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Presumptive Deference and the Role of Expertise on Questions of Law in Canadian Administrative Law

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PRESUMPTIVE DEFERENCE AND THE ROLE OF EXPERTISE ON QUESTIONS OF LAW IN CANADIAN ADMINISTRATIVE LAW

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ABSTRACT

Administrators in Canada are presumptively accorded deference on questions of law. This deference is grounded largely in expertise, a pragmatic justification for deference. This thesis examines the relationship of expertise to other practical justifications for deference and to legislative intent. This thesis questions (i) whether assumptions about administrative expertise are grounded in administrative realities; (ii) whether deference to expertise has a meaningful nexus with legislative intent; and (iii) whether heavy reliance on expertise leaves meaningful room for judicial review on questions of law within reasonableness. I conclude that the doctrine of deference relies too heavily on presumptions about the expertise of administrators on questions of law. Deference of this nature risks allowing administrators to deviate from legislative policy, privileging administration over democracy. Where the courts apply reasonableness, expertise also risks becoming a presumptive explanation for why a decision is reasonable.

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Introduction

The doctrine of deference in Canada applies to the judicial review of administrative decisions, including those involving questions of law. The doctrine was developed beginning in the 1970s as an attempt to correct for excessive judicial intervention in administrative decisions in favour of economic actors and in opposition to the administrative state. The fundamental legal justification for deference was that it respected legislative intent to delegate decisions to administrators and to allocate final decisions to administrative tribunals rather than courts. On this theory, administrators were granted these powers by the legislature because they had superior expertise and specialized abilities to handle complexity. Administrators were accorded deference on questions of law because they were seen to have a superior understanding of legislative intent on the technical nuances of statutory terms, broader policy contexts, and legislative purpose.

Since *Dunsmuir* was decided in 2008, the Supreme Court of Canada has increasingly narrowed opportunities for correctness review on questions of law. However, it has struggled to provide a consistent, principled basis for why deference should be accorded in these circumstances. Current doctrine focuses heavily on tribunal decision-making and does not provide principled reasoning for the application of deference to the diverse array of administrative decision-makers that are subject to judicial review. Increasingly, the Supreme Court relies on practical justifications for deference on questions of law, such as expertise, that are divorced from legislative intent. Further, the Supreme Court has struggled to explain how decision-makers can act reasonably and how courts should identify a reasonable decision on questions of law.

Administrators are diverse and many are charged with day to day decision-making implementing policies directed at protecting collective interests such as risk managing environmental harm, health, safety and socio-economic equality. These policy areas may be highly controversial and contentious and may involve regulating powerful actors. Administrators implementing such areas are charged with widely varying degrees of discretion in balancing economic benefits with other social values, or alternatively ensuring that other social values are determinative. While some administrators have broad and flexible public interest mandates, many have more constrained policy mandates designed to ensure that health, safety or the environment are protected. For example, an administrator has a very narrow mandate when charged with determining if there is scientific evidence sufficient to show that there is "reasonable certainty that no harm to human health, future generations or the environment will result" from an exposure to a pesticide.[1]

Similarly, an administrator has a narrow mandate when determining if a person does not meet the express requirements for Canadian citizenship, such as being born in Canada after February 14, 1977.[2] While such mandates inevitably involve some level of discretion, these administrators are not given mandates to make broad determinations of good policy, or balancing collective and economic interests. The legislature has made many of the important policy decisions, and the role of the administrator is primarily to implement them. In other cases, administrators make a more hybrid determination that has some element of both. For example an administrator might need to make factual or scientific determinations of whether a project is likely to cause "adverse

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[1] *Pest Control Products Act,* SC 2002, C26, s. 2(2), s.7-8.
[2] *Citizenship Act*, RSC 1985, c C-29, s.3.

environmental effects" as well as making more subjective or policy-driven decisions such as determining if those effects are "significant" or "justified".[3] While I refer to deference doctrine more generally in this thesis, my interest is primarily in addressing how it applies to questions of law in circumstances where the legislature has spelled out – at least to some extent – the objectives and policies which are to be achieved by administrative decisions. I'm concerned with the theoretical problems that arise where the legislature has given the administrator direction on desired policy outcomes by either setting out articulate legislative purposes or objectives, or has provided a relatively narrow decision-making mandate, or both.

This practical concern arises from my own decade of practice experience both advising administrators and litigating against them on a wide range of issues, most frequently on issues of environmental protection. As deference doctrine has expanded into questions of law, it has the potential to encourage administrators to ignore, sideline or even undermine their legislative mandates. I use this observation to inform my analysis, however an empirical examination of this through caselaw or practical research in public administration is beyond the scope of this thesis.

My focus is instead on how deference doctrine makes assumptions about administration, and how those assumptions influence the doctrine. I argue that if these key assumptions are wrong, the doctrine can have potentially adverse effects.

While often the legislative mandates of administrators relate to protecting vulnerable interests, such as workers or the environment, my concern is not specifically with whether any one policy

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[3] *Canadian Environmental Assessment Act, 2012,* SC 2012, C19, s 52, s.31.

agenda, such as protecting the environment, is enforced by the courts. My concern is with the deeper question of whether current deference doctrine helps or hinders public and democratic control over administrative decisions. In my experience, judicial review, while imperfect, is often the only practical means by which administrators can be held accountable to the legislature's delegated mandate, both from the inside – through legal advice, and on the outside through litigation. The expansion of deference on questions of law is considered here, while acknowledging it is only one small part of a potentially much broader matrix of social trends towards the concentration of social, political and economic power in Canada. Courts and legislatures provide an important, if flawed, means of mitigating such trends, where the law permits.

Current deference doctrine tends to presume that administrative decision-makers operate largely in broad policy making arenas and has been developed predominantly in the tribunal context. This thesis however takes as a starting point that not all administrators have the institutional frameworks of a tribunal, nor do they all have broad or poorly defined decision-making mandates. This thesis attempts to examine whether deference doctrine is capable of consistently holding administrators accountable to legislative mandates.

The focus of my analysis of deference on questions of law is broad. In this thesis I refer to "administrators" as including a diverse array of decision-makers ranging from Ministers to lower level bureaucrats, not only to boards and tribunals. Further, this thesis is not interested in the question of administrative interference with individual rights and economic liberty. Instead the thesis is more concerned with how the courts might police the boundaries of administrative

public policy mandates to ensure that legislation protecting collective interests can accomplish the policy objectives that the legislature intended.

This thesis questions (i) whether assumptions about administrative expertise are grounded in administrative realities; (ii) whether expertise has a meaningful nexus with legislative intent; and (iii) whether heavy reliance on expertise leaves meaningful room for judicial review on questions of law within reasonableness.

I begin my thesis in Part 1 by undertaking an examination of the theory behind deference and administrative decision-making. This section sets out what the assumptions behind the doctrine of deference are and sets out some of its practical limitations. In Part 2 I examine a selection of Supreme Court of Canada cases in more detail, in light of my earlier critiques. In Part 3 I examine how the assumptions behind the doctrine of deference influence the application of deferential reasonableness.

This thesis uses a conventional doctrinal approach to analysing deference doctrine, and takes as a starting point the approach used by leading common-law scholars in administrative law. However embedded within the common-law jurisprudence and scholarship are certain entrenched assumptions about how administrators behave, their characteristics and their achievements. I attempt to incorporate conclusions and theories of social scientists concerned with the study of public administration.[4] By doing this, I attempt to diversify viewpoints on

[4] While I do not purport to apply a critical theory or critical legal studies approach, some of the scholarship I review includes critical theorists and is inspired in part by work such as Lorne Sossin "The Politics of Discretion: Toward a Critical Theory of Public Administration" (1993) 36(3) Can Pub Admin 364.

administrators, their role, societal function and how administration relates to broader issues of political power. I use this diversity of viewpoints to test the strengths and weaknesses of the assumptions made by common law jurisprudence and scholarship.

The thesis concludes that the post-*Dunsmuir* doctrine of deference relies too heavily on presumptions about administrators that may not be true. The doctrine relies heavily on presumed expertise to justify a strong presumption of deference on questions of law. Reliance on presumed expertise, particularly in relation to questions of law, is problematic because it is nearly impossible to rebut and does not necessarily reflect administrative realities. Where the courts apply reasonableness, expertise also risks becoming a presumptive explanation for why a decision is reasonable.

I conclude that the presumptions behind the doctrine of deference are flawed and an approach that respects diversity in legislative intent is necessary. Finally, this thesis argues for the importance of a more positivist approach on questions of law, and a more purposive approach to reasonableness, in order to ensure that statutory objectives are met by administrators.

Part 1 – Background: Historical Origins of Deference

Deference doctrine arose in a specific historical and jurisprudential context. Any critique of it must grapple with its origins. To understand why deference is accorded to administrative decision-makers and what the assumptions underpinning deference are, it is important to understand the theoretical and practical problems that deference doctrine was attempting to solve. Exploring this history permits a better understanding of the central concerns of courts and scholars as deference doctrine was developing. It also facilitates and highlights potential weaknesses and oversights in the doctrine. The early debates around the growth of discretion in the administrative state help us to understand the political and social tensions about what kind of legal power is considered legitimate and where the source of the legitimacy arises. These debates help to contextualize the jurisprudence on deference.

History of modern deference doctrine

Dicey and the Rule of Law

At the turn of the 20th Century the administrative state was expanding in the common-law world. In this early period, the potential for the administrative state to interfere with economic and other freedoms was a growing concern. Scholars like Albert Venn Dicey were highly critical of the growth of the administrative state and emphatic that "rule of law" could only be preserved by an independent judiciary.[5] Dicey's practical and normative concern was to prevent political and administrative actors from interfering with the private legal rights of individuals. Dicey was

[5] Albert Venn Dicey, *Introduction to the study of the law of the constitution*, 7th ed (London: Macmillan, 1908).

concerned that administrators might do so without legislative endorsement or judicial supervision.[6]

In his classic treatise, Dicey focused largely on two issues: the first was the supremacy of legislative function, the principle that courts could not intervene in the legislative process and that the executive could not ignore duly passed laws. Second, Dicey was interested in executive accountability to the ordinary courts.[7]

Dicey identifies these principles as fundamental to the English legal tradition and contrasts them with continental legal traditions, which afforded administrators and the executive more discretion. Dicey critiques continental legal traditions as despotic due to the ability of the executive to bypass ordinary laws and the inability of the courts to hold administrative and executive decision-makers accountable to those laws. Dicey famously denied that "administrative law" was part of the English tradition and described French administrative law as a historical response to various French constitutional crises. These crises, he argued, related to a desire for a more powerful executive in relation to courts and legislatures. This power relationship facilitated significant and timely law reform by the executive without intervention from legislatures and courts.[8] Dicey described this situation in disparaging terms as "the

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[6] *Ibid* at 54-56, 60, 183-184, 189-191, 198, 344.
[7] *Ibid* at 344.
[8] *Ibid*.

traditional desire, felt as strongly by despotic democrats as despotic kings, to increase the power of the central government by curbing the authority of the law Courts."[9]

Dicey has been identified as a legal positivist due to his conviction that judges were well positioned to objectively interpret laws. Dicey's belief was that judicial supervision could prevent administrators and the executive from evading the law or operating outside the law. According to a common interpretation of Dicey, the principles of legislative supremacy and rule of law operated to exclude a role for the administrative state in making and interpreting the law in the English tradition.[10] In this context, Dicey described the reluctance of English Courts to interfere in parliamentary proceedings[11] and the unavailability of judicial review remedies to quash legislation.[12] Dicey's description of the rule of law turns on the inability of bodies other than courts to enforce the law in ways that interfere with the liberty of persons or property.[13] In other words, Dicey believed that courts protected citizens from arbitrary persecution by the bureaucracy or the executive. Dicey contrasted this role of the courts with his view of other countries where:

> ..wherever there is discretion there is room for arbitrariness, …discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.[14]

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[9] *Ibid*.
[10] *Ibid*. Of course the historical and jurisprudential accuracy of Dicey's account of the state of English administrative law as a contrast with French demagoguery is frequently rejected. See for example the critiques in note 22 *infra*. I do not intend to revisit the question here.
[11] *Ibid* at 54-56.
[12] *Ibid* at 60.
[13] *Ibid* at 183–4.
[14] *Ibid* at 184.

It is important to understand the explicit limits of Dicey's discussion of the rule of law and legislative supremacy. Dicey focused on the principle that legislative activity is given space by the other branches of government. This space was protected in the sense that the executive and the judiciary did not have opportunities to interfere with or ignore legislation. Dicey's discussion focused on the legislative process and not on administrative discretionary decision-making under otherwise valid legislation. For the most part, Dicey's analysis highlighted that, in his understanding of the English tradition, bureaucrats and the executive did not have the ability to alter the legislative frameworks or judicial oversight that governs the civil liberties of citizens. A further element of the rule of law according to Dicey was that "no man is above the law" in the sense that all persons, regardless of rank, are subject to the ordinary laws of the country and amenable to the jurisdiction of the courts.[15] Dicey also identified "rule of law" as including general principles of the constitution which arise from common law jurisprudence.[16] From this understanding of rule of law Dicey summarizes these elements:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.[17]

Key to this understanding of the rule of law was the exclusion of "the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary tribunals".[18] It is said that Dicey's conception of the rule of law "is

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[15] *Ibid* at 189.
[16] *Ibid* at 191.
[17] *Ibid* at 198.
[18] *Ibid*.

significant because by definition it excludes the possibility that administrative institutions might wield legal authority under the law of the constitution."[19] Dicey's rule of law attempted to challenge the legitimacy of the administrative state. Dicey's hope was that affirming legislative supremacy and rule of law would reinforce the accountability of bureaucrats and executive decision-makers to courts and legislatures.

Legal historians have suggested, with some support in Dicey's own writing, that Dicey's perspective was grounded in a mistrust of growing administrative state institutions and their potential to limit economic liberty.[20] However Mark Walters has pointed out that Dicey's concerns about administrative law had deeper historical and constitutional roots, noting that Dicey's concerns arose from a longer-term observation of common law scholars about the potential for executive discretion in continental legal systems to permit "suspensions of legality" in times of political tension, and to allow administrative tribunals to decide cases "from a governmental point of view" based on "official bias" rather than judicial independence.[21]

Taken in this context, Dicey's concern about bureaucratic and executive power was not unique and did not arise solely in the context of the growing administrative state. His concerns arose from a more universal institutional tension between legislative supremacy, judicial independence and executive power which remains relevant today.

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[19] Matthew Lewans, *Administrative Law and Curial Deference* (S.J.D., University of Toronto (Canada), 2010) [unpublished] at 20.
[20] H W Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall LJ 1 at 10–11.
[21] Mark D Walters, "Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to Droit Administratif" (2016) 66:1 UTLJ 53 at 57–67.

Dicey has been widely criticized on many grounds, including for his refusal to acknowledge that administrative and executive discretion had a legitimate place in the historical English legal tradition.[22] For the purposes of this thesis, what is most relevant is that Dicey has been frequently critiqued for denying that administrators and the executive had a "legitimate" role in making and interpreting the law.[23] Dicey has also been critiqued for claiming a judicial monopoly on statutory interpretation. This critique is often grounded in general claims about how the judiciary and administrative state function and about the purported strengths and weaknesses of different branches of government. For example, Hogg and Zwibel argued:

> Dicey exaggerated the virtues of the courts, exaggerated the risks of administrative decision making, misunderstood the state of administrative law even at the time when he wrote, and refused to see merit in the civilian systems of Europe.[24]

Such critiques depend more on the political or philosophical position of the writer regarding the "virtues" of courts and the "risks" of administrative decision-making than on the utility of Dicey's work for analysis of administrative law doctrines. Social and political perceptions of virtues and risks of various branches of government are not static or universal, they are dynamic

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[22] I do not intend to quibble with the arguments made by many able scholars that Dicey's treatise was flawed on varied legal and historical grounds: See H W Arthurs, *supra* note 20 at 6–7; Martin Loughlin, "The Functionalist Style in Public Law Administrative Law Today: Culture, Ideas, Institutions, Processes, Values - Essays in Honour of John Willis - I. John Willis in Intellectual Context" (2005) 55 UTLJ 361 at 366; Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada Administrative Law Today: Culture, Ideas, Institutions, Processes, Values" (2005) 55 UTLJ 715 at 716; Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58 UTLJ 75. Dicey is further critiqued on ideological grounds for coming from a conservative perspective that was opposed to the expansion of the administrative state, which he allegedly saw as imposing potentially arbitrary limits on economic liberty. For a more nuanced explanation of Dicey's perspective see Walters, *supra* note 21.

[23] Lewans, *supra* note 19 at 20.

[24] Hogg & Zwibel, *supra* note 22.

and may shift over time. What such critiques tell us is that, over time, the potential risks posed by the rise of administrative discretion have come to be seen as irrelevant or at least less important in comparison to other social and political concerns. Moreover, the positivist understanding of law and legal reasoning upon which Dicey's analysis depends has been critiqued. For example, a common critique of Dicey is that he overemphasized the clarity and simplicity of legislative will and the judicial role in, or legitimacy of, "objectively" identifying legislative intent.[25] Notwithstanding these critiques, the concept of legislative intent and judicial efforts to discern that intent remains an important part of administrative law doctrine.

Weber and the rise of administrative rationalism

As the 20th Century continued and the administrative state grew, other scholars attempted to understand the internal logic of administration and how it impacted political power and civil rights. This line of scholarship in many ways reversed the logic of Dicey about the legitimacy of administrative statutory interpretation. These scholars argued that administrative reasoning could be superior to legal reasoning. They saw courts and legal reasoning as antiquated and formalistic, compared to a potentially dynamic and flexible administrative rationality based in expertise.

In the early 20th Century German scholar Max Weber spent considerable time contemplating how policy discretion in the civil service impacted political power and civil rights.[26] Weber and

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[25] Lewans, *supra* note 19 at 27; Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992) at 140; for other critiques and defenses of objective statutory interpretation see discussions in Cass Sunstein, "Interpreting statutes in the regulatory state" (1989) Harv L Rev 405; and Owen Fiss, "Objectivity and interpretation" (1981) 34 Stan L Rev 739.

[26] Fritz Sager, "Weber, Wilson, and Hegel: Theories of Modern Bureaucracy" (2009) 69:6 Public Administration Review 1136.

his predecessors, such as Friedrich Hegel, were concerned with how to achieve efficient and effective public administration. Hegel argued for a "formalized, rule-bound administrative system" that was objective and bound by precedent.[27] For both Hegel and Weber, administrative effectiveness and legitimacy were grounded in an objective, independent, expert and heavily structured and professionalized civil service. Weber applauded the expert civil servant decision-maker as dispassionate and rational, noting that only a professional and expert bureaucracy "has established the foundation for the administration of rational law…". [28] Weber saw administrative discretion as non-arbitrary and arising from an idealized rationalism that "stands opposite the kind of adjudication that is primarily bound to sacred traditions" found in the judicial process. Weber rejects the Diceyan idea of objective court supervision of "gapless" laws.[29] Yet Weber explicitly endorses rationalism and objectivity based in administrative expertise. In Weber's view administrative expertise in rational law was superior to legal expertise. Notably he states that "in the field of executive administration, especially where the 'creative' arbitrariness of the official is most strongly built up, the specifically 'objective' idea of 'reasons of state' is upheld as the supreme and ultimate guiding star of the official's behaviour" wherein "in principle a system of rationally debatable 'reasons' stands behind every act of bureaucratic administration…[30] According to Weber, this system of providing rationally defensible reasons and the use of precedent by administrators ensures equality before the law.

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[27] *Ibid*. at 1142
[28] Max Weber, "Bureaucracy" in Heinrich Gerth et al, ed, *Essays on Sociology* (New York: Oxford University Press, 1946) at 216.
[29] *Ibid* at 219.
[30] *Ibid* at 220.

Yet, at the same time, Weber recognized that there were risks to a strong bureaucracy that needed to be managed. He argued that: "bureaucracy as such is a precision instrument which can put itself at the disposal of quite varied — purely political as well as purely economic, or any other sort — of interests in domination."[31] Weber recognized that the expert knowledge of private economic interest groups could be superior to the expert knowledge of the bureaucracy, something which could potentially undermine the influence of the bureaucracy and cause it to be leveraged for narrow private purposes.[32] Weber also understood that a strong bureaucratic structure raised the potential problem of overwhelming its political masters.[33] Weber felt that for his ideal of a rational and therefore just bureaucracy to be realized, a strong legislature and an apolitical civil service were crucial.[34] Weber identified the need for a working legislature with committees actively engaged in supervising and investigating the activities of bureaucratic departments. They would do so through "systematic cross-examination" of experts under oath in the presence of department officials.

Weber's ideas remain important because they provide the background understanding of the potential merits and risks of public administrative decision-making that form the backdrop for other scholarship on judicial review. While Weber advocated for the benefits of administrative expertise and rationality, he also understood that it required both internal and external checks and balances to ensure democratic control.

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[31] *Ibid* at 231.
[32] *Ibid* at 235.
[33] *Ibid* at 215–216.
[34] *Ibid*.

John Willis – recognizing the rational, expert civil servant in Canada

As the administrative state grew in common law jurisdictions, common law scholars also adopted a more forgiving view of the administrative state compared to Dicey. Canadian scholar John Willis raised a number of practical concerns with judicial intervention in administrative statutory interpretation. He saw administrative discretion and the extent to which it should be controlled as "the fundamental problem of administrative law."[35] He made forceful arguments in favour of an expansive administrative state that was not subject to intense judicial oversight. He attacked the need for, and practicality of, impartial adjudication of legal rules that he saw as being the heart of the "rule of law."[36]

Willis was concerned that judicial intervention was a retrogressive force that prevented modern functions of the administrative state from being fully realized. In his view, the administrative state was inherently the instrument of collective public welfare. He characterized discretionary administrative powers as having a "purpose of fulfilment of a social philosophy that sets public welfare above private rights."[37] In contrast, the courts were seen as ideologically aligned with private rights and incapable of interpreting welfare statutes to advance social goals such as collective employee rights. For Willis, judicial method in statutory interpretation was defective. He asserted that, under the judicial method, "a statute is strictly construed. It is placed against the background of a common law whose assumptions are directly opposed to modern legislation."[38]

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[35] John Willis, "The Administrator as Judge - The Citizens Right to an Impartial Tribunal" (1953) 2 UBC Legal Notes 427 at 431.
[36] *Ibid* at 427–428.
[37] John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1:1 UTLJ 53, at 59.
[38] *Ibid* at 60.

Willis argued strongly against judicial intervention that he felt would undermine the growth of the administrative state more broadly.[39] In essence, for Willis, the judiciary had an inherent bias towards private rights, which it applied in interpreting legislation that had socially or economically transformative objectives. At issue for Willis was whether those kinds of objectives could be met and who was better at ensuring this outcome as between courts and administrators.

However, Willis' favourable view of the administrative state went well beyond the specific context of the rise of the administrative state. Willis believed that the merits of administrative discretion in policy-making were universal, going so far as to suggest that executive discretion in the Tudor era could be similarly defended.[40] Based on this view, Willis argued for a functional approach that asked what body was "best fitted" to exercise discretion and how that should be supervised.[41] Yet Willis was clear on who was always going to be best fitted. In his view, judges "nullify the effect of statutes which emphasize not the rights of the subject but the claims of the state upon him."[42] Willis decried the absence of a more purposive approach by judges, saying they "are ignorant, by a self-imposed limitation, of the policy which the act sets forth in general statements…"[43] In essence, what Willis sought was for Judges to leave the substantive "policy"

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[39] *Ibid*; John Willis, "Delegation of Legislative and Judicial Powers to Administrative Bodies: A Study of the Report of the Committee on Ministers' Powers Symposium on Administrative Law Based upon Legal Writings 1931-33" (1932) 18 Iowa L Rev 150; John Willis, "Canadian Administrative Law in Retrospect" (1974) 24 UTLJ 225; John Willis, *supra* note 35; John Willis & Donald W Buchanan, *Canadian boards at work* (Toronto: Macmillan, 1941).
[40] Willis, *supra* note 37 at 53-55.
[41] *Ibid* at 59.
[42] *Ibid* at 60.
[43] *Ibid*.

issues, including determining legislative intent, to administrators. His reasoning included a belief that judges tended to impose fundamental values on administrators that were detached from the realities of administration.[44]

Willis developed important practical justifications for judicial deference to administrators, including on legal questions. Among the most important of these was necessity. Willis asserted that discretion, including discretionary regulatory powers, accorded to administrators were inherently required for the administrative state to function: "the delegation of legislative power to a government department… is now universally recognized by responsible persons as a practical necessity of the work of government is to be carried on at all."[45] Willis asserted that this institutional necessity was rooted in complexity and specialization in the modern administrative state, claiming "there are whole tracts of human life too specialized and complex for the Courts to deal with effectively".[46] He identified administrative discretion as a nexus of policy making, not simply legislative policy application. Willis questioned judicial legitimacy in this "policy making" role.[47]

In Willis' view, administrators had a superior understanding of legislative intent and a superior method of statutory interpretation. Administrators, including in the executive, could further be trusted to be self-policing through such mechanisms as "professional pride" and guiding norms

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[44] Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis" (2005) 55:3 UTLJ 629 at 630.
[45] Willis, *supra* note 37 at 55.
[46] Willis, *supra* note 35 at 428; for academic and jurisprudential approaches in the US in a similar tradition to that of the "new rule of law" and John Willis see Aditya Bamzai, "The Origins of Judicial Deference to Executive Interpretation", 2017, 126 Yale LJ at 974-984.
[47] Willis, *supra* note 35 at 430.

and principles, and secondarily through the political process.[48] Moreover, Willis argued that administrators were granted "discretion" not simply to flexibly apply fixed legal rules but also to make those rules. Speaking more specifically of tribunals, Willis felt that they often had very broad discretion over vague terms that could be best understood by the tribunals themselves.[49] Because of this view, Willis did not put much emphasis on legislative policy-making, the purposes for which discretion was granted by the legislature, or the concept of legal limits on administrative discretion. For Willis, there was no such thing since questions of law and policy were too difficult to differentiate in instances of broad discretion, which he perceived as being widespread.[50]

Willis also brought a functional pragmatism and concern for access to justice to his scholarship. He argued that a burdensome court review process would undermine access to justice through tribunal decisions.[51] However, Willis has been critiqued for neglecting the private interests and liberties of those who are subject to administrative decisions.[52] Willis has also been critiqued for largely rejecting compatibility between rule of law and discretion.[53] While Willis' rejection of the rule of law may be at times hyperbolic,[54] his approach of rejecting judicial policy making

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[48] Willis & Buchanan, *supra* note 39; David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis Administrative Law Today: Culture, Ideas, Institutions, Processes, Values - Essays in Honour of John Willis - IV. The Rule of Law/The Rule of Judges" (2005) 55 UTLJ 691 at 692.
[49] Willis & Buchanan, *supra* note 39 at 69.
[50] Cartier, *supra* note 44 at 635; Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2001) 27 Queen's LJ 859 at 862.
[51] Willis, *supra* note 35 at 435.
[52] Cartier, *supra* note 44 at 633.
[53] *Ibid*.
[54] Dyzenhaus, *supra* note 48.

through the interpretation of discretionary provisions would ultimately be influential in developing Canadian doctrine.[55]

Historical context in Canada to the development of deference doctrine

Willis' perspective is certainly understandable if one looks at mid-20th century judicial interference in labour matters in Canada, where there is very compelling evidence of judicial hostility to legislation promoting collective bargaining.[56] The modern approach to deference in Canadian administrative law accordingly arose in the context of labour adjudication.[57] The rise of labour law emphasized the regulation of private economic affairs (i.e. employment contracts) by the state in favour of protecting employee interests. Prior to the development of deference doctrine, the Courts tended to intervene in favour of private rights and employer interests. There was heavy criticism towards judicial decisions that, it was argued, undermined the balance between employer rights and worker protections in labour laws across the country.[58] In the post-war period, Canadian legislatures included privative clauses in labour laws to try to limit judicial interference. Legislatures also moved labour adjudication to specialized boards and tribunals. Scholars argued that privative clauses gave democratic legitimacy to administrators on questions

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[55] Cartier, *supra* note 44 at 643; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 54.
[56] Martin Loughlin, *Sword and scales: an examination of the relationship between law and politics* (Oxford: Hart, 2000) at 104; Martin Loughlin, *supra* note 25 at 162–165; David E Gruber, "Judicial Review Advocacy in the Post-Dunsmuir Era" (2009) 22:3 Cdn J Admin L & P 303, at 306; Bora Laksin, "Certiorari to Labour Boards: The Apparent Futility of Privative Clauses" (1952) 30:10 Can Bar Rev 986.
[57] *C.U.P.E. v NB Liquor Corporation*, [1979] 2 SCR 227; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190.
[58] Jack Watson, "Twelve Bottles of Whiskey Special Issue: Alberta Court of Appeal 100th Anniversary" (2014) 52 Alta L Rev 9 at 41; Laskin, *supra* note 56; Howard Snow, "Some Comments on Labour Boards and Judicial Review Symposium of In the Last Resort: A Critical Study of the Supreme Court of Canada" (1975) 13 Osgoode Hall L J 303; Paul C Weiler, "The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-1970" (1971) 9 Osgoode Hall L J 1.

of law that was sufficient to justify constraining judicial review.[59] Matthew Lewans refers to the era, before that in which privative clauses were given weight, as the "formal and conceptual era" that emphasized separation of powers and the distinct roles of executive and judicial branches of government. Jurisprudence in this era was focused on identifying jurisdictional error. Lewans describes the era in disparaging terms:

> The upshot was an all-or-nothing approach to judicial review which jealously scrutinized the implementation of economic policy, but turned a blind eye towards executive decisions during wartime. While judges invoked the separation of powers, freedom of contract, and property rights to frustrate collective bargaining regimes, they were reluctant to deploy similar constraints to defend civil liberties or question draconian war measures.[60]

Lewans also describes how the Privy Council struck down "nearly every piece of legislation" in the Canadian new deal era, relying largely on this methodology.[61] Later, Justice Rand at the Supreme Court of Canada started to sketch out the early beginnings of a deferential reasonableness doctrine.[62] However, this approach was not further developed for at least two decades after Justice Rand retired.[63] Responding to these critiques, the Supreme Court ultimately developed deference doctrine to allow more space for specialized labour adjudicators to strike an acceptable balance between employer and worker rights in the interpretation of labour agreements and laws.[64]

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[59] Weiler, *supra* note 58.
[60] Matthew Lewans, *Administrative law and judicial deference* (Portland Oregon: Hart Publishing, 2016).
[61] *Ibid* at 144.
[62] *Ibid* at 150–156.
[63] *Ibid* at 154.
[64] *C.U.P.E. v N.B. Liquor Corporation, supra* note 57 further discussed below, is a clear response to Willis' critique.

CUPE – liberating the labour tribunals

Justice Dickson's seminal decision in *CUPE* in 1979 articulates some basic reasoning in favour of judicial restraint based on the development of the patent unreasonableness standard of review, while maintaining correctness as the standard for some ambiguously defined jurisdictional questions. In *CUPE*, Justice Dickson sets out important reasons why deference was warranted in the context of labour adjudication: the expertise of the Board in administering the legislation, the inclusion of a privative clause with a strong policy rationale, and the statute itself was ambiguous.[65] There are clear echoes of Willis in these explanations. *CUPE* was authored by Justice Dickson but also appeared to be influenced by the academic work of Supreme Court Justice Bora Laskin, who had expertise in labour law and had commented extensively on deference and privative clauses in his academic career.[66] Commenting on the need for judicial restraint and deference regarding the Board's decision in *CUPE* Justice Dickson noted:

> The usual reasons for judicial restraint upon review of labour board decisions are only reinforced in a case such as the one at bar. Not only has the Legislature confided certain decisions to an administrative board, but to a separate and distinct Public Service Labour Relations Board. That Board is given broad powers—broader than those typically vested in a labour board—to supervise and administer the novel system of collective bargaining created by the *Public Service Labour Relations Act*. The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met.[67]

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[65] *Ibid*.
[66] Laskin, *supra* note 56. Also see analysis in Lewans, *supra* note 60 at 156–162.
[67] *C.U.P.E. v N.B. Liquor Corporation*, *supra* note 57 at 236.

The decision is sparse in its explanation of what the "usual reasons" might be and whether they go beyond those addressed in the decision. *CUPE* should be read in the context of the political battle over labour relations in Canada and whether the judiciary should interfere with adjudicative regimes set up to protect post-war workers' rights. *CUPE* gives a clear nod to Willis's arguments that the administrative tribunal was afforded "broad powers" to balance various policy objectives and that the tribunal needed to use its "sensitivity and expertise" in relation to those policy objectives.

After *CUPE,* the Supreme Court of Canada adopted what Lewans calls a "functionalist rationale" for deference. The Laskin court promoted an understanding that administrative tribunals and boards could be vested by legislatures with the authority to interpret laws in the first instance, and that they were owed deference by the courts. This was seen as acceptable so long as the judicial function was preserved through some degree of judicial review.[68] In *Pezim* in 1994, the Supreme Court reasoned that statutory terms were best understood by administrators who had a role in policy development.[69]

The common post-*CUPE* rationales for deference tried to align the practical justifications for deference that Willis highlighted with legal justifications such as legislative intent by way of privative clauses. The Supreme Court in the pragmatic and functional era presumed that the legislature intended the specialized administrative body (normally a tribunal or board) to interpret relevant statutory definitions largely as the administrative body sees fit, at least to the

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[68] Lewans, *supra* note 60 at 166–169.
[69] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 (SCC) at 589–591.

extent that those provisions reside within the core of its expertise or are ambiguous.[70] In this framing, the words of the statute are seen as intentionally or inherently ambiguous to permit the administrative decision-maker to use its discretion and flex its policy muscle to breathe meaning into the statutory language. At the same time, the practical justifications are anchored in the existence of a privative clause, confirming legislative intent to accord deference and therefore relying on a legislative rather than a purely judicial policy basis for giving effect to the practical justifications.

Dyzenhaus – the middle ground

More recently, scholarship and jurisprudence have tried explicitly to find a middle ground between Dicey and Willis. David Dyzenhaus, writing in the post-*CUPE* era, was highly critical of Willis' rejection of the rule of law.[71] Dyzenhaus' writing was concerned, if indirectly, with the potential attack on the administrative state through pushes for privatization in government.[72] Dyzenhaus worried that privatization would remove "standard mechanisms of public law accountability" and the potential for privative clauses to "protect the process of privatization" from such mechanisms.[73] As such, Dyzenhaus was concerned with the existence of "legally enforceable standards of accountability" in administration.[74] Dyzenhaus recognized an important

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[70] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 293–310.
[71] Dyzenhaus, *supra* note 48.
[72] *Ibid* at 693 where Dyzenhaus suggests that "Perhaps Willis would not have been so sanguine [that Canada was not a lassiez-faire state] had he lived through the recent conservative onslaught on government" also see Dyzenhaus, *supra* note 70 at 283 where Dyzenhaus claims that he was concerned that "the opponents of the administrative state are to be found within the apparatus of the state" due to privatization.
[73] Dyzenhaus, *supra* note 70 at 283.
[74] *Ibid* at 283.

question in administrative law: whether the legal limits of administrative power are set by the legislature, or whether there are also common law limits.[75] Dyzenhaus argued that judges need not submit to the intention of the legislature (specifically in regard to privative clauses).[76] Dyzenhaus referred to submission to privative clauses as "a positivist understanding of intention."[77] Instead, Dyzenhaus advocated for common law values to have a role in administrative law. Dyzenhaus sources the legitimacy of judicial review to an "inherent limit" on what legislatures may delegate to the administrative state. Dyzenhaus saw judicial review as legitimate because it "maintains legal standards to which public officials are accountable" rather than being inherently hostile to public welfare, as Willis would have argued.[78] Dyzenhaus acknowledged a fear that judge-made common law would erode the statutory aims of the legislature, but argued that judges have a role in upholding values like equality, which can be legitimated through a "legal culture of justification."[79]

With respect to administrative rationality, Dyzenhaus thought that judges should acknowledge that administration had its own rationality but be willing to supervise that rationality. However, the courts ought to supervise administrative rationality with caution to prevent themselves from engaging in a "Diceyan type judicial review."[80] Administrative rationality could be policed by

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[75] *Ibid* at 284.
[76] *Ibid* at 286, 291. Dyzenhaus regarded the emphasis on privative clauses by the Supreme Court in *C.U.P.E.* to rely on the "formal reason for deference" of legislative intent. He saw Justice Beetz' subsequent jurisprudence as incorporating "substantive" reasons for deference through the pragmatic and functional approach.
[77] *Ibid*.
[78] Dyzenhaus, *supra* note 70 at 279–283.
[79] *Ibid* at 302.
[80] *Ibid* at 289.

holding an administrator to "be true to the basic objective of its governing statute, on the judge's understanding of that statute." In other words, was the substantive policy content of the administrator's decision rational? Of course, this approach risks judicial interference in policy areas that they do not understand, something that Dyzenhaus acknowledges.

Dyzenhaus makes explicit a dilemma that is not explicit in the jurisprudence. Legislative supremacy suggests that it is for the legislature to determine what political and moral values will have the force of law. Where judges go beyond this position, whether by imposing common law values or by moderating the impact of privative clauses in their assessments of administrative rationality, Dyzenhaus argues that is a legal fiction that judges rely on legislative intent in doing so.[81] However, Dyzenhaus was explicitly concerned that a privatized civil service would not source its power to legislative intent but rather to contracts with government, and that there could therefore potentially be "no legal limits on [administrative] power."[82] He further notes that this challenges courts to decide whether to defer to administrators simply because the legislature commands them to do so, through a privative clause, or, alternatively, to defer based solely on "substantive" or pragmatic rationales. Where these two factors are contradictory, how will courts determine which prevails?

> This ambiguity left Canadian courts in a dilemma. Should they defer merely because the legislature has said so despite the fact that the substantive rationale for deference is not in place? And should they defer when there is a substantive rationale for deference despite the fact that the legislature has not included a privative clause in the relevant

[81] *Ibid* at 284-285.
[82] *Ibid*.

> statute, perhaps even has expressly allowed for appeals on questions of law?[83]

Dyzenhaus argued that much of the Supreme Court of Canada's jurisprudence in the pragmatic and functional era was an attempt to reconcile the formal (or legislative intent) rationale for deference with the practical justifications for deference.[84]

In Dyzenhaus' understanding the judiciary is not set up in opposition to the administrative state, but instead as "partners" with the administrative state to preserve the rule of law.[85] On this framing, administrative decision-makers are seen as full legal actors who can legitimately create subordinate legislation and interpret laws. Dyzenhaus argued that the judiciary should subscribe to a policy of "deference as respect" in which the interpretive approach and views of the administrative decision-maker are given weight, but some residual judicial oversight remains to preserve the rule of law. Judges should stop short of "submission" to administrative determinations on questions of law, as a privative clause might suggest was necessary, and should interfere where core common law or legislative values were at stake. Dyzenhaus was primarily concerned that submission to legislative intent on a "positivist" understanding (on a strict reading of Dicey) would perversely prevent judicial review by promoting a close adherence to privative clauses and that this could result in unrestrained administrative power. He strived for a consistent approach to the treatment of such clauses.

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[83] *Ibid* at 290.
[84] Also see David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2001) 27 Queen's LJ 445 at 449.
[85] Beverly McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" 12 Can J Admin L & Prac 171 at 174; Dyzenhaus, *supra* note 84 at 451.

Mary Liston has observed that Dyzenhaus' version of deference-as-respect was conditioned upon administrative justification and "reason-giving" as well as the principle of substantive equality.[86] For Dyzenhaus "the courts retain[ed] a legitimate role as the ultimate authority on the interpretation of the law."[87] However, the circumstances in which judges should interfere should not be formalistic, by which he meant that it should not be based on rigid categories of decision-making. Instead, judges should rely on the underlying principles that justify any categories or distinctions.[88]

The impact of Dunsmuir

Dyzenhaus' approach combined, on the one hand, respect for rule of law in the form of a more values-based approach to judicial review and, on the other hand, legislative intent to accord judicial deference through respectful attention to reasons of administrative decision-makers. Both elements of this approach were acknowledged by the Supreme Court in the pragmatic and functional era.[89] Yet administrative law was also widely criticized in this era for creating "formalistic" debates and "law office metaphysics" around determining the proper standard of review, as between correctness, reasonableness, and patent unreasonableness.[90] *Dunsmuir* was an open attempt to simplify the pragmatic and functional approach by articulating a presumptive

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[86] Mary Liston, "Deference as respect: Lost in translation?", (19 February 2018), online: *Administrative Law Matters* <http://www.administrativelawmatters.com/blog/2018/02/19/deference-as-respect-lost-in-translation-mary-liston/>.
[87] Dyzenhaus, *supra* note 70 at 290.
[88] Dyzenhaus, *supra* note 84 at 450.
[89] *Baker v Canada (Minister of Citizenship and Immigration)*, *supra* note 55 at para 65.
[90] Bastarache Michel, "Dunsmuir 10 Years Later", (9 March 2018), online: *Administrative Law Matters* <https://www.administrativelawmatters.com/blog/2018/03/09/dunsmuir-10-years-later-hon-michel-bastarache-cc-qc/>.

standard of review of reasonableness and by eliminating the patent unreasonableness standard.[91] The majority in *Dunsmuir*, as explained by subsequent cases,[92] confirms that reasonableness is a presumptive standard subject to rebuttal by four categorical correctness exceptions: (1) issues relating to the constitutional division of powers; (2) true questions of *vires*; (3) issues of competing jurisdiction between tribunals; and (4) questions that are of central importance to the legal system and outside the expertise of the decision-maker.[93]

In *Dunsmuir* the Supreme Court confirmed that it would not submit to privative clauses because judicial review was constitutionally protected.[94] In this way the Court confirmed that the constitutional nature of judicial review could trump express legislative intent. *Dunsmuir* also confirmed a commitment to implied legislative intent on the issue of the standard of review through the continued use of practical justifications and contextual factors. The contextual factors listed in *Dunsmuir* for determining standard of review are a mix of legal and pragmatic criteria for deference.[95] For example, the majority in *Dunsmuir* notes that the existence of a privative clause is a strong indicator of legislative intent for deferential review but is not determinative.[96] The majority in *Dunsmuir* asserts that judicial review affirms legislative

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[91] *Dunsmuir v New Brunswick*, *supra* note 57 at paras 44-48 and 63 the Court notes that they are replacing the term "pragmatic and functional" with "standard of review analysis" due to the confusion it caused. At para 121 Justice Binnie appears to mock this move by quoting Romeo and Juliet.
[92] See *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 65; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, [2016] 2 SCR 293.
[93] *Dunsmuir v New Brunswick*, *supra* note 57 at paras 58-61.
[94] *Ibid* at para 52.
[95] *Ibid* at para 64.
[96] *Ibid* at para 52.

supremacy by narrowly construing the four categories of correctness review and also by "acknowledging that courts do not have a monopoly on deciding all questions of law."[97]

The majority in *Dunsmuir* also stated that the task of the courts is to preserve the rule of law while avoiding "undue" interference with administrative bodies.[98] Rule of law is preserved by ensuring that the courts have the final say on questions of jurisdiction and some other questions of law.[99] With a nod to Dyzenhaus, the majority reiterated that it intended to achieve rule of law based on broader values and legislative intent to accord deference.[100] However, the majority in *Dunsmuir* articulated a strong presumption of reasonableness as the standard of review. The Court asserted that, where the question is one of fact, discretion or policy, deference on a reasonableness standard "will usually apply automatically."[101]

An often overlooked part of *Dunsmuir* and the caselaw that follows it is the Supreme Court's commitment to a values-based purposive approach to statutory interpretation under reasonableness. The majority in *Dunsmuir* clearly utilizes Dyzenhaus' framing that one can assess what makes a decision reasonable on a question of law from the administrator's perspective, but also by drawing on broader statutory context and normative values. This approach suggests a stronger role for judicial statutory interpretation. For example, the *Dunsmuir* majority's application of the reasonableness standard found that the decision was unreasonable because the adjudicator "relied on and led to a construction of the statute that fell outside the

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[97] *Ibid* at para 30.
[98] *Ibid* at para 27.
[99] *Ibid* at paras 30 and 50.
[100] *Ibid* at paras 47-49.
[101] *Ibid* at 53.

range of admissible statutory interpretations."[102] Noting that "[t]he interpretation of the law is always contextual. The law does not operate in a vacuum," the Court deeply questioned the adjudicator's approach as inconsistent with the employment contract and "the larger labour context in which it is embedded." In so reasoning, the Court held that "the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law."[103] Yet, at the same time, the Court asserts that reasonableness entails the idea that "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported."[104] These two divergent comments leave it very unclear what the courts' role is in statutory interpretation under a presumptive reasonableness standard. On the one hand, should a court second-guess the policy rationale behind the administrator's interpretation by using the court's own understanding of statutory purpose and context in light of broader normative values and, if so, to what extent? If there are multiple possible interpretations, how does the court know which ones are valid and which are not? How do administrators choose between multiple rational or valid interpretations? In essence, the Supreme Court's post-*Dunsmuir* approach includes a strong commitment to judicial statutory interpretation, including a purposive and contextual interpretation leading to a positivist result. On the other hand, this approach extends, or may extend, only to a point, after which the administrator's interpretation is owed deference and the Court's commitment to a positive result dissipates. Yet it is unclear where the vanishing point of judicial oversight is or

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[102] *Ibid*. at para 72.
[103] *Ibid*. at paras 74 and 76.
[104] *Ibid* at para 41 (emphasis added).

how it can be determined. Likewise the principles that justify stopping short of full statutory interpretation – but nevertheless using it heavily in an outer layer of analysis, are not evident in the Supreme Court's decisions.

Similarly, it appears contradictory to mix a strong presumption of reasonableness with the assertion that contextual factors (and precedents based on those factors) continue to play a role in determining whether the standard is reasonableness or correctness.[105] The presumption of reasonableness is a move away from statutory interpretation on standard of review, while the use of contextual factors strongly imports a search for implied and express legislative intent on standard of review.

The majority in *Dunsmuir* articulated a version of the rule of law that was focused primarily on preserving legislative intent to "create various administrative bodies and endow them with broad powers" and secondarily to ensuring that "all exercises of public authority must find their source in law."[106] The majority noted that "[b]y acting in the absence of legal authority, the decision-maker transgresses the principle of rule of law."[107] It also emphasized that judicial review "performs an important constitutional function in maintaining legislative supremacy."[108] However, the majority's view of legislative supremacy is very limited. Legislative supremacy is "assured because determining the applicable standard of review is accomplished by establishing legislative intent."[109] Although the Court linked its presumptive standard (of reasonableness) to

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[105] *Ibid* at para 63.
[106] *Ibid* at paras 27-28.
[107] *Ibid* at paras 27-33.
[108] *Ibid* at para 30.
[109] *Ibid* at para 30.

legislative intent, the very presumptive nature of the reasonableness standard makes it more connected to "universal" practical justifications. These practical justifications and assumptions explained the presumption, not legislative intent based on a specific statutory framework.

Moreover, the majority's analysis assumed that there are workable distinctions between "questions of fact, policy or discretion" and the four categories of correctness review. The four categories of correctness review would then operate as a nuclear option, a rule of law backstop, while deference is afforded to administrators on questions of law the rest of the time.

In this framework, the role of legislative intent and supremacy is limited to establishing the standard of review, and does not extend to the public policies that the legislature might have intended the administrator to advance. The latter type of intent does not inform the standard of review in any explicit manner under *Dunsmuir*. The great irony of *Dunsmuir* is that the Court does articulate broader public policy considerations and apply its own purposive statutory interpretation, but it does so mainly within a reasonableness analysis. This approach would continue in many cases after *Dunsmuir*, albeit largely unacknowledged. The rationale for this becomes clear, however, if one understands the reasonableness review in *Dunsmuir* as a nod to the values-based approach advocated by Dyzenhaus.

A major failing of *Dunsmuir* is that the Court does not acknowledge the dilemma identified by Dyzenhaus: whether deference should be accorded primarily by relying on legislative intent or based on "free standing" practical justifications such as expertise. As will be seen in the post-*Dunsmuir* jurisprudence discussed below, where legislative intent and practical justifications conflict, there is no consistent approach, although over time expertise has become the dominant factor. The Supreme Court has largely denied that it relies on free-standing pragmatic

justifications by styling them as part of "implied" legislative intent. Yet, in holding that express legislative intent in the form of privative clauses and rights of appeal are not determinative, the Court ensures that the exercise is not simply one of looking for legislative intent using ordinary statutory interpretation methods. Increasingly, the court presumes the existence of "implied" legislative intent factors such as expertise,[110] which further disconnects the inquiry from legislative intent.

Another limitation of *Dunsmuir* that would come back to haunt the Court is that the Court purports to be according deference on questions of law, but presumes that it has the expertise to do its own purposive statutory analysis. This seems to contradict the practical justifications for deference that Willis advocated, namely that judges don't understand legislative intent on substantive questions of policy and are biased against public welfare legislation. Administrators on the other hand are experts in policy, and the legislature intended them to make policy. If judges do understand legislative intent, and should take the more substantive values-based approach that was advocated by Dyzenhaus, it begs the question of what role administrative expertise actually plays in explaining deference. If expertise remains an important practical justification for deference on questions of law, then what is that expertise? Is it expertise in purposive statutory interpretation or something else? If not the former, why is deference owed on questions of law? These questions remain largely unanswered.

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[110] See *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, *supra* note 92 at para 1.

Summary of various practical justifications for judicial deference

These historical lines of argument represent differing philosophies about which branches of government should have power and how power should be mediated between them and for what purposes. They also express different views about the appropriate accountability mechanisms for administrators. The differences provide a backdrop for understanding the Canadian jurisprudence. Each highlights important risks arising from judicial intervention and administrative discretion. They are all worth considering when reflecting on deference and its jurisprudential justifications.

The practical and legal justifications for deference are interrelated. The practical justifications, most clearly initially articulated by Willis, are premised on a belief that the legislature is institutionally incapable of managing the details of public affairs because they are too voluminous and complex in the modern state. On this reasoning, to manage public affairs, the legislature must delegate crucial functions to technical and policy experts within the public administration. Discretion is part and parcel of this process. Courts should not interfere lightly with the expert and policy functions of administrators because the functions are too complex for judges to understand and, moreover, the courts risk undermining the legislature's necessary scheme of delegation. For example, Paul Daly argues that complexity makes some areas of decision-making better suited to administrators than to courts or the legislature.[111] He argues that the expertise of administrative decision-makers – and their procedural flexibility and ability to resolve complex, uncertain and polycentric problems – positions them better than courts to

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[111] Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) at 89–94.

handle complexity.[112] Legislatures, it is argued, cannot take on these public policy-making tasks because they would be too time consuming.[113] Administrative discretion is explained as a necessary feature of complex regulation, and it warrants deference largely because it lies within the realm of expertise. Because of this complexity, necessity and expertise, administrators must have their own domain of power or sphere of influence.

Weber and Willis were confident that administrative impropriety can be controlled by the legislature and the broader political process or, alternatively, by administrative professionalism. On the other hand, Dicey and Dyzenhaus were not convinced of the reliability of these means of control. Elements of both Willis and Dyzenhaus strongly animates the jurisprudence of the Supreme Court of Canada. The core practical and legal justifications for deference based on the "necessity" argument are interrelated: (i) deference upholds legislative intent to delegate traditionally legislative functions, such as policy-making, to the administrative state;[114] (ii) this delegation was seen as necessary to the functioning of the administrative state because of the complexity of the functions that the state must fulfill and (iii) non-"legal" expertise and a unique administrative rationality are desirable and necessary to manage that complexity.[115] Judges are cast as out of their depth and unable to comprehend this complexity and, further, as being politically illegitimate when doing so, since this form of decision-making is a policy making role

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[112] *Ibid*.
[113] *Ibid* at 91.
[114] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, *supra* note 92 at para 22: deference respects the choice of the legislature to assign responsibility to an administrator. *Dunsmuir v New Brunswick*, *supra* note 57 at para 49 "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers."
[115] *Dunsmuir*, *Ibid* at para 49 notes that the legislative choices are motivated by "particular expertise and experiences" of administrators.

and judicial interference is said to contradict legislative intent.[116] However, where Willis advocates for an absence of judicial supervision and is skeptical that judges understand basic administrative policy, Dyzenhaus is more forgiving of judges and their ability to apply appropriate external values and norms to understand broader legislative policy and common law values. The tension between these perspectives remains very relevant.

A general critique of the underlying practical justifications for deference

The key assumptions behind the practical justifications

Scholarship such as that of John Willis depended on assumptions about how administrators operate. First, it is assumed that there is relatively little internal or external interference with the broader goals of the administrative state at the level of the administrative decision-maker. Second, it is assumed that public decision-making is checked for arbitrary and improper behavior by internal bureaucratic, technocratic or expertise-driven checks and balances. Third, it is assumed that legislatures suffer from many significant limitations in terms of their capacity for public policy-making.

In assessing the merits of deference, the universality (or not) of assumptions by scholars like Willis and Weber are important. If there is a material risk that these assumptions are not true, then accountability mechanisms for the administrative state – such as legislative reform, statutory interpretation and judicial review – take on more significance. As a background matter, it is important to remain open-minded about whether all of the assumptions about the complexity of modern public administration and the role of public service, in particular public service

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[116] McLachlin, *supra* note 85; Willis, *supra* note 37; Daly, *supra* note 111.

experts, underpinning the necessity and complexity justifications for deference are empirically supported. This is particularly true where, to justify deference, the courts rely on an approach that sidelines legislative intent in favour of substantive and practical considerations.

Failure to reflect on democratic accountability and control

With respect to the third assumption, that legislatures have significant limitations on their ability to make and supervise public policy, it is worth asking how such a view might impact broader issues of political and democratic power. The standard justifications for deference are vulnerable to challenge to the extent that they largely do not grapple with fundamental questions of normative legitimacy and democratic oversight and control. Weber and Willis both assume that some level of political control over administrators was necessary and possible as an external check on administrators. In the standard justifications for deference, democratic legitimacy for the administrative state's policy-making functions is sourced to legislative intent: Once the legislature intends to delegate discretion to an administrator, it is therefore legitimate, in the sense that the democratically elected legislature permitted the delegation.

One feature of this type of reasoning however is that it fails to capture the spectrum or degrees of legislative delegation to administrators to make policy. Legislatures may make detailed public policy decisions, and grant very narrow discretion to implement those policies, or they may grant very broad policy discretion with few constraints on administrative decision-making.

It is overly simplistic to assume that all delegations of administrative discretion are very broad such that legislative control over policy ends with a decision to delegate. The issue of democratic control takes on more importance when the legislature delegates powers to administrators for an express purpose or to serve a narrower policy implementation rather than a broad policy-making

function, or when the functions of a particular administrator are diverse. The reasoning of Willis is incomplete because it does not explain how administrators can be held accountable to the goals of these narrower functions or to the broader legislative objectives that motivated the legislature to grant the discretion.

Delegation is further justified through the operation of law. This justification explains the legitimacy of the existence of the discretion, but it cannot explain the legal or normative legitimacy of the exercise of discretion in a particular case. The lack of an explanation for the legitimacy of the exercise of discretion may rest on implicit assumptions that: (i) administrators are not particularly likely to act contrary to their statutory mandates and (ii) that the legislature, as a general proposition, intends to grant administrators broad policy-making functions rather than narrowly administrative ones. Yet this framing fails to address how administrators can be held accountable, on an ongoing basis, in their use of discretion for the purposes for which it is granted. It likewise fails to show how they can be held accountable for adhering to the procedural or substantive limits to discretion which the legislature may have otherwise intended. In reasonableness review, accountability is largely directed towards an internal administrative rationality rather than outwardly towards the legality of a particular administrative decision. This rationality does not always have a clear relationship with legal frameworks that govern administrators. Without such a clear relationship, the legal legitimacy of a particular administrative decision is ambiguous. This framework also does not account adequately for the question of legislative control and accountability through law-making and the provision of policy direction to administrators.

In the absence of a clear role for judicial statutory interpretation within reasonableness, there is no clear mechanism for such legislative control to be maintained. The pragmatic justifications for deference rely on a theory that legislatures must, of necessity, delegate some policy-making functions and rely on experts. Yet the tensions between bureaucratic expertise and the availability of democratic oversight are not always acknowledged. Some scholars have recognized that the pragmatic justifications for the power of the administrative state are not fully compatible with constitutional principles of democratic control.[117] Others have noted that the emphasis on expertise has antidemocratic overtones:

> When power can be properly exercised only by experts, because they demonstrate their ability to exert control over people or machines, then the claim of the old participants in politics, citizens and politicians, to have a part in controlling such power is rejected. In fact, both the citizen and the politician are disqualified from the new apolitics. They are replaced by functionaries and experts."[118]

Weber acknowledged this tension and was concerned that an expert bureaucracy could overwhelm democratic institutions. In arguing for a strong bureaucracy, Weber argued for strong legislative oversight based on searching legislative committees as well as internal peer review.[119] Weber felt that for his ideal of a rational and just bureaucracy to be realized, a strong legislature and an apolitical civil service were crucial.[120]

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[117] Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010) at 457–459.citing R. Hummel, The Bureaucratic Experience (New York: St. Martin's Press, 1982), at 204.
[118] Lorne Sossin, "The politics of discretion: toward a critical theory of public administration" (1993) 36:3 Can Pub Admin 364 at 377.
[119] *Ibid*.
[120] Weber, *supra* note 28.

The modern theory of deference in Canada contrasts with Weber's approach in that, in the modern theory, bureaucratic independence, internal bureaucratic accountability structures and substantive legislative oversight are often overlooked entirely. Canadian administrative law scholars tend simply to assume that the legislative role in policy-making is limited and that it is not realistic to expect legislatures to decide complex policy issues. For example, in her academic work, former Supreme Court Chief Justice Beverly McLachlin highlights the necessity justification, if in more muted tones than Willis, asserting that the courts must partner with administrative institutions rather than dominate them "as a purely practical matter." McLachlin also claims that "modern governmental administration is so pervasive and complex that it can be achieved only through administrative boards and tribunals."[121] Implicit in this position is a view that "modern" policy-making cannot be done by legislatures. Scholar and prominent administrative law jurist John Evans has also commented that:

> [T]he goals of ensuring effectiveness, fairness and democratic legitimacy cannot be met in the contemporary administrative state through a combination of judicialized public administration and the traditional political process.[122]

Evans is explicit in his dismissal of the "traditional political process" as a vehicle for policy making, going so far as to imply that this would not have democratic legitimacy. The wholesale rejection by legal scholars of "traditional political process" (in other words, legislators acting directly on matters of policy) as an effective means of governing seems cynical. More

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[121] McLachlin, *supra* note 85 at 179. It is not clear what McLachlin means by this exactly, in so far as there is a potentially significant difference between the courts directly administering laws and courts exercising judicial review functions over the administration of laws.
[122] John M Evans, "Administrative Appeal or Judicial Review, a Canadian Perspective" (1993) Acta Juridica 47.

concerning is the absence of clarity about what democratic accountability mechanisms could or should replace legislative oversight. Very few legal scholars ask or answer questions about accountability of the administrative state and how existing democratic and bureaucratic institutions do or do not provide effective oversight.

When Canadian scholars do turn their minds to issues of legislative accountability and control, they tend to side-step them as having little importance in relation to judicial oversight of administrative discretion. For example, Daly argues that "in certain instances" the executive or legislative branch may have authority over administrators.[123] However, his examples of legislative authority are limited to appearances before legislative committees, public reporting and budgeting.[124] Daly does not discuss whether these mechanisms are effective at ensuring that administrators are acting within the boundaries that the legislature intended to set for them. Indeed, these examples are not really accountability mechanisms in any direct sense. Appearance before a legislative committee may give the legislature information that could assist with reforming the law but not necessarily with ensuring administrative compliance with an existing law. Similarly, public reporting provides information relevant to administrative accountability but not the ability for the legislature to change administrative behaviour directly by changing the law. Finally, budgeting can restrict or enhance the prestige and power of administrators, but it is not clear that reducing, or threatening to reduce, the budget of an administrator causes the administrator to pursue legitimate legislative objectives in a better way. It might be equally

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[123] Daly, *supra* note 111 at 108. It is worth noting that the accountability examples provided are from the American context.
[124] *Ibid* at 111–112.

plausible that budgetary considerations might undermine statutory objectives by incentivizing administrators to "re-calibrate" those objectives to align with available resources. Daly acknowledges that the inclusion in a statute of democratic checks and balances, such as public reporting, could be relevant to whether there was legislative intent to accord deference.[125] Yet Daly ultimately concludes that the very concept of democratic legitimacy is "vague" and therefore lacks relevance to doctrines of judicial deference.[126]

Dyzenhaus recognized that deregulation and privatization could undermine the democratic accountability of administrators. He argued that the "opponents of the administrative state are to be found within the apparatus of the state…" and that governments may desire judicial deference "to protect the process of privatization from the reach of standards developed during the heyday of the [welfare] state."[127] In other words, administrative discretion may be a vehicle to obscure policy change away from the promotion of the administrative state and could serve to undermine legislative accountability. Scholars too often ignore this transparency problem in public policy and its relationship to democratic oversight and control. As Lorne Sossin has noted, a heavy emphasis on functionalism or pragmatism may come at the expense of ensuring that administrative practices are aligned with legal norms and social objectives of the legislature, by legitimating "whatever administrative practice is deemed functionally necessary to perpetuate the status quo."[128]

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[125] *Ibid* at 111.
[126] *Ibid* at 112.
[127] Dyzenhaus, *supra* note 70 at 283.
[128] Sossin, *supra* note 118 at 380.

Beyond noting that some policies set by the legislature might be attacked or undermined by the executive and the administrative state itself, scholars also do not question the principled reasons why the legislature should be able to delegate policy-making functions to the executive or to administrators from the perspective of democratic accountability. Martin Loughlin has gone so far as to claim that "majority rule is no longer the fundamental principle of modern democracy."[129] Therefore, there is an implicit philosophical stance inherent in the practical justification for deference. It is that the complexity of state functions and the expertise of administrators in managing that complexity provides a normative legitimacy for a process that takes public policy making power away from legislatures and increases the power of administrators to effect social change. This stance rests on implicit assumptions that legislatures are ineffectual at making public policy. Further, it rests on a view that public administrators are legitimate, expert, trustworthy, independent and capable implementers or promoters and designers of public policy.[130] Sossin notes that "[a]ccording such esteem to the critical judgments of administrators does not mesh well with either our conception of democratic governance or the rule of law."[131]

My analysis starts from the premise that there must be, at a minimum, some level of accountability for day to day administrative decision-making to legislative objectives if the

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[129] Loughlin, *supra* note 117 at 450–457. Loughlin ultimately argues that democratic accountability and delegation cannot explain the administrative state, positing that the administrative state must claim an original and non-delegated authority and legitimacy in order to reach its full potential, he goes further and cites Duguit for the proposition that the oversimplification of sovereignty as an electoral majority is unsatisfying and that "majority rule is no longer the fundamental principle of modern democracy."
[130] Lorne Sossin, "Speaking Truth to Power? The Search for Bureaucratic Independence in Canada" (2005) 55:1 UTLJ 1.
[131] Sossin, *supra* note 118 at 382–383.

administrative state is to have normative legitimacy in a democracy. Legitimacy for all uses of discretion cannot accrue from the delegation of some measure of discretion by the legislature in a statute. The legislature must be able to shape the uses for which administrative discretion can be put. A democratically elected legislature must be able to reform the law governing administrative discretion to ensure its desired substantive policy outcomes are achieved. In other words, one should reject the notion that the legislature has no role in making public policy, or that it is necessary to devolve the vast majority of policy-making functions to the administrative state. A theory of deference must address, at least to some extent, how legislative intent on substantive questions of policy can be advanced through legal rules and identify plausible accountability mechanisms for those rules. It is not sufficient to suggest that questions of democratic accountability and control over public policy are quaint because the experts will handle everything. This approach fails to respond to Dicey's fundamental concern, which is how to ensure that administrative decision-making is not merely a vehicle for enhanced executive power relative to legislatures. To address this concern, it is not sufficient to presume that administrators act in an idealized fashion.

Dicey's concerns about administrative discretion and its potential to enhance executive power remain very relevant. Political scientists and scholars on public administration in Canada have raised concerns about concentration of power in the executive and the loss of power by elected representatives and lower-level bureaucrats. Focusing on the federal government, Donald Savoie has documented the concentration of power in what he calls "central agencies" such as the Treasury Board and the Prime Minister's Office. He argues that the legislature, the Cabinet and the civil service have progressively lost influence over the machinery of government. He

describes the role of the public service as being "to take political direction, and where it doesn't exist, to tread water until direction is given. In short, the role of administrators is to advise the rulers on complex policy issues, not to make the decisions."[132] Others have followed up on this line of scholarship, calling this governance from the centre the "new political governance".[133] It has been argued that the pressures of "new political governance" serve to weaken the traditional norms of political neutrality, professionalism and relative independence of administrators and that it constitutes a "corrupt form of politicization."[134] This scholarship is important because it raises fundamental questions about whether the executive or central agencies are making policy decisions and judgments or whether the "expert" administrators are.

In this context, questions of law may become the purview of central agencies or, optimistically, the senior legal advisors to government, acting on political calculus rather than expertise in either technical issues or policy. If the executive and central agencies are in charge, then it is an open question whether the "expert" administrators are playing the function of managing the complexity of the administrative state.[135] If political masters or central agencies are really the drivers behind administrative decisions, this could fundamentally undermine each of the necessity, complexity and expertise pragmatic rationales for deference. If central agencies can

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[132] Donald Savoie, *Governing from the centre: the concentration of power in Canadian politics* (Toronto: University of Toronto Press, 1999) at 8.
[133] Peter Aucoin et al "Constraining Executive Power in the Era of New Political Governance" in James Bickerton et al, *Governing: essays in honour of Donald J. Savoie* (Montreal: McGill-Queen's University Press, 2013) at 36.
[134] Jill Anne Chouinard and Peter Milley, "From New Public Management to New Political Governance" (Spring 2015) Can. J of Program Eval 30.1:1 at 8.
[135] It should not be overlooked that the concentration of power in Cabinet was a phenomenon with which Dicey was also concerned in the later editions of his treatise: see Loughlin, *supra* note 56 at 153.

manage the subject matter of decisions, then they may also be simple enough for legislatures and legislative committees to set clear policies about them. Further, central agencies and high-level political decision-makers are usually generalists and not experts in the details of policies or statutory interpretation. It is therefore unclear if any epistemic advantage exists over the legislature or the courts. Complexity explains why a legislature would want to delegate policy functions to an administrative decision-maker, and the related argument of necessity explains why they should be able to. Yet both the complexity and necessity justifications for deference are vulnerable where politics, not expertise, strongly influences decision-making. There may be instances where political or bureaucratic institutional influences prevail. The presence of these factors may rebut the assumption that the policy function is "too complex" for legislatures to engage in directly.

I do not suggest that political interference should be a contextual factor for review by a court. Such an inquiry would often be fruitless in judicial review. Rather, the critique is that assumptions about these characteristics of administration are used to justify deference. I leave open the possibility that there may be some instances where there are sufficient legislative indicia of both independence and expertise to provide confidence that practical justifications for deference are sustainable. Nevertheless, a widespread centralization of administrative functions leads to questions about the merits of relying on the necessity and complexity justifications as opposed to other criteria for deference to administrators. The scholarship from Canadian political scientists who study public administration should give cause for concern about relying on these justifications as "substantive" reasons for deference. Ultimately, any presumptions about

complexity, necessity and expertise should be treated with at least some caution. Taken alone, they cannot support judicial deference as a general policy for all administrators in all cases.

Legitimacy and presumptive limits of delegated public policy making

Complexity is advanced as a rationale for why there is a policy-making function delegated to administrators.[136] Legislative intent may provide the basis for determining that a decision-maker has, in law, been granted the discretion over questions of public policy. Yet it does not explain why that discretion should be constitutionally permissible or why it is in line with the separation of powers or democratic principles. In other words, why do we consider it to be normatively and constitutionally legitimate for administrators who may not be democratically accountable in a meaningful sense to make public policy? Fisher has argued that while public administration is "a well-entrenched and necessary feature of democratic life", any clear democratic or constitutional theory about its legitimacy is elusive and has "defied principled explanation".[137]

Canadian scholars and jurists tend to accept that the delegation of public policy making by the legislature can be unlimited. Such delegation – whether to administrators or the executive itself – can only be accounted for at the ballot box or through non-confidence votes. A strong separation of powers in Canada has long been dismissed by constitutional law scholars such as Hogg,[138]

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[136] Daly, *supra* note 111 at 89–100.
[137] Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Oxford: Hart Pub., 2007) at 22.
[138] Peter W Hogg, *Constitutional law of Canada*, student ed. ed (Scarborough, Ont: Carswell, 1999) at 321.

although it has occasionally been acknowledged as a constitutional principle by the Supreme Court in limited contexts.[139]

In modern administrative law in Canada, as compared to the United States, the extent of legislative power to delegate policy or law-making roles to administrators has rarely been given serious treatment.[140] This lack of serious debate does not, however, make the problem disappear. In the abstract, the legislature can always be held accountable for such delegation or withdraw such expansive administrative or executive powers. This possibility does not eliminate the normative problem of delegation, which raises the question of the legitimacy of those doing the governing and making the substantive decisions that impact people's lives. Further, delegation can discourage legislative consensus and transparency of process in favour of more clandestine or narrowly focused policy-making.[141]

The implications for democracy of an expansive view of delegation are significant. For example, in theory, it means that it is possible for a majority government to pass a single law that grants the prime minister or Cabinet total discretion over all matters of public policy. Others have pointed to the potential availability of Henry VIII clauses that grant the executive authority to

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[139] *Provincial Judges Reference*, [1997] 3 S.C.R. 3 at para. 108; *Operation Dismantle v The Queen*, [1985] 1 S.C.R. 441, 49; but see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 15; *Vriend v Alberta*, [1998] 1 S.C.R. 493, para. 136.

[140] Rare exceptions can be found in some Canadian graduate work, see for example: Diane McMurray, *Re-examining the law-making power in the Canadian Constitution: A case for a non-delegation doctrine* (LL.M., University of Ottawa, 1996) [unpublished]; William K Kelley, "Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument" (2017) 92:5 Notre Dame LR 23; Keith E Whittington & Jason Iuliano, "The Myth of the Nondelegation Doctrine" (2017) 165 U Pa L Rev 54.

[141] Neomi Rao, "Administrative Collusion: How Delegation Diminishes the Collective Congress" (2015) 90 NYU L Rev 1463.

dispense with legislative requirements.[142] I do not attempt to argue for the use of a version of the American non-delegation doctrine in Canada; that doctrine presents serious challenges that are beyond the scope of this paper.[143] However, the absence of such a doctrine highlights the importance of other administrative law principles which potentially define the legitimate uses of administrative discretion.

Canadian courts have tackled this issue by highlighting purposive legislative objectives and broader normative context as a tool for legislative and judicial regulation of administrative discretion. For example, in *Roncarelli v Duplessis* Justice Rand attempted to establish that discretion, under a public law regulatory statute, could only be exercised for the purposes for which it was granted. Thus, Justice Rand asserted something like the non-delegation doctrine when he said "in public regulation… there is no such thing as absolute and untrammelled "discretion".[144] Supporting this position, he held that there was effectively a statutory interpretation presumption against such discretion and that only "express language" could enable "arbitrary power exercisable for any purpose."[145] Justice Rand asserts that there is "always" a perspective within which a statute is intended to operate.[146] In light of this limitation on discretion, the exercise of statutory interpretation – to define the purposes for which the

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[142] David Mullan & Antonella Ceddia, "The Impact on Public Law of Privatization, Deregulation, Outsourcing, and Downsizing: A Canadian Perspective" (2003) 10:1 Ind J Global Legal Stud 199.
[143] See Kelley, *supra* note 142. For discussion of the difficult line-drawing exercise involved in determining the permissible scope of delegation. For attempts to argue for this doctrine in Canada see McMurray, *supra* note 140. Further discussion of the somewhat troubling uses to which such a doctrine might be put are canvassed in Cass R Sunstein & Adrian Vermeule, "Libertarian Administrative Law" (2015) 82 U Chicago L Rev 393.
[144] *Roncarelli v Duplessis*, [1959] SCR 121 at 140.
[145] *Ibid*.
[146] *Ibid*.

legislature granted discretion, and accordingly what purposes are "irrelevant" or outside the jurisdiction of the administrator – are important. The doctrine set out in *Roncarelli* creates an interpretive presumption, not an independent basis, for striking out otherwise valid legislation granting administrative discretion. It leaves open the possibility of "express language" granting untrammelled discretion. *Roncarelli* nevertheless attempts to hold legislatures accountable for the extent of their delegation of policy-making functions and reinforces the judicial function in policing those boundaries.

Such purposive approaches to defining legitimate administrative action have important intersections with the practical justifications for deference. If one gives weight to Willis's view that administrators understand the purposes of legislation better than courts, then the judicial role in enforcing purposive limits to administrative power is questionable. A judicial role in policing legislative purpose introduces the risk of judges making mistakes about the purposes for which discretion is granted, because those purposes are complex, they follow an administrative not a legal logic and administrators are potentially better able to understand them.

On this reasoning, where courts disagree about the legislative purpose, they should let the administrator's understanding prevail because the administrator has the policy expertise to give better effect to legislative intent on substantive questions of policy.[147] This step creates the significant problem that, if legislative purpose is itself part of the arena of administrative discretion, then there can be no judicial presumption that there are any related limits to discretion, as described in *Roncarelli*. Of course, expertise in legislative purpose is not the only

[147] Paul Daly, "Unreasonable Interpretations of Law." (2014) 66 Sup Ct L Rev 233.

type of expertise that administrators might have as a basis for deference, but it is central to deference on statutory interpretation.

As Willis observed, there will often be no clear boundary between a question of law and a question of policy in an administrative context. Even very constrained discretion has some potential for public policy-making.[148] This policy making function can be broad and explicit; for example, discretion to determine if something is in "the public interest" by weighing various factors. Or, it can be far more subtle, such as applying a narrow legislative definition to particular facts. Galligan has argued that there is essentially endless variation in the degree to which official discretion may be constrained, including by rules or by standards and values, and that there is no "discretion free" decision-making.[149] Similarly Davis has explored the characteristics of broader policy discretion and has acknowledged that legislatures cannot anticipate all policy issues or eliminate all discretion.[150] Gifford has explored how attitudes towards discretion are shaped, by focusing on decision-making that is non-repetitive and heavily factual in nature and that must therefore be guided by principles and values rather than narrow rules.[151] Pratt and Sossin have summarized the literature on discretion – following Dworkin's discretionary hole in the legal doughnut metaphor – as espousing a view that there is a binary relationship between law/ rules and discretion and that "[t]his view also reflects the conceit that

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[148] Kenneth Culp Davis, *Discretionary justice: a preliminary inquiry.* -- (Baton Rouge: Louisiana State University Press, 1969) at 41–42.
[149] Denis James Galligan, *Discretionary powers: a legal study of official discretion* (Oxford: Clarendon Press, 1986) at 34–35.
[150] Davis, *supra* note 148 at 41–42.
[151] Daniel J Gifford, "Discretionary Decision-making in the Regulatory Agencies: A Conceptual Framework" (1983) 57 S Cal L Rev 101.

discretion can be eliminated and that legal rules, when not framed in discretionary terms, are somehow self-executing."[152]

Thus it is flawed simply to try and parse out decisions that are broadly discretionary and imbued with "policy" or "polycentricity", for more deference, from those that are narrower. Both equally raise the problem of what branch of government should make policy as between the legislature, the executive and the courts and therefore the problem of what presumption applies in relation to standard of review.[153] To the extent that legislatures direct policy, can courts police the boundaries of that policy through legal reasoning on the assumption that it was the legislature's intent? Or, should we assume, as Willis does, that the fact that a decision is being implemented by an administrator means that the legislature delegated all policy functions to the administrator, including ascertaining legislative purpose?

Willis' approach is arguably incompatible with the existence of clear legal rules or legislative policy-making through those rules. Instead, legislation presumptively grants policy discretion to administrators, rather than asking administrators to carry out predetermined policies. Justice Rand in *Roncarelli* and Dyzenhaus provide another option, where legislation may create a space within which administrative discretion prevails, but it is still circumscribed by broader normative and legislative principles which are the purview of courts.

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[152] Anna Pratt & Lorne Sossin, "A Brief Introduction of the Puzzle of Discretion" (2009) 24 CJLS 301.
[153] Similar observations are made in *Baker v Canada (Minister of Citizenship and Immigration), supra* note 55. at paras 51-55 in which the Court rejects the idea of "a ridged dichotomy" between discretionary and non-discretionary decisions but instead asserts that there are degrees of discretion.

If the legislature cannot eliminate discretion, this has important implications because it means that the legislature is not unlimited in its ability to impose legal rules that are enforceable by the courts. There are areas of regulation where the legislature has little practical choice but to delegate some form of discretion, including policy-making discretion, to administrative decision-makers. Yet we lack a theory explaining whether the fact of delegation of administrative discretion necessarily implies, in turn, a legislative intent that courts should refrain from interpreting the legal rules that bound that discretion, or to what extent. The fact that such decisions may be guided by legislated objectives or values, rather than bounded by hard legal rules, does not in itself mean that the legislature wanted administrators to have the final say about how those "soft" objectives and values should be implemented.

The transparency of a public policy-making function, when undertaken by administrators, can vary widely. This lack of transparency can be significant. There are many areas of regulation where the difference between mediating polycentric interests and making public policy, on the one hand, and executing technical expertise, on the other, are blurred. For example, risk assessment entails well-known difficulties related to separating value judgments about risk from "objective" scientific or mathematical assessments.[154] Risk assessment and risk management are widely acknowledged to be value-laden and subjective in nature, rather than "pure" science that can rely on internal scientific checks and balances while incorporating subjective structures and assumptions based on judgment.[155] Risk regulation has a policy-making element that is

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[154] Sven Ove Hansson & Terje Aven, "Is Risk Analysis Scientific?" (2014) 34:7 Risk Analysis 1173.
[155] Howard Kunreuther & Paul Slovic, "Science, Values, and Risk" (1996) 545 The Annals of the American Academy of Political and Social Science 116 at 119; Ralph L Keeney, "The Role of Values in

conducted largely outside the democratic process and that therefore raises questions about the legitimacy and transparency of public policy-making.[156] Moreover, the way risks are framed and the desired endpoint of the risk (such as lives saved, injuries avoided, or environmental benefits) may also be value-laden and subjective.[157] The relationship between professional bureaucratic risk management and discretion is also iterative in that the structure and opacity of risk assessment can hide or obscure the "black box" of discretion.[158] As Sossin has also noted, the tendency of civil servants, even outside this type of regulation, is to disguise subjective policy determinations behind apparently rational and neutral decisions.[159] This practice presents important transparency and democratic legitimacy problems for deference. It becomes unclear how the public would even know about the policy decisions being made by administrators and, accordingly, how there could be any political accountability for such decisions.

The existence of these problems strongly supports the legitimacy of judicial accountability mechanisms such as the one employed in *Roncarelli,* where judges can try to ascertain legislative intent on the overall policy objectives of statutes and hold administrators accountable for using and interpreting their powers in accordance with those objectives. While this approach presents the very serious risk that judges will misinterpret or misconstrue the objectives of administrative

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Risk Management" (1996) 545 The Annals of the American Academy of Political and Social Science 126; Sven Ove Hansson, "Seven Myths of Risk" (2005) 7:2 Risk Management 7 at 12.

[156] Fisher, *supra* note 137 at 22; Birgitte Wandall, "Values in science and risk assessment" (2004) 152:3 Toxicology Letters 265 at 268.

[157] Kunreuther & Slovic, *supra* note 155 at 119–120.

[158] Kelly Hannah-Moffat, Paula Maurutto & Sarah Turnbull, "Negotiated Risk: Actuarial Illusions and Discretion in Probation The Dilemmas of Discretion" (2009) 24 Can JL & Soc 391.

[159] Lorne Sossin, "Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L Rev 1.

statutes, the risk is also present where administrators are involved in statutory interpretation and policy implementation. Certainly, judges have the advantage of institutional independence in determining legislative intent, even where they have other practical disadvantages such as lack of policy expertise.

The limits of expertise

Daly has recognized that, even where experts have expertise on questions of law, expertise has limitations. He highlights various phenomena such as agency capture and groupthink that can undermine expert effectiveness.[160] He notes that "[c]ourts should remain alive to the possible shortcomings of expertise".[161] However Daly does not propose any doctrinal mechanism by which to ensure that expertise is being used in a way that makes administrative determinations on questions of law superior to those of courts. Instead, Daly advocates for expertise to be grounded in legislative intent and asserts that only implied legislative intent about expertise can justify its use to explain deference. Yet this position seems to do little to address the risks of problems like agency capture. It raises the question of how administrative expertise can be policed and by whom. Willis and Weber advocated for professionalism and peer review mechanisms to ensure the rational use of expertise, using the administrator's own specialized and unique understanding and logic. However this method offers no external political, public or democratic accountability, and presumes a particular administrative structure that is based on

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[160] Daly, *supra* note 111 at 82–86.
[161] *Ibid*.

independent but internal peer review. Canadian administrative law does not currently take into account whether such internal accountability mechanisms are in place.

At the outer boundary, current administrative law doctrines suggest that courts can get at this issue by looking to the internal rationality of the administrator, as expressed through transparent and intelligible reasons. For example the majority in *Dunsmuir* asserts that "courts ought not to interfere where the tribunal's decision is rationally supported" and speaks of a range of "acceptable and rational" solutions that an administrator might reach.[162] This fails to address the possibility that a decision could be superficially rational without employing any expertise in the policy behind a statutory provision or its meaning. At its most extreme, a decision may appear superficially rational or well-reasoned even where it runs contrary to the objectives of a statute or the technical or expert norms or methods in a particular area. Specialized norms or functions may also appear irrational to an outside observer. The test of rationality in reasonableness review is therefore a poor test of, or proxy for, expertise in the interpretation of law. Accordingly, more than bare "rationality" is required for a decision to be reasonable, there must be a substantive component to reasonableness and deferential review. Such a substantive component may serve ensure administrative accountability to the practical justifications that underpin deferential review, such as expertise, or accountability to legislative intent.

Even setting aside the need for a substantive component to judicial review, it is worth questioning the weight given to rationality in assessing the reasonableness of administrative decisions. Weber's view of public administration as fundamentally rational has been questioned

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[162] *Dunsmuir, supra* note 57 at paras 41 & 47.

by more recent scholars, such as Herbert Simon. Simon questions whether bureaucrats operate as purely rational actors employing technical expertise. He relies on the phenomenon of "bounded rationality" to explain administrative decision-making, particularly in complex situations. Simon argues that so-called "rational" administrative decision-making "takes place within the boundaries of the limited capability of human beings to be entirely value free and objective"[163]:

> Rather than seeking out information to optimize their decisions across various alternatives, decision makers "satisfice" and make "good enough" decisions by using rules of thumb and other heuristics that reduce the need to collect and process information. In such models, decision making entails "muddling through," with scientific information being only one element of "a broad, diffuse, open-ended, mistake-making social or interactive process, both cognitive and political."[164]

Simon explains that "actual computation of the optimum [solution to a problem through substantively rational analysis] is infeasible for problems of any size and complexity." Accordingly, for complex problems one needs "a theory of efficient computational procedures to find good solutions" and a shift from optimal solutions to "good solutions".[165] Further, a shift from substantive to procedural rationality is necessitated when administrators are faced with any significant uncertainty.[166] Simon's analysis questions strongly whether administrators are self-

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[163] Herbert Simon, *Administrative behavior: a study of decision-making processes in administrative organizations*, 4th ed. ed (New York: Free Press, 1997). Also see Pietro Caratti, Holger Dalkmann & Rodrigo Jiliberto, *Analysing Strategic Environmental Assessment: Towards Better Decision-making* (Edward Elgar Publishing, 2004) at 32.
[164] Ronald Mitchell, William Clark & David Cash, "Evaluating the Influence of Global Environmental Assessments" in *Global Environmental Assessments: Information and Influence* (Cambridge, Mass: MIT Press, 2006) at 9.
[165] Herbert Simon, "From bounded to procedural rationality" in *25 Years of Economic Theory*, Papers delivered at the 25th anniversary of the Faculty of Economics of the University of Groningen, the Netherlands (Leiden: Martinus Nijhoff, 1976) 65 at 69.
[166] *Ibid* at 80.

correcting and emphasizes that the process of administrative decision-making can overtake substantive results. This perspective raises important questions about whether internal bureaucratic mechanisms will actually reinforce or undermine rational decision-making. The solution that is "good enough" may have a strong political dimension that is potentially devoid of both a policy rationale in relation to the statute and a rational interpretation of the statute. The implications of Simon's critique are twofold: first, courts cannot necessarily expect administrative decisions to be rational, even on an administrator's own terms; second, it may in practice be difficult to determine whether a decision is "rational" in real life by taking the decision on its own merits. Ultimately it is clear that administration cannot be completely self-policing in terms of enforcing internal norms, expertise or rationality.

Administrative "rationality" must inevitably be measured against some external standard or value, such as legislative objectives and broader norms, like Dyzenhaus proposed. The language in *Dunsmuir* implies as much by referring to "acceptable and rational" solutions along a continuum. To a limited extent, this position guards against decisions which are coldly rational but which advance improper interests outside the object and purpose of legislation.[167] Yet this approach requires a strong role for judicial statutory interpretation and recognition that courts have a role in policing statutory language and purposes as applied by administrators.

Deliberative democracy and procedural legitimacy

The modern approach to addressing problems of regulatory opacity, the limits of expertise and a lack of perceived democratic legitimacy for administrators tend towards public consultation and

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[167] *Dunsmuir v New Brunswick, supra* note 57 per Binnie J at para 148.

other deliberative democratic mechanisms. Daly refers to this tendency as "procedural legitimacy" and has argued that it is itself a practical justification for deference.[168] However, deliberative democratic processes have been critiqued as largely idealized and theoretical rather than addressing the real-life power dynamics that are engaged when members of the public or disparate interest groups participate in regulatory processes.[169] Proponents of deliberative democratic rationality take the view that "outcomes produced by good procedures are by definition good outcomes."[170] Many scholars have pointed out that this position merely replaces substantive administrative rationality with procedural administrative rationality, in the sense that the "decision is procedurally rational if it is the outcome of appropriate deliberation."[171] This is sometimes understood as "communicative rationality".[172] Deliberation procedures may substitute for the lack of information or uncertainty involved.[173] The reasoning behind rational, technical documentation of administrative decisions is itself a potential means of bureaucratic managerial control as explained by Rydin:

> The step-by step methodologies become a means of maintaining control through managerial modes. Issues of expertise are handled through bringing in outside advice, particularly from scientists, but outside expertise never undermines the advice that the controllers of the policy process themselves give. Rather they become part of a cascade of advice: manuals advise bureaucrats; they take advice from other experts; and they in turn advise politicians. This cascade also

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[168] Daly, *supra* note 111 at 123–134.
[169] Bo Elling, "Rationality and effectiveness: does EIA/SEA treat them as synonyms?" (2009) 27:2 Impact Assessment and Project Appraisal 121 at 122.
[170] John Dryzek, *Deliberative democracy and beyond: liberals, critics, contestations* (Oxford: Oxford University Press, 2000) at 174.
[171] Caratti, Dalkmann & Jiliberto, *supra* note 163 at 32.
[172] Elling, *supra* note 168 at 121; Frank Fischer, *Citizens, experts, and the environment: the politics of local knowledge* (Durham, NC: Duke University Press, 2000).
[173] Caratti, Dalkmann & Jiliberto, *supra* note 163 at 32–33.

> erects a wall between political decisions and advice or expertise. It helps present the policy official in a neutral role. … In this way, the problems of the rational comprehensive model that have been identified by commentators – such as the impossibility of comprehensive data collection, the tendency towards satisficing rather than optimizing, and the problem of incommensurate preference orderings – are swept aside. … Similarly the messy interaction of interests within policy is ignored; methodology overcomes power.[174]

Any type of administrative decision that blends technical expertise with the application of policy judgement will have these same challenges. It will be at risk of disguising discretion on broad public policy issues as technical expertise and legitimating those decisions through public participation. In this way, administration can substitute, if poorly, for democratic debate and democratic decision-making. Ulrich Beck's theory of the "risk society" is important to understanding that public risk regulation is potentially subversive in that managing risks can threaten "the legitimacy of the political-economic system" based on expansive industrial capitalism.[175] Beck argues that democratic or participatory ways of managing risks also serve to legitimate the continuing persistence of those risks.[176] Thus certain types of policy outcomes may tend to be favoured by deference towards administrators. The type of outcomes that might be favoured could include those that perpetuate industrial capitalism or which uphold the status quo socio-economic power structure. Those policy outcomes may not necessarily be aligned with the policy outcomes desired by the legislature.

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[174] Yvonne Rydin, *Conflict, Consensus, and Rationality in Environmental Planning: An Institutional Discourse Approach* (OUP Oxford, 2003) at 80.
[175] Dryzek, *supra* note 170 at 162–163; Ulrich Beck & Mark Ritter, *Risk Society: towards a New Modernity*, Theory, culture & society (London: Sage Publications, 1992).
[176] Dryzek, *supra* note 170.

Thus it would be dangerous, doctrinally, to assume that all or most administrative decisions are grounded in expertise merely because a decision appears to be substantively or procedurally rational and is stated in formally rational and neutral terms. This recognition raises the significant problem of the proper role of deference where technical or even policy expertise is not the only decision-making basis. It raises the further problem of how deference is impacted, if at all, when the decision-maker does not take the advice of his or her experts or disregards the stakeholders whose participation is relied on for procedural rationality. For example, in environmental regulation, particularly environmental assessment, decisions have been frequently critiqued as being based on science that relies heavily on questionable methods, and analysis that is not transparent.[177] It is difficult to explain deference to this type of decision-making by heavily relying on justifications such as expertise or by relying on process.

Therefore, the rationality of administrative decisions, whether procedural or substantive, can in some circumstances be little more than a way of neutrally justifying policy decisions that are not politically neutral.[178] While rationality may serve to legitimize administrative decisions and procedures, this impact does not mean that these decisions in-fact achieve or help achieve the substantive legislative goals that motivated the delegation of discretion. It can be challenging to decipher whether an apparently rational administrative decision has substantive merit.

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[177] Westwood, Alana and Olszynski, Martin et al, "The Role of Science in Contemporary Canadian Environmental Decision Making: The Example of Environmental Assessment" (2019) 52 UBC L Rev 243 at 273-278; David Schindler, "the impact statement boondoggle" (1976) 192:4239 *Science* 509; David Schindler, "Facts don't matter, Harper is gone, but pro-development governments continue to ignore science" (30 June 2017) *Alberta Views* online: https://albertaviews.ca/facts-dont-matter/

[178] The analysis of this discourse is engaged with extensively in Rydin, *supra* note 174.

Nevertheless, ignoring the substantive merit of complex administrative decisions in relation to statutory goals risks permitting a presumption of "untrammelled discretion."

All of these issues raise the question of whether courts can or should police administrative rationality and to what extent. If we accept that this rationality is not as simple as Weber's idealized administrative actors, using technical expertise and regulated by clear internal rules and logic, then the rational principles underpinning complex administrative decisions become more and more unclear. At a minimum, there is a potentially important judicial role in policing the transparency of such decisions, particularly where they purport to be the outcome of procedurally rational processes. Moreover, such decisions are best understood in relation to legislative objectives as expressed through statutory language.

It may be raised that the Courts provide a weak venue for policing either administrative rationality or expertise. This is a legitimate concern. However this critique assumes that Courts should focus on these aspects of administrative decision-making instead of more substantive or legal concerns around legislative intent and transparency. Where the focus of judicial review is on the latter aspects of administrative decision-making, it provides a democratically legitimate basis for substantive review. First, in the form of ascertaining legislative intent on substantive policy goals using legal reasoning, and second by ensuring that administrative decisions transparently uphold the practical justifications for administrative delegation by providing transparent, reasoned decisions that are compatible with legislative intent.

Failure to reflect on the importance of impartiality and independence

The presumptions behind deference include a presumption that administrators operate largely benevolently in relation to legislative mandates, rather than in favour of certain social, economic

or political interests. The scholarship of Donald Savoie and others in political science raise important questions about these assumptions. The administrative state encompasses diverse actors, ranging from tribunals and prosecutors to political actors like Ministers. Thus, the concept of bureaucratic independence is at best fluid and uncertain.[179] Certainly it is debatable whether a range of tribunal and non-tribunal Canadian administrative decision-makers have any noteworthy indicia of independence and neutrality, including such features as merit-based appointment, security of tenure, whistleblower protection, and a duty of loyalty to the Crown or to the public interest more generally (overriding a duty of loyalty to the government of the day).[180]

For the purpose of this thesis it is sufficient to note that there is a very broad spectrum of independence, along which an administrative decision-maker may be anything from a direct political actor to a non-political actor, such as a tribunal, with some measure of independence and impartiality. There are no clear guarantees of independence or impartiality for most Canadian administrators. Some commentators have suggested that a lack of independence, for example a decision made by or controlled by Cabinet, could lend "democratic legitimacy" that justifies deference.[181] For example, certain types of policy decisions may require "political judgment" and therefore be delegated to Ministers. Another explanation for why powers might be delegated to Ministers (even if exercised by delegates) instead of independent administrators is that the legislature intended a measure of political accountability in the decision-making.[182]

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[179] For a discussion of this see Sossin, *supra* note 130.
[180] *Ibid*. in which Sossin canvasses the caselaw on conventions of political neutrality in the public service as well as typical statutory provisions.
[181] Daly, *supra* note 111 at 101–114.
[182] *Ibid* at 105-106.

The reverse is also potentially true because, on the one hand, an administrator that does have a large degree of independence (for example, a merit based appointment and security of tenure) might arguably attract less deference to counteract the lack of political oversight in their policy-making functions and, on the other hand, the administrator might attract more deference because they were intended to replace judicial functions using expertise.[183] Using "independence" as a contextual factor in determining the standard of review is problematic for these reasons. Yet, there is a potentially important relationship between the independence or neutrality of the decision-maker and the ability of that decision-maker to interpret the statute – neutrally, in good faith and in accordance with legislative intent on substantive issues of public policy – and to employ expertise in doing so. If deference doctrine is premised largely on practical justifications such as "expertise", then the ability to rely on that expertise impartially and consistently, and without political interference, becomes significant. Arguably, the more expertise is relied on as a justification for deference, the more important the administrator's independence and freedom to rely on expertise becomes. Administrative independence could help to ensure the actual influence of that expertise on decisions. Conversely, a lack of independence may have the result that political considerations trump expertise and legislative intent regarding policy outcomes.

There are other benefits to impartiality and independence. Judicial reasoning and precedent provides a measure of consistency, transparency and clarity that permits the legislature to predict, at least to a limited degree, what policy outcomes its words – as set out in statutes – will likely have. Administrative decision-making that follows its own unique, apparently "rational",

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[183] *Ibid* at 112-113.

logic, with variable transparency, may not have this benefit. Further, once legislation is enacted, the judicial process ensures a measure of consistency in the interpretation of public law and, accordingly, equality before the law that may be absent from administrative decision-making, where there are usually no rules of precedent. Finally, independence and impartiality at least assist the Court in being better positioned to focus on what policy outcomes and meanings the legislature intended, as opposed to other considerations such as political expediency of the moment, budgetary limitations or internal bureaucratic or expert norms.

The lack of independence and impartiality of many administrators may make them vulnerable to pursuing other non-legislative objectives, such as internal bureaucratic goals or the short-term political goals of the executive or central agencies. I do not suggest that independence and impartiality are the only considerations. Yet there is a striking absence of both academic and doctrinal discussion on the relative merits of independence and expertise in terms of administrators' reliability in upholding legislative intent and employing expertise to do so. Daly raises this issue but concludes that there are principled reasons that could be raised both in favour of and against deference in relation to the degree of independence of administrators. He argues that, while independent administrators are less accountable to the political process, this does not merit more intense review where the legislature has otherwise intended deference.[184] Daly does not address Dicey's concern about whether a lack of independence could enable centralization of power in the executive. Such centralization, while arguably within the purview of the legislature, undermines the pragmatic rationales for deference based on expertise and complexity.

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[184] *Ibid* at 113–114. Daly argues that independence and impartiality cut both ways.

Given the lack of clear measures of independence for many Canadian administrators, the issue of independence weighs strongly in favour of the availability of judicial statutory interpretation on a correctness standard. While an administrator may have expertise in the policy behind the statute or technical matters, an administrator who is not at liberty to employ that expertise should not attract deference relative to a court. While *de facto* independence may be difficult to gauge in a particular case, the legislative indicia of independence should be identifiable. I do not suggest that this consideration would need to be a contextual factor employed on a complex spectrum in every case, but as a general matter it supports a presumption of correctness on questions of law that could be rebutted with legislative criteria. While some administrators are sufficiently independent to ensure that they are not controlled by the executive, the overall lack of concrete guarantees of independence (or even whistleblower protections for administrators) means that administrators are vulnerable to being used as a vehicle for the executive to appropriate policy-making functions that the legislature did not necessarily intend to delegate. This risk is most pressing in relation to questions of statutory interpretation. It is in statutory interpretation that administrators and the executive have the most important opportunity to go beyond the scope of delegation intended by the legislature. Thus, judicial statutory interpretation remains important as a check or balance against the interpretations of administrators who lack independence.

Problems arising from real world decision-making

Some policy decisions are subjected to political interference from the executive

Some kinds of public regulation may be subversive of administrative order or of political and economic interests. After the legislature enacts public law, the political pressures and power imbalances between the winners and losers in the legislative balance that was struck remain

dynamic. The executive of the day may be unhappy with the balance struck by the legislature and may be subject to social and economic pressures to strike a different one. In an ideal world, a new balance would be struck through the legislative process, but this is not always the case. Sometimes the legislative process might open up such decision-making to unwanted public scrutiny.

Many forms of public regulation are the result of a political compromise between limiting the potential adverse political, social and risk consequences of industrial capitalism and maintaining capitalism.[185] Those compromises will likely remain hotly contested after legislation is passed. Administrators who are tasked with this balancing role have a potentially socially and economically subversive mandate. Their discretion could be exercised to suit different opposing interests. When operating in this context, the faithful fulfillment of a statutory mandate may have costs to the bureaucracy in terms of lowered budgets or even the elimination of their mandates altogether.

An example is environmental regulation in Canada's resource sector.[186] In this field of regulation, administrators may be particular targets for political interference by central agencies.[187] Scholars such as Paehlke and Torgerson have argued that the administrative state is

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[185] See Beck *supra* note 175; Nancy Reichman, "Power and justice in sociolegal studies of regulation" in Byrant and Austin eds., *Justice and Power in Socio-Legal Studies*, Vol 1, at 233-271.
[186] Bruce Doern, Graeme Auld & Christopher Soney, *Green-lite : complexity in fifty years of Canadian environmental policy, governance, and democracy* (McGill-Queen's University Press, 2015) at 348.
[187] Doern, Auld & Soney, *ibid*; Michael M'Gonigle & Louise Takeda, "The Liberal Limits of Environmental Law: A Green Legal Critique" (2013) 30:3 Pace Envtl L Rev 1005; Mary Christina Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift" (2009) 39 Envtl L 43; Stepan Wood, Georgia Tanner & Benjamin J Richardson, "What Ever Happened to Canadian Environmental Law" (2010) 37 Ecology LQ 981 at 1011–1012.

embedded in the larger social context of industrial capitalism, which runs contrary to the goals of environmental protection. They argue that administrators tend to promote a "particular order" which serves industrial capitalism.[188] This may run directly counter to environmental objectives. According to Paehlke and Torgerson, speaking about environmental regulation, the administrative state absorbs environmental objectives and critiques by casting environmental interests as an "expression of narrowly self-serving groups and individuals." The task of administration is one of "containing and overcoming irrational resistance" to the "natural and necessary course of development."[189] Paehlke and Torgerson conclude that, while the low-priority status of environmental management generally (and broader political, social and economic forces) contribute to the ineffectiveness of environmental legislation, administration also plays an important role.[190] It should be no surprise then that bureaucrats and regulated entities might find their mandates "disordering" to preferred modes of decision-making or might consider some types of risk regulation to be unwieldy, unrealistic and administratively unmanageable.[191] Such reactions to environmental legislation are common both inside and outside the public service.[192] The history of bureaucratic resistance to federal environmental

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[188] Robert Paehlke & Douglas Torgerson, eds *Managing Leviathan: environmental politics and the administrative state* (Peterborough, Ontario: Broadview Press, 2005) at 7.
[189] *Ibid* at 8.
[190] *Ibid* at 7.
[191] *ibid*. Examples of these complaints are included in Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2009) 20:1 J Envtl L & Prac 1 at 2.; Ken Coates & Sean Speer, *Defending the National Interest in Energy Resource Development, From a mandate for change to a plan to govern* 8 (Ottawa, Ontario: Macdonald-Laurier Institute, 2016) at 5–7. Bram Noble & Aniekan Udofia, *Protectors of the Land Toward an EA Process that Works for Aboriginal Communities and Developers*, Aboriginal People and Environmental Stewardship 1 (Ottawa, Ontario, 2015) at 2–3.
[192] Paehlke & Torgerson, *supra* note 188 at 5–6.

assessment regimes in Canada is a well-researched example.[193] Smith and Fenge have described that agencies "were able to water down" federal environmental assessment policy and that agencies with resource development mandates perceived environmental policies as "an unwarranted intrusion on their authority and freedom of action."[194]

There is also empirical research that should cause administrative law scholars to question whether the Weberian ideals about public administration are accurate, in so far as they see administrators acting largely above the political fray and based in technical expertise. The Professional Institute of the Public Service, the largest union in Canada representing scientists and professionals employed in both federal and provincial governments, surveyed its members on issues relevant to how the civil service administers the public administrative state and how it treats expert advice in that process. The survey found a great deal of political pressure on federal scientists and highlighted the dynamic, non-static nature of political pressure with surveys from both the Harper and Trudeau governments. In 2013, 86 per cent of the survey respondents said they felt they couldn't share concerns about health, safety or the environment without censorship or retaliation. In 2017, 73 per cent felt they were not free to raise these concerns. This pressure went beyond issues of public discourse into actual decision-making. In 2013, 50 per cent of

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[193] *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, adopted on June 22, 1984, on the recommendation of the Minister of the Environment pursuant to s. 6(2) of the *Government Organization Act, 1979*, S.C. 1978-79, c. 13, amended by s. 6 of the *Department of the Environment Act*, R.S.C. 1985, c. E-10. The history of that resistance is detailed very extensively in Terry Fenge & L Graham Smith, "Reforming the Federal Environmental Assessment and Review Process" (1986) 12:4 Can Pub Pol'y 596.; Bram Noble & Aniekan Udofia, *Protectors of the Land Toward an EA Process that Works for Aboriginal Communities and Developers*, Aboriginal People and Environmental Stewardship (Ottawa, Ontario, 2015) at 9–10; Michael C Blumm, "The National Environmental Policy Act At Twenty: A Preface" (1990) 20 Environmental Law 447 at 795.

[194] Fenge & Smith, *supra* note 193 at 603.

respondents said they were aware of cases where the health, safety or environment of Canadians was compromised because of political interference. In 2017, 23 per cent said they were aware of these types of cases. These are substantial numbers of federal public servants advancing concerns about political interference.[195] In a recent investigation, the federal Information Commissioner confirmed that the survey was, in her view, accurate.[196]

It is unclear how common political interference is and to what extent it impacts administrative decision-making inappropriately. Even so, legal scholars should be more mindful that there are a diverse array of problems for different categories of decision-makers and that the nature of administration is not singular or fixed over time. As a result, the general presumption that the administrative state is free to advance policy goals, relying primarily on expertise and without significant political interference, may not always be accurate.

Some policy decisions are resisted by the bureaucracy itself

Other scholarship tackles the social embeddedness of administrators outside the risk assessment context. Sossin examined administrative discretion in the context of Canada's redistributive tax

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[195] Mike De Souza, "Senior bureaucrats 'clinging' to Harper government rules and muzzling scientists, says survey", *Natl Observer* (21 February 2018), online: <https://www.nationalobserver.com/2018/02/21/news/senior-bureaucrats-clinging-harper-government-rules-and-muzzling-scientists-says>; citing *Defrosting Public Science* (Professional Institute of the Public Service of Canada, 2018).

[196] Office of the Information Commissioner, Legault to Sandborn "Re complaint made under the Access to Information Act, against the Canadian Food Inspection Agency (CFIA), the Department of National Defence (DND), Environment and Climate Change Canada (ECCC), the Department of Fisheries and Oceans Canada (DFO), Natural Resources Canada (NRCan), and the National Research Council of Canada (NRC) - systemic investigation pursuant to paragraph 30(1)(f) of the Act" (February 28, 2018) in which the Commissioner concludes that "The fear observed by the OIC on the part of public servant investigation participants is consistent with the "chill" documented in the survey of over 4,000 federal government scientists conducted by the Professional Institute of the Public Service of Canada and reviewed by the OIC as part of this investigation."

regime, which is arguably also subversive of prevailing economic and social forces. He questioned whether discretion can or does function in precisely the way that administrative law scholars appear to assume. He argues that nearly all discretionary decisions have a normative dimension and that:

> The roles that the administrators in the welfare state are called upon to perform cannot be neatly compartmentalized in the popular understanding of bureaucratic subservience to democratic political institutions, nor can they be properly legitimated on the basis of norm-free, rule-based technical expertise.[197]

Sossin argues that administrative structures not only regulate the social and economic systems they govern but are embedded within them. In reviewing exercises of discretion of federal tax officials in Canada, he concludes that the overriding objective of tax enforcement officials – due to the influence of wealthy taxpayers in the enforcement system – appeared not to be to pursue the redistributive goals of income tax legislation but rather "to enforce compliance as little as practicable while still curbing flagrant fraud."[198] Sossin's analysis also highlights how an approach to judicial review that focuses on controlling the excesses of the administrative state and its impact on the individual functions as a potentially poor form of oversight, since it tends to exacerbate public sector biases against regulating powerful political and economic actors.[199] In his analysis, he describes how tax officials attempt to avoid making politically controversial decisions, resulting in the odd use, or non-use, of enforcement discretion in controversial areas:

> Administrative discretion that is depoliticized in this fashion can be legitimated solely on the basis of expertise, impartiality, and instrumental reason; any form of administration which depends on

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[197] Sossin, *supra* note 159 at 14.
[198] *Ibid* at 17.
[199] *Ibid* at 18.

> substantive justifications for discretionary judgments is thus effectively precluded.[200]

What Sossin describes is a politically embedded administrative system with a socially and economically subversive mandate that must legitimate its decisions on apparently politically and normatively neutral grounds. This quest for neutrality reinforces avoidance of the pursuit of statutory regulatory mandates that are potentially controversial. Sossin notes that, while the idea of a neutral, apolitical and impartial administrator is a flimsy "legal fiction", there is nothing to replace it: "[i]n other words, if officials cannot act neutrally, in whose interest and for what purpose should they act?"[201] Among other reforms to the tax system, Sossin advocates for greater statutory clarity in order to confine discretion and for clearer normative goals to provide the administrator with a clear purposive mandate.[202] Thus, alongside the characterization of administrators as neutral and rational experts administering complex policies, we have descriptions of this same apparent neutrality and rationalism that are said to be empty of substantive content when it comes to the normative goals for which the discretion is granted. This dynamic leaves a vacuum into which political and economic forces can enter.

In this framing, formal rationalism in administrative decision-making therefore has the potential to be merely a legitimating mask for the use (or non-use) of discretion simply to avoid the appearance of controversy. Substantive legislative policy goals may well take a back-seat. Sossin's analysis demonstrates that administrators may not always be fully interested in or comfortable with the role of regulatory policy-maker, or even policy implementer, that is implied

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[200] *Ibid* at 37.
[201] *Ibid* at 40.
[202] *Ibid* at 41.

by the necessity and complexity justifications for judicial deference. Whether this aversion is a result of internal institutional pressures, social embeddedness or political pressure is not as important as recognizing that these phenomena are known to occur.

Thus, even in the absence of "political" interference, there can be resistance to legislative mandates from within the administrative state. This can take the form to resistance to the political, social or economic outcomes of the legislation or to the deliberative democratic procedures that are disordering to administrative and political power structures. It is important to consider that administrators may not always be engaging in policy practices that are based in either expertise or legislative mandates.

Summary – Critique of the practical justifications for deference

The central practical justifications for deference, which will be revisited in the caselaw, are vulnerable to the accusation that they do not reflect how real-world decisions are made. They evidence a naiveté about the strengths and weaknesses of administrators relative to other state actors such as courts and legislatures.

The necessity argument and related justifications, such as complexity and legislative incapacity, are key to justifying modern deference doctrine. However, they should be exposed as only some of many possible understandings of how the administrative state functions. By granting deference to administrators, courts risk granting deference to the core of the executive and central agencies of government. In doing so, they risk weakening the legislature's control over public policy questions. In this sense, Dicey's concern about executive arbitrariness and parliamentary supremacy remain relevant.

Administrative decision-makers may be working against the goals that the legislature intended a grant of discretion to be used for. They may be working in favour of other interests, both institutional or socio-political. Legal scholars should be more mindful that courts may be granting deference based on assumptions about the administrative state that might not be empirically valid or theoretically sound.[203] They should draw more on scholarship from the social sciences about the nature of public administration.

If the executive or other economic, social and political actors can pressure the civil service to act in ways not contemplated by the policies of the legislature, then the power of the legislature to control the nature of the powers it delegates is potentially significantly undermined, and with it democratic accountability. In practical terms, an example would be a case where there are popular changes to a law by the legislature, but administrators keep making decisions as if the change never happened. At its root, the issue is whether the rule of law and statutory law matter and to what degree the electorate and the legislature controls them.

The implications of these problems for public regulation are significant. Deference must be understood in the context of its different tensions. First, deference plays a potential role in providing space for administrators to faithfully carry out statutory policy mandates. However, it also risks entrenching forces – both internal and external to administrative decision-makers – that might undermine those goals. We should strive to move beyond a naïve understanding of administrators and, in explaining why deference is accorded, do more than ask who is "best

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[203] Peter Gall, "Dunsmuir: Reasonableness and the Rule of Law", (6 March 2018), online: *Administrative Law Matters* <http://www.administrativelawmatters.com/blog/2018/03/06/dunsmuir-reasonableness-and-the-rule-of-law-peter-a-gall-qc/>.

fitted". We could ask instead how deference potentially maintains, promotes or undermines different aspects of legislative and executive power. What outcome is desirable is more than a question of judicial policy. The question has significant political and normative dimensions, as Dyzenhaus recognized.

Part 2 – Post-*Dunsmuir* explanations for deference

The legal justifications for deference

Despite the above commentary on *Dunsmuir*, not all of the justifications for deference underpinning current jurisprudence are pragmatic. At least some remain "legal" in nature. The legal flavour of the justifications for deference is also confirmed by the categorical exceptions to deference originally set out in *Dunsmuir*, which include questions of *vires* and constitutional questions. These legal justifications engage a broader debate about the separation of powers. What is the source of (or limits to) legitimacy for judicial review? Where does legislative power end and judicial power begin? For example, why should courts be able to override express legislative intent in privative clauses?[204] Deference obviously engages with these issues because it attempts to resolve them by striking a balance between legislative and judicial power. The primary way that deference doctrine tackles this issue is by framing the issue in terms of legislative intent.

Underscoring the importance of legislative intent to accord deference, Daly has called it "the declared constitutional principle" upon which his general theory of deference relies.[205] In relation to all practical arguments for deference, he asserts that these must be linked back to legislative intent and that practical justifications for deference cannot be "free standing". While Daly supposes that reliance on legislative intent used in this way is "neutral as between schools of

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[204] Laskin, *supra* note 56.
[205] Daly, *supra* note 111 at 38.

statutory interpretation",[206] arguably this approach to legislative intent is based on a particular method of statutory interpretation. The particular method is one that discounts the importance of privative clauses and rights of appeal as compared to contextual factors implying legislative intent to accord deference.

Dyzenhaus argued that one of the reasons for the decline of the Dicey framework was that the use of privative clauses complicated an account of the rule of law that focused on legislative intent, as understood by judges, as the lynchpin of a theory supporting judicial oversight of administrative law.[207] This complication arose from the legislature's expression of its intent that administrators rather than the courts have the final say on statutory interpretation, through the use of privative clauses.

The focus of such arguments is legislative intent with respect to deference and legislative intent to delegate policy-making functions to administrators. Legislative intent on the underlying legislative policy, or the purposes for which discretion is granted, is not the focus. Legislative intent normatively justifies deference by linking it to the decision of a democratically elected legislature. Legislative intent to accord deference is tied to whether courts must respect the boundaries set by the legislature in order to maintain fundamental constitutional order. By "respecting" the legislature's "decision" to allow administrators to determine questions of law, deference is seen to uphold legislative supremacy. As phrased in *Dunsmuir*, "legislative supremacy is assured because determining the applicable standard of review is accomplished by

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[206] *Ibid* at 43.
[207] Dyzenhaus, *supra* note 70 at 281.

establishing legislative intent."[208] An interesting feature of this focus on legislative intent is the necessary assumption that legislatures turn their mind to this question, or that this question takes on importance or significance in the legislative process. It is unclear whether this is actually the case, particularly where there is no privative clause or right of appeal proposed that might form a nexus for legislative debate.[209] Moreover, the Supreme Court's jurisprudence, by downplaying both rights of appeal and privative clauses where they are present, emphasizes "implied" legislative intent – in other words, pragmatic justifications – at the expense of a good faith search for legislative intent through classical statutory interpretation.

How is legislative intent to accord deference established

In the pragmatic and functional era, where the various contextual factors were weighed to determine standard of review, there was often a reasonably clear approach employed by the Supreme Court to establish legislative intent to accord deference.[210] This approach looked at both express legislative intent, through an examination of privative clauses and rights of appeal, and contextual factors said to indicate "implied" legislative intent. No one factor was determinative. However, contextual factors were not really tied to legislative intent, but rather to practical justifications, which were employed in a particular legislative context.

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[208] *Dunsmuir v New Brunswick*, *supra* note 57 at para 30 (emphasis added).
[209] A search of the terms "judicial review" or "privative" and "standard of review" in openparliament.ca provides only a handful of examples where primarily committee witnesses raise the issue. Also see comments in Martin Olszynski, "Dunsmuir is Dead – Long Live Dunsmuir! An Argument for a Presumption of Correctness", (13 December 2017), online: *Ablawg* <https://ablawg.ca/2017/12/13/dunsmuir-is-dead-long-live-dunsmuir-an-argument-for-a-presumption-of-correctness/>.
[210] A good example would be the approach in *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748.

That the contextual factors were not really a search for legislative intent becomes clear when an express right of appeal or privative clause is present but not determinative. Under the pre-*Dunsmuir* pragmatic and functional approach, the Supreme Court struggled with expressions of legislative intent regarding the standard of review itself in the form of a right of appeal or a privative clause. The Court's focus under the pragmatic and functional approach favours implied legislative intent, wherein the existence of a specialized tribunal is itself seen as an indication of legislatively desired limitations on judicial interference. Strongly contextual and pragmatic justifications govern the level of deference owed, including "the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal."[211]

In *Pezim* and *Dr. Q*, the Supreme Court noted that the existence of a statutory right of appeal alone was just one factor to be weighed by the court.[212] Legislative intent remains highlighted in *Dr. Q* as the organizing feature of the justification for judicial deference. However, in order to explain why a standard of review analysis is necessary in the face of a statutory right of appeal, the Supreme Court is necessarily identifying "the consequences that flow from a grant of powers" and avoiding "unnecessarily" employing reviewing power. This analysis is framed in terms of legislative intent (i.e. a legal justification for deference) but betrays an emphasis on pragmatic justifications for deference and judicial policy-making by distancing itself from legislative intent where decision-makers might be "better placed" or have an epistemic

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[211] *Pezim v British Columbia (Superintendent of Brokers), supra* note 69 at 592 citing with approval *U.E.S., Local 298 v Bibeault*, [1988] 2 S.C.R. 1048.
[212] *Dr Q v College of Physicians and Surgeons of British Columbia*, [2003] 1 SCR 226, 2003 SCC 19 at paras 17 and 21.

advantage. In *Dr. Q*, the Court claims that, in weighing these other contextual factors against an explicit statement of legislative intent to allow appeal to the courts, it is preserving the rule of law.[213] Implicitly this "rule of law" is one that is focused on not frustrating the administrator's role in interpreting the law. A similar view was articulated by Justice Wilson in *National Corn Growers Association*:

> [W]e must recognize (1) that [administrative] decisions are crafted by those with specialized knowledge of the subject matter before them; and (2) that there is value in limiting the extent to which their decisions may be frustrated through an expansive judicial review.[214]

Daly recently tackled the broader contextual problem in his treatise on deference. He argues that legislative intent is the key to understanding and justifying deference. However, he dismisses outright the lack of weight often ascribed to privative clauses, stating that privative clauses are necessarily "incoherent" and amount to the legislature stultifying itself. With echoes of the pragmatic and functional era jurisprudence, he argues that "legislative intent in general can have the same effect as a privative clause."[215] In other words, the courts must give effect to legislative intent, but legislatures cannot usurp the function of judicial review and so privative clauses are not determinative.

There are significant challenges with this line of reasoning. Even if one accepts that there is always judicial discretion to engage in judicial review, notwithstanding the existence of a

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[213] *Ibid* at para 26.
[214] *National Corn Growers Association v Canada (Import Tribunal)*, [1990] 2 SCR 1324 at para 8 cited in Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall L J 317 at 321.
[215] Daly, *supra* note 111 at 65–67.

privative clause, this conclusion does not resolve the issue of why *other factors* besides the privative clause are better indications of legislative intent on the very issue of standard of review. Arguably, it is a pure legal fiction that practical justifications for deference, through contextual factors such as the "nature of the decision" or "expertise", are clearer and better expressions of legislative intent than a privative clause or right of appeal. More recently it has been suggested that instead of using privative clauses or rights of appeal, legislatures should simply articulate an express standard of review.[216] The central apparent benefit of such an approach is that it would allow the courts to sidestep the doctrinal difficulty caused by ignoring privative clauses and rights of appeal. Yet, for the courts to direct the legislature how to express its intention on standard of review would seem to overreach the proper role of a court, and moreover, raises the question of whether contextual factors would simply once again overtake the jurisprudence.

While Daly argues that reliance on pragmatic contextual factors are grounded in "implied" legislative intent, he admits that the concept of implied legislative intent is problematic in other circumstances[217] and that, once implied, "virtually any intention at all can be imputed [to the legislature]." He goes on to note that implied legislative intent "does not give concrete guidance

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[216] At the recent hearing of the Supreme Court of Canada for the case of *Minister of Citizenship and Immigration v Alexander Vavilov*, 2018 CanLII 40807 (SCC) it was argued extensively that all legislatures should be expected to explicitly state their preferred standard of review in a statute rather than using privative clauses or rights of appeal. The parties pointed to the British Columbia *Administrative Tribunals Act* as a model for such legislation, but see Brent Olthius, "Can we make it any clearer? BC's experience with legislated standards of review" (2018) Ontario Bar Association Institute, online: <https://www.litigationchambers.com/lawyers/pdf/2018-01-22-legislated-standard-of-review.pdf>.

[217] Daly describes why courts should not use concepts such as implied delegation to the courts to answer legal questions to explain judicial review powers in the face of other expressions of legislative intent. However, Daly argues that courts should use implied delegation to administrators to explain deference.

as to the appropriate relationship between reviewing courts and delegated decision-makers."[218] Speaking to the complex problem of who is best suited to interpret laws, he recognizes that:

> It might be perfectly plausible that the legislature would intend to delegate a legal question to a delegated decision-maker, or a factual question to a court. If the nature of the question is to be said to be related to legislative intent, it is necessary to make an assumption [about who the legislature intends will answer these types of questions]…But if these background assumptions are permissible, surely other background assumptions can be introduced as well.[219]

Accordingly, Daly admits that the basis for making background assumptions about legislative intent, particularly regarding who is better suited to answer certain categories of decisions as between administrators and the courts, is not clear. Yet he argues that these same background assumptions employed through deference doctrine have the potential to enhance legislative power because judicial deference gives "guidance to the legislature as to how it might by statute further its objective to insulate a body from, or expose it to, judicial scrutiny."[220] Daly argues that the potential proliferation of background assumptions regarding legislative intent are "necessary", but nevertheless "it becomes difficult to perceive whether courts are navigating by the polar star of legislative intent, or by some other source of light."[221] Ultimately, Daly acknowledges that implied legislative intent may be employed "as a vehicle for policy preferences which should be supported on other grounds."[222] Indeed, it would appear that implied legislative intent – in reality, a focus on pragmatic justifications – overtook a meaningful

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[218] Daly, *supra* note 111 at 51.
[219] *Ibid*. at 51-52.
[220] *Ibid* at 47–48.
[221] *Ibid* at 52.
[222] *Ibid*.

search for legislative intent in the pragmatic and functional era. Thus, the legal justifications for deference, to the extent they rely heavily on implied legislative intent, have a weak foundation. This does not mean that contextual factors can never be a signal of legislative intent. Of course, standard statutory interpretation demands that a privative clause, right of appeal or even a clear statement on standard of review is a clause that must be read and properly understood in its full context. However, to have a strong legal foundation, the legal justifications for deference must have a clearer relationship with expressions of legislative intent on standard of review such as privative clauses or rights of appeal. Such clauses may be read in context, but they may not be read "away" entirely or ignored as "unclear" in favour of heavy practical justifications and presumptions.

Evolution of the Court's approach away from legislative intent

As described above, in the pragmatic and functional era the courts began to weigh "contextual factors" or implied legislative intent so heavily that these practical justifications could overcome express legislative intent in the form of privative clauses and rights of appeal. After *Pezim*, the Supreme Court privileged implied legislative intent over express legislative intent.[223] This approach allowed the courts to "assume the role of the legislature to determine when deference is or is not owed."[224] After *Dunsmuir*, the Court adopted increasingly presumptive deference and the focus shifted to what types of legislative features could rebut the presumption.

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[223] *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 87.
[224] *Ibid* at para 91.

By adopting a presumption of deference, *Dunsmuir* initiated a shift away from legislative intent as a justification for deference based either on contextual factors or on express legislative indicia such as privative clauses or rights of appeal. Instead, the Court's rhetoric increasingly spoke of presumptive legislative intent, which had to be overcome. Initially *Dunsmuir* asserted a presumption of reasonableness with specific categories of exceptions, but created a tension by suggesting that a contextual standard of review analysis (using both express and implied legislative intent) could still be applied.

The foundations of presumptive deference rest almost entirely on pragmatic justifications rather than context or legislative intent. The Court battled over this issue shortly after *Dunsmuir*, where the majority of the Court held that no "statutory direction" was required to support deference.[225] Instead, the fact that "a particular decision had been allocated to an administrative decision-maker" was sufficient to ground deference on facts, policy and law because "in many instances" administrators develop considerable expertise or field sensitivity to a legislative regime."[226] In strong dissenting reasons, Justice Rothstein argued that expertise (even where present) was not a free-standing basis for according deference.[227] Rather, Justice Rothstein reasoned that the legislature was in a better position than the courts to determine expertise and that the legislature could signal its intent to accord deference for this reason or others using a privative clause.[228] Justice Rothstein changed his position entirely, shortly after *Khosa*, as author of the majority

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[225] *Ibid* at para 25.
[226] *Canada (Citizenship and Immigration) v Khosa*, *supra* note 223 per McLaughlin CJ at para 25, *Dunsmuir v New Brunswick*, *supra* note 57 at para 49.
[227] *Ibid* per Rothstein J at para 84.
[228] *Ibid* at paras 94-95.

decision in *Alberta Teachers*, where he adopted the view that it was no longer necessary to consider whether an administrative regime was specialized or whether an administrator had expertise, noting:

> Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter.[229]

The result was a presumption of reasonableness for all administrators operating under their "home statutes", whereby the home statute became a proxy for specialization and expertise. No contextual inquiry into the presence of expertise or specialization was necessary. Specialization and expertise were instead presumed as general justifications for the presumption of deference in *Dunsmuir*.

Justice Binnie's reasons in *Alberta Teachers* raised the concern that there was no contextual (or legislative intent) element to these justifications. He suggested that it did not make sense to employ this assumption of expertise and specialization outside "the context of elaborate statutory schemes such as labour relations legislation" in which it arose, where there was typically both specialization and privative clauses supporting implied and express legislative intent. He objected to the use of the presumption for all questions of law for all administrators under their "home statutes."[230] Justice Binnie does not seem to complete this analysis, however, and ultimately appears to accept the presumption, suggesting only that such a presumption could be rebutted where a legal question was outside the administrator's expertise and was of general

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[229] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, *supra* note 92 at para 1 (emphasis added).
[230] *Ibid* at para 82.

importance.[231] He also supported broadening the categories of questions of general legal importance.[232] In justifying this position, Justice Binnie cited a passage from the Supreme Court's 2011 decision in *Mowat*, stating that where the expertise of the administrator is not required to interpret a statute, "the last word on questions of general law should be left to judges."[233]

In a separate concurring judgment in *Alberta Teachers*, Justice Cromwell argued that the contextual approach continued to apply because it was fundamental to ensuring that the legislature intended deference on questions of law. First, Justice Cromwell asserted that "[t]he touchstone of judicial review is legislative intent" and that the primary question is not whether an exception in *Dunsmuir* applies but "whether the legislature intended that a particular question [of law] be left to the tribunal or to the courts."[234] Justice Cromwell explained that the contextual factors apply to determine this, asserting that expertise within the "home statute" is one of the factors.[235] He cautioned against "elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its "home" statute will not often raise a jurisdictional question."[236] He argued that the legislature intends the courts to accord deference where there is

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[231] *Ibid* at para 83. The Supreme Court would later adopt, and still uses the "outside expertise and of central importance to the legal system" exception to the presumption of deference for example see *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 17 in which the majority held, without any explanation, that parliamentary privilege fit this category with respect to labour arbitrators. Also see dissent at para 86.

[232] *Ibid* at para 84.

[233] *Ibid* at para 85, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2011] SCR 471 at para 128.

[234] *Ibid* at para 96.

[235] *Ibid* at paras 97-98.

[236] *Ibid* at 92

a broadly worded statutory provision in a complex statutory scheme.[237] Yet Justice Cromwell does not provide principled reasons why the presumption of expertise applies to all administrators operating under their home statutes in the first place, or why it should be rebutted by examining the breadth of the provision. It remains unclear how the other contextual factors could apply to rebut the presumption of deference, if at all.

The upshot of the success of the majority position in *Alberta Teachers* was that, after *Alberta Teachers*, the tension between presumptive reasonableness with categorical exceptions, on the one hand, and the continued application of the contextual analysis that permitted a role for legislative intent, on the other hand, was resolved strongly against a continuing role for any form of analysis of legislative intent to explain deference. Legislative intent instead played a very limited role in explaining whether the presumption of deference was rebutted. Questions of rebuttal focus more on judicial policy than they do on legislative intent.

However, the contextual approach did not disappear completely, creating considerable confusion. The Supreme Court would still in some cases purport to make an inquiry into whether the question of law resides within the core of an administrator's expertise.[238] On some occasions, legislative intent to accord deference would remain relevant where there is a right of appeal.[239] For example, in *Tervita*, Justice Rothstein held for the majority that a right of appeal or leave to appeal can rebut the presumption of reasonableness under *Dunsmuir*.[240] In concurring reasons,

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[237] *Ibid*
[238] *McLean v British Columbia (Securities Commission)*, [2013] 3 SCR 895 at para 33; *Groia v Law Society of Upper Canada*, 2018 SCC 27, paras 51-52, 214.
[239] *Tervita Corp v Canada (Commissioner of Competition)*, [2015] 1 SCR 161.
[240] *Ibid* per Rothstein J at paras 34-40.

Justice Abella disagreed.[241] The issue arose again in 2016 in *Edmonton East (Capilano) Shopping Centres*.[242] In that case, while the Supreme Court acknowledged the possibility of strong statutory language rebutting the presumption of reasonableness, the Court found it was narrowly confined to "unique" rights of appeal.[243] The majority held that the right of appeal in that case was not sufficient to overcome the presumption of reasonableness. The majority left the door open to contextual analysis into legislative intent, while at the same time disparaging it as generating "uncertainty and endless litigation concerning the standard of review."[244] In a strong dissent, Justices McLachlin, Moldaver, Côté and Brown held that the standard of review was correctness.[245] They resurrected to some extent the debate between the majority and Justice Rothstein in *Khosa* by asserting that the legislature "has a role to play in designating and delimiting the presumed expertise" of an administrator. They raised a concern that the majority's approach simply presumed expertise was present and that this approach risked transforming the presumption of deference into "an irrebuttable rule." The dissenting justices noted that "[r]espect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker".[246] In an unusual move, the dissenting justices also found that the Board had a "lack of relative expertise in interpreting the law." They advocated that the existence of a statutory right of appeal "in combination with other factors" can rebut

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[241] *Ibid* per Abella J concurring in the result but differing on this issue at paras 169-180.
[242] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, *supra* note 92 per Karakatsanis J at paras 22-35.
[243] *Ibid* at para 31.
[244] *Ibid* at para 34.
[245] *Ibid* at para 63.
[246] *Ibid* at para 85.

reasonableness and require correctness.[247] However the dissent in *East Capilano* provides no methodology to rebut a presumption of expertise. Instead, it largely draws bald conclusions that "statutory interpretation does not fall within the specialized expertise of the Board, since its day-to-day work focuses on complex matters of valuation of property." Unable to clearly articulate how they know whether the Board is an expert in statutory interpretation, the dissenting justices fall back on calling it a "jurisdictional question" without further elaboration.[248]

Increasingly, the debate at the Supreme Court has tended towards a majority that seriously questions whether the presumption of reasonableness can ever be rebutted, and a minority that advocates a "we know it when we see it" exception that ranges from being cast as jurisdictional to being cast as an "outside expertise" and a question of central importance to the legal system as a whole. Both the majority and the minority versions are problematic. The majority approach fails to address legislative intent in any meaningful way and effectively deprives the legislature of any reliable means to point to correctness. The minority, while asserting that rebuttal based on legislative intent must remain possible, consistently fails to articulate any statutory interpretation methodology to rebut the presumption, identify the scope or application of expertise, or identify expressions of legislative intent for correctness.

Both approaches are ultimately devoid of clear, principled articulations for why reasonableness is presumed.[249] If either legislative intent or practical justifications, such as expertise, are central

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[247] *Ibid* at para 73.
[248] *Ibid*.
[249] Many commentators have made this complaint in recent years, most clearly articulated by Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27.

to the rationale for the presumption, then they must be key to any method of rebuttal. The current doctrinal approach largely displaces the role of either legislative intent or practical justifications in the rebuttal of reasonableness. Moreover, the conflict between various iterations of minorities and majorities at the Supreme Court exposes the problem of heavy reliance on presumed practical justifications and the sidelining of legislative intent.

In arguing that legislative intent is central to deference, Daly has asserted that "the practical justifications for deference all contain flaws."[250] Specifically, he notes that expertise and complexity are not reliable indicators of whether deference is warranted. He argues that, if these justifications were not linked to legislative intent to accord deference, then "courts would have to address these potential flaws on a case-by-case basis", an exercise that is impractical and outside the range of tasks for which judges are expert.[251] The problem with this argument is that there are limits on how a practical justification, which may have nothing to do with legislative intent, can nevertheless remain "linked" to it. For example, if expertise is not signalled through a privative clause, as Justice Rothstein argued for in *Khosa*, then it is likely going to be free-standing and requires a contextual case-by-case analysis. It is unclear how else the legislature can reliably signal expertise, except perhaps by requiring specific qualifications or tenure for administrators. Unless expertise is only relied on in these narrow situations where there is a clear link to legislative intent, it will become free-standing and must be addressed in each case. The Supreme Court's approach of treating expertise as both a presumptive factor and a free-standing basis for

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[250] Daly, *supra* note 111 at 133–134.
[251] *Ibid*.

deference simply cannot be sustained. The limited and methodologically ambiguous "escape" category of correctness for matters which are outside expertise and of central importance of the legal system is too unclear and unprincipled to address this problem. It fails to permit an explanation of why questions that are outside the expertise of the administrator should in some cases be accorded deference, but not other questions. Nor does it address the methodological problem of identifying the scope of the administrator's expertise relative to the question before it.

As Dyzenhaus recognized, the Court must ultimately choose whether in justifying deference from a principled perspective the Court is relying on legislative intent or whether, alternatively, it is relying on free-standing practical justifications for deference. If it is the latter, then the Court requires a methodology for determining what expertise is and when it is relevant to a question of law. The Court's approach has continued to conflate the presence of practical justifications with the presence of legislative intent. By rendering the practical justifications presumptive rather than contextual, they are no longer plausibly connected to legislative intent. The presumption of deference has become so strong, and the exceptions to it so limited, that neither legislative intent nor the pragmatic justifications can explain why courts should show deference. Current doctrines would accord deference where neither a privative clause nor any indicia of expertise, complexity or specialization are actually present. The Court has never explained why all administrators can be assumed to have expertise in questions of law relative to the courts, such that their statutory interpretations should be left to stand where judges disagree. Further, even if administrators have such expertise, the Court has failed to explain why expertise should be a "free standing"

justification for deference, in the face of signals that the legislature might have intended otherwise.

Summary

Having criticized the Supreme Court's current approach to deference doctrine, I do not advocate a retreat to a contextual approach to expertise. The arguments that expertise is too difficult to determine on a case-by-case basis are compelling. Clear legislative indicia on expertise are probably limited to statutory qualification requirements for administrators or perhaps indicia of independence such as security of tenure. Relying on these factors alone would serve as a potentially under-inclusive inquiry into potential administrative expertise. Yet other "contextual" approaches rely heavily on speculation and conclusory pronouncements. The same difficulties arise regardless of whether the inquiry into expertise occurs as part of the identification of reasonableness or in rebutting expertise as part of a rebuttal of the presumption of reasonableness.

On the other hand, a purely presumptive approach to expertise – as a primary justification for the presumption of reasonableness – is unacceptable. For the reasons explained in my critique of the practical justifications for deference, there is no good reason to assume that administrative decision-making is, as a rule, an exercise that turns on the objective and rational application of specialized policy or technical expertise. Rather, the evidence suggests that such decisions may be just as likely driven by budgets, political interference, satisficing and other factors.

In practical terms, this can lead to the undermining of legislative objectives. Where an administrator is interpreting and applying the law, in other words legislative policy, deference based in expertise assumes that the administrator is "best fitted" to understand that legislative

policy. Deference therefore strongly discourages courts from engaging in meaningful analysis of what the underlying legislative policy objectives of discretion might be. It also discourages courts from engaging with the alignment between the policy outcomes of administrative decision-making and legislative objectives. This can apply even where an administrator makes little or no effort to interpret the statute, but simply pursues policy outcomes the administrator thinks are best for other reasons.

For example, in *Vavilov* the Supreme Court recently heard a case where a decision to deny citizenship to the son of Russian spies born in Canada was made, and a very limited effort was made, entirely after-the-fact, to conduct an outsourced statutory interpretation analysis afterwards to explain the decision. The Federal Court questioned the expertise of the decision-maker on questions of law and applied a correctness standard.[252] However at the Federal Court of Appeal, expertise was not discussed and seems to be accepted. The Federal Court of Appeal presumed reasonableness, but the majority applied a very narrow form of reasonableness approaching correctness.[253] In dissent, Justice Gleason held that the statutory scheme left it open to the decision maker to adopt the interpretation it did, as well as other interpretations.[254] Despite a lack of discussion of expertise on questions of law, the key difference between the majority and the dissent that emerges in that case at the Court of Appeal is the extent to which they engaged with statutory purpose and text in applying reasonableness. Justice Gleason engaged in a standard reasonableness analysis which stopped well short of assessing what sort of outcomes

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[252] *Vavilov v Canada (Citizenship and Immigration)*, [2016] 2 FCR 39, 2015 FC 960 at para 16.
[253] *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 per Stratas JA at paras 36-38.
[254] *Ibid* per Gleason JA at paras 92-103.

the legislature might have intended, leaving it open to the administrator to grant Canadian citizenship for the son of one Russian spy, but not for another. Put another way, the dissent trusted the presumed expertise of the administrator on the question of law while the majority did not.

The problem currently before the Supreme Court in *Vavilov* illustrates the problem of potentially allowing administrators to make essentially political or extraneous policy determinations – for example about the merits of discouraging Russian spies – implicitly or explicitly because statutory language is not crystal clear and the administrator is the expert in the statute. It is ultimately reasonableness doctrine, not the statute itself, or any clear legislative direction, that establishes that these determinations are a permissible part of decision-making. Applying reasonableness in the way currently advocated by the majority of the Supreme Court strongly discourages closing gaps in the statute through standard interpretive mechanisms, or emphasizing statutory purpose and intended legislative outcomes. The result is a potentially very wide discretion granted on even narrow issues of legislative policy implementation.

Given that reasonableness doctrine rests so heavily on expertise, the potential absence of any such expertise – or at the very least the lack of a commitment to applying it to questions of law– creates serious problems: First, the outcome of decisions may be the opposite of what the legislature intended in terms of policy outcomes (ie. who should or should not have a right to Citizenship) as these are not given serious treatment; second, it can become practically impossible for the legislature to grant any discretion, or permit any ambiguity of flexibility in statutes without potentially undermining its own objectives; third, the lack of accountability to either expertise within reasonableness or the statute's wording and purpose can create serious

inequality between those subject to administrative discretion, allowing opposite outcomes on similar facts to be reasonable.

Similar problems arise under risk management regimes. Administrators making risk management decisions may have before them issues that are predominantly scientific or factual with a narrowly framed standard to meet[255] – or they may have discretion to make complex policy decisions on risk, constrained primarily by general legislative purposes.[256] Presumed expertise as a justification for deference provides little or no room for meaningful accountability on factual findings, nor for judicial scrutiny of whether legislative objectives are advanced by particular decisions. Applicants have no clear method of addressing the use or non-use of expertise on either facts or legislative policy issues to rebut the presumption, or demonstrate unreasonableness.[257]

An alternative solution is to retreat from expertise as a practical justification for deference on questions of law.[258] The reliance on the expertise of administrators on questions of law is an

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[255] A potential example can be found in the *Pest Control Products Act*, SC 2002 c 28, s.2(2).

[256] See for example the purpose provisions to "promote sustainable development in order to maintain a healthy environment and a healthy economy" and to "avoid significant adverse environmental effects" etc. in *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s.4, combined with broad decision-making provisions in s.52.

[257] The Federal Court of Appeal decision in *Greenpeace Canada v Canada (Attorney General)*, 2016 FCA 114 is an example where neither the language of the provisions nor the purpose of the statute are discussed in any detail in assessing reasonableness. Further, the Court of Appeal refused to review the facts or reasoning of the administrator beyond the procedural merits of the decision, relying heavily on presumptive expertise.

[258] Such a solution was recently proposed by David Jutras and Audrey Boctor in their *amicus* factum before the Supreme Court of Canada in *Vavilov v Attorney General (Canada*). However, I do not advocate their solution which is to replace presumed expertise with presumed institutional competence, which would amount to the same result.

over-correction and over-reaction to historical judicial limitations in applying legislative purpose in the labour law context. The advantages of judicial statutory interpretation have merit and deserve to be given additional weight. As will be shown below, these arguments are augmented if one digs deeper into what it means to show deference on questions of law through the application of a reasonableness standard.

In so far as the Supreme Court now pays lip service to legislative intent, while effectively ignoring most rights of appeal and privative clauses (or even contextual factors addressing implied intent), the Court lacks a clear legal justification for deference. The central justification is presumptive expertise, which cannot in practice be rebutted by any known method. Thus, the pragmatic justifications for deference are a shadow of their former role as implied indicia of legislative intent. They now persist largely as a background philosophical stance about the role of the administrative state relative to courts. Such heavy reliance on practical justifications such as expertise and complexity are problematic. The lack of contextualization in current doctrines of deference at the Supreme Court of Canada exacerbates those problems.

As I discuss below, the lack of clear principled justifications for deference on questions of law considerably complicates the application of the reasonableness standard to questions of law. In particular, the heavy reliance on a background assumption of expertise and specialization in all administrators, as well as the assertion that all questions of law have malleable meanings or potential outcomes, serves to frustrate a robust understanding of how the courts should determine whether a decision is reasonable. Ultimately, I argue below that judicial statutory interpretation must play a clear and legitimate role in even deferential review.

Part 3 - the role of statutory ambiguity in justifying and defining reasonableness

There are numerous conceptual, doctrinal and practical problems with the application of the Court's post-*Dunsmuir* jurisprudence on the standard of review.[259] My focus in this section is on doctrinal problems in applying reasonableness to questions of law. These problems flow from the legal and pragmatic assumptions used to justify deference. First, the legal justifications for deference, namely the court's approach to legislative intent, creates methodological problems in applying deference that lead to a presumption that public law statutes are ambiguous. Second, the practical justifications for deference, such as expertise, risk being used as a full answer to the question of whether an administrative decision is reasonable. Third, the justifications for deference taken together can result in rationality being equated with reasonableness, unbounded by the statutory context in which discretion is granted and untethered from the factual record before the decision-maker.

The presumption of statutory ambiguity

The ambiguity of a statutory provision has since *CUPE* been held to be an indicia that the legislature intended deference. Ambiguity is taken as a signal that the legislature delegated policy questions to the administrator and that the legislature intended the administrator, not the

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[259] Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38 Queen's LJ 59; Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review Case Comment" (2012) 58 McGill LJ 483; Gruber, *supra* note 56; Hilary Evans Cameron, "Substantial Deference and Tribunal Expertise Post-Dunsmuir: A New Approach to Reasonableness Review" (2014) 27 Can J Admin L & Prac 1; Lauren J Wihak, "Wither the correctness standard of review? Dunsmuir, six years later" (2014) 27 Can J Admin L & Prac 173; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action - The Top Fifteen" (2013) 42 Advocates' Q 1; David Stratas, *supra* note 249; Nicholas McHaffie, *Through the looking glass, recent cases on standard of review* (Toronto: Law Society of Upper Canada, 2016); Nicholas McHaffie, *A Rose By Any Other Name: Recent Cases on the Standard of Review* (Toronto: Law Society of Upper Canada, 2015).

courts, to decide those policy questions.[260] Broadly worded provisions or explicit policy questions are said to confirm that reasonableness is the proper standard. In *Dunsmuir* the majority held that reasonableness entails the idea that "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported."[261] In *Khosa* this concept of multiple interpretations or statutory ambiguity was further relied upon to explain presumptive deference.[262] This reliance raises the question of what method the Court employs to determine that the statute "might" be ambiguous. As with the other contextual factors discussed above, while initially framed as a contextual factor leading to a finding of legislative intent for the courts to accord deference, the existence of statutory ambiguity as a contextual factor is now largely presumptive.

For example, in *McLean* the majority of the Supreme Court linked deference to "the resolution of unclear language" in the home statute. The majority reasoned that "the choice between multiple reasonable interpretations will often involve policy considerations." The existence of these "policy considerations" then supports a presumption that there is legislative intent to accord deference. The administrator is also said by the majority to have "expertise" in those policy considerations.[263] This analysis harkens back to John Willis' view that administrators are better

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[260] *C.U.P.E. v N.B. Liquor Corporation, supra* note 57.
[261] *Dunsmuir v New Brunswick, supra* note 57 at para 41 (emphasis added).
[262] *Canada (Citizenship and Immigration) v Khosa, supra* note 223 at para 25.
[263] *Ibid* at para 33.

positioned to give a purposive analysis that interprets statutes in alignment with legislative intent on questions of policy.

Yet the Supreme Court does not appear to have a consistent methodology for determining when a statutory provision is "ambiguous" in administrative law. In most cases, the Supreme Court starts by doing its own statutory interpretation and then determining whether that statutory interpretation leads to the conclusion that the statute permits multiple reasonable interpretations. If it does not, then there is no meaningful difference between reasonableness and correctness on questions of law. Yet the method the court should employ for reaching a conclusion on ambiguity is difficult to determine from the existing jurisprudence.[264]

In *McLean*, the Supreme Court explained that the first step in applying reasonableness is to determine whether the statute "permits of multiple reasonable interpretations" using "ordinary tools of statutory interpretation."[265] If multiple reasonable interpretations are permitted, then the administrative decision-maker "holds the interpretive upper hand" and deference requires that the court "defer to *any* reasonable interpretation adopted by the administrative decision-maker."[266] The Court goes so far as to opine that "[j]udicial deference in such instances is itself a principle of modern statutory interpretation."[267]

However, the Supreme Court's approach to statutory interpretation in administrative decisions diverges significantly from that used in other contexts. In its leading case on statutory

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[264] Daly, *supra* note 147.
[265] *McLean v British Columbia (Securities Commission)*, *supra* note 238 at para 38 [emphasis added].
[266] *Ibid* at 40.
[267] *Ibid* at paras 38–40.

interpretation, the Court held in *Bell ExpressVu* that it was a legal error to start from a belief that there is statutory ambiguity.[268] The Court asserted that there "is only one principle or approach" to statutory interpretation.[269] In that case, the Court held that the broader context of the provision and a full understanding of the intentions expressed in the statute must be considered before a Court determines that a statute is "reasonably capable of more than one meaning."[270] Where that is the case, then the next step is for the Court to resort to external interpretive aids, including other principles of statutory interpretation to resolve the ambiguity.[271] Crucially, the Court held that ambiguity cannot reside in the mere fact that different courts or doctrinal writers have reached different conclusions on interpretation.

The Supreme Court in *McLean* fails to explain why the Court should start by using ordinary rules of statutory interpretation, but then stop short of resolving (or attempting to resolve) any ambiguities using the same rules to apply deference. It is also not clear at what point a court should stop in its statutory interpretation analysis. Does it stop before the use of interpretive aids or after? The Supreme Court does not address how it is that it will determine if a statutory provision is so ambiguous that it cannot have a single meaning. More importantly, the approach of starting with statutory interpretation appears to contradict the purpose of according deference, to the extent that deference is accorded in light of the administrator's supposed advantage, using expertise, to understand the meaning of technical terms and legislative intent in context. It is clear that the Court's approach in *McLean* would have the Court do its own inquiry into

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[268] *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, 2002 SCC 42 at paras 25, 30.
[269] *Ibid* at para 26.
[270] *Ibid* at para 29.
[271] *Ibid* at para 30.

legislative intent. Once such an inquiry is deemed necessary, it becomes unclear why deference based on expertise would then be granted at some later point in the statutory interpretation analysis. Fundamentally, the issue is whether the Court can trust the administrator on these broader contextual and policy questions of interpretation.

A variation on this approach was used in *Mowat*.[272] However, in that case the Supreme Court did explain how administrative expertise in the statute was employed in the analysis. In the case, a human rights commission determined that it had the authority to award costs under its home statute. Although it did not explicitly use the method later set out in *McLean*, the Supreme Court started in *Mowat* by conducting a *de novo* statutory interpretation exercise and then determining whether the commission's interpretation fell within this exercise.[273] Regarding the commission's interpretation, although the commission decided that it had costs authority in the case at hand, the Court held that the commission had consistently expressed the view that its statute had no authority to award costs and had repeatedly asked that the statute be amended to include costs authority.[274] Based on its statutory interpretation exercise, the Court held that the commission's interpretation was relevant to judicial statutory interpretation, but not determinative.[275] It held that there was only one reasonable interpretation of the statute and that the commission's determination that there was authority to award costs was unreasonable.[276] The approach in *Mowat* is also used in *Wilson v. BC*, where Justice Moldaver concluded that the scope of

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[272] *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, *supra* note 233; also see discussion in Daly, *supra* note 147.
[273] *Ibid* at paras 35-52, 57-64.
[274] *Ibid* at paras 53-56.
[275] *Ibid* at para 53.
[276] *Ibid* at para 64.

permissible interpretation would be determined using Driedger's rule, in that case finding that the adjudicator's interpretation of the Act was reasonable and was the only reasonable interpretation.[277] The Court in *Mowat* held that it was improper for the commission to interpret the statute consistent with what it considered to be "a beneficial policy outcome" rather than in a manner that was most consistent with the intent of the legislature (i.e. judicial canons of interpretation). In this approach, the Court still starts with statutory interpretation (as in *McLean*). Yet in *Mowat,* unlike in *McLean* the Court does not ask "is the statute ambiguous" and then proceed to determine if the administrator's interpretation fits within the permitted area of ambiguity. Instead, the Court incorporates the administrator's interpretation *into* its judicial exercise in statutory interpretation. The administrator's view of the statute is given weight, but is not determinative. This contrasts with the approach in *McLean* to the extent that, once a "space" of ambiguity is found, the administrator's view of the statute is determinative, so long as it resides within that space.

The approach in *Mowat* appears to provide very little deference to the policy expertise of the administrator in interpreting its statute. The court's reluctance to place a "beneficial policy outcome" determination above what the legislature intended results in a need for judges to independently assess legislative intent and then measure this assessment against the administrator's interpretation. Where the policy preferred by the administrator conflicts with the legal reasoning around legislative intent, the latter prevails. This sequencing begs the question of why to bother giving purported deference to administrators on questions of law at all. If

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[277] McHaffie, *supra* note 259 at 55; *Wilson v British Columbia (Superintendent of Motor Vehicles)*, [2015] 3 SCR 300 at paras 18–22.

administrators cannot be trusted to pursue outcomes that are consistent with legislative intent, then surely courts must intervene by interpreting statutes themselves. Even so, *Mowat* is attractive in that it purports to promote a method that would at least consider the policy rationale of the administrator as part of a judicial statutory interpretation analysis. In *Mowat*, the Court tries to consider the administrator's interpretation as part of the overall context of the enactment. This seems to balance judicial rationality more precisely against respect for the policy expertise of the administrator, including expertise in the statute. However, in the end, the Court rejects that pure policy considerations are within the administrator's purview where they conflict with the usual canons of statutory interpretation. Ultimately, the result is the same. Judicial statutory interpretation defines the space within which administrators can address questions of policy. If there is no space, there is no actual deference on questions of law.

Similarly, the *McLean* approach starts by ignoring the administrator's interpretation altogether. It then permits the administrator a choice between interpretations that the Court deems to be reasonable using its own analysis, or perhaps no choice.[278] While this approach respects the application of consistent canons of statutory interpretation, it shows a lack of respect for the administrator's presumed expertise in understanding statutory purpose. As a result it begs the question of why it is necessary to show deference and, more specifically, what policy advantage, if any, deference provides administrators in the arena of statutory interpretation.

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[278] For another take on this see Daly, *supra* note 147.

The alternate approach, of starting with the administrator's analysis and then gauging reasonableness, is equally problematic.[279] First, many administrators provide no analysis related to the meaning of a statute, and a forensic exercise to try to understand what the statutory interpretation analysis might have been can be very artificial.[280] Further, even where an administrator does provide enough analysis of a statute's meaning, which a court can use as a starting point for its own analysis, the administrator is unlikely to employ the same statutory interpretation techniques as the court would use. Thus it is unclear what methods a court should use to assess whether the administrator's interpretation is reasonable. The Supreme Court has suggested that other methods might still lead to reasonable conclusions, but it remains unclear what those other methods are and how they can be assessed. One might argue that the Court should take the administrator's interpretation on its face and assess only whether it is "rationally supported" by a justification that may have nothing to do with judicial canons of interpretation, in other words an "administrative" rationality as an alternative to judicial rationality.[281] However, if that were done, it is unclear what kind of "rational support" would be permissible, and with what method a court could assess it. As I have argued above, this model can easily slip into a substantively empty review that ensures no accountability to either substantive legislative objectives or expertise. If the Court were to employ some kind of "other" method of statutory interpretation, what would it be and what would its justification be in public law, in contrast to other contexts where the usual canons of statutory interpretation would apply?

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[279] *Ibid*.
[280] Take for example the Supreme Court's analysis of the Minister's reasoning on "national interest" in *Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559.
[281] Daly, *supra* note 147.

To a large extent, the Supreme Court has attempted to address this dilemma by noting that administrative rationality is assessed against both the reasoning and the "outcome." The reference to outcome presumably imports some degree of substantive analysis, but what methods the Court is using to assess a reasonable "outcome" is not apparent. To date, most of the substantive analysis has turned on an interpretation of legislative purpose. Absent a detailed inquiry into the question of legislative purpose, there is little against which a court could assess the reasonableness of the outcome without resort to a pure policy analysis. Again, once the court is looking in detail at legislative purpose, a fundamental advantage that is supposed to be provided by deference is lost: that of allowing the administrator, rather than a court, to engage in the policy balancing.[282]

Crucially, it remains unclear what should happen if a court disagrees with the purposive analysis of the administrator about the policy underlying the statute. In other words, the fundamental labour arbitration question underlying *CUPE* returns. Should the court assume that the expertise of the administrator in the policy behind the statute should rule the day or not?

By employing *de novo* interpretation, including in the purpose of the statute, the Court implicitly overrides the administrative expertise that underpins the rationale for deference in the first place. At a further level, it remains unclear whether courts should follow the same approach in non-administrative law cases, and presume that statutes are not ambiguous and attempt to resolve any ambiguities. If the Court should not attempt to resolve ambiguities, this raises the question of at when they should stop attempting this. The Court fails to explain why it should use a different

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[282] Daly, *supra* note 147.

statutory interpretation method in administrative law cases. It also remains unclear whether statutes in administrative law will tend to be found to have broad ambiguity, therefore permitting multiple reasonable interpretations, or whether they will usually be found to be unambiguous.

In the Court's decision in *Wilson v Atomic Energy*, Justice Abella seems to argue against the principle in *Bell ExpressVu* and employs a presumption to circumvent these problems. She opines that in administrative law statutory ambiguity is the norm, not the exception, stating that "[e]ven in statutory interpretation, the interpretive exercise will usually attract a wide range of reasonable outcomes."[283] This position suggests that if the Court is to start with a statutory interpretation exercise it should "usually" stop well short of resolving any ambiguity. It begs the question of whether the Court should engage in statutory analysis at all, and if so, how much.

While the tools of statutory interpretation are not an exact science, they are arguably directed at finding the best interpretation, which we then refer to in administrative law as the "correct" interpretation.[284] They are, if imperfect, at least a consistent set of tools and principles to guide interpretation. The Supreme Court's approach since *McLean* asserts that, in employing these tools, a court may in some cases be unable to find a single interpretation that is correct,[285] but that in some cases it will be possible.[286] This is a very surprising conclusion. The Court gives little doctrinal justification for why the tools of statutory interpretation work to provide legal

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[283] *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 34 [emphasis added].
[284] Best in light of the ordinary meaning and statutory purpose and context.
[285] *Wilson v Atomic Energy of Canada Ltd.*, *supra* note 283.
[286] For example in *Wilson v British Columbia (Superintendent of Motor Vehicles)*, *supra* note 277; *Agraira v Canada (Public Safety and Emergency Preparedness)*, *supra* note 280.

finality and certainty about legislative intent in private law but not public law, and in the latter realm only some of the time.

Standard tools of statutory interpretation usually allow a court to find a clear expression of legislative intent on questions of policy (i.e. resolve the meaning of a statutory provision) where there is no administrative decision-maker in first instance. If the Court is capable of doing so, then a clear justification is required to refrain from doing so only where there is an administrative decision-maker in first instance. The decision-maker in the first instance should be irrelevant to whether a statute is ambiguous.[287] The same public law statute may come before the Court via a tribunal or an administrator or through a private action. *Bell ExpressVu* for example dealt with legislation that the Canadian Radio and Telecommunications Commission regularly interprets in the first instance and regarding which the CRTC would normally be afforded deference. Another good example is the Supreme Court's recent decision in *Ewert*, in which the statute came before the Court in an action for Charter damages and was interpreted on a standard of correctness, without any standard of review analysis, whereas the same issue would have been subject to reasonableness on judicial review if no Charter damages were claimed.[288] Thus, because public law statutes may have both administrative and non-administrative dimensions, it is significant that there could be different rules for interpreting different parts of the same statute, or even the same part of the statute in different contexts. It is not compelling to simply respond that the concept of deference to administrative decision-makers, writ large, justifies this approach to

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[287] McHaffie, *supra* note 259 at 44–50.

[288] *Ewert v Canada*, 2018 SCC 30 Côté and Rowe JJ dissenting at para 127.

statutory interpretation. This question goes to the issue of whether deference is justified on questions of law in the first place. Traditional justifications for deference are premised on the administrator being able to reach a "better" or truer or more accurate interpretation than a Court. The concept of statutory ambiguity undermines this to some extent by divorcing the administrative interpretation from legislative intent and accepting the possibility of multiple reasonable interpretations of the statute that are all equally open to the administrator. Each interpretation is equal and the choice between them begins to seem worse in that it has a great potential for arbitrariness. In this scenario it becomes unclear why a Court choosing one of the reasonable interpretations based on an attempt to determine legislative intent is inferior to the administrator choosing one of the reasonable interpretations.

The Supreme Court's decisions demonstrate that it is at best highly unpredictable whether a statute will be said to be ambiguous. For example, in *Agraira* the Supreme Court held that the term "national interest" was not ambiguous and had only one reasonable meaning when read in its statutory context. The Court held that it must defer to the Minister's implicit interpretation of what is in the national interest on the particular facts, but the Minister's implicit interpretation accorded with ordinary rules of statutory interpretation.[289] As a result, the Court avoided finding that the statute was ambiguous, since the Court was able to discern a specific meaning for

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[289] *Agraira v Canada (Public Safety and Emergency Preparedness), supra* note 280 at paras 63-64. It was certainly debatable in *Agraira* whether the Minister's non-existent interpretation of that provision accorded with the Supreme Court's application of the rules of statutory interpretation, in which the Court held that factors other than national security must be considered. The Court curiously held that the Minister's implicit interpretation did consider other factors, though the Minister himself had argued otherwise before the Court.

"national interest".[290] However, in the same year, the Court found in *McLean* that another statute was ambiguous and allowed for multiple reasonable interpretations. This finding was key to the application of reasonableness. *McLean* concerned the meaning of "the events" in the limitation provisions of securities legislation. The Court found that the statute was ambiguous and that both the appellant's and the Securities Commission's interpretations were reasonable *and* consistent with the outcome reached through ordinary tools of statutory interpretation.[291] Thus, the Court's approach to determining when a statute is ambiguous was somewhat unexpected; a broad, public interest-type provision regarding what was in the "national interest" (in *Agraira*) was found to be unambiguous but in *McLean* a narrow term in a limitation period – a provision whose very purpose was to give certainty to litigants – was ambiguous. The progression to the Court's majority position in *Wilson v. Atomic Energy*, where statutory ambiguity is considered the norm, suggests the presence of a difficulty in applying statutory interpretation methods to determine whether a statute is ambiguous. It follows that the use of statutory ambiguity is highly problematic, both to signal that reasonableness is the appropriate standard and, in the case of reasonableness review, to determine any margin of appreciation on questions of law.[292]

It is also important to question whether statutory ambiguity should be so central to according deference in the first place. According deference to an administrator in applying a statutory provision to a particular case does not necessitate that a statute is actually ambiguous. The Court's fixation on this issue has led to the problem which existed in *Wilson v Atomic Energy*. In

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[290] *Ibid* at 64 & 78.
[291] *McLean v British Columbia (Securities Commission)*, *supra* note 238 at paras 69-70.
[292] Daly, *supra* note 147.

that case, different arbitrators interpreted the same statute differently, with opposite results depending on the arbitrator. This inconsistency persisted for many years.

Having committed the deference doctrine to a framework dependent on finding statutory ambiguity in order to accord deference, neither the majority nor the dissent in *Wilson v Atomic Energy* were able to see their way out of the problem. For the majority, multiple possible interpretations were reasonable and, for deference to work, the inconsistency in arbitrator practice therefore had to be acceptable. The dissent could propose only to carve out a correctness exception for persistent inconsistency, rather than challenge the fundamental issue of deference to statutory interpretation writ large.[293]

More doctrinal problems in applying *Dunsmuir* were laid bare in *Wilson v. Atomic Energy*, which like *Dunsmuir* engaged the issue of dismissal without cause.[294] The Court failed to provide clarity, issuing a split decision with three sets of concurring reasons and one set of dissenting reasons. The Court was unable to agree on the standard of review analysis, even though reasonableness as the standard of review was not contested by the parties. The Court was also unable to agree on how to apply reasonableness. In dissent, Justices Moldaver, Côté and Brown rejected presumptively deferential review under *Dunsmuir* as inconsistent with the rule of law and, in particular, values of consistency and predictability. They give great weight to the disagreement among labour arbitrators on the appropriate interpretation of the provisions, noting that this inconsistency undermines the rationale for deference. They would have set aside the

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[293] *Wilson v Atomic Energy of Canada Ltd., supra* note 283
[294] *Ibid.*

arbitrator's decision. However, they largely tackle the issue not by fundamentally challenging the presumption of reasonableness or its application to statutory interpretation but by providing additional situations in which the presumption might be rebutted, namely persistent ambiguity.[295]

The dissent in *Wilson* is incredibly important because it attempts to look explicitly to the rationales for deference and the values underpinning the presumption of reasonableness and to articulate how these rationales and values apply in the case of labour arbitrators who disagree. The dissenting justices question the fairness to the parties of permitting different labour arbitrators to reach different conclusions on fundamental issues of employment policy. Such differences in opinion, according to the dissenting justices, undermine the expertise and other rationales for deference.[296] The dissent is alive to the doctrinal problem of how administrators can choose between different reasonable interpretations, noting that if expertise points in different directions, it isn't clear what the basis for deference is:

> To accord deference in these circumstances privileges 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.[297]

Despite this, the dissent only carves out a correctness exception to reasonableness for situations where a statute is unambiguous.[298] The rule of law value being promoted in the dissent is equality before the law but, for correctness to be available, the court must accept the premise that there is one "correct" way to interpret a statute which the court can intelligibly identify.

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[295] *Wilson v Atomic Energy of Canada Ltd., supra* note 283 paras 74–92.
[296] *Ibid* paras 84-89
[297] *Ibid* para 88.
[298] *Ibid* para 89.

Neither the majority nor the dissent comment on the appropriateness of allowing the administrator rather than a Court to settle on one of the multiple possible reasonable interpretations of a statute. If a court is ultimately going to determine, and capable of determining a single interpretation that is correct, why should deference be shown to consensus decisions of administrators that are incorrect but reasonable?

Once the door is opened, by acknowledging that courts are well positioned to resolve questions of statutory interpretation, there is no longer a strong rationale for granting deference for questions of statutory interpretation, whether administrators can agree amongst themselves or not. More importantly, the doctrinal explanation for why some statutory provisions can be understood by courts (and others are ambiguous and can be understood only by administrators) is left untouched. *Wilson v Atomic Energy* therefore exposes deeper flaws in the *Dunsmuir* approach of a presumption of deference on questions of law. The question of who is better at finding the best interpretation of the statute cannot be properly answered under this framework because *Dunsmuir* simply presumes the answer. Working within that framework, the justices in *Wilson v Atomic Energy* struggle to explain their conclusions.

How do courts determine if a statutory interpretation is reasonable?

As discussed above, there are two underlying assumptions about statutory interpretation in modern deferential review. The first is that the legislature intentionally creates statutory ambiguity so that no single correct meaning can be reached using standard canons of statutory interpretation. The second is that courts can use statutory interpretation to identify the scope of that ambiguity. I have questioned both of these assumptions. However, even if they are both fully

accepted, it would still leave the question of what methods are open to the administrator to determine the meaning of the statutory provision "reasonably".

We are left with the problem that, if the administrator uses tools of statutory interpretation, the administrator using an ambiguous statute will continue to get multiple possible answers. How does an administrator act reasonably to select one interpretation over the others? One possible response is that the administrator's expertise in the policy of the statute allows the administrator to select "a" reasonable interpretation. But the necessary implication is that there is some other method to interpret statutes – some sort of special "administrative rationality" – that can and should resolve any residual statutory ambiguity.

This thesis, that there is some method of administrative rationality, is difficult to support with any evidence. Even if it is assumed to exist, there is the remaining issue of why administrative rationality is preferred to judicial reasoning. Is it better able to *resolve* statutory ambiguity, therefore enhancing rule of law and equality before the law? Or does "administrative rationality" pave the way for proper delegation of policy decisions and, if so, is it because this form of rationality employs expertise? These questions are difficult to answer. For example, it could be argued that "a policy choice is only a policy choice if the choice is made between policies which are equally consistent with and supportable by the legislation."[299] In other words, it is unclear how much flexibility there is *within* administrative rationality.

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[299] *Caimaw v Paccar of Canada Ltd.*, [1989] 2 SCR 983, 1989 CanLII 49 (SCC) per Wilson J dissenting at 1020, 1026, also discussed in Dyzenhaus, *supra* note 70 at 293.

The majority in *McLean* asserts, not only that administrators are better positioned to interpret statutes in accordance with legislative intent on issues of policy, but also that there may be multiple reasonable interpretations of a statute, all equally aligned with legislative intent.[300] Because there is ambiguity, the administrator has discretion to adopt "any interpretation that the statutory language can reasonably bear."[301]

However, if we accept that there are not just multiple possible but also multiple *reasonable* interpretations of the statute, as the Court repeatedly asserts, then it becomes unclear how the administrator choses between multiple reasonable interpretations and why the selected interpretation has normative or legal legitimacy over the others. If they are all reasonable interpretations, then presumably relative expertise supports all of them. This vexing result is evident from the Court's willingness to defer to administrators who chose "any" reasonable interpretation, including opposite or conflicting ones. As Justice Côté points out in her dissent in *Wilson*, it is unclear why the court defers to one expert over the other in that case.[302] Put another way, if expertise does not lead to the single best interpretation of a statutory provision, but only to one of multiple reasonable interpretations (all equally valid), then why is the chosen interpretation worthy of deference and why is expertise useful? The purpose of deference ought to be to ensure that Courts don't misinterpret statutes because they don't understand them to allow administrators to choose the best interpretation using their expertise. The purpose ought

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[300] *McLean v British Columbia (Securities Commission)*, *supra* note 238 at para 40.
[301] *Ibid*.
[302] *Wilson v Atomic Energy of Canada Ltd.*, *supra* note 283 at para 88.

not to be to ensure that administrators are free to interpret statutes as they see fit, regardless of the best interpretation.

This observation returns us to expertise as a justification for deference. The Court's approach to statutory interpretation is only understandable where administrative expertise is accepted over statutory policy. Expertise operates in the background as a primary explanation for why the interpretation selected by the administrator is acceptable and entitled to deference by courts, rather than the court selecting another reasonable interpretation that is potentially better. Yet expertise cannot explain how a single interpretation is reached or why it should be accepted where multiple interpretations are reasonable.

What then is the relevant rationale for deference? Deference depends on a theory that administrators are experts in the policy of a statute and are supposed to be better placed (following the logic of John Willis) to give a purposive interpretation of statutory provisions.[303] The classic example is the labour arbitrator who better understands collective bargaining provisions and how they balance employer and employee interests. Yet this example does not require a court to find that there are *multiple* meanings of a statutory provision. It requires only that the administrator is "better placed" to find the single or most purposive, and therefore most reasonable (and arguably correct), meaning of a statutory provision.

Yet, if an administrator's decision can be understood in this way, it could paradoxically also be understood as being in full accordance with judicial reasoning using ordinary tools of statutory interpretation. Those tools require a provision to be read in its context and in a purposive manner

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[303] Also see Daly, *supra* note 111 at 244.

with regard to legislative history and context. Somewhat ironically, if the decision-maker explains the approach taken, and if that approach is purposive and in accordance with the overall policy of the legislation, then it will accord with Driedger's rule and so with modern judicial approaches to statutory interpretation. Any relative expertise that the administrator had in interpreting the statute becomes irrelevant and deference is rendered unnecessary. If one combines judicial statutory interpretation with respectful attention to any reasons given on questions of law by the expert administrator – such that those reasons inform the Court's understanding of the policies behind the statute – then the rationale for full deference on questions of law all but disappears. The traditional rationale for deference is consistent with a view that administrators may be better at applying the purposive aspects of Driedger's rule than courts. However, it is not consistent with the view that they employ some other legitimate method. In turn, an administrator's reasoning should be used or considered by courts, but there is no clear need for courts to defer where they use a purposive approach to statutory interpretation.

Admittedly, in some cases the legislature leaves much unsaid in relation to the objectives of a broadly worded statutory provision and that administrators are thus entrusted to breathe some life into those provisions. That this is the case in some instances, though, should not require that there will "usually" be multiple acceptable interpretations in deferential review or that, as a question of method and outcome any reasonable interpretation should stand. Take for example an issue where an administrator determines whether a decision is in the public interest. There may be multiple outcomes arising from particular facts from which an administrator may choose with reference to the public interest. Yet this prospect does not lead automatically to the conclusion

that the meaning of "public interest" is itself ambiguous, such that it is an enigma to be solved by the administrator alone.

The meaning of public interest must be understood in the context of the enactment where it is found. This context includes the broad objectives or values that the administrator is required to balance in decision-making. It does not follow, however, that judicial canons of statutory interpretation cannot guide what a reasonable interpretation of a statute is and therefore which is best. This conclusion explains why the Supreme Court routinely applies its own purposive analysis to statutory provisions and, in turn, it appears that the administrator's decision is being assessed against Driedger's rule of statutory interpretation, with a purposive lens.[304]

This approach is most common when no reasons or thin reasons are given by the administrator.[305] Where the administrator's reasons provide deeper insights into the purpose behind the statute, into the policy issues arising from the statute, or into the technical nuances of its terms, there is no reason judges cannot use these insights to inform their analysis. The question for the application of deference is whether those insights should merely be given weight and considered by the court or whether the court can (or should) diverge from them if it disagrees. A willingness to disagree with the administrators approach is essentially the approach the Supreme Court took in *Mowat*. However it could be improved upon by providing greater clarity regarding how administrative interpretations of statutes can be incorporated into judicial statutory interpretation. A modified approach from *Mowat* could have the benefit of utilizing the

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[304] McHaffie, *supra* note 258 at 48–50.
[305] John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27:1 Can J Admin L & Prac 101 at 108.

expertise of the administrator, where present, and where reasons are given, to ensure that judicial statutory interpretation is well-informed.

Of course, a method that attempts to use administrative expertise to inform judicial statutory interpretation, rather than defer to it, will be at risk of failing in situations where a court gets the purposive analysis completely wrong. This risk is exacerbated where the administrator employs non-legal reasoning or provides no reasons at all on statutory interpretation. The potential solution can be found in promoting or requiring transparency in the reasoning of administrators. Judicial submission to any "reasonable" statutory interpretation is not the only possible solution. With an approach that uses informed statutory interpretation, rather than complete deference to any reasonable interpretation, the administrator's policy and purposive expertise, where evident from its reasons, can be given weight but will not be determinative where legislative intent appears to conflict with the administrators determinations. In turn, a "black box" of expertise will not be allowed to decide the outcome. Further, the assumption that a statute be considered "ambiguous" will not be needed to afford administrators with poorly defined arenas of discretion.

Interplay between transparency and reasonableness

An administrator's interpretation of a statute should not be deferred to where the administrator does not use its expertise to explain in a coherent manner how its interpretation better gives effect to legislative policy, or employs a better understanding of technical terms. In other words, the rational and substantive basis for the decision to select a particular interpretation of a statute must be evident. The absence of reasons on a question of law entails a material risk that the decision is improper. For example, an administrator may be employing irrelevant considerations,

misunderstanding the purpose of the statute or the policy behind the enactment, or deliberately subverting the intention of the legislature because the administrator disagrees with the policy in the statute, as was arguably true in *Mowat*. At a minimum, administrative decisions require a basic level of transparency to attract deference. Where expertise is applied, and can be explained, judges certainly should give it weight. However, ultimately judicial review plays the crucial function of ensuring that there is alignment of administrative decisions with legislative intent on questions of overall purpose and policy. It cannot play this function if presumed "expertise" becomes a complete answer to whether a decision is reasonable. In short, in administrative statutory interpretation expertise should not be permitted to undermine legislative intent.

An administrator that does not give reasons articulating how it interpreted a statute cannot be "better placed" to give a purposive statutory interpretation. Two factors favour a court as better placed in this respect. First, administrators may lack independence in relation to their mandates, resulting in interpretations that may serve purposes other than the legislature's statutory objectives. For example, the case described by Sossin of tax collectors using their discretion to avoid prosecuting powerful entities where it will strain their resources while seeking to enforce strictly against ordinary taxpayers.[306] In such cases, there are resource and other motivations that may be in play. Alternatively, Savoie describes situations where the interpretation may be shaped by Cabinet or a central agency's political agenda.[307] In such cases, deference to statutory interpretation may undermine the legislature's fundamental objectives. The interpretations are determinations not of experts but of non-experts with agendas that are potentially divorced from

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[306] Sossin, *supra* note 159.
[307] Donald Savoie, *supra* note 132.

the mandate of the agency or the statute. It is unclear why deference should be accorded to such interpretations.

Courts can generally be assumed to have less interest in how resources are expended or in the views of the government of the day, relative to administrators. While judges may be alive in some cases to such concerns, they are not embedded within the administrative system and not directly subject to pressures arising from within that system. While judicial interpretations may not accord with the way things "operate in practice," judicial interpretations have greater political distance than administrators and therefore freedom to engage with what the legislature intended. Legislative intent is the focus of judicial statutory interpretation. Courts also have expertise in using clear criteria to try to determine legislative intent. Administrators close to the subject-matter they regulate may lack this and may be more concerned with what they, not the legislature, think is good policy. This epistemic deficit of administrators may be particularly apparent where they do not in fact interpret the statute or give reasons for their implied interpretation.[308] Surely, the presumption that an administrator has used expertise to arrive at an appropriate and reasonable interpretation of the statute could be rebutted by the failure to interpret the fundamental meaning of a key provision on which the decision rests. Similarly if an administrator cannot explain how it applied the provision to particular facts, or if it shows no insight into the technical meaning of its terms, then this too should rebut any presumption of expertise.

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[308] For similar commentary see Gall, *supra* note 203; Olszynski, *supra* note 209.

Thus, there is a middle ground where administrators that demonstrate some insight into their statutory scheme through compelling reasoning are accorded "respectful attention" in matters of statutory interpretation,[309] but administrators that fail to accord with ordinary tools of statutory interpretation are not accorded deference. In *Southam*, Justice Iacobucci cited with approval a relevant passage:

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [310]

Of course, this approach presents the risk that the courts will ignore the administrative logic behind decisions altogether or that they will significantly misinterpret legislative intent. Judges do have weaknesses, not only in the policy of the statue but also for being in a demographic, class, ethnicity or gender positioning that could have significant biases on questions of policy. There is no question that this consideration was a major issue pre-*CUPE*. It will continue to be problematic today or in the future. The purpose of this analysis is not to suggest judicial perfection in understanding legislative intent or policy. However, there is no question that judges are situated very differently from administrators, in terms of the expectation of impartiality, the

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[309] Such an approach was advocated by Iacobucci J. in *Canada (Director of Investigation and Research) v Southam Inc.*, *supra* note 210; also see Dyzenhaus, *supra* note 70.
[310] *Canada (Director of Investigation and Research) v Southam Inc.*, *ibid* at para 62; citing R P Kerans, *Standards of review employed by appellate courts* (Edmonton: Juriliber, 1994).

availability of appellate review, independence and level of distance from the immediate pressures of practical bureaucratic concerns or political forces.

It is an oversimplification and overcorrection for Courts to shy away from their role in adjudicating administrative legality because they might make mistakes. Where they do, so long as they are clear in their interpretive reasoning, so long as they reason in accordance with known and established statutory interpretation principles, and so long as they are attentive to legislative intent, there will be potential legislative and even appellate remedies available. In contrast, where administrators are permitted to select one of multiple reasonable interpretations based on unknown principles, it is unclear how legislative reform can address mistakes. Mistakes by courts or administrators are unavoidable; the question is how administrative law can best allow the legislature to fix them. The known canons of judicial statutory interpretation have significant advantages in this regard, compared to an idea of administrative rationality that is potentially inconsistent or relies on unknown principles.

Without a requirement for reasons that articulate how the expertise of an administrator was employed in interpreting or applying a statute, deference as respectful attention is unjustifiable or impossible, or both. Deference in such circumstances requires a repudiation of the two pillars of legislative intent and expertise, upon which the fundamental rationale for deference rests. In the absence of reasons the administrator's interpretation is either unknown or non-existent. The Supreme Court's approach of implying reasons by reviewing the record is judicial review by speculation. If an administrator does not interpret its own statute, the administrator cannot fairly be said to be employing expertise or to have an epistemic advantage in doing so.

Expertise serves as a compelling rationale for deference in statutory interpretation where it is actually used to engage an interpretive upper hand. If the administrator does not explain its decision, deference becomes empty. Administrators are not judges and it is fair to observe that a clearly reasoned statutory interpretation cannot be expected in every instance. However, the issue is not whether this outcome can be fairly expected of administrators. The issue is what approach should be used when the administrator fails to provide reasons on statutory interpretation or those reasons are wanting. Should the Court assume that the administrator employed expertise and piece together an "implicit" interpretation, as was done in *Agraira*? The difficulty with that approach is that inevitably this implicit interpretation must be upheld against some standard and the only one available will come from judicial statutory interpretation, since the administrator has provided no alternative. In practice, the court will need to interpret the statute anew. Once the Court has done this, the benefit of comparing that interpretation to an administrator's implied interpretation is very questionable.

A hybrid approach to statutory interpretation that uses an administrator's reasons to inform the purpose of a statute or the technical meaning of its terms is of course potentially foreclosed by the Supreme Court's reluctance to require reasons after *Alberta Teachers*[311] and *Newfoundland Nurses.*[312] While the Court has retreated somewhat since *Delta* from an approach that infers and

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[311] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, supra* note 92 at paras 54, 71-72. The Court responds to this criticism a few times in the majority decision and again in *McLean v British Columbia (Securities Commission), supra* note 238 at para 22.

[312] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* [2011] 3 SCR 708 at para 14. Also see *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd., supra* note 92. where the absence of any reasons "did not prevent the Supreme Court from developing its own, reasonable, interpretation of the statutory provisions" for related commentary see Paul Daly, "Reasons and Reasonableness in Administrative Law: Delta Air Lines Inc. v Lukács, 2018 SCC 2", (22

implies reasons, it has stopped short of actually requiring reasons for a decision on statutory interpretation to be reasonable. After *Delta*, judicial supplementation of reasons is only acceptable where reasons are insufficient or are not given because the issue was not raised before the decision-maker.[313] In *Delta*, the Court emphasized that "reasons still matter" and that the outcome cannot be the "sole consideration".[314] However, the absence of a requirement for reasons on statutory interpretation undermines the role of transparency and intelligibility that are held out as central to deference under *Dunsmuir*. A meaningful role for transparency in reasoning would entail a duty to give at least minimal reasons. Instead, this stage of the judicial review analysis is really more concerned with the outcome. In other words, deference will operate to uphold a decision that could have been reasonable, with different or better reasons for it being made. The problem with this approach is that it is difficult to tie it back to the justifications for deference. It applies deference for a presumed expert who is unable to explain the decision-making process or rationale. It also applies deference to potentially irrational decisions that happen to have "worked out alright" from the reviewing court's perspective.[315] Whatever the practical merits of this reasonableness without reasons approach, it is difficult to find a principled basis for it that coincides with the core practical justifications for deference. In other words, it fails to ensure that expertise is employed, or needs to be employed, to interpret a complex statute. Instead, it undermines expertise as a rationale for deference by assuming that

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January 2018), online: *Administrative Law Matters* <http://www.administrativelawmatters.com/blog/2018/01/22/reasons-and-reasonableness-in-administrative-law-delta-air-lines-inc-v-lukacs-2018-scc-2/>.

[313] *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras 23–24.

[314] *Ibid* at para 27.

[315] One might ask whether a better approach would be to refuse a remedy.

expert reasoning has taken place. Further, by assessing the "outcome", it is not clear how the Court is applying deference and against what judicial criteria the outcome can be considered reasonable, other than the fact it was made by a presumptive expert. In this way, expertise can be determinative of reasonableness without accountability to expert reasoning.

Does reasonableness have substantive content?

The Court's post-*Dunsmuir* approach to substantive rationality reflects certain presumptions about administrators having expertise that grants them a superior understanding of the facts and/or the application of the law to the facts. However, this approach risks expertise becoming a complete answer to the question of whether a decision is reasonable in light of the facts, not just the law as set out above. On this view, the administrator's legitimacy is sourced to a practical rationality in administering the public good:

> The code by which public law undertakes its work is … generated by the tensions and trade-offs involved in sustaining this network of social co-ordination. In this light, the basic law of the administrative state is a type of disciplinary law. All governmental action becomes reviewable in the light of a means-end rationality, the precise specification of which is determined by the institutional remit and competence of the particular official agency.[316]

Yet it remains unclear whether formalistic, abstract rationalism is all that is needed to make a decision reasonable. Reasonableness should be guided by substantive content, such as broader social norms or statutory purpose and context. In other words, does the administrator have full purview over a "means-end" rationality or can the means and the ends both be bounded by external forces? The Dyzenhaus and *Dunsmuir* framework suffers from a lack of clarity about

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[316] Loughlin, *supra* note 117 at 459–460.

the "legal standards" to which administrators are or should be held. Must these standards be sourced in legislative intent, for example in legislative purposes, and to what extent can they draw on broader values? When we speak of rule of law in the context of deference, does it have any substantive content or is it achieved by pragmatic rationality in the absence of substantive standards?

For example, Allan has advocated that the legal standards underpinning the rule of law are moral standards which protect fundamental individual or constitutional rights.[317] When courts engage in extensive statutory interpretation, with a view to discerning broader legislative policies and values underpinning a grant of discretion, this should not be considered an improper form of judicial review or dismissed as correctness in disguise. To do so is to ignore that rationality and reasonableness inherently has a substantive dimension. Absent any such analysis, a "reasonable" decision can be perverse so long as it is logical.

In the absence of well-established legal principles about individual liberty or constitutional rights, it is more difficult to identify what "legal standards" may legitimately be employed in judicial review and their source. This is relevant to administrative law decisions about risk regulation where the values that might potentially guide the understanding of legal standards are not anchored in individual liberty or constitutionality but rather on broader social values around managing risk which may be, (but are not always) expressed through statutory purposes. In such cases the minimum requirement ought to be that the legislative purposes of risk regulation are sought out through judicial reasoning, and informed, where possible by administrative expertise.

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[317] T R S Allan, "The Moral Unity of Public Law" (2017) 67:1 UTLJ 1.

Admittedly, this is a fought exercise, as discussed earlier in this thesis, the purpose of risk regulation can alternately be understood as legitimating the persistence of risk or an attempt to reduce or eliminate risk. However, in many cases, there is at least some legislative signal pointing towards one or the other as being a dominant purpose.

That the exercise in assessing reasonableness against substantive values might be fought or difficult does not justify a deferential review that avoids it altogether. If the use of discretion becomes disconnected from the social norms that motivated the legislature to grant the discretion to administrators this undermines the legislative role in policy-making. Without any substantive grounding, the legal standards that define when a decision is "reasonable" risks being nothing more than a standard of formal rationalism, largely empty of substantive content and potentially disconnected from legislative objectives and the norms that motivated the legislature to grant administrative discretion.

Ultimately, if deferential reasonableness review is to be linked back to the practical and legal justifications for deference discussed earlier it must have some substantive content. It cannot be an empty vessel, filled by the expertise of the administrator. Even in a broadly worded or "ambiguous" statute, the normative context and legislative purpose in which the ambiguous statute operates must play a functional role in deferential review. Tolerance of a lack of substantive content risks allowing administrators an arena of non-accountability that is very broad. The lack of substantive content could allow considerations that are absurd or completely irrelevant to be determinative, such as an administrator's preference for jelly doughnuts over sprinkles, so long as the decision was formally reasoned and the administrative discretion broad or ambiguous enough. While permitting administrators room to determine which factors in their

decisions are relevant may seem admirable, there must always be some external substantive standard, or perspective within which the discretion is operative, or reasonableness will have retreated to pre-*Roncarelli* formalism.

Any approach to deference that is not permissive of a legitimate role in judicial statutory interpretation, deprives the courts of a clear basis upon which to engage in a substantive analysis. Judicial substantive review must inevitably start with legislative purpose and an attempt to understand that purpose in context. Deferential review should likewise abandon the concept of statutory ambiguity, which creates an artificial arena of discretion by arbitrarily stopping a court from completing its own interpretation of the statute. Such an analysis is key to ensuring substantive accountability for administrators.

The current post-*Dunsmuir* jurisprudence does a poor job of theorizing how administrators can or should mediate between different reasonable interpretations or applications of a statutory provision. Presumed expertise cannot be a complete answer to this question. The twin concepts of statutory ambiguity and expertise are in reality doctrinal crutches which are used to avoid the problem of substantive reasonableness.

The Supreme Court's approach to reasonableness is highly unsatisfactory in so far as it engages the tension between, on the one hand, recognizing that administrators may legitimately interpret statutory provisions and, on the other hand, applying the modern rule of statutory interpretation. It also fails to provide a coherent system for courts to hold administrators accountable on substantive grounds related to the fulfillment of legislative intent on questions of policy.

Conclusion

The practical justifications for deference need to be moderated by a more complete understanding of the potential strengths and weaknesses of modern public administration. No matter how committed one is to the idea that the legislature can or must delegate broad policy questions to the administrative state, the contrary risks of untrammelled discretion or an unaccountable administrative branch of government must be managed in some coherent manner and cannot be dismissed entirely. The delegation of discretion must be for some discernable lawful purpose and should have discernable legal boundaries, using consistent methods.

A self-policing administrative state entails social risks, the most important of which is that the legislature is sidelined, and executive power is potentially entrenched. The legislature's role in public law should not be limited to giving policy discretion to administrative bodies who may, to varying degrees, be *de facto* agents of the executive. The same legislative grants of discretion may then have no policy content other than the meaning that is given to them by administrative decision-makers. Doctrinally and theoretically, the problem is left outstanding because a consistent methodology for statutory interpretation in deferential judicial review is not available. The current approach also threatens to undermine key values such as rule of law and equality before the law, as recognized by the dissenting decision in *Wilson v Atomic Energy*.[318]

The key mischief wrought by the current doctrinal framework for deference on questions of law is that the legislature is highly constrained in its ability to control administrators or guide their

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[318] *Wilson v Atomic Energy of Canada Ltd., supra* note 283 at paras 81-87.

decisions. This is particularly so where future scenarios are difficult to predict and uncertain and therefore administrative flexibility is required for statutory goals to be advanced. Environmental management, health and safety regulation and other risk management processes are prime examples. Perhaps ironically, these are areas in which technical expertise is important to administrative decision-making. Instead of supporting the use of technical expertise, deference doctrine therefore puts legislatures in a bind where, if they rely on flexibility and technical expertise they are potentially stripped of their ability to direct policy outcomes. They are stripped by the doctrinal resistance of courts to look deeply at legislative purposes and statutory language on deferential review and to hold administrators accountable to legislative goals.

The Supreme Court has adopted a very limited view of legislative supremacy, one that entertains a legislature as existing only to delegate to administrators. This view does not give enough weight to the important role of legislatures in policy-making and of transparent democratic policy debates. It also does not adequately address the risk of executive or administrative bodies acting arbitrarily, and contrary to legislative policy objectives, or the risk that they will become unaccountable to the legislature or the legislative policies they are to carry out.

In terms of doctrinal reform, I do not propose that reasonableness as a standard needs to be dispensed with. I also do not propose that decisions that do not turn on questions of law should be reviewed on a correctness standard. Yet the pragmatic and legal rationales for strong deference to administrators on questions of law, as a universal approach, are weak. Courts must develop doctrines that are sensitive to the diversity of independence and mandates of administrative decision-makers, to the issue of whether administrators have provided reasons for their legal interpretations, and to the potential fallacy of purely pragmatic justifications.

Both the practical and legal justifications for relying heavily on deferential review for questions of law are also weakened if one adopts a more robust understanding of public administration. Deferential review may fail to ensure that legislative objectives guide administrators in matters of policy. Courts can and should act as arbiters of legislative policy constraints for grants of administrative discretion. Deference "as respect" ought not to mean that reasonable decisions can be unmoored from the purposes for which discretion was granted.

In the course of writing this thesis, many administrative law scholars published works considering the impact of the *Dunsmuir* doctrine over the past decade.[319] In December 2018 Supreme Court also heard two appeals in a case that may reform the law of the standard of review in Canada.[320] Dissatisfaction with the *Dunsmuir* framework appears to be growing, with some appellate courts in near open revolt on the level of review for questions of law.[321] It is clear that tensions are rising between those social actors who are historically seen as benefiting from the administrative state, who are increasingly opposed to deferential review, and the administrative agencies that benefit from deference.[322] These timely debates go well beyond the

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[319] Paul Daly and Leonid Sirota eds, *A Decade of Dunsmuir* (Toronto: Carswell, 2018). The final publication was not available to me during editing, so I have cited to the blogs which pre-published this material.

[320] *Minister of Citizenship and Immigration v Vavilov* and *Bell Canada et al v Attorney General of Canada.*

[321] *Garneau Community League v Edmonton (City)*, 2017 ABCA 374; and *Bell Canada v 7265921 Canada Ltd.*, 2018 FCA 174. also See for example David Stratas, *supra* note 249; David Stratas "A Decade of Dunsmuir: Please No More" (March 8, 2018) *Administrative Law Matters* (blog) online: <https://www.administrativelawmatters.com/blog/2018/03/08/a-decade-of-dunsmuir-please-no-more-hon-david-w-stratas/> and David Stratas, "Looking past Dunsmuir: Beginning Afresh" (March 8, 2018) *Double Aspect* (blog) online: < https://doubleaspect.blog/2018/03/08/looking-past-dunsmuir-beginning-afresh/>.

[322] Supreme Court of Canada, *Factums on Appeal: Case 37748 Minister of Citizenship and Immigration v Alexander Vavilov* (2018) online: https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37748 in which a range of civil society interests from First Nations to prisoners advocates to tenants advocated for

ones offered here. However, the current discourse is increasingly consistent with my thesis that deference for questions of law has reached a point where it grants the administrative state too wide a purview of decision-making, with insufficient oversight. The changing dynamics of the debate also are consistent with my argument that real-world administrators function in complex ways which are not always contemplated by deference doctrine in Canada. However the Supreme Court responds to the critiques, I have attempted in this thesis to identify some root problems with the current doctrine's treatment of administrators, how it justifies that treatment, and how the doctrine distorts the justifications for and the application of deference. Judicial review doctrine would benefit from a rekindling of the romance between courts and legislatures and from a more meaningful and robust exploration of legislative intent, statutory interpretation, and the normative dimensions of each. Courts should do more to defend legislative power from potential executive abuse, by holding administrative agencies accountable on questions of law. It will be interesting to see whether the Supreme Court of Canada will engage in extensive reform and to what extent it may determine it needs to salvage reasonableness review in that process.

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more searching review on questions of law while nearly all of the tribunals and government agencies, along with the amicus argued for more deference or maintaining deference on those questions.

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