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The Complexity of Coherence: Justice LeBel’s Administrative Law

Lorne Sossin*

Canadians will deal with administrative action and justice more often than with the civil or criminal courts in their daily life.

— Justice Louis LeBel¹

I. INTRODUCTION

In *Blencoe*,² Justice LeBel’s first major administrative law judgment after joining the Supreme Court, he memorably quipped, “[N]ot all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions and milk control boards may seem to have about as much in common as assembly lines, cops, and cows!” It was clear a fresh voice had arrived — and at a moment of significant upheaval and flux for Administrative Law. But few predicted just how significantly Justice LeBel would transform key aspects of the field.

In the 20 or so significant administrative law judgments that followed *Blencoe*, Justice LeBel carved out a distinctive approach to Administrative Law, one characterized by the search for analytic coherence in a field, as he noted above, defined by its diversity. While far more space would be needed to fully engage with Justice LeBel’s many

* Dean and Professor, Osgoode Hall Law School, York University. I am grateful to Davina Finn, J.D./M.B.A. ’16 for her helpful research assistance for this article. I am also indebted to Julia Hughes for her invaluable comments on an earlier draft of this article as well as the organizers and participants of the Workshop on the Legacy of Louis LeBel held at the University of Toronto on October 17, 2014.

¹ Speech given by Justice LeBel to CLEBC Administrative Law Conference on October 26, 2012, published in the Canadian Journal of Administrative Law & Practice (2013), at 51-66, online: <<http://administrativejusticereform.ca/lebel-j-perhaps-stronger-constitutional-protection-for-administrative-tribunals/>>.

² *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, [2000] 2 S.C.R. 307, at para. 158 (S.C.C.) [hereinafter “*Blencoe*”].

contributions to administrative law, the analysis that follows will focus on the standard of review doctrine, as it is hard to think of a field of law more affected by his tenure on the Court.

Beginning with concurring judgments in *Chamberlain*³ and *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*,⁴ Justice LeBel took issue with the prevailing approach to the standard of review (both its methodology and application). His concern was not only the lack of coherence in the field as it had then been developed, but he also worried, relatedly, about the predictability and workability of the analytic framework whose creation was primarily the responsibility of the Supreme Court. More than just the important content, Justice LeBel also brought a distinctive analytic authenticity to his signature administrative law judgments. His judgments during this period were more inquisitive than authoritative, reflecting his intellectual curiosity and search for clarity.

Justice LeBel finally had the opportunity to develop his own vision of the standard of review in *Dunsmuir*,⁵ the landmark administrative law judgment he authored jointly with Bastarache J. While the dust has yet to settle on what has come to be known as the *Dunsmuir* Framework, Justice LeBel's pursuit of simplicity, transparency and coherence has reinvigorated Canadian administrative law and clarified its practice for advocates, adjudicators and academics alike. At the same time, however, Justice LeBel may have achieved greater analytic clarity at the risk of glossing over the very contextual resonance he first articulated so colourfully in *Blencoe*. Put differently, the problem may not be with Justice LeBel's vision, but with the lens itself, and whether the judicial process, with its inherent constraints of experience and evidence, can do justice to the lived realities of the administrative state.

This article is divided into three sections and a conclusion. In the first section, I canvass Justice LeBel's evolving vision of administrative law and his growing focus on the standard of review. In the second section, I focus on *Dunsmuir* and some of the subsequent cases which sought to refine (and amplify) the path which *Dunsmuir* charted. In the third section, I elaborate on the implications of Justice LeBel's vision of Canadian administrative law and the inherent tension with that vision between

³ *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, 2002 SCC 86, at paras. 199-215 (S.C.C.) [hereinafter "*Chamberlain*"].

⁴ [2003] S.C.J. No. 64, [2003] 3 S.C.R. 77, at paras. 60-135 (S.C.C.) [hereinafter "*Toronto (City)*"].

⁵ *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.) [hereinafter "*Dunsmuir*"].

coherent judicial principle and diverse context and settings for administrative law practice in Canada.

II. JUSTICE LeBEL'S EVOLVING VISION OF ADMINISTRATIVE LAW'S EVOLUTION

It is often said that administrative law is the most interesting and important area of law precisely because it is about every other area of law too. At its broadest, any exercise of statutory or public power by any official in any context engages administrative law principles (*e.g.*, labour, immigration, banking, social benefits, taxation, national security, *etc.*).

This breadth presents certain complications when attempting to discuss the body of work of a Supreme Court Justice. For this reason, I have limited my discussion to a certain group of “core” administrative law cases where Justice LeBel authored or co-authored a substantively significant decision. I have no doubt such an analysis seriously underestimates his influence on the field — both through decisions to which he contributed through deliberations and comments on drafts but did not author, and through his various speeches and writings on administrative law, only a few examples of which are referenced in the discussion below.

Before turning to Justice LeBel's judgments, it is important to understand his enduring fascination (and, some would say, fixation) on the standard of review within administrative law. The standard of review addresses how and when courts may interfere with the actions of statutory decision-makers, whether through appeals set out in statutory schemes or through judicial review of administrative decision-making. As Justices LeBel and Bastarache note in *Dunsmuir*, the standard of review is first and foremost a key instantiation of the rule of law.⁶ The rule of law dictates that all government authority must have a source in law, and therefore that courts have an inherent jurisdiction to review all exercises of government authority to ensure the legal limits of that authority have not been exceeded.

At the same time, the standard of review reflects democratic commitments, and the obligation of the courts to defer to the intent of the legislature to endow administrative decision-makers with legal authority,

⁶ *Id.*, at paras. 27-28.

and in some cases, broad discretion. Finally, the standard of review engages the changing realities of the administrative state, where courts have come increasingly to recognize the expertise of various policy, regulatory and discretionary bodies relative to the judicial role.

While rooted in enduring principles, the standard of review doctrine has been dynamic rather than static — it is an evolving, multi-headed hydra precisely because of the virtually unbounded diversity of administrative decision-making. As Iacobucci J. observed, the complexity of the standard of review lies not in the conceptual framework of a spectrum of standards, but in its application to the myriad delegated powers of decision: “... The complexity was created not by the courts but by the legislators, who wisely decided that not all administrative agencies would operate in the same way. It is a complexity that the courts must attempt to deal with and it would be irresponsible simply for judges to wish it away.”⁷

For example, the attempt at synthesis in cases such as *Ryan*,⁸ involving the review of tribunals, had unravelled by the time of *Dunsmuir*, a mere five years later. Similarly, the apparent clarity around the standard of review for administrative discretion in *Baker*⁹ had to be revisited and clarified again as early as in *Suresh*.¹⁰ Justice LeBel not only witnessed these twists and turns, but acted as a key catalyst for rethinking the doctrine so as to create a more enduring framework. Early on, Justice LeBel seemed to realize that the path to progress would be one of creative destruction of the then-existing standard of review framework.

In *Chamberlain*, for example, writing sole concurring reasons, Justice LeBel reviewed the then-governing “pragmatic and functional” methodology for determining which of the three standards of review then recognized would apply in a given decision-making context (patent unreasonableness was the most deferential standard, correctness was the least deferential and reasonableness *simpliciter* was a standard

⁷ The Honourable Justice Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27 *Queens L.J.* 859-78, at 872 [hereinafter “Iacobucci, ‘Articulating a Rational Standard’”].

⁸ *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247 (S.C.C.).

⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.) [hereinafter “*Baker*”].

¹⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1 (S.C.C.).

somewhere in the middle of this spectrum of deference). *Chamberlain* involved the review of a school board decision involving elementary school curriculum materials and Justice LeBel questioned the usefulness of the pragmatic and functional approach in the context of policy decisions made by elected municipal councils. He observed:

When the administrative body whose decision is challenged is not a tribunal, but an elected body with delegated power to make policy decisions, the primary function of judicial review is to determine whether that body acted within the bounds of the authority conferred on it. Courts must respect the responsibility of such bodies to serve those who elected them, and will, as a rule, interpret their statutory powers generously (see *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244, per McLachlin J. (as she then was); *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 23). The decisions or actions of an administrative body of this kind will be invalidated if they are plainly contrary to the express or implied limitations on its powers. The mechanical application, in this context, of a test which was developed with a quite different kind of administrative body in mind is not only unnecessary, but may also lead both to practical difficulties and to uncertainties about the proper basis of judicial review.¹¹

Justice LeBel's critique raised a more fundamental challenge to the direction the Supreme Court was bringing to Canadian administrative law, largely under the leadership of then Justice Iacobucci.¹² That challenge was whether the same standard of review should apply for all manner of administrative decisions, from regulatory to adjudicative, policy to factual, immigration officer to Minister, regulatory to discretionary. As Justice LeBel put it, "... In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to

¹¹ *Chamberlain*, *supra*, note 3, at para. 191 (S.C.C.).

¹² For some contemporaneous reflections, see Iacobucci, "Articulating a Rational Standard", *supra*, note 7; L. Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference?: Revisiting the Standard of Review in Administrative Law" (2003) 27 *Advocates' Q.* 478; and D. Mullan, "Baker and Deference: Interpreting the Conflicting Signals" in D. Dyzenhaus, ed., *The Unity of Public Law* (London: Hart, 2003). For more background on Iacobucci J.'s contributions, see L. Sossin & C. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (Special Issue, Spring 2007) 57 *U.T.L.J.* 581.

determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.”¹³

In *Toronto (City)*, Justice LeBel (writing in a concurring judgment) acknowledged the “growing criticism” and “serious concerns” about the Court’s standard of review case law.¹⁴ That judgment reflects what I characterized above as Justice LeBel’s analytic authenticity.

While the standard of review questions in the case at bar were uncontroversial (indeed, the Court was unanimous that a patently unreasonable standard applied and that it had been infringed by the arbitrator whose decision was impugned), and while the parties had not made submissions on the broader standard of review framework, Justice LeBel observed, that “The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law.”¹⁵ While the majority judgment (authored by Arbour J.) dispensed with the standard of review in four paragraphs,¹⁶ Justice LeBel devoted 75 paragraphs to his detailed examination of the issue.

Justice LeBel responded to the concerns he identified in a reflective and comprehensive analysis which cast doubt on the entire structure of the Court’s standard of review jurisprudence.¹⁷ Justice LeBel described the distinction between patent unreasonableness and reasonableness *simpliciter* as “nebulous”,¹⁸ and characterized the relationship between

¹³ *Toronto (City)*, *supra*, note 4, at para. 61 (S.C.C.).

¹⁴ *Id.*, at para. 64.

¹⁵ *Id.*, at para. 64.

¹⁶ Justice Arbour had the benefit of reviewing Justice LeBel’s reasons and offered the following comment:

My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court’s unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

Id., at para. 12.

¹⁷ For another example of this critique, see the judgment of Justice LeBel in *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, [2004] S.C.J. No. 2, 2004 SCC 23, at paras. 39-42 (S.C.C.).

¹⁸ *Toronto (City)*, *supra*, note 4, at para. 65 (S.C.C.). On this point, after reviewing in-depth the attempts to distinguish the two types of reasonableness review, Justice LeBel:

In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator’s interpretation,

patent unreasonableness and correctness as “blurred”. In one passage, he observed:

At times the Court’s application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.¹⁹

While he could have left the discussion at this point, instead he pursued the point to its logical end. He added:

There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and ‘admits of more than one possible meaning’; provided that the expert administrative adjudicator’s interpretation ‘does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention’ (Mullan, ‘Recent Developments in Standard of Review’, *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could

the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, ‘That Curious Curial Deference Just Gets Curiouser and Curiouser — *Canada (Director of Investigation and Research) v. Southam Inc.*’ (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator’s decision deviates from what falls within the ambit of the reasonable, not on ‘fine distinctions’ between the test for patent unreasonableness and reasonableness *simpliciter* (see Flazon, *supra*, at p. 33).

Id., at para. 108.

¹⁹ *Id.*, at para. 99.

be sustained on ‘any reasonable interpretation of the facts or of the law’ (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)²⁰

Justice LeBel concluded his analysis by calling for administrative law to continue its “evolution”. With a concern for coherence, predictability and workability in mind, he raised the possibility of a turning back of the clock to a time when deference was an “on-off” switch, under which a court would either show deference or decide not to show deference to an administrative decision.²¹ He explored this view further outside the context of Supreme Court judgments in “Some Properly Deferential Thoughts on Deference”.²² A few short years later, he would have the opportunity to apply his preferred approach to the next milestone in the evolution of the standard of review in Canadian administrative law.

III. *DUNSMUIR* AND THE NEW AND IMPROVED STANDARD OF REVIEW ANALYSIS

In arguably the most significant decision for Canadian administrative law since the Supreme Court’s 1999 *Baker* decision, the majority decision in *Dunsmuir v. New Brunswick*, authored by Bastarache J. and Justice LeBel, delivered the very overhaul Justice LeBel had urged in *Toronto (City)*:

The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when dealing with fundamental principles.²³

The majority judgment in *Dunsmuir* reduced the number of review standards in Canadian administrative law from three to two with “patent unreasonableness” disappearing from the lexicon. There would now simply be a deferential standard, known as reasonableness, and the standard of correctness which conveyed less deference.

The judgment also renamed the methodology to be employed in determining the standard of review from the “pragmatic and functional analysis” to the “standard of review analysis”. While the test has a new name, its content is the same, and involves a consideration of four factors:

²⁰ *Id.*, at para. 121.

²¹ *Id.*, at para. 134.

²² (2008) 21 C.J.A.L.P. 1.

²³ *Dunsmuir, supra*, note 5, at para. 26.

(1) the presence or absence of a privative clause; (2) the purpose of the tribunal in light of the enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. Although the Court had insisted that all factors be considered in all cases under the earlier approach, Justices LeBel and Bastarache clarified that not all factors will need to be considered under the standard of review analysis, as a particular factor may on its own be determinative of the reasonableness standard.

Importantly, the judgment envisions recourse to this standard of review methodology only where the standard of review has not already been established by previous jurisprudence, and where the standard is not clear on its face, where for example, “true questions of jurisdiction” is involved, or where a question of law that is both of “central importance to the legal system as a whole” is at issue.

Taken together, these changes streamline and simplify the standard of review analysis, though there is no suggestion in *Dunsmuir* that any previous standard of review decision would have had a different outcome or would not remain good law.

Dunsmuir was a New Brunswick public servant, dismissed and given four and a half months salary in lieu of notice. The Government relied on section 20 of the *Civil Service Act*²⁴ which provided that “[s]ubject to the provisions of this Act and any other Act” termination of any employee “shall be governed by the ordinary rules of contract”. According to the Government, this meant it could dismiss Dunsmuir simply by providing him with reasonable notice or salary in lieu thereof. It did not have to establish cause or give him a hearing before dismissing him.

While Dunsmuir was dismissed because he was deemed not suitable for the position he was occupying, he grieved the decision, contesting both the notice period and whether the dismissal was actually for cause (in which case additional procedural rights would be triggered by statute). In a preliminary ruling, the adjudicator rejected the Government’s challenge and finding that Dunsmuir’s dismissal was related to his work performance, ordered that the Government reinstate Dunsmuir as of the date of dismissal because it had dismissed him without a hearing. On an application for judicial review,²⁵ the motions court judge determined that the appropriate standard of review was correctness and set aside the adjudicator’s decision on the preliminary motion as incorrect in law.

²⁴ S.N.B. 1984, c. C-5.1.

²⁵ *Nouveau-Brunswick (Conseil de gestion) c. Dunsmuir*, [2005] N.B.J. No. 327, 2005 NBQB 270 (N.B.Q.B.).

The Court of Appeal sustained that decision but on the basis that unreasonableness was the appropriate standard of review.²⁶

The Supreme Court unanimously upheld the lower courts' decision. A majority of the Court found the standard of review to be reasonableness and that the adjudicator's decision was unreasonable as a matter of law. Three of the judges (Deschamps J., Charron and Rothstein JJ. concurring) reached the same conclusion on the basis of correctness review.

Justices LeBel and Bastarache described the reasonableness review in the following terms:

a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.²⁷

For the majority, the decision did not meet this standard because the adjudicator inquired into the reasons for the discharge of Dunsmuir, an inquiry inconsistent on any reading with the employment contract which governed Dunsmuir's relationship as a non-unionized employee to the employer. In short, the adjudicator had treated a matter of private law as if it were a matter of public law.

All nine members of the Court held that those in Dunsmuir's position have no entitlement to procedural fairness as a pre-condition of effective dismissal. The procedural fairness aspect of the decision represented an overturning of earlier Supreme Court jurisprudence and confirmed that fairness issues in the context of public office holders should be appropriately addressed through private employment law principles. In

²⁶ *Nouveau-Brunswick (Conseil de gestion) c. Dunsmuir*, [2006] N.B.J. No. 118, 2006 NBCA 27 (N.B.C.A.).

²⁷ *Dunsmuir*, *supra*, note 5, at para. 47 (S.C.C.).

Knight v. Indian Head School Division No. 19,²⁸ the Court held a public law duty of fairness arose when a statutory employee, who served at the pleasure of the School Division, was dismissed. That decision, in turn, built on *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*,²⁹ which confirmed fairness duties in the context of public employment. As a result, *Dunsmuir* reversed *Knight*.

Justices LeBel and Bastarache's attempt to cohere the standard of review was subject to critique within the decision itself, notably by Binnie J., in concurring reasons, who noted that while the majority ambitiously seeks to revisit the standard of review system as a whole, their framework focuses exclusively on adjudicative tribunals. In one of the more memorable lines from any administrative law judgment, Binnie J. observed, "... [j]udicial review is an idea that has lately become unduly burdened with law office metaphysics."³⁰

Justice Binnie questioned whether the *Dunsmuir* framework could be easily applied to discretionary decisions by ministers or "lesser officials" working in the "bowels and recesses of government departments".³¹ For Binnie J., the "nature of the question" is more than one of several factors to be considered; rather, it drives any determination of what kinds of reasonable outcomes a decision-maker is authorized to make.

Another critical strand was highlighted by Deschamps J. who, joined by Rothstein J. and Charron J., argued for an even simpler and more straightforward statutory interpretation approach, and one based in long established doctrines of appellate review of trial decisions. Where an administrative decision concerns a question of fact or mixed fact and law, for Deschamps J., deference should normally follow. Where the decision involves a question of law, the analysis as to whether deference is warranted should be based on statutory interpretation principles.

Thus, while *Dunsmuir* aspires for a comprehensive revision of the standard of review doctrine, the central critiques — that it fails to engage with complexity on the one hand, and simplicity on the other hand, are apparent in the concurring judgments themselves. The tantalizing question *Dunsmuir* raises but arguably fails to resolve is whether complexity and simplicity can be embraced under the standard of review doctrine. I return to this notion below in the fourth section of this article.

²⁸ [1990] S.C.J. No. 26, [1990] 1 S.C.R. 653 (S.C.C.) [hereinafter "*Knight*"].

²⁹ [1978] S.C.J. No. 88, [1979] 1 S.C.R. 311 (S.C.C.).

³⁰ *Dunsmuir*, *supra*, note 5, at para. 122 (S.C.C.).

³¹ *Id.*, at para. 136.

While Justice LeBel took active roles in other areas of Administrative Law in the years that followed, applying, refining and defending the *Dunsmuir* framework characterized most of his reasons in subsequent cases in the field.

IV. THE IMAGINATION OF JUSTICE LEBEL'S ADMINISTRATIVE LAW

While the most significant cases exploring the impact of *Dunsmuir* have been authored by other members of the Court (for example, Binnie J. authored the majority reasons in *Canada (Citizenship and Immigration) v. Khosa*,³² which featured two further concurring sets of reasons and dissenting reasons all seeking to interpret *Dunsmuir* in the context of the statutory standard of review set out in the *Federal Courts Act*),³³ Justice LeBel has returned to the standard of review analysis in various contexts.

In *Montréal (City) v. Montreal Port Authority*,³⁴ Justice LeBel authored a unanimous judgment considering statutory discretion exercised by a Crown Corporation in relation to a municipal taxation scheme. Justice LeBel confirmed that the reasonableness standard is particularly well-suited to the exercise of discretion where there is more than one possible course of action. In this case, he concluded the decision was not reasonable as the approach taken by the Crown Corporation accorded neither to the statutory framework nor Parliament's intent.

In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*,³⁵ Justices LeBel and Cromwell, writing for the majority, apply the standard of review in the context of a human rights tribunal exercising its authority to award costs. While acknowledging this is a question of law, Justices LeBel and Cromwell view the question as one within the Tribunal's home statute and not one that rises to the exception created in *Dunsmuir* for declining deference where a question of central importance for the legal system is at issue. The majority concludes that even viewed through the most generous interpretation, the power of the Tribunal to redress costs incurred by victims of discrimination cannot extend to legal

³² [2009] S.C.J. No. 12, 2009 SCC 12 (S.C.C.).

³³ For an excellent review of the challenges of applying *Dunsmuir* in subsequent case law, see Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall L.J. 317-57.

³⁴ [2010] S.C.J. No. 14, 2010 SCC 14 (S.C.C.).

³⁵ [2011] S.C.J. No. 53, 2011 SCC 53 (S.C.C.).

expenses. While this case represents a welcome clarification of the scope of “questions central to the legal system”, it also reveals the kinds of new metaphysics Binnie J. warned about in *Dunsmuir*, focusing more on the nomenclature to which *Dunsmuir* has given rise and less on the spectrum of deference and its underlying rationales.

In *Agraira v. Canada (Public Safety and Emergency Preparedness)*,³⁶ Justice LeBel, writing for a unanimous Court, summarized and applied the *Dunsmuir* framework in exactly the kind of discretionary context Binnie J. argued *Dunsmuir* had failed to consider. *Agraira* involved a ministerial decision to deny relief to a Libyan national who had been found inadmissible to Canada because of his sustained contact with a terrorist organization. The statute provided for ministerial relief of this decision, which *Agraira* sought. In determining the appropriate standard of review for the Minister’s decision to deny the discretionary relief requested, Justice LeBel set out that a court needs to engage in a two-step process: first, the Court must determine whether the standard of review has been established satisfactorily in the existing jurisprudence; and second, and only if the answer to the first question is “no”, the Court must perform a full standard of review analysis.

Justice LeBel found that in the ministerial context at issue in *Agraira*, the standard of review had been satisfactorily determined in past decisions to be reasonableness. The Minister’s interpretation of “national interest” in the legislation to include national security concerns was found to be reasonable, notwithstanding a recommendation from staff in the Ministry that the relief be granted based on the circumstances of the case, and in particular the minimal contact between *Agraira* and the terrorist organization.³⁷ Justice LeBel highlighted that it was open to the Minister to interpret the “national interest” term in the manner he did and that this did not mean other factors set out in a ministry guideline were not considered as well. The fact that the Minister’s determination differed from his staff’s recommendations could not in itself lead to the conclusion that the Minister was acting unreasonably in exercising his discretion. While critics were perhaps justified in worrying that the collapse of patent unreasonableness and reasonableness *simpliciter*

³⁶ [2013] S.C.J. No. 36, 2013 SCC 36 (S.C.C.) [hereinafter “*Agraira*”].

³⁷ This case builds on the deferential approach Justice LeBel brought to a minister’s decision in another policy-laden area (environmental law) in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] S.C.J. No. 59, 2003 SCC 58 (S.C.C.).

standards in *Dunsmuir* might invite greater judicial intervention, Justice LeBel's post-*Dunsmuir* decisions reflect a robust appreciation of deference, particularly in relation to ministerial discretion. Indeed, some have argued judicial review where national security is involved (particularly post-9/11) has been overly deferential.³⁸ The aspect of *Agraira* with implications more far-reaching than the standard of review, however, relates to the place of soft law in the framework of administrative law. Dating back at least to the *Baker* decision, the Court approached the existence of ministerial guidelines (which, because they are developed by the executive body itself and not promulgated through legislation or regulations, cannot be treated as binding) as playing a role in the reasonableness analysis. In other words, in *Baker*, the Court found the decision to deport Ms. Baker was inconsistent with the applicable guideline which indicated parents would not be separated from their children. This inconsistency was treated as one of several indicia of unreasonableness in the exercise of ministerial discretion in that context.³⁹

In *Agraira*, the issue should not have arisen, as Justice LeBel found that the ministerial decision at issue was not inconsistent with the applicable guidelines and therefore could not form a basis for concluding the exercise of discretion was unreasonable. In a brief section at the end of his reasons, however, Justice LeBel indicated (arguably, in *obiter*) that a publicly issued guideline setting out clear procedures to which the decision-maker committed to follow could give rise to legitimate expectations.⁴⁰ As confirmed in *Baker*, legitimate expectations cannot create a fairness obligation that does not otherwise exist, but can expand or amplify an existing fairness obligation where the affected individual is promised a particular procedure or substantive result.⁴¹ Justice LeBel's reference to guidelines creating a legitimate expectation in *Agraira* begs far more questions than it resolves. Why would legitimate expectations arise only from procedural guidelines and not substantive ones? Does recognizing guidelines as giving rise to legitimate expectations mean some guidelines (*e.g.*, procedural ones) can be treated as binding? What is the significance in this context of a guideline being "publicly" available? Should a guideline

³⁸ See David Mullan, "Deference from Baker to Suresh and Beyond: Interpreting the Conflicting Signals" in D. Dyzenhaus, ed., *The Unity of Public Law* (London: Hart, 2004), at 21.

³⁹ *Baker*, *supra*, note 9, at paras. 72-75.

⁴⁰ *Agraira*, *supra*, note 36, at para. 101.

⁴¹ *Baker*, *supra*, note 9, at para. 26.

obligating a decision-maker to follow a particular procedure that is not public be more easily disregarded?

The way in which *Agraira* might revive the relevance of soft law and the relevance of the law of legitimate expectations will have to await subsequent application. In an odd way, the way in which Justice LeBel raised the legitimate expectation issue in *Agraira* is reminiscent of his first reference to his doubts about the standard of review in *Chamberlain* — as an aside in a case where the reference was not determinative to the outcome of the case. Justice LeBel’s analytic authenticity unfolds alongside his intellectual curiosity and an overarching vision of accountability through administrative law.

In his final administrative law judgment, in *Mission Institution v. Khela*,⁴² Justice LeBel considered the argument that “*Dunsmuir* Reasonableness” review cannot apply to a decision of prison authorities on a *habeas corpus* application. Rejecting this premise, Justice LeBel reviewed the decision to transfer an inmate to a maximum security facility on a standard of reasonableness. Notwithstanding the important legal interests at stake, Justice LeBel argued a failure to apply deference would lead to courts micro-managing prisons. Ultimately, Justice LeBel did not need to apply the unreasonableness standard as he found the transfer decision at issue was unlawful on procedural fairness grounds.

Another dimension of the *Khela* decision was the determination that jurisdiction over *habeas corpus* applications could be shared between federal and provincial courts. While this decision appears to cut against the goal of coherence (shared jurisdiction can lead to re-litigation and inconsistent decisions), it advances the sometimes competing goal of access to justice by ensuring multiple avenues of redress.⁴³ In this sense, *Khela* represents a last affirmation that coherence is necessary in the development of administrative law, but not always sufficient.

There is a clear arc to Justice LeBel’s design of the standard of review doctrine, from his early *cri de coeur* calling for greater coherence in *Chamberlain* and *Toronto (City)*, through to his comprehensive and principled overhaul of the standard of review analysis in *Dunsmuir*, and subsequent refinements and applications in his last judgments. While it is too early to offer definitive conclusions on how enduring the *Dunsmuir* analysis will turn out to be, it is clear that by the time of his retirement,

⁴² [2014] S.C.J. No. 24, 2014 SCC 24 (S.C.C.) [hereinafter “*Khela*”].

⁴³ I am grateful to Jula Hughes for this insight, which was shared as part of her commentary of this article for the Workshop on the Legacy of Louis LeBel.

Justice LeBel had emerged as a leading architect of the Court's approach to administrative law. That approach is rooted in a responsive and clearly articulated analytic framework.

In a paper written for a conference in honour of retiring Justice Iacobucci, Colleen Flood and I mapped out what we argued was a way to marry the desire for simplicity in the standard of review analysis with an embrace of diversity and the complexity to which it inevitably gives rise. We looked for inspiration to the other grand doctrine of Canadian administrative law — procedural fairness. While the standard of review has been mired in the aforementioned metaphysics, the duty of fairness has come to be seen as a spectrum of varying obligations which may be adapted to any setting involving an administrative decision-maker. *Baker* may not have stood the test of time as a decision synthesizing the standard of review for exercises of administrative discretion, but its synthesis of the threshold, degree and content of fairness remains the well-spring for the duty of fairness 15 years later. Both the fairness and standard of review doctrines balance the primacy of legislative intent with non-exemptible minimum standards of legality. Why then have they diverged so strikingly within the same context of Canadian administrative law?

One of the reasons for the success of the Court's fairness jurisprudence is its aversion to imposing fixed categories on the myriad points along the spectrum of fairness where particular decisions (in light of the decision-maker, the statutory scheme, the expectation of those affected by the decision, and the impact of the decision on their lives) might fall. While the Court has spoken generally of minimal, medium and high degrees of fairness, there has been no attempt to define and distinguish these terms from one another. Rather, they are simply directional beacons as to how onerous fairness obligations are to be depending on the context. This demonstrates the potential of the judicial role when it builds on the lived realities of administrative justice, rather than trying to fit the roundness of that lived experience into the squareness of juridical categories.

While an approach contemplating multiple points of deference along a principled spectrum stood in stark contrast to Iacobucci J.'s categorical approach to the standard of review, I would argue it represents the fulfilment of Justice LeBel's search for coherence in the complexity of the administrative state.

I am not suggesting the standard of review analysis need look identical to the fairness analysis. Rather, I am suggesting deference is

(and ought to be) a far more variable concept than it has been currently envisioned. It is more than the distinction between correctness review and reasonableness review.

What would such an approach look like? An example may be found in New Zealand, and the decision of its High Court in *Wolf v. Minister of Immigration*.⁴⁴ Mirroring some aspects of *Baker*, that case involved a review of a deportation decision which would have the effect of separating a father from his two children. Justice Wild found the significance of the decision to the affected father should be considered in determining the standard of reasonableness to be applied by the reviewing court in the case. Justice Wild summarized the approach to be followed in the following passage:

Whether a reviewing Court considers a decision reasonable and therefore lawful, or unreasonable and therefore unlawful and invalid, depends on the nature of the decision: upon who made it; by what process; what the decision involves (ie its subject matter and the level of policy content in it) *and the importance of the decision to those affected by it, in terms of its potential impact upon, or consequences for, them*.⁴⁵

While no Canadian court has yet adapted the fairness analysis to inform the standard of review in this fashion, there have been glimmers that the Canadian Supreme Court is open to exploring points of intersection between the fairness analysis and the *Dunsmuir* analysis. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,⁴⁶ Abella J., wrote for a unanimous Court about the relationship between the *Dunsmuir* analysis and the quality of reasons provided by a tribunal (which had been viewed primarily through the lens of the variable duty of fairness post-*Baker*):

This, I think, is the context for understanding what the Court meant in *Dunsmuir* when it called for 'justification, transparency and intelligibility'. To me, it represents a respectful appreciation that a wide range of specialized decision-makers routinely render decisions in their respective spheres of expertise, using concepts and language often unique to their areas and rendering decisions that are often counter-intuitive to a generalist

⁴⁴ [2004] NZAR 414 (H.C.), *per* Wild J. I am grateful to Professor Hanna Wilberg of the University of Auckland for bringing this case and its significance for this argument to my attention.

⁴⁵ *Id.*, at para. 47. See also para. 64 (emphasis added).

⁴⁶ [2011] S.C.J. No. 62, 2011 SCC 62 (S.C.C.).

Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the ‘adequacy’ of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at ‘the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes’ (para. 47).

... if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.⁴⁷

Just as the duty to provide reasons will vary according to the degree of fairness appropriate to particular decision-making contexts, so the scrutiny of those reasons may vary according to the degree of deference appropriate to particular decision-making contexts. Deference, in other words, is a concept that need not be an on-off switch. Just as there may be varying degrees of intensity in an analysis of fairness (where one setting might require full disclosure and an oral hearing, another may be fair if there is simply notice and an opportunity to be heard in writing), so deference may be adapted to various circumstances. This does not put judges in the position of having to divine the distinction between two levels of unreasonableness, as had been the undoing of the pre-*Dunsmuir* pragmatic and functional era, but it does mean that a minister making a discretionary policy decision may be entitled to more deference than that same minister making a discretionary decision engaging legal rights. Deference may well be justified in both cases, but *more* deference ought to attach to the policy determination.

While Justice LeBel himself may not agree with this approach, it is one very much inspired by his call for coherence in a world of decision-makers affecting assembly lines, cops and cows.

⁴⁷ *Id.*, at paras. 13-16, quoted by LeBel J. in *Agraira*, *supra*, note 36, at para. 52.

V. CONCLUSION

While Justice LeBel largely (though not fully) delivered on his ambitious goal of coherence in the categorical approach to the standard of review, the approach itself can only take root if it resonates with the lived realities of administrative decision-making. Justice LeBel rightly characterized the rule of law and democratic commitments as the twin pillars of the standard of review (and, I would add, of administrative law more broadly). The project I believe he has left for the next generation of thought leaders is to balance these in a way that does justice both to the enduring and the evolving context of administrative law.⁴⁸

⁴⁸ For an attempt to take up this ambitious challenge, see Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge: Cambridge University Press, 2012).