

## **Seeking simplicity in Canada's complex world of judicial review**

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### **Abstract**

This essay, written from the perspective of a current adjudicator and former litigator, proposes a two-step process for simplifying the standard of review framework for judicial review in Canada. First, the courts would establish a default framework that evaluates the reasonableness of tribunal decisions. Second, the legislatures would pass clear statutory language on when the default standard of review of reasonableness will not apply.

### **Introduction**

Over the past few decades, the relationship between tribunals and courts in Canada has gone through great change and uncertainty. This is particularly so in respect to the standard of review framework used in the judicial review of tribunal decisions. However, a simpler approach could be developed, which would clarify the judicial review framework in a way that respects the roles of legislatures, tribunals and courts. Given my current experience overseeing several tribunals and my former role as a litigator before courts and tribunals, I offer the following thoughts to complement the many insightful commentaries that have been published by academics and others.<sup>2</sup>

In brief, I propose a two-step process for simplifying the standard of review framework for judicial review in Canada. First, the courts would establish a

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<sup>2</sup> For an excellent collection of perspectives, see:

<https://www.administrativelawmatters.com/blog/2018/05/11/revisiting-dunsmuir-food-for-thought/>. The collection resulted from an online symposium on Canadian administrative law hosted by Paul Daly and Leonid Sirota and will be published in an upcoming issue of the *Canadian Journal of Administrative Law and Practice*. That symposium collection and the Supreme Court of Canada's recent leave to appeal decision indicating that it wished to "consider the nature and scope of judicial review of administrative action" (see footnote 20 below) in three upcoming appeal hearings partly inspired me to write this essay. Though much has been written on the topics explored in this essay, the symposium essays are the main ones to which I refer here. Many of them contain references to other leading commentaries as well as the most relevant case law.

default framework focused on evaluating the reasonableness of tribunal decisions and the fairness of tribunal procedures (either as a separate question or as an aspect of an expanded notion of reasonableness). Second, the legislatures would follow up with clear statutory language on when the default standard of review will not apply.

In law school, I recall my administrative law professor attempting to clarify judicial review by using diagrams to show when a tribunal stepped outside its jurisdiction. When a tribunal exceeded its jurisdiction, the courts would intervene. The diagrams were clear but the bounds of what exactly constituted a jurisdictional error were fuzzy, at least to me. Later, as a practising lawyer appearing in courts on cases challenging the decisions of tribunals and other statutory decision-makers, it was essential to keep up to date on the evolving area of judicial review so as to properly characterize the alleged error (fact, mixed fact and law, or law) and the appropriate standard of review (correctness, reasonableness *simpliciter*, or patent unreasonableness). Success on some cases could largely turn on how the issues were framed vis-à-vis the categories established by the courts. More recently, standard of review questions and related issues regarding the relationship between tribunals and the courts arise in cases I hear, even though those questions more regularly arise before the courts.<sup>3</sup> As well, nearly every

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<sup>3</sup> For example, in hearing a motion asking Ontario's Assessment Review Board to "state a case" to the courts (*Waste Management of Canada (Re)*, 2015 CanLII 68073 (ON ARB)), I noted:

[45] As the modern jurisprudence regarding administrative tribunals reflects significant deference towards them, it follows that those tribunals that have stated case provisions should not be too quick to use them on questions that the courts and the legislatures expect tribunals to answer themselves. In the words of Macaulay and Sprague, a case should not be stated unless the court's opinion is "essential". It follows that it is not essential to have the court answer questions that the court itself would assess on a reasonableness standard if no case had been stated. There is no compelling policy rationale to bypass a specialized tribunal on a question that would attract deference if the Board answered it itself.

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[60] ...Having regard to the role and values of tribunals, there is no rationale for a specialized tribunal to pass off to the court questions that would be subject to a reasonableness standard in an appeal... If administrative tribunals are to "act consistently with the values underlying the grant of discretion" (*Doré*) given to them by legislatures and if they are to merit the degree of deference now given to them by the courts, even on questions of law, then it follows that such tribunals must bravely answer the many difficult legal questions that arise.

[61] ...If the Board were to state cases such as the one sought here simply because the parties prefer that option, then it would not be acting in a manner consistent with the modern view of specialized tribunals. That modern view of tribunals includes administrative decision-makers who are called upon to answer tough legal questions.

administrative law conference I have attended in recent years has explored the latest vexing questions related to standard of review. Though I find the questions that continue to be posed interesting, I often ask: why does this area of law always seem to be in flux?<sup>4</sup> Is the world of Canadian administrative law so complex that it is impossible for a simpler approach to evolve?<sup>5</sup>

In proposing a two-step path here, I do not undertake a comprehensive survey of the existing literature and case law. However, my thoughts are certainly influenced by the case law and commentary and are by no means entirely original. Rather, I attempt to bring together some of the existing strands of thought into a simpler path forward. In so doing, I do not attempt to define the content of a new default reasonableness standard. That work will be needed, but is outside the scope of this essay.

The synthesis I suggest respects the specific roles of legislatures, tribunals and courts. In a nutshell, it involves the courts first settling the jurisprudence on judicial review into a simple default approach that looks only at reasonableness and fairness (or just reasonableness, if fairness is rolled into a new broadened notion of reasonableness) unless the relevant statute specifies some other standard of review. The second step would be for legislatures to enact clear provisions that set out the instances where the default approach established by the courts will not apply. Those provisions could target specific tribunals or specific types of questions for which a legislature wishes the courts to be able to substitute their views for those of the tribunals.

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<sup>4</sup> See: Paul Daly, “Why is Standard of Review So Addictive?” (<https://www.administrativelawmatters.com/blog/2018/02/12/why-is-standard-of-review-so-addictive/>) (February 12, 2018); David W. Stratas, “A Decade of *Dunsmuir*: Please No More” (<https://www.administrativelawmatters.com/blog/2018/03/08/a-decade-of-dunsmuir-please-no-more-hon-david-w-stratas/>) (March 8, 2018); and David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (2016), 42 *Queen’s L.J.* 27.

<sup>5</sup> See: para. 19 of *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29; Andrew Green, “The Search for a Simpler Test: *Dunsmuir* and Categories” (<https://www.administrativelawmatters.com/blog/2018/02/13/the-search-for-a-simpler-test-dunsmuir-and-categories-andrew-green/>) (February 13, 2018); Leonid Sirota, “The Paradox of Simplicity” (<https://doubleaspect.blog/2018/03/07/the-paradox-of-simplicity/>) (March 7, 2018); and Robert Danay, “Did *Dunsmuir* Simplify the Standard of Review?” (<https://doubleaspect.blog/2018/03/02/did-dunsmuir-simplify-the-standard-of-review/>) (March 2, 2018).

The ultimate objective of this proposal is to allow everyone involved in tribunal proceedings and judicial review to refocus on solving the actual disputes that come before tribunals and courts without too many resources being spent debating the overall relationship between tribunals and the courts. My view is that, as much as possible, resources should be directed to the merits of dispute resolution so as to meet the needs of those who bring their disputes to tribunals and courts.<sup>6</sup> It must be remembered that one of the reasons for delegating powers to a tribunal “is to provide an expeditious and inexpensive method of settling disputes”.<sup>7</sup> So long as uncertainty pervades the framework governing the relationship between courts and tribunals (including questions relating to standard of review),<sup>8</sup> parties to cases are forced to spend resources engaging in that debate before the courts after a tribunal decision in addition to their debate before a tribunal in the first instance.<sup>9</sup> This reduces access to justice and unnecessarily increases the overall cost of administering the justice system.

### **Complexity and diversity in the world of administrative tribunals**

The complexity and diversity of tribunals has been well-recognized for years. This passage from the Supreme Court of Canada from 1992 is one example:

Administrative boards play an increasingly important role in our society. They regulate many aspects of our life, from beginning to end. Hospital and

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<sup>6</sup> See para. 133 of *Dunsmuir v. New Brunswick*, 2008 SCC 9.

<sup>7</sup> Sara Blake, *Administrative Law in Canada*, Sixth Edition, Markham: LexisNexis, 2017, p. 3.

<sup>8</sup> As noted by Paul Daly, “standard of review touches on issues fundamental to the legal order” (“Why is Standard of Review So Addictive?” (<https://www.administrativelawmatters.com/blog/2018/02/12/why-is-standard-of-review-so-addictive/>) (February 12, 2018)).

<sup>9</sup> As noted by Paul Daly, “The Politics of Deference? *Gehl v. Canada (Attorney General)*, 2017 ONCA 319” (<https://www.administrativelawmatters.com/blog/2017/07/25/the-politics-of-deference-gehl-v-canada-attorney-general-2017-onca-319/> (July 25, 2017)):

Consider the reasons, beneath the doctrine, why judges might feel comfortable deferring to administrative interpretations of law.

First, it may simply be *efficient* to do so. Where statutory terms are ambiguous or vague, a judicial interpretation of law might only add little marginal value to an administrative interpretation of law. The front-line decision-maker’s interpretation may be ‘close enough for government work’ or, at least, not demonstrably wrong. Leaving the elaboration of ambiguous or vague statutory provisions to other bodies frees up judicial resources, which can be focused on matters the judges deem to be more important. In addition, a judicial interpretation of law will be set in stone and chiselling a new one would take many years of litigation, whereas an administrative body will have much more flexibility to adjust its view of a statutory provision in light of changed circumstances.

medical boards regulate the methods and practice of the doctors that bring us into this world. Boards regulate the licensing and the operation of morticians who are concerned with our mortal remains. Marketing boards regulate the farm products we eat; transport boards regulate the means and flow of our travel; energy boards control the price and distribution of the forms of energy we use; planning boards and city councils regulate the location and types of buildings in which we live and work. In Canada, boards are a way of life. Boards and the functions they fulfil are legion.<sup>10</sup>

Today, there are over 700 substantial tribunals, commissions, boards and agencies in Canada performing a “myriad of functions”.<sup>11</sup>

I have served on various tribunals and overseen a federal tribunal and a cluster of six provincial boards and tribunals. I can attest to the diversity of disputes that arise and the variety of legislative and tribunal responses to having disputes settled without recourse to the courts. The statutory frameworks for the tribunals I currently lead are incredibly varied. One tribunal is not adjudicative at all; it only conducts mediations. Another holds adversarial hearings but has no final decision-making authority on the merits; instead it makes recommendations to government. Others are more traditional adjudicative tribunals, but administer appeals under many different statutes employing quite different approaches.<sup>12</sup> One tribunal carries out proceedings under over a dozen statutes with various provisions (depending on the statute under which the proceeding was brought) for the tribunal’s decisions being directly appealed to the courts, for appeals to the courts but only with leave, or for no appeal to the courts at all. Some of the tribunals I oversee hear appeals of decisions by administrative decision-makers, others from elected decision-makers and others hear matters in the first instance without any decision having been made previously. A more adversarial format may be employed for many proceedings or a more inquisitorial one for others. All parties may be represented by counsel in one hearing room while the next is

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<sup>10</sup> *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623, 1992 CanLII 84

<sup>11</sup> Robert W. Macaulay, James L.H. Sprague, and Lorne Sossin, *Practice and Procedure before Administrative Tribunals*, Toronto: Thomson Reuters, updated to 2018 Release 8, pp.1-2 to 1-5.

<sup>12</sup> See, for example, Jerry V. DeMarco and Paul Muldoon, *Environmental Boards and Tribunals in Canada*, Second Edition, Toronto: LexisNexis, 2016, pp. 47-49

occupied by parties without any legal representatives. Hearings can last less than an hour or can last many months. Some are in person, others by telephone or video conference, and others solely in writing. One case may involve a relatively minor dispute over the appropriate property tax assessment for a house and another may involve a proposed large-scale resource development project that has involved years of planning.

It is well known that there are many different types of disputes that come before tribunals every day and, as noted above, there are hundreds of tribunals set up to resolve them. However, it is not just that there are many tribunals in Canada; there are many tribunal models as well. When a statute establishing a tribunal is being drafted, numerous design questions need to be addressed. According to my theoretical calculations set out below, there are over 1000 possible scenarios in respect of the nature of the tribunal proceedings and the types of questions they deal with (fact, law, or mixed). In theory, any of these scenarios can come up before a court on appeal or on judicial review and the court must decide how to approach its role vis-à-vis the tribunal decision being challenged.

Here are some of the main variables (many of which have also been considered in the jurisprudence on deference) that give rise to the 1000+ possible scenarios before a court on judicial review: 1) whether the tribunal whose decision is under review is a standing tribunal, *ad hoc* tribunal panel, or a mixed model, 2) whether it is a specialized expert tribunal or not, 3) whether there is a right to appeal the tribunal decision to the courts, right to seek leave to appeal, or no appeal provision at all (with a privative clause or without); 4) whether the tribunal has a policy-making role, whether it resolves a specific *lis* between parties or whether it is some other type of tribunal, 5) whether the tribunal hearing was adversarial or inquisitorial or a hybrid, 6) whether the tribunal decides or recommends, and 7) whether the issue arising from the tribunal decision is fact-based or law-based or a mixed question of fact and law.

To illustrate the diversity of scenarios mathematically, I have assigned each of the above variables a unique letter code:

1) standing tribunal = A; *ad hoc* = B; mixed = C;

- 2) specialized expert tribunal = D; non-expert tribunal = E;
- 3) right to appeal = F; right with leave = G; no right of appeal (with privative clause) = H; no right of appeal (no privative clause) = I;
- 4) policy-making tribunal = J; tribunal that resolves a specific *lis* = K; other type = L;
- 5) adversarial = M; inquisitorial = N; hybrid = O;
- 6) decision-making tribunal = P; recommendation-making tribunal = Q; and
- 7) factual issue = R; legal issue = S; mixed question of fact and law = T.

Of course, some of these categories could be divided up at a finer scale than I have above,<sup>13</sup> but even without doing that, the number of resulting combinations from the above 7 categories (1 through 7) and 20 individual variables (A through T) can be calculated as  $3 \times 2 \times 4 \times 3 \times 3 \times 2 \times 3 = 1,296$ . These 1,296 combinations range from ADFJMPR to CEILOQT and every other one in between.

With all of this theoretical and actual diversity among tribunals and issues that may come before the courts, it may seem surprising that we have only two (at present)<sup>14</sup> or three (previously) standards of review available. Perhaps a much longer list of standards of review is needed, or perhaps no list at all but just a

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<sup>13</sup> This also ignores other statutory decision-makers that do not hold hearings at all. This essay focuses on tribunals that hold some form of a hearing as opposed to the many other statutory decision-makers that are also subject to judicial review. However, some of the concepts explored herein may also be pertinent to the judicial review of non-tribunal decision-makers.

<sup>14</sup> Arguably, a third standard, which may be termed “exacting reasonableness” has been employed recently by the Federal Court of Appeal (*Vavilov v. Canada (Citizenship and Immigration)*, 2017 FCA 132 at para. 36). Some commentators also refer to a type of “disguised correctness” standard being employed such that the text of a court’s decision adopts a reasonableness standard, but the nature of the analysis evidences an approach more akin to correctness (see: David Mullan, “The True Legacy of *Dunsmuir* — Disguised Correctness Review?” (<https://doubleaspect.blog/2018/02/15/the-true-legacy-of-dunsmuir---disguised-correctness-review/>) (February 15, 2018); Joseph T. Robertson, “*Dunsmuir*’s Demise & The Rise of Disguised Correctness Review” (<https://www.administrativelawmatters.com/blog/2018/02/15/dunsmuir-s-demise-the-rise-of-disguised-correctness-review-the-hon-joseph-t-robertson/>) (February 15, 2018); and Joseph Robertson, “Administrative Deference: The Canadian Doctrine That Continues to Disappoint” (<http://dx.doi.org/10.2139/ssrn.3165083>) (April 18, 2018). The conceptual difficulties associated with the word “correctness” being used as a category of standard of review are explored later in this essay.

spectrum of deference?<sup>15</sup> But how many different standards or points on the spectrum would be needed to truly reflect this incredible diversity of scenarios? Or looking at it from a different perspective, given the vast diversity, perhaps little is added by having two or three separate standards or a spectrum? Perhaps what is really needed is just one default standard, such as reasonableness, that is applied contextually whenever the legislatures do not specify a different standard or level of deference?

Here, I seek to explore that final option. Given the diversity across tribunals,<sup>16</sup> is it feasible for the system of court oversight of such tribunals to be simple? I believe it can be simplified, if the courts and legislatures carry out the two steps I have identified here. Before delving further into the proposed path forward, it is worth revisiting the roles of administrative tribunals in society and their roles relative to the courts. That context helps demonstrate why a deferential default position of reasonableness is appropriate, while leaving ample room for legislatures to decide when another approach is suitable in specific instances.

### **The roles of tribunals in society and their relationship with the courts**

A variety of tribunals have been created by legislatures to deal with the diversity of disputes that the legislatures wish to have resolved outside the court system. As well, within a given tribunal, a wide variety of processes and rules have been developed to ensure that the differing disputes before them are dealt with fairly and efficiently. In an address to Canada's tribunal community in 2013, former Supreme Court of Canada Chief Justice McLachlin described the evolving role of tribunals in society as follows:

The move to administrative governance in a host of areas gained momentum in the last half of the 20th century. Now, in the beginning of the 21st century, literally thousands of administrative systems occupy the legal landscape. Virtually all the important areas of endeavour and social

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<sup>15</sup> See: Lorne Sossin, "*Dunsmuir* – Plus ça change Redux" (<https://www.administrativelawmatters.com/blog/2018/03/07/dunsmuir-plus-ca-change-redux-lorne-sossin/>) (March 7, 2018).

<sup>16</sup> As noted earlier, there is also diversity in the types of proceedings within some individual tribunals, especially those with multiple statutory mandates.



concern, from labour to human rights, from workers' compensation to mental health – areas once under the jurisdiction of the common law courts – have been, to coin a term, “administerized”. Vast swaths of the rule of law are dealt with by commissions and tribunals.

Chief Justice Lamer acknowledged the centrality of administrative tribunals in Canadian society when he said, quite simply, “the impact of administrative agencies on the lives of individual Canadians is great and likely surpasses the direct impact of the judiciary”.<sup>17</sup>

Later in that same address, she noted the range of acceptable results that may emanate from a tribunal hearing and situated that within the overall relationship between the courts and tribunals:

... I believe that we have reached a new stage in the saga of courts, administrative tribunals and the rule of law. We have not resolved all the problems. But we understand better how to go about resolving them. We understand better than we once did that what matters is fundamental fairness, and that what is fundamentally fair depends profoundly on the particular mandate and context of the tribunal in question. We understand

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<sup>17</sup>Administrative Tribunals and the Courts: An Evolutionary Relationship (Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada), <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> (May 27, 2013) [footnotes omitted]. She also noted:

The shift to regulatory governance has been wildly successful. In a word, it works. The complex modern state could not function without the many and varied administrative tribunals that people the legal landscape.

Tribunals provide specialized and technical resolutions in different situations, ensure greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies, and provide an informal and rapid forum for public hearings, thereby minimizing time and costs related to litigation before ordinary courts. As Justice Abella stated while she was sitting on the Ontario Court of Appeal:

Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.

In sum, without administrative tribunals, the rule of law in the modern regulatory state would falter and fail. Tribunals offer flexible, swift and relevant justice. In an age when access to justice is increasingly lacking, they help to fill the gap. And there is no going back.

Yet the rise of administrative tribunals posed a problem. How could we have all the benefits of tribunal justice, and still maintain the rule of law? How, it was asked, could the public be sure that government-appointed tribunal members would hold fair hearings and stay within the ambit of their administrative powers? Would the gains made in the long fight for rights and fair adjudication before the courts be lost when appointed board members – accountable to no one but the government they hoped would re-appoint them – decided the rights and wrongs of people's disputes with each other and with the state? If these fears have not been realized, if tribunals work within the rule of law and not outside it, it is because the courts took on the task of ensuring that administrative tribunals remain true to their fundamental mandates, both procedurally and substantively. In a word, it is because of judicial review.

better that the rule of law does not always call for one right answer in every case, but rather that for many decisions there is a range of reasonable alternatives. And most importantly, we understand that both tribunals and courts are essential to maintaining the rule of law in our complex, rapidly changing world.<sup>18</sup>

Former Chief Justice McLachlin posited that the relationship between courts and tribunals has gone through four periods: 1) confrontation (1950-1975), 2) contextual deference (starting in the late 1970s), 3) the search for standards of review (starting in the late 1990s), and 4) consolidation and settling down (2008 to the date of her remarks in 2013).<sup>19</sup>

Now five years later, it is apparent that the third period has not yet ended and that the fourth period has not resulted in as much “settling down” as hoped. Indeed, the Supreme Court, in a somewhat unusual move, has invited more debate on the standard of review by including the following direction in three recent leave to appeal decisions:

The Court is of the view that these appeals provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, and subsequent cases. To that end, the appellant and respondent are invited to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review...<sup>20</sup>

This invitation provides an opportunity for the Supreme Court of Canada to take the next step in ending the long-running standard of review search and truly entering the “settling down” period.

### **The trouble with “correctness” and the suitability of “reasonableness”**

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<sup>18</sup>Administrative Tribunals and the Courts: An Evolutionary Relationship (Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada), <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> (May 27, 2013) [footnotes omitted].

<sup>19</sup>Administrative Tribunals and the Courts: An Evolutionary Relationship (Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada), <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx> (May 27, 2013).

<sup>20</sup> *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (SCC); *Bell Canada, et al. v. Attorney General of Canada*, 2018 CanLII 40808 (SCC); *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (SCC).

One of the key issues in recent Canadian judicial review jurisprudence involves the decision as to whether to employ a reasonableness standard or correctness standard in reviewing a tribunal decision. The concept of correctness has occupied an important place in standard of review jurisprudence before and after *Dunsmuir*.<sup>21</sup> In standard of review parlance, correctness review is intended to convey a standard of lower or no deference to a tribunal decision. But not all questions subject to correctness review have only one acceptable answer just as not all questions subject to reasonableness review necessarily have more than one acceptable answer. Though the plain meaning of “correctness” (i.e., “the quality of being free from error”<sup>22</sup>) is well understood, its suitability as a standard of review category is questionable. How should correctness review deal with situations where there are two or more correct or acceptable answers? The term may be better suited to describing questions that have only one acceptable answer as opposed to describing a level of deference.

Unlike correctness, the use of the term reasonableness in standard of review can work comfortably in most situations – both when there is a legitimate range of acceptable outcomes and when there is only one acceptable outcome.<sup>23</sup> There are many questions addressed by tribunals that give rise to all sorts of reasonable responses, without any one of them being correct *per se*. Generally, under a reasonableness analysis, any answer provided by the tribunal will be upheld if it falls within the range of reasonable outcomes. The reasonableness lens works very well in that situation, which arises with great frequency. However, reasonableness also works when there really is only one acceptable answer. For those types of questions, an outcome that is not the single acceptable outcome would be overturned regardless of whether one employed the term incorrect or unreasonable. In other words, unreasonableness will capture that type of incorrect answer and there is no need for another category, such as correctness, in order for the court to appropriately intervene.

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<sup>21</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9.

<sup>22</sup> Oxford English Dictionary: <https://en.oxforddictionaries.com/definition/correctness>.

<sup>23</sup> See *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 at para. 35.

It may be appropriate to replace the concept of correctness in judicial review nomenclature with clearer language such as “the tribunal decision is subject to substitution by the reviewing court” because that is really what has been meant by the correctness standard in Canadian administrative law to date. If the concept of correctness is to survive in judicial review at all, it may be better suited to describing certain types of questions (perhaps defined in the case law as only those questions that have one acceptable answer) as opposed to describing a level of deference.

### **A two-step path forward from the courts and legislatures**

Courts and legislatures have made considerable efforts to clarify the standard of review regime. Nevertheless, those efforts have yet to yield a satisfactory result, as evidenced by the fact that questions regarding the appropriate standard of review in a given case and the appropriate overall approach to standard of review remain open for debate. It does not serve the interests of justice or the interests of parties to litigation for so many resources to be put to standard of review questions on a continuous basis. So long as administrative law is dominated by this debate, time and resources are being spent on questions other than those that the parties seek to resolve in a particular case.

But, as noted above, the landscape of administrative law is a diverse one. Is it really possible to find a simply elegant solution to questions that arise in so many different contexts? Recognizing that there are other “reasonable” approaches to this vexing problem in administrative law, one possible path forward is set out below.

A simpler path forward can be designed by the courts and legislatures using a two-step process, keeping in mind that some of the rules and principles of administrative law are created by judges and some by statute.<sup>24</sup> As a first step, the courts could clarify the jurisprudence around standard of review by employing a simpler default framework for judicial review of administrative decisions. That default framework can explicitly contemplate that, immediately following that

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<sup>24</sup> Robert W. Macaulay, James L.H. Sprague, and Lorne Sossin, *Practice and Procedure before Administrative Tribunals*, Toronto: Thomson Reuters, updated to 2018 Release 8, p.1-11.

clarification from the courts, legislatures can carry out a second step by bringing greater clarity as to the intended role of the courts with respect to specific types of tribunals and specific types of questions. The two-step approach respects the roles of tribunals, courts and legislatures while also resolving what has been an unnecessarily long and complex debate.

For questions of fairness, the courts need only ask one question: was the process followed by the tribunal or statutory decision-maker procedurally fair? The question is framed so as to create a binary approach to answering the question. If the answer is yes, the tribunal's decision will not be overturned. If the answer is no, the court will determine the appropriate remedy. No standard of review analysis would arise. Nevertheless, the analysis leading to a court's decision on whether a tribunal process was fair does need to keep in mind that, while the question it is answering only has two possible answers (yes it was fair or no it was not fair), the question before the tribunal may have given rise to a range of acceptable and fair outcomes. In other situations, such as whether a person was owed a duty to be notified of a particular hearing directly affecting his or her rights, there may really only be one fair outcome available.

To use a simple example, a tribunal dealing with a motion to adjourn is clearly involved in a question of fairness but there is often more than one acceptable answer to a request for an adjournment given the factual context of a specific case. Any of the acceptable answers would be considered to be procedurally fair. Answers that result in procedural unfairness would not be acceptable. The approach is simple and easy to implement. The question is simply about whether the process was fair and the analysis looks at whether there was more than one fair option available to the tribunal and, if so, whether the option chosen was among those fair options. In the many situations where there are multiple fair options open to a tribunal, the fairness analysis will resemble a traditional reasonableness analysis but be focused on the process that was followed.

For questions regarding the merits of a decision and for which no standard review is stipulated in the relevant statute, the courts also need only ask one question:

was the decision reasonable?<sup>25</sup> There is no need to force-fit each question or each tribunal into one of correctness or reasonableness. For questions that truly only have one right answer, any answer that is not that right answer is, of course, unreasonable. For questions that give rise to a range of acceptable outcomes, the court would only set aside those decisions that fall outside the range. Whether the range of acceptable outcomes in a given case is one, many or infinite, the standard of review of reasonableness would remain constant.<sup>26</sup>

Conceptually, it would even be possible to roll fairness into an all-encompassing reasonableness standard. For example, if one were to define a reasonable outcome more globally as one that falls within the range of acceptable outcomes and that emanates from a procedurally fair process, then one over-arching reasonableness standard could actually suffice for all situations for which no other standard of review is stipulated in the relevant legislation.

Outside the simple framework set out above (i.e., fair and reasonable or an expanded definition of reasonableness that is defined to include fairness), the legislatures would need to engage only when they want the courts to employ a different approach than the default one set out by the courts. This respects the fact that legislatures may desire greater court scrutiny for some types of tribunal decisions and that they are best positioned to identify when such should occur because it was the legislatures themselves that decided to stream certain types of disputes to tribunals in the first place.

This type of legislative response to a change in the case law occurred to a limited extent when the standard of review jurisprudence evolved, for a time, to the three standard regime in *Southam*.<sup>27</sup> After that jurisprudential development, some statutory provisions were passed that identified which standard should be

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<sup>25</sup> See the reasons of Abella J. in *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

<sup>26</sup> See para. 33 of *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29:

Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one “defensible” outcome for those which formerly attracted a correctness review.

<sup>27</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748.

applied.<sup>28</sup> The same process could occur in the near future if the courts were to adopt a default position of reasonableness wherever a statutory standard was absent. Keeping in mind that the standard of review analysis has its roots in statutory interpretation, legislatures could decide to bring further clarity to the situation where they saw fit. For example, where a legislature wishes courts to be able to substitute their views for those of a given tribunal without any notion of deference or a standard of reasonableness, the applicable provision can clearly set that out.<sup>29</sup> As well, where a legislature wishes the answers to certain classes of questions (e.g., Constitutional questions, application of common law, etc.) to be subject to substitution by the courts regardless of whether the tribunal decision was reasonable, the applicable provision can also set that out.<sup>30</sup> In the absence of such provisions, the reasonableness standard would apply by default.<sup>31</sup>

## Conclusion

While the administrative justice system is admittedly complex, the system for judicial review need not be. Ironically, given the roots of standard of review jurisprudence in the interpretation of words, the very words used in judicial review have often clouded rather than clarified the analytical exercise being undertaken. For a time “jurisdiction” was stretched to the point where other

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<sup>28</sup> For example, the “patently unreasonable” standard was included in s. 23.1 of the *Environmental Assessment Act*, RSO 1990, c E.18 (as amended in 2000):

23.1 Subject to section 11.2, a decision of the Tribunal is final and not subject to appeal, and a decision of the Tribunal shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

<sup>29</sup> There are already many examples of this at the tribunal level, where the legislature clearly indicates that a tribunal does not need to defer to the original decision-maker. I was on a panel that analyzed one such example in *Associated Industries Corp. v. Ontario (Ministry of the Environment)*, [2008] OERTD No. 57, 40 CELR (3d) 101 (ON ERT). The provision in question was s. 145.2(1) of the *Environmental Protection Act*, RSO 1990, c E.19:

145.2 (1) Subject to sections 145.3 and 145.4, a hearing by the Tribunal under this Part shall be a new hearing and the Tribunal may confirm, alter or revoke the action of the Director that is the subject-matter of the hearing and may by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, and, for such purposes, the Tribunal may substitute its opinion for that of the Director.

<sup>30</sup> For greater clarity, I suggest the use of something other than “correctness” to implement this in legislation. Clearer language could include, for example, provisions that explicitly state that a court can substitute its decision for that of the tribunal.

<sup>31</sup> A related approach is for a statute to exclude certain types of questions from being determined by a tribunal at all. Such questions, if they arise, would be dealt with only by the courts. See, for example, s. 44 of the *Administrative Tribunals Act*, SBC 2004, c 45.

types of unacceptable results were force-fit into “jurisdiction” when the category in reality was simply “unacceptable outcomes including errors of jurisdiction”. And “correctness” has and continues to be used inappropriately to describe a “low deference” standard that is meant to apply to some questions that can have more than one acceptable outcome as well as those that have just one correct one (for which the notion of correctness may be a better fit).

Fortunately, a clearer path forward need not be invented from scratch. Nearly everything that is needed for such a path has been said in the case law or commentary. All that is needed is for the courts to embark on a serious effort to weave the useful strands together into a simpler and more coherent whole and for the legislatures to follow up with clarity on when the default standard of review ought not apply.

As noted above, one option for the first step is for the courts to ask only two questions on judicial review:

- 1) was the process followed by the tribunal procedurally fair? and
- 2) where there is no standard review stipulated in the relevant statute, was the tribunal decision reasonable?

As mentioned earlier, the two questions could actually be merged into one all-encompassing question if the notion of fairness were included within a broadened concept of reasonableness. After clarification from the courts on the default framework for standard of review, the legislatures could then carry out their legitimate role in clearly stating in statute when they want courts to substitute their views for those of tribunals, having regard to the nature of certain tribunals or the nature of certain questions put to tribunals.

The adoption of the approach set out above, or another approach that achieves the same objectives, would simplify Canada’s unnecessarily complex system of judicial review in a way that respects the roles of all the institutions involved (tribunals, courts and legislatures), implements legislative intention, and makes justice more efficient and accessible for those whom the administrative justice system was set up to serve in the first place.