 33.

[38] *Ibid*.

[39] *Ibid* ¶ 33-35.

[40] *Ibid* ¶ 36

[41] *Ibid* ¶ 37.

those circumstances.[42]

The analysis of these four factors would result in the application of one of three standards of review: correctness, reasonableness simpliciter, or patent unreasonableness. The three standards exist on a spectrum of deference. Correctness affords no deference to the decision maker and instead the court undertakes "its own reasoning process to arrive at the result it judges correct."[43] Patent unreasonableness is on the opposite end of the spectrum, offering the most amount of deference. Under a patent unreasonableness review, the court is to affirm the tribunal's decision unless it is "so patently unreasonable that [it] cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."[44] The standard of reasonableness simpliciter falls somewhere in the middle of correctness and patent unreasonableness.[45] A decision which is reviewed on the standard of reasonableness simpliciter requires the court to conduct a "somewhat probing examination."[46] Whilst patent unreasonableness applies where there is an obvious defect in an administrative decision, the reasonableness simpliciter standard applies when "it takes some significant searching or testing to find the defect."[47] In that case, the decision is still unreasonable, although not so obvious as one that is patently unreasonable.

The framework for the standard of review was, however, far from settled. Only one year after *Pushpanathan*, the Supreme Court of Canada released its decision in *Baker v Canada*

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[42] *Ibid* ¶ 38.

[43] *Law Society of New Brunswick v Ryan*, 2003 SCC 20 ¶ 50 [*LSNB v Ryan*].

[44] Daly, 'Form Over Substance', *supra* note 19 ¶ 8.

[45] *Southam*, *supra* note 34 ¶ 60.

[46] *Ibid* ¶ 56.

[47] *Ibid* ¶ 57.

(Minister of Citizenship and Immigration)[48] in which it attempted to simplify the standard of review analysis. Ms. Baker had been working illegally in Canada for 11 years and she had four Canadian-born children. An immigration officer ordered for the deportation of Ms. Baker. In response, Ms. Baker applied for an exemption from deportation under s.114(2) of the *Immigration Act*[49] to obtain permanent residency status in Canada on humanitarian and compassionate grounds. The immigration officer refused her application.[50] The case raised several issues of procedural fairness and substantive review.[51] The *Baker* framework for determining the standard of review can be divided into two main questions.

The first question is: what is the standard of review? The decision maker is to choose from one of the three aforementioned standards; correctness (no deference accorded to the decision-maker), reasonableness simpliciter (a moderate amount of deference is given), and patent unreasonableness (provides the most amount of deference available). To determine which one of these standards to apply, the court is to consider the four factors outlined in *Pushpanathan*; 1) the presence or absence of a privative clause; 2) the expertise of the decision maker; 3) the purpose of the act as a whole and the provision in particular; and 4) the nature of the problem.[52] In *Baker,* the majority of the court weighed these four factors and decided that although the statutory language and fact-specific nature of the issue attracted a high degree of deference, the absence of a privative clause and the polycentric nature of the issue suggested that the "standard of review

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[48] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]

[49] *Immigration Act,* RSC 1985*,* c I-2, s.114(2) [*Immigration Act*].

[50] *Baker, supra* note 48 ¶ 1-6.

[51] Only the parts of the decision which pertain to substantive review will be discussed. The court's decision on the issues of procedural fairness falls outside the scope of this paper.

[52] *Baker, supra* note 48 ¶ 57-61.

should not be as deferential as 'patent unreasonableness.' The balancing of the factors, therefore, demonstrated the standard of review should be reasonableness simpliciter; the middle of the deference spectrum.[53]

Once the court determines which standard of review to apply to the case, the next question under the *Baker* framework is whether that standard has been met. In *Baker*, the question became: was the decision unreasonable? The test for whether a decision is unreasonable is as follows:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.[54]

In an effort to clarify the confusion surrounding what deference is and how it can be applied to strike a balance between respecting legislative intent and upholding the rule of law, the court said that deference "requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."[55] The court decided that the decision by the immigration officer was unreasonable because "his decision was inconsistent with the values underlying the grant of discretion."[56] Despite the conclusion that the decision was not reasonable, the court in *Baker* exhibited a more deferential approach to judicial review by considering the reasons the decision-maker gave for his decision. The examination of the reasons marked a more deferential approach to the administrative decision-making process than courts had exercised in

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[53] *Ibid* ¶ 62.

[54] *Ibid* ¶ 63, citing *Southam, supra* note 34 ¶ 56.

[55] *Baker, supra* note 48 ¶ 65, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at 286.

[56] *Baker, supra* note 48 ¶ 65.

the past.[57] The deferential approach to judicial review would be adopted less than a decade later in *Dunsmuir*, discussed below.

B. The *Dunsmuir* Standard of Review Analysis

Prior to *Dunsmuir*, the process the courts undertook to determine the standard of review was called the 'pragmatic and functional approach.'[58] *Dunsmuir* held that this particular phrase "may have misguided courts in the past."[59] The court in *Dunsmuir* therefore decided that the process should instead be called the 'standard of review analysis.'[60] In an effort to simplify the standard of review analysis, the court established that there are only two standards of review: correctness or reasonableness.[61]

The standard of reasonableness, the court in *Dunsmuir* held, is a deferential standard wherein the court must accord a "margin of appreciation"[62] to tribunals. This involves giving "due considerations to the determinations of decision makers"[63] and recognizing that "certain questions that come before administrative tribunals do not lend themselves to one specific,

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[57] Dyzenhaus, 'Constituting the Rule of Law', *supra* note 15 at ¶ 93.

[58] *Dunsmuir, supra* note 5 ¶ 63.

[59] *Ibid*.

[60] *Ibid*.

[61] *Ibid* ¶ 34.

[62] *Ibid* ¶ 47.

[63] *Ibid* ¶ 49.

particular result. Instead, they may give rise to a number of possible, reasonable conclusions."[64] The court outlined how the reasonableness standard should be exercised:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [65]

If a court conducts a review for reasonableness and concludes that the decision falls within the "range of possible, acceptable outcomes" [66], the decision should be given deference and upheld as reasonable. The broad scope of the reasonableness standard demonstrates the shift away from judicial supremacy and toward a deferential approach to judicial review. This shift highlights the judiciary's acknowledgement of the need to respect legislative intent in order to uphold democratic values. The "range of possible, acceptable outcomes" [67] affords more decision-making authority to administrative bodies while simultaneously eliminating some of the judiciary's power to overturn administrative decisions. This is undoubtedly a major sign of respect for legislative intent. The *Dunsmuir* framework, however, did not create unlimited deference to the administrative state. The court in *Dunsmuir* very clearly preserves the correctness standard of review which offers no deference to the decision-maker. The exercise of the correctness standard requires the court to,

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[64] *Ibid* ¶ 47.

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*.

> Undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[68]

To determine which standard of review to apply, a reviewing court must conduct a two-step analysis. The creation of this methodical framework signifies the court's efforts to create a standard of review analysis that is coherent and consistent. A coherent framework is needed in order to provide a degree of transparency in judicial review in order to demonstrate that the courts acknowledge and respect the legislature's choice to empower the administrative decision-maker to make public decisions. Consistency in judicial review is fundamental to the rule of law, which is reflected in the first step of the *Dunsmuir* standard of review analysis.

The first step is to determine whether the jurisprudence has established which standard of review applies to the category of question at issue. [69] If the jurisprudence has established that either the standard of reasonableness or correctness applies to the particular question, the court should apply that standard. If the jurisprudence has not determined the standard of review, the reviewing court should move to the second step in the analysis: the consideration of several factors to determine which standard of review applies. The court outlined several factors which, when considered together, assign the decision at issue to a reasonableness or correctness review.[70] The court is clear that the analysis of the factors "must be contextual."[71] The factors are familiar:

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[68] *Ibid* ¶ 50: The correctness standard "must be maintained in respect of jurisdictional and some other questions of law" in order to avoid inconsistent application of law.

[69] *Ibid* ¶ 63.

[70] Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting The Standard of Review in Canadian Administrative Law" (2014) 47 UBC L Rev 443 ¶ 19 [Green, 'Can There Be Too Much Context in Administrative Law'].

[71] *Dunsmuir, supra* note 5 ¶ 64.

1) the presence or absence of a privative clause; 2) the purpose of the tribunal as determined by interpretation of enabling legislation; 3) the nature of the question at issue, and 4) the expertise of the tribunal.[72]

When analyzing these factors, the following findings attract deference and hence a reasonableness review should be conducted. The presence of a privative clause in the statutory regime demonstrates the legislature's intent that the decision-maker be given deference. Deference should also be accorded to the decision-maker where the nature of the question is one of fact, discretion or policy or where the question involves legal and factual issues which cannot be easily separated.[73] The tribunal can be considered an expert when the "tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity"[74], and accordingly should be given deference. Deference should also be provided on questions of law where the "tribunal has developed particular expertise in the application of a general common law or civil rule in relation to a specific statutory context." [75] The court does not specifically elaborate on "the purpose of the tribunal as determined by interpretation of enabling legislation" [76] but this concept can be found by referring to the other indicators for deference. For example, if the purpose of the tribunal is to decide on the specific question at issue before the court, such a situation would attract deference because it is the very reason for the tribunal's existence and accordingly the tribunal should be considered an expert in areas of its own purpose.

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[72] *Ibid*.

[73] *Ibid* ¶ 53.

[74] *Ibid* ¶ 54.

[75] *Ibid*.

[76] *Ibid* ¶ 64.

To refuse deference in the face of decision-maker expertise would undermine the existence of the administrative scheme.

The following factors, however, lead to the conclusion that the decision is subject to the standard of correctness: 1) constitutional questions[77], 2) "determinations of true questions of jurisdiction or *vires*"[78], 3) questions regarding jurisdictional lines between two or more competing specialized tribunals, and 4) questions of general law that are "both of central importance to the legal system as a whole and outside the [decision maker's] specialized area of expertise."[79] These questions impact the administration of justice and consistent answers are necessary to uphold the rule of law.[80] With respect to matters of a home statute interpretation, the court in *Dunsmuir* said "deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."[81] This principle was affirmed in 2013 in *McLean v British Columbia (Securities Commission)*[82] in which the Supreme Court held that a presumption of reasonableness applies when a decision-maker is interpreting its home statute.[83] This presumption, however is not without its limitations. The court in *McLean* also said that a contextual analysis of the issue before the court "may 'rebut the presumption of reasonableness review for questions involving

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[77] *Ibid* ¶ 58.

[78] *Ibid* ¶ 59: "'"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction."

[79] Green, 'Can There Be Too Much Context In Administrative Law', *supra* note 70 ¶ 19; *Dunsmuir*, *supra* note 5 ¶ 60; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 ¶ 62 [*Toronto (City)*].

[80] *Dunsmuir, supra* note 5 ¶ 60.

[81] *Ibid* ¶ 54.

[82] *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*].

[83] *Ibid* ¶ 21.

the interpretation of the home statute.'"[84] The presumption of reasonableness on a home statute interpretation would become the centre of the disagreement at the Supreme Court three years later in *Wilson.*

To conclude, the notion of deference is entrenched in respect for legislative intent: it is the elected legislative body that has chosen to delegate certain powers to administrative decision-makers.[85] *Dunsmuir* stands for the proposition that the application of deference to administrative decisions is necessary to respect legislative intent and democratic values. Deference should not be given, however, where to do so would interfere with rule of law values. [86] In this way, the rule of law "sets the boundaries of potential administrative action."[87] The balancing of legislative intent with the rule of law, however, becomes particularly challenging when the decision being reviewed involves the interpretation of a home statute. Such a decision requires the decision-maker to interpret and apply the law. The question becomes whether that decision-maker has the relative expertise, as compared to the courts, to interpret and apply the law. It is difficult to determine the appropriate amount of deference to apply in this situation, particularly when the only indicator that the decision-maker is an 'expert' is that he or she is the decision-maker. In other words, the decision-maker is an expert because the decision-maker is the decision-maker. This circular argument jeopardizes the rule of law and raises the question: should there still be a presumption of the reasonableness standard of review when a decision-maker is interpreting

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[84] *Ibid* ¶ 22.

[85] *Dunsmuir, supra* note 5 ¶ 48.

[86] *Ibid* ¶ 60.

[87] *Ibid* ¶ 125.

questions of law within its home statute? This question was addressed in *Wilson,* which will be discussed below.

II. The *Wilson* Decision & Dissent

A. The *Wilson* Majority Decision

Mr. Wilson was hired by Atomic Energy Canada Limited (AECL) in 2005. He had a clean disciplinary record but was dismissed in November 2009. In December 2009, Mr. Wilson filed a complaint claiming that he was unjustly dismissed contrary to s.240(1) of the *Canada Labour Code*[88] (the *Code*). In response to a request for reasons for his dismissal, AECL sent a letter in March 2010 saying that Mr. Wilson was "terminated on a non-cause basis" and was given a "generous dismissal package".[89] Mr. Wilson claimed that he was terminated in reprisal for having filed a complaint of improper AECL procurement practices.[90] A labour adjudicator was appointed to hear the complaint. The adjudicator concluded that the employer could not fire Mr. Wilson without cause and the employer "could not resort to severance payments, however generous, to avoid a determination under the *Code* about whether the dismissal was unjust."[91]

On judicial review, the application judge reviewed the adjudicator's decision on the standard of reasonableness. The judge found that because Part III of the *Code* does not prohibit employers from dismissing non-unionized employees without cause, AECL could fire Mr. Wilson

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[88] *Canada Labour Code*, *supra* note 11.

[89] *Wilson, supra* note 1 ¶ 8-9.

[90] *Ibid* ¶ 10.

[91] *Ibid* ¶ 13. The labour adjudicator concluded he was bound by *Redlon Agencies Ltd v Norgren,* 2005 FC 804.

without cause and accordingly the adjudicator's decision was unreasonable.[92] The Federal Court of Appeal reviewed the decision on the standard of correctness but held that even if a reasonableness review applied to this case, the "Adjudicator should be afforded 'only a narrow margin of appreciation' because the statutory interpretation in this case 'involves relatively little specialized labour insight.'"[93] The major point of disagreement between the judges at the Supreme Court of Canada was whether the adjudicator's interpretation of the *Code* was subject to a reasonableness or correctness review.

The Supreme Court provided four sets of reasons. Three of the four sets of reasons ultimately came to the same conclusion: the standard of review in this case is reasonableness. In her reasons for judgement, Justice Abella cited *Dunsmuir*[94] at para 68 which holds that labour arbitrators and adjudicators acting under the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), "can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions".[95] Accordingly, Justice Abella determined that "the decision of labour adjudicators or arbitrators interpreting statutes or agreements within their expertise attract a reasonableness standard."[96] The majority held that because the *Canada Labour Code* is within the "adjudicator's specialized area of expertise"[97], the adjudicator's decision in *Wilson* should be reviewed on a standard of reasonableness.

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[92] *Wilson, supra* note 1 ¶ 14.

[93] *Ibid* ¶ 18.

[94] *Dunsmuir, supra* note 5 ¶ 68.

[95] *Ibid*.

[96] *Wilson, supra* note 1 ¶ 15.

[97] *Ibid* ¶ at 23, citing *Dunsmuir, supra* note 5 ¶ 60.

Justice Abella noted that "a handful of adjudicators have taken a different approach to the interpretation of the *Code*."[98] The contradiction of previous decisions by labour adjudicators would suggest that the jurisprudence has not determined the applicable standard of review "in a satisfactory manner."[99] Conflicting jurisprudence together with the need for consistency in law would indicate that the standard of correctness should be applied. Justice Abella, however, is firm in the applicable of reasonableness and states that the existence of different interpretations of the *Code* "does not justify deviating from a reasonableness standard."[100] Justice Abella accordingly applied the reasonableness standard of review to the adjudicator's decision and concluded that the "entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be entitled to protection from being dismissed without cause under Part III of the *Code*."[101] As a result, to allow an employer to pay severance in lieu of cause "falls outside the range of 'possible, acceptable outcomes which are defensible in respect of the facts and law' because it completely undermines"[102] the purpose of Part III of the *Code*. Hence, Justice Abella held, the adjudicator's decision was reasonable.

It is important to note, however, that Justice Abella said that where the question is "outside the adjudicator's specialized area of expertise"[103], a standard of correctness should apply. The concept of 'expertise' in the context of a home statute interpretation was the focus of the dissent,

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[98] *Wilson*, *supra* note 1 ¶ 17.

[99] *Dunsmuir, supra* note 5 ¶ 63.

[100] *Wilson*, *supra* note 1 ¶ 17, citing *Toronto (City)*, *supra* note 79 ¶ 71; *Dunsmuir*, *supra* note 5 ¶ 55-56; *Smith v Alliance Pipeline Ltd*., [2011] 1 SCR 160 ¶ 38; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., [2013] 2 SCR 458 ¶ 7-8 [*Irving Pulp & Paper Ltd*].

[101] *Wilson*, *supra* note 1 ¶ 39.

[102] *Ibid*.

[103] *Ibid* ¶ 23, citing *Dunsmuir*, *supra* note 5 ¶ 60.

discussed below. The dissent in *Wilson* demonstrates the court's continued struggle in striking a balance between respect for legislative intent and upholding the rule of law.

B. The *Wilson* Dissent

The dissent in *Wilson* argued that the contextual factors in this case rebut the presumption of reasonableness[104] and accordingly the standard of review should be correctness because:

> [T]his case exposes a serious concern for the rule of law posed by presumptively deferential review of a decision-maker's interpretation of its home statute. In the specific context of this case, correctness review is justified. To conclude otherwise would abandon rule of law values in favour of indiscriminate deference to the administrative state.[105]

Since decision-makers, like the labour adjudicator in *Wilson*, are not bound by the principle of *stare decisis*, the application of deference on matters of statutory interpretation creates the likely possibility that different decision-makers will reach opposing interpretations of the same statute.[106] In the present case, labour adjudicators across the country have come to contradictory interpretations of the same provision of Part III of the *Code*: some adjudicators have said that an employer is permitted to dismiss a non-unionized employee without cause and other adjudicators have said the opposite. On judicial review, lower courts have found both interpretations to be reasonable.[107] The judicial application of the reasonableness review on conflicting interpretations of the same statutory provision creates the result that "the identity of the decision-maker determines the outcome of individual complaints, not the law itself".[108] This, the dissent said,

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[104] *McLean, supra* note 82 ¶ 22.

[105] *Wilson*, *supra* note 1 ¶ 79.

[106] *Ibid* ¶ 81-82.

[107] *Ibid* ¶ 83.

[108] *Ibid* ¶ 84.

allows "the caprice of the administrative state to take precedence over the 'general principle of normative order.'"[109] The application of the reasonableness review where there is conflicting adjudicative jurisprudence undermines the rule of law in several ways.

The application of the reasonableness review when there are conflicting interpretations of the same statute threatens the cardinal values of the rule of law; certainty and predictability. This is because the reasonableness review allows the conflicting interpretations to remain unresolved. The effect is that citizens cannot determine how to order their lives. The lack of uncertainty manifests in that employers cannot determine how they can lawfully dismiss their employees and employees cannot be certain of their job security.[110] The lack of predictability of the law means that the *same* employer may be told in one case that it can dismiss an employee without cause and told in another case that it cannot.[111] These effects offend the rule of law. This demonstrates how the outcome of one's case will depend on "the identity of the decision-maker… not the law itself."[112] This obviously contradicts the foundational principle that there is "one law for all" [113] and jeopardizes the "promise of orderly governance."[114]

Moreover, the fact that decision-makers have reached conflicting interpretations of the same statute "undermines the very basis for deference."[115] The basis for deference on a home statute interpretation is that the decision-maker is presumed to be an expert. The presumption of

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[109] *Ibid*.

[110] *Ibid* ¶ 86.

[111] *Ibid* ¶ 87.

[112] *Ibid* ¶ 84.

[113] *Ibid* ¶ 85, citing *Reference re Secession of Quebec*, [1998] 2 SCR 217 ¶ 71 [*Reference re Secession of Quebec*].

[114] *Wilson*, *supra* note 1 ¶ 84-85.

[115] *Ibid* ¶ 88.

expertise is undermined, however, when two decision-makers, who are both entitled to equal deference, reach incompatible interpretations of the same statute. The law must only have one meaning: either an employer *can* dismiss a non-unionized employee without cause or an employer *cannot* dismiss a non-unionized employee without cause. Conflicting adjudicative answers on questions of law that demand either a yes or no answer rebut the basis for deference and require a correctness review. In the words of the dissent:

> Where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate.[116]

Accordingly, the dissent applied a correctness review to the adjudicator's decision and determined that because the adjudicator's interpretation of the impugned sections of the *Code* was "inconsistent with the text, context and purpose of these provisions", it was incorrect and ought to be set aside.[117] Thus, the dissent reached a decision which was the exact opposite of the majority: the majority upheld the adjudicator's decision whereas the dissent would have set aside the adjudicator's decision. This is a clear example of how the application of deference can threaten rule of law values. The application of deference by the majority results not only in upholding the adjudicator's interpretation of the law in an area where adjudicator's have disagreed on the law, but it also creates the precedent that even in the face of conflicting interpretations of the law, the reasonableness standard applies. This raises the question, as articulated by the dissent, but what does the law mean? By applying the reasonableness standard

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[116] *Ibid* ¶ 89.

[117] *Ibid* ¶ 75.

of review in this case, the majority has, in some ways, bypassed addressing the fact that individuals across the country have be ordered to conduct their lives according to an interpretation of the impugned provision that is diametrically opposed to the interpretation which the Supreme Court has said is reasonable. Although the reasonableness standard allows for "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" [118], the nature of this question is one which dictates *one* answer which necessarily means that, in this case, there is not a range of outcomes "which are defensible in respect of the facts and law."[119] Conversely, the dissent holds that the disagreements amongst decision-makers within the same statutory scheme is a contextual factor which rebuts the basis for deference and instead demands a correctness review in order for the courts to provide individuals with a clear interpretation of the law.

The dissent's reasons in *Wilson* highlight an important issue in judicial review: which standard best achieves a balance between respect for legislative intent and protection for the rule of law where an administrative decision-maker has interpreted the law within its home statute but contextual factors in the case rebut the basis for deference? Answering this question involves analyzing conflicting principles within the standard of review: why deference for administrative decision-makers is important but also why deference grounded in the presumption of expertise is inherently problematic. The following paragraphs will address this dilemma.

III.What is an Indiscriminate Amount of Deference?

A. Why Deference is Important

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[118] *Dunsmuir, supra* note 5 ¶ 47.

[119] *Ibid*.

Dunsmuir established the standard of review analysis under which a reviewing court implements a categorical approach to determine which standard of review applies.[120] The interpretation of a home statute is its own category under the standard of review analysis and a factor which attracts a presumption of a reasonableness review.[121] The rationale for applying deference to a decision-maker who has interpreted its home statute is twofold; it assists in the good administration of executive decision-making and it upholds the values of democracy insofar as it respects legislative intent.[122]

The presumption of deference assists in good administration because it recognizes that a decision-maker holds specialized expertise, as compared to the courts, in interpreting and applying its home statute to fulfill its statutory mandate.[123] The application of deference is justified on the basis that it is the decision-maker, and not the court, that grapples with the impugned legislation on a daily basis. The decision-maker's interpretation has therefore been "informed by years of experience"[124], that, arguably, the court does not possess. This therefore makes the decision-maker the more effective interpreter of the legislation. It is important to recognize that certain decisions fall within a decision-maker's scope of expertise because to do otherwise would undermine the existence of an administrative body: a court's refusal to recognize that a decision-maker is competent to make decisions would eliminate the legitimacy of the

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[120] Green, 'Can There Be Too Much Context in Administrative Law', *supra* note 70 ¶ 19.

[121] *Ibid* ¶ 19-20.

[122] Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 213 ¶ 78 [Daly, 'Time for Fusion'].

[123] *Ibid*.

[124] Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 ¶ 19 [Justice Stratas, 'The Canadian Law of Judicial Review'].

decision-maker and render the decision-making body ineffectual, and potentially undermine confidence in the administrative decision-making system as a whole.

The presumption of deference on a home-statute interpretation also upholds democratic values: deference respects the fact that the elected legislature has decided to empower the administrative decision-maker, and not the courts, with the authority to make decisions within its enabling statute.[125] Moreover, and especially, where the legislature has used broad words in the legislation to articulate its intent to give the administration decision-maker the "power to shape the meaning of the provision based upon its policy appreciation, specialization and experience."[126] It therefore follows that when a case involves the interpretation of a home-statute, a court should respect the legislature's choice to accord deference to the decision-maker because "to do otherwise would offend the constitutional principle of legislative supremacy."[127] The reasonableness standard thus upholds democratic values by respecting the separation of powers between the elected legislature and appointed judiciary. Proponents of the reasonableness standard therefore argue that the presumption of deference on a decision-maker's interpretation of its home statute is "a good default rule."[128]

The application of deference on matters of home statute interpretation raises an obvious concern: since administrative decision-makers are not bound by *stare decisis*, which standard of review should apply when a tribunal has reached conflicting interpretations of the same statutory

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[125] Green, 'Can There Be Too Much Context in Administrative Law', *supra* note 70 ¶ 109

[126] Justice Stratas, 'The Canadian Law of Judicial Review', *supra* note 124 ¶ 13.

[127] *Ibid* ¶ 18.

[128] Green, 'Can There Be Too Much Context in Administrative Law*', supra* note 70 ¶ 109.

provision?[129] Justice L'Heureux-Dubè addressed this issue in *Domtar Inc. v Quebec (Commission d'appel en matière de lésions professionnelles)*.[130] Writing for a unanimous court, Justice L'Heureux-Dubè emphasized the importance of recognizing that the legislature has given the decision-making authority to administrative tribunals and these tribunals require autonomy in order to be effective.[131] Consequently, she held, that administrative decision-makers have the "authority to err within their expertise"[132] and accordingly, the requirement for consistency in law is not absolute in the administrative decision-making context.[133] Thus, "a lack of unanimity [in administrative decision] is the price to pay for the decision-making freedom and independence given to the members of these tribunals".[134] *Domtar* stands for the proposition that "the Rule of Law must make way for the 'decision-making autonomy, expertise and effectiveness' of specialized tribunals."[135] Since the need to respect legislative supremacy trumps the need for consistent decisions in the administrative law context, and since the application of this principle requires a reviewing court to grant decision-makers a margin of appreciation within which to interpret their home statute, it follows that "the law does not prevent an inconsistent tribunal

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[129] Justice Joseph T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide To 60 Years of Supreme Court Jurisprudence" (2014) 66:2 SCLR 1 ¶ 294 [Justice Robertson, 'Judicial Deference to Administrative Tribunals'].

[130] *Domtar Inc. v Quebec (*Commission d'appel en matière de lésions professionnelles), [1993] 2 SCR 756 [*Domtar*]. See also Justice Robertson, ''Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 294.

[131] *Domtar, supra* note 130 ¶ 66.

[132] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 294, citing *Domtar*, *supra* note 130 ¶ 94.

[133] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 294, citing *Domtar*, *supra* note 130 ¶ 66.

[134] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 294, citing *Domtar, supra* note 130 ¶ 94.

[135] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 305, citing *Domtar*, *supra* note 130 ¶ 66.

decision from being reviewed on the deferential standard"[136] of reasonableness. This principle was affirmed in *Ellis-Don Ltd v Ontario (Labour Relations Board)*[137]:

> Inconsistencies or conflicts between different decisions of the same tribunal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality.[138]

It is important to remember that administrative tribunals are created to provide individuals with access to decision-making and access to justice outside of the arduous court process. To achieve these goals, certain judicial requirements, such as the need for unanimity in decision-making, must be flexible to allow the administrative state to be effective. *Domtar* and *Ellis-Don* demonstrate this principle. Further, the principle that an administrative body be a 'master of its own procedure' dictates that it is the administrative body, and not the court, which should be responsible for developing procedures to ensures consistency in decision making.[139] Thus, "it is not the role of reviewing courts to ensure consistency in tribunal decision-making"[140] and accordingly, conflicting tribunal decisions "do not justify a move from the deferential standard of review."[141] It is also important to note that according deference to decision-makers does not give the decision-maker unfettered discretion: decision-makers can only exercise the powers which have been delegated to them by the legislature.[142]

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[136] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 296.

[137] *Ellis-Don Ltd v Ontario (Labour Relations Board)*, [2001] 1 SCR 221 [*Ellis-Don Ltd*].

[138] *Ibid* ¶ 28.

[139] *Ibid*.

[140] Justice Robertson, 'Judicial Deference to Administrative Tribunals', *supra* note 129 ¶ 305.

[141] *Ibid*.

[142] Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799 ¶ 31 [Daly, 'Scope and Meaning'].

As discussed in the previous section of this paper, the majority decision in *Wilson* applied the *Dunsmuir* categories and determined that the reasonableness standard of review applied because the labour adjudicator had interpreted its home statute, which is a factor which attracts the presumption of deference based on expertise. The principle that deference should be applied in these situations to simultaneously encourage good governance of administrative bodies and to uphold the democratic principle of legislative supremacy was also the basis for the majority decision in *Edmonton (City*) *v Edmonton East (Capilano) Shopping Centres Ltd*.[143] This also demonstrates that the courts continue to uphold the *Dunsmuir* categorical approach to judicial review.

B. Expertise is a Relative Concept

The dissent in *Wilson* held that the contextual factors of a case may rebut the presumption of a reasonableness review on a question of law when a decision-maker has interpreted its home statute. The following paragraphs will analyze the concept of expertise to determine whether there are certain circumstances in which the decision-maker is not an expert relative to the reviewing court and is thus not entitled to deference on interpretations of its home statute.

The jurisprudence[144] has established that an administrative decision-maker's interpretation of its home statute attracts a presumption of expertise and accordingly, in this situation, the deferential reasonableness standard of review should be applied. The court in *Dunsmuir*, however, expressed several ways in which the application of deference should be limited. Deference, the court said, "does not mean that courts are subservient to the determinations of

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[143] *Edmonton (City*) *v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 [*Edmonton East*].

[144] *McLean*, *supra* note 82 ¶ 21.

decision makers, or that courts must show blind reverence to their interpretations."[145] Deference must be applied in such a way that "imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law."[146] The majority in *Dunsmuir* said that a correctness review is justified where the question at issue is one of general law that is "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."[147]

Justice Binnie wrote his own reasons for judgement in *Dunsmuir* and said that it is "a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is 'of central importance to the legal system as a whole.'"[148] Justice Binnie said that when a court is quantifying the deference to accord to a decision-maker who has interpreted its home statute,

> It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges[149] [emphasis added].

Thus, the majority's threshold in order to attract a correctness review on questions of law is higher insofar as the majority imposes an additional requirement that the question be of "central importance to the legal system as a whole."[150] By way of contrast, Justice Binnie holds

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[145] *Dunsmuir, supra* note 5 ¶ 48.

[146] *Ibid*.

[147] *Ibid* ¶ 60.

[148] *Ibid* ¶128.

[149] *Ibid*.

[150] *Ibid* ¶ 60.

that the application of a correctness review does not require the general question of law to be of "central importance to the legal system" [151] so long as the question of law is outside of the decision-maker's area of expertise. Justice Binnie's reasons raise the question, does it matter whether the question is "of central importance to the legal system"[152]? Respectfully, it should not matter whether the question of law is "of central importance to the legal system as a whole"[153] in order to attract a correctness review where the question is outside of the decision-maker's area of expertise. The rule of law "sets the boundaries of potential administrative action"[154] to ensure there is one law for all. As demonstrated in *Wilson*, the law can only have one meaning, for example, either employees can or cannot dismiss non-unionized employees without cause. This question, from *Wilson*, may not be considered "of central importance to the legal system as a whole"[155] but to uphold contradictory interpretations of labour law, by which individuals order their lives, offends the rule of law. The acceptance of two incompatible interpretations of the law, whether the interpretation is integral to the legal system or not, subjects individuals to arbitrary decision-making.[156] This also affronts the principle that there is one law for all; a principle which is vital to maintain "an actual order of positive laws which preserves and embodies the more general principle of normative order."[157] Hence, where the application of deference to

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[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid*.

[154] *Ibid* ¶125.

[155] *Ibid* ¶ 60.

[156] *Roncarelli v Duplessis*, [1959] SCR 121 ¶ 41-44 [*Roncarelli v Duplessis*].

[157] *Reference re Secession of Quebec*, *supra* 113 ¶ 71, citing *Reference re Manitoba Language Rights*, [1985] 1 SCR 721 at 747-752 [*Reference re Manitoba Language Rights*].

administrative decision-makers threatens rule of law values, the correctness standard of review should apply.

Further, the discrepancy between the majority's reasons and Justice Binnie's reasons in *Dunsmuir* can be reconciled in the sense that both reasons express the court's objective that the application of deference be limited to circumstances in which the facts and law justify deference. This suggests that there are certain cases in which the facts and law demonstrate the decision-maker does not possess the relative expertise and is therefore not entitled to deference on questions of general law within a home statute interpretation. An analysis of two post-*Dunsmuir* Supreme Court of Canada decisions, however, will demonstrate how the courts shifted from limiting deference on questions of law to according unlimited deference on questions of law within a home statute interpretation. This shift contradicts the limits on deference articulated above in *Dunsmuir* and contradicts the rule of law.

Three years after *Dunsmuir*, the Supreme Court of Canada released its decision in *Alberta (Information and Privacy Commission) v Alberta Teachers' Association*.[158] The facts in *ATA*[159] are as follows. The Alberta Privacy Commissioner received ten individual complaints between October 13 and December 2, 2005 that the ATA disclosed private information in contravention of the Alberta *Personal Information Protection Act* (*PIPA*).[160] Section 50(5) of *PIPA* provided that the Commissioner must complete an inquiry within 90 days of receiving the complaint unless the Commissioner notified the parties that he was extending the time period for the investigation and provided an anticipated date for completing the inquiry. Instead, the Commissioner waited 22

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[158] *Alberta (Information and Privacy Commissioner) v Alberta's Teacher's Association*, 2011 SCC 61 [*ATA*].

[159] *Ibid*.

[160] *Personal Information Protection Act*, SA 2003, c P-6.5, s 50(5) [*PIPA*].

months before extending the time period for completing the inquiry. An additional 7 months later, an adjudicator delegated by the Commissioner issued an order finding that the ATA had contravened *PIPA*. The ATA applied for judicial review and argued that the Commissioner had lost jurisdiction over the issue due to his failure to extend the time period within the 90 days as per the statute. The chambers judge quashed the adjudicator's decision on that basis. A majority of the Court of Appeal upheld the chambers judge's decision.[161] The Supreme Court, however, applied the standard of reasonableness and reinstated the adjudicator's decision on the timeliness issue.[162]

In reaching its decision, the majority of the Supreme Court in *ATA*, said that the issue is "not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information."[163] The court held that the "timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise."[164] Respectfully, two contextual factors in *ATA* demonstrate that the majority decision in *ATA* does not align with the principle from *Dunsmuir* that deference on questions of law be limited to circumstances in which the facts and law justify deference.[165] The first factor is the court's conclusion that the timeliness issue engages the Commissioner's expertise. This is a curious conclusion and a factor which supports a correctness review because the heart of this issue is that the Commissioner, quite obviously, disregarded the

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[161] *ATA*, *supra* note 158 ¶ 3-9.

[162] *Ibid* ¶ 77.

[163] *Ibid* ¶ 32.

[164] *Ibid*.

[165] *Dunsmuir*, *supra* note 5 ¶ 60,128.

timelines by which he was bound under his home statute. The Commissioner's blatant disrespect for the restrictions imposed upon him by the legislature demonstrates either that the Commissioner did not understand the time limits prescribed in the statute or that he simply chose to ignore the statutory limits and empower himself to act outside the boundaries of his authority. Either way, the Commissioner's actions demonstrate a lack of expertise, rebut the basis for deference and accordingly justify a correctness review.

The second factor which demonstrates that the facts and law do not justify deference in this case, and accordingly a correctness review should instead be applied, is the fact that this question has never been raised before the tribunal and in answering the question, the tribunal failed to provide express reasons to the disposition of the issue. The majority of the Supreme Court said that the lack of express reasons could be explained by the fact that this issue had never been raised before the tribunal.[166] However, the failure to provide express reasons in this case demonstrates a lack of decision-maker expertise: if there is ever an issue which demands that the tribunal provide reasons, it is the issue which the tribunal has never dealt with before in order to demonstrate the principles of justification, transparency and intelligibility in decision-making.[167] The lack of reasons in this case suggests a lack of understanding of the role and impact the tribunal has on individuals. This is a factor which rebuts the presumption of expertise and accordingly attracts a correctness review. The majority of the court in *ATA*, however, began its analysis with the view that because this issue was not "of central importance to the legal system as a whole"[168] and because the issue fell within the decision-maker's home statute, expertise

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[166] *ATA*, *supra* note 158 ¶ 1.

[167] *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 ¶ 59 [*Khosa*].

[168] *ATA*, *supra* note 158 ¶ 32.

could be presumed and accordingly the reasonableness standard applied. By framing its analysis through the reasonableness lens, the contextual factors were coloured with the presumption of deference before being examined for what they were; factors which instead rebutted the presumption of deference and attracted a correctness standard of review.

In *Abdoulrab v Ontario (Labour Relations Board)*[169], employees were dismissed in 2003 and did not receive termination and severance pay to which they were entitled under the *Employment Standards Act* (the *ESA*).[170] An employment standards officer determined that the three employers involved in the dispute were jointly and severally liable as related employers under s.4 of the *ESA*.[171] The three employers filed applications with the Ontario Labour Relations Board for review of the orders to pay. The Board overturned the officer's decision. The Divisional Court applied the standard of reasonableness because the language in the statute read, "a decision of the Board concerning the interpretation of this Act shall not be overturned unless the decision is unreasonable."[172] The Divisional Court upheld the Board's decision. The Court of Appeal dismissed the employee's appeal because, since the statutory language apparently stipulated that the reasonableness standard applied, the Divisional Court did not err in applying the standard of reasonableness and upholding the Board's decision. The Court of Appeal said that the legislative scheme "precluded the Divisional Court from determining what, in its view, would be the correct interpretation of s.4 of the *ESA* in its review of the Board's decision."[173] It is

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[169] *Abdoulrab v Ontario (Labour Relations Board)*, 2009 ONCA 491 [*Abdoulrab*].

[170] *Employment Standards Act*, SO 2000, c 41, s 4 [*ESA*].

[171] *Ibid*

[172] *Abdoulrab*, *supra* note 169 ¶ 25, citing *ESA*, *supra* note 170 at s 119(14).

[173] *Abdoulrab*, *supra* note 169 ¶ 47.

important to note, however, that the *ESA* was drafted eight years before the Supreme Court released its decision in *Dunsmuir*. The word 'reasonable' therefore held a different meaning in the context of judicial review when the legislation was drafted in 2000 compared to the meaning of the word in judicial review when this case was before the court in 2009. Accordingly, there may be a disconnect between the legislature's intention in 2000 and what the court is interpreting this statute to mean in 2009.[174]

The Court of Appeal in *Abdoulrab* recognized that it "seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable."[175] The court proceeds to discuss the application of the reasonableness standard and ultimately concludes that "different decisions can be understood by the presence of a particular fact or facts in one case and the absence of such a fact or facts in other cases."[176] *Abdoulrab*, however, involved the same set of facts being interpreted by different decision-makers who reached contradictory interpretations of the same provision. The problem in this case is that the statutory language binds the court to a reasonableness review. However, by narrowing its focus on the reasonableness standard, the court, in its analysis, has circumvented the issue that the facts of this case justify a departure from a reasonableness review.

Abdoulrab highlights the problem with the presumption of expertise on a home statute interpretation. The reasonableness review assumes that a decision-maker holds a specialized

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[174] This raises the question whether pre-*Dunsmuir* cases should be reviewed to determine if they are consistent with *Dunsmuir*. See *Khosa*, *supra* note 167 ¶ 2-4; *Catalyst Paper Corp v North Cowichan,* 2012 SCC 2 ¶ 18; *Maritime Broadcasting Systems Ltd v Canadian Media Guild*, 2014 FCA 59 ¶ 52-56.

[175] *Abdoulrab*, *supra* note 169 ¶ 48.

[176] *Ibid* ¶ 53.

expertise that the courts do not possess. However, the rule of law dictates the need for consistent interpretations of the law. The fact that two decision-makers in the same administrative scheme have reached irreconcilable interpretations of the same statute supports the application of a correctness review for the courts to resolve this general question of law. This is a case where the standard of correctness should instead be applied to ensure that citizens who are governed by the legislation receive equal treatment regardless of which decision-maker they appear before. This case is an example of how a court's subservience to legislative language can abandon the rule of law. It is not in the interests of justice for courts to blindly follow vague or arbitrary legislative language that threatens the rule of law. In these circumstances, a higher threshold in judicial review is needed to achieve a proper balance between two competing democratic values; legislative intent and the rule of law. The correctness review offers more protection to rule of law values than the reasonableness review and is therefore the more appropriate standard of review when courts face legislative language that contradicts rule of law values.

The correctness review, however, is not without its limits. The balancing of the rule of law and legislative intent cannot be achieved if courts apply the correctness standard of review where deference is justified. To ignore legislative intent equally undermines the rule of law as does blindly applying deference where none is justified. For example, *Trinity Western University v The Law Society of Upper Canada*[177] is an example of a case where the facts and law justify the application of deference and attract a reasonableness standard of review on the Law Society's interpretation of its home statute. This argument is supported by a number of factors[178], especially

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[177] *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 [*TWU*].

[178] Some of the relevant factors in determining the standard of review in this specific case, such as the Doré framework, are outside the scope of this paper.

the fact that the issue involves accreditation. Accreditation is a core function of the Law Society and is therefore a factor which justifies deference on the Law Society's interpretations of its home statute and application of its mandate. At first glance, this argument may appear to contradict the thesis of this paper but this discrepancy can be reconciled. The argument in this paper is not that deference should never be afforded to a decision-maker when interpreting its home statute. The argument in this paper is that a contextual analysis of the facts and law is needed to ascertain whether the decision-maker possesses the relative expertise to have the final word on questions of law. In other words, ascertaining the boundaries of expertise on questions of law involves determining "what the appropriate standard of review is for *this* question decided by *this* decision maker."[179] Otherwise, the risk is an arbitrary application of the standard of review. *TWU* is an example where the contextual analysis supports the application of deference. This example highlights the complexity of the relative nature of expertise in quantifying deference in judicial review. Respect for legislative intent and accordingly the reasonableness standard of review on home statute interpretations is not something that should be discarded. However, respect for legislative intent is not something that trumps the role of the courts in protecting the rule of law.[180] The two concepts work concurrently, although often in juxtaposition, to protect our democracy. This tension, although often frustrating, creates the checks and balances between the legislature and the judiciary.

The balancing of these two competing values, and the corresponding standard of review, is part of the challenge in determining which standard of review should have been applied in

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[179] *Edmonton East*, *supra* note 143 ¶ 71.

[180] This paragraph shows the complexity in determining issues of expertise. It also invites debate on how to balance legislative intent and the rule of law. A more comprehensive debate is outside the scope of this paper, but is something I hope to discuss in a future paper, hopefully with Professor Glover's guidance and wisdom.

Abdoulrab. The problem in *Abdoulrab* is that the statute seemingly contained express legislative language with respect to which standard of review the court could apply. The facts of *Abdoulrab* demonstrate the problem the legislature creates by prescribing the standard of review in the statute: it binds the court to a standard of review in cases where the facts and law attract a different standard of review. This handcuffing can threaten rule of law values where the question is one of law and decision-makers within the same administrative scheme have reached conflicting interpretations of the law. In *Abdoulrab*, not only do the facts of the case suggest a lack of relative decision-maker expertise but the nature of the question is one that can only have one answer; either the employers are liable to pay the employees severance pay under the *ESA*[181], or they are not liable to pay. The yes or no quality of the question of law in the context of disagreements between decision-makers in the same factual matrix is a factor which rebuts the basis for deference and attracts a correctness review in order to uphold rule of law values, regardless of whether the question falls within a home statute interpretation. The express legislative language is a factor which unfortunately prevents the court from undertaking a correctness review and consequently obstructs the protection of rule of law values. This case is an example of an unsuccessful balancing of democratic values. This case also underscores the point that expertise is a relative concept which requires a contextual analysis: it is not something that can be predetermined and deference should not be prescribed in a statute because decision-makers are not bound by previous decisions and often reach incompatible interpretations of the same law. The legislature's imposition of the reasonableness standard in this case undermines the

[181] *ESA*, *supra* note 170.

role of the courts and abandons "rule of law values in favour of indiscriminate deference to the administrative state."[182]

The above analysis demonstrates that expertise is a relative concept: the standard of review analysis must determine whether the decision-maker is an expert in interpreting the law relative to the court, or whether the question of law requires the expertise of the court. The dissent in *Wilson* considered the contextual factors of the case to ultimately conclude that the decision-maker did not possess the relative expertise needed to exempt an interpretation of law from the correctness standard, despite the question falling within the decision-maker's home statute. The fact of decision-makers reaching diametrically opposed interpretations of the same provision of the *Canada Labour Code*[183], particularly when the provision can only contain one true meaning (either employers can dismiss non-unionized employees without cause or they cannot), demonstrates that the interpretation of the law falls outside the scope of the decision-maker's expertise. The fact that the question on judicial review involves an interpretation of the law which decision-makers cannot agree on moves this question into the category of expertise, as opposed to the category of the nature of the question, to ascertain what the law means and how individuals are to order their lives. To analyze this question under the category of the nature of the question, rather than under the category of expertise, would effectively privilege "the expertise of the decision-maker whose decision is currently subject to judicial review over the expertise of other similarly situated decision-makers without any compelling reason for doing so."[184] The lingering disagreement amongst decision-makers on the interpretation of the law therefore supports the

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[182] *Wilson, supra* note 1 ¶ 79.

[183] *Canada Labour Code*, *supra* note 11.

[184] *Wilson, supra* note 1 ¶ 88.

analysis under the category of expertise. The facts of *Wilson*, the dissent said, did not justify the application of deference on the question of law before the court and instead the correctness review was the more appropriate standard of review.

By way of contrast, the application of the reasonableness standard of review on questions of law within a home statute interpretation was recently revisited in August 2016 by the Ontario Court of Appeal in *Ottawa (City) Police Services v Ottawa (City) Police Services*.[185] Justice Miller, for the Court, held that "questions of statutory interpretation will admit of a single reasonable answer where, for example, legislation posits a clear *rule* whose interpretation does not depend on the application of vague or open-ended criteria."[186] In other words, where the legislature could only have intended the provision to contain one meaning, there can only be one interpretation. In his decision, Justice Miller refers to Justice Moldaver's decision in *McLean* in which Justice Moldaver said "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable."[187] These statements suggest that where a decision-maker espouses an interpretation that is different from what the legislature has clearly intended, there is not a palpable difference between applying the standard of reasonableness or the standard of correctness; either review will result in the court overturning the administrative decision. *Ottawa (City)* thereby seems to suggest that the reasonableness standard of review contains sufficient safeguards to protect the rule of law: where there is only

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[185] *Ottawa (City) Police Services v Ottawa (City) Police Services*, 2016 ONCA 627 [*Ottawa (City) Police*].

[186] *Ibid* ¶ 56.

[187] *Ibid*, citing Justice Moldaver in *McLean, supra* note 82 ¶ 38. It is interesting to note Justice Moldaver's comments in *McLean* in light of his dissent in *Wilson, supra* note 1.

one reasonable interpretation of the statute, any other interpretation will be overruled by the courts on judicial review.

This raises the question: is there any reason why, in light of this analysis, the correctness standard is nonetheless needed in certain cases of a home statute interpretation? There is a reason and that reason can be found in the dissent in *Edmonton East*, a Supreme Court decision released four months after *Wilson*. The dissent presented the query that a decision-maker may no longer be entitled to deference when contextual factors demonstrate that the decision-maker is not an expert relative to the courts. The dissent in *Edmonton East* said:

> An administrative decision maker is entitled to deference on the basis of expertise only if the question falls within the scope of its expertise, whether specific or institutional. A constant in this Court's jurisprudence both pre- and post-*Dunsmuir* is that expertise is a relative concept. It is not absolute.[188]

The proposition that expertise is not absolute strikes a balance between respect for legislative intent and respect for the rule of law. To achieve this balance, the application of deference should not be automatic, it should be based on the contextual factors of a given case. The Alberta Court of Appeal in *Altus Group Ltd v Calgary (City)*[189] also expressed the principle that deference for administrative decision-makers is not unlimited: "the rule of law and the boundaries of the administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law." [190] To maintain the proper balance between legislative intent and the rule of law, the court in *Dunsmuir* said that "the last word on questions of general law should be left to judges."[191] Thus, where the contextual factors demonstrate that either the

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[188] *Edmonton East, supra* note 143 ¶ 83-84.

[189] *Altus Group Ltd. v Calgary (City)*, 2015 ABCA 86 [*Altus Group Ltd*].

[190] *Ibid* ¶ 23.

[191] *Dunsmuir, supra* note 5 ¶ 128.

decision-maker is not an expert relative to the courts or the statutory interpretation does not "require the expertise of the administrative decision maker" [192], that decision-maker is not entitled to deference and the interpretation of law, should be reviewed on a standard of correctness to protect rule of law values.

The reason the rule of law is in jeopardy when the courts apply a reasonableness review where a decision-maker does not possess the relative and requisite expertise is because decision-makers are not bound by prior decisions. For example, the Supreme Court of Canada in *Irving Pulp & Paper Ltd*, held that arbitrators are entitled to "depart from the relevant arbitral consensus."[193] This leads to the result, as seen in *Wilson*, of different arbitrators reaching conflicting interpretations of the law; something which contradicts the rule of law principle that there must be one law for all.[194] Furthermore, the advantage of an administrative decision-maker over a court exists in the ability of the administrative system to provide an individual with faster decision-making. The advantage of an administrative decision-maker has "nothing whatever to do with any relevant advantage over judges in determining questions of law."[195] Although, as discussed in the previous section, the concept of deference in judicial review is important to respect legislative intent, our democracy cannot be maintained without simultaneous respect for rule of law values. Achieving this balance necessitates a closer look at whether an administrative decision-maker (who is also appointed) possesses any more expertise relative to a reviewing

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[192] *Ibid*.

[193] *Irving Pulp & Paper Ltd, supra* note 100 ¶ 79.

[194] *Reference re Manitoba Language Rights, supra* note 157.

[195] Martin Teplitsky in his article "Standard of Review of Administrative Adjudication: 'What a Tangled Web We Weave…'" (2013) 32:1 The Advocate's Journal 3 ¶ 13 [Teplitsky, 'Standard of Review of Administrative Adjudication'].

judge. It is nonsensical to suggest that an administrative decision-maker is always an expert in interpreting its home statute relative to a reviewing judge. While there are circumstances in which a decision-maker is more familiar with the nuances of its home statute than a judge, familiarity with a statute does not necessarily translate into relative expertise. As explained by Martin Teplitsky in his article "Standard of review of administrative adjudication: 'What a tangled web we weave…'" (2013) 32:1 The Advocate's Journal 3,

> [I]t does not follow that familiarity with their home statutes and related statutes makes them more expert than appellate judges in the sense of being better able to discern the correct view of the statute's meaning. Appellate judges are the experts in determining questions of law. It is what they do.[196]

The administrative system losses credibility and purpose if decision-making is based not on what the law says but rather on the personal interpretation of a specific decision-maker. When this occurs, it is a factor which demonstrates a lack of decision-maker expertise within the administrative scheme and the presumption of deference in the form of a reasonableness review is thereby rebutted. The problem, therefore, with the categorical approach applied post-*Dunsmuir* is that the categories are both "over and under inclusive."[197] The way in which courts apply the *Dunsmuir* precedent, as demonstrated above in *ATA* and *Abdoulrab*, results in failing to conduct a more appropriate contextual analysis to determine whether the decision-maker possesses the relative expertise required to attract the presumption of deference on interpretations of the law. The dissents in both *Wilson* and *Edmonton East* demonstrate that a comprehensive contextual analysis can prove that certain questions of statutory interpretation fall outside the scope of the

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[196] *Ibid* ¶ 14.

[197] Green, 'Can There Be Too Much Context in Administrative Law', *supra* note 70 ¶ 1.

decision-maker's expertise and in such a situation, the standard of correctness is needed to protect the rule of law. The dissents in *Wilson* and *Edmonton East* suggest there may be a shift toward recognizing the importance of a contextual analysis when determining a decision-maker's expertise instead of applying automatic deference to a home statute interpretation as seen in the cases immediately post-*Dunsmuir*.

Conclusion

The application of the standard of review must be clear and consistent to assist in the success of the administrative state: decision-makers need to understand the process by which their decisions will be reviewed to inform their analysis of the issue before them.[198] A consistent framework for the standard of review analysis is also needed to ensure stability and predictability in the law. However, the strict adherence to a categorical approach fails to consider the contextual factors of a case which are needed to guide the standard of review analysis. Justice Cromwell in *Canada (Citizenship and Immigration) v Khosa*[199], said that the reasonableness standard of review "takes its colour from the context".[200] In *Khosa*, Justice Cromwell also said that the reasonableness standard must "be assessed in the context of the particular type of decision making involved and all the relevant factors." The sentiment that judicial review should be coloured by the context[201] should apply whether the standard is reasonableness or correctness to guard against arbitrary applications of the standard of review.

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[198] Teplitsky, 'Standard of Review of Administrative Adjudication', *supra* note 195 ¶ 25.

[199] *Khosa*, *supra* note 167.

[200] *Ibid* ¶ 73.

[201] *Ibid*.

The contextual factors are especially important when administrative decision-makers have interpreted the law. This is because the concept of expertise is relative: the question is whether the decision-maker possesses the requisite expertise relative to the courts in order to have the final word on the question of law in review. Hence, the presumption of expertise as the basis for deference on interpretations of the law within a home statute interpretation threatens the rule of law where the contextual factors rebut the presumption of expertise. To apply the reasonableness standard of review in this situation would "abandon rule of law values in favour of indiscriminate deference to the administrative state."[202] While the principle of deference "is something that inheres in a tribunal itself as an institution,"[203] achieving a balance between respect for legislative intent and the rule of law requires consideration of the contextual factors of a case and not blind reverence to the presumption of expertise in a case where the facts and law do not justify deference.

A compelling factor for applying the correctness standard of review on a home statute interpretation is where there are "lingering disagreements amongst decision-makers"[204] because this disagreement "undermines the very basis for deference."[205] For example, as in *Wilson,* the fact that decision-makers had reached conflicting interpretations of the same statute colours the context of the case: it highlights a lack of relative expertise which rebuts the basis for deference because it demonstrates the decision-makers have not determined the question of law "in a

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[202] *Wilson*, *supra* note 1 ¶ 79.

[203] *Edmonton East*, *supra* note 143 at ¶ 33, citing *Dunsmuir*, *supra* note 5 ¶68.

[204] *Edmonton East*, *supra* note 143 ¶ 88.

[205] *Ibid*.

satisfactory manner."[206] In this scenario, the courts are needed to resolve the question of law. On the other hand, a contextual analysis of a case involving an administrative decision-maker's interpretation of the law may establish that deference is justified, and in that case, the reasonableness standard of review should be applied to respect legislative intent. The balancing of democratic values, however, also requires respect for the rule of law. Thus, where the contextual factors rebut the presumption of expertise on questions of law within a home statute interpretation, the correctness standard of review should be applied.

Thus, the precedent from *McLean*, that the presumption of reasonableness applies when a decision-maker is interpreting its home statute[207], should not be interpreted in isolation. The court in *McLean* is clear: "this Court has long recognized that certain categories of question – even when they involve the interpretation of a home statute – warrant review on a correctness standard."[208] The Supreme Court has unmistakably articulated that there exists limits to deference on questions of law and that a "contextual analysis may 'rebut the presumption of reasonableness review for questions involving the interpretation of the home statute.'"[209] Post-*Dunsmuir* jurisprudence[210], however, has demonstrated a shift away from these limits and toward an automatic application of the reasonableness standard whenever the issue involves the interpretation of a home statute. The limits to deference on questions of law as articulated by the Supreme Court should be considered when weighing the relativity of a decision-maker's

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[206] *Dunsmuir, supra* note 5 ¶ 63.

[207] *McLean,* supra note 82 ¶ 21.

[208] *Ibid* ¶ 22, citing *Dunsmuir*, *supra* note 5 ¶ 58-61.

[209] *McLean*, *supra* note 82 ¶ 22, citing *Public Performance of Musical Works, Re,* 2012 SCC 35 at ¶ 16.

[210] As demonstrated by the case study in this paper, such as the majority decision in *Wilson, supra* note 1, the decision in *ATA*, *supra* note 158, and the majority decision in *Edmonton East*, *supra* note 143.

expertise against the court's expertise in interpreting the law. Assessing the relative nature of expertise is necessarily specific to the factual matrix of a case. The process of judicial review on a home statute interpretation without simultaneously considering the limits on deference results in an unbalanced judicial review.