Khosa – Still Searching for that Star

DAVID ELLIOTT *

I. INTRODUCTION

Legislative intent, the Supreme Court has said, is the "polar star" of standard of review analysis.[1] After the Supreme Court's spring 2009 decision in *Khosa*[2] though, the star still needs more focus. In this decision, a 7-1 majority of the Court upheld an immigration tribunal's decision to reject an application for an exemption from a removal order. *Khosa* was the last chapter in a human drama that started with a fatal street race on Vancouver's Marine Drive. It is an ongoing chapter in another story, the debate about the nature of judicial review of administrative action. The majority judges in *Khosa* disagreed as to whether section 18.1(4) of the *Federal Courts Act*[3] is sufficient to establish the relevant standard of review, or whether it must be supplemented by the common law standard of review principles in the 2008 decision in *Dunsmuir.*[4] This prompted a wide-ranging exchange about the relationship between judicial review and legislative intent. Neither of the majority approaches seems entirely satisfactory to me, but the debate in *Khosa* suggests some ideas for improvement. To show why, I will note briefly the facts and the immediate questions in this case, and then look in more depth at

* David W. Elliott, D.Phil., M.A., B.A. (Hons. Jur.), B.A., is Associate Professor of Law at Carleton University in Ottawa. He has taught and written in the fields of public law, administrative law, and law and Aboriginal peoples.

1 *Canadian Union of Public Employees v. Ontario (Minister of Labour),* 2003 SCC 29, [2003] 1 S.C.R. 539 at para. 149.

2 *Canada (Minister of Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339 [*Khosa*], rev'g *Khosa v. Canada (Minister of Citizenship and Immigration),* 2007 FCA 24, [2007] 4. F.C.R. 332, 276 D.L.R. (4th) 369 [*Khosa v. Canada* (F.C.A.) cited to F.C.R.], rev'g 2005 FC 1218, 266 F.T.R. 138, 142 A.C.W.S. (3d) 293, 48 Imm. L.R. (3d) 253 [*Khosa v. Canada* (F.C.) cited to F.T.R.], aff'g [2004] I.A.D.D. No. 1268 (Immigration Appeal Division) [*Khosa v. Canada* (I.A.D.)], aff'g *R. v. Khosa,* 2003 BCCA 644, 190 B.C.A.C. 23, 61 W.C.B. (2d) 155, 44 M.V.R. (4th) 13 [*R. v. Khosa* (B.C.C.A.) cited to B.C.A.C.].

3 R.S.C. 1985, c. F-7, s. 18.1(4).

4 *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190 [*Dunsmuir*]. Unless otherwise indicated, references to Dunsmuir are to the five-judge majority judgment in this decision, rendered by Bastarache and LeBel JJ. Binnie J. and Deschamps J. (for herself and Charron and Rothstein JJ.) delivered separate concurring judgments on the question of the standard of review.

the key underlying question of the relationship between common law review on one hand, and review codes and other legislative provisions, on the other. Then I will offer some suggestions for adding coherence to standard of review analysis.

The Vancouver street race ended when a car driven by Mr. Sukhvir Singh Khosa, an eighteen-year-old landed immigrant, struck and killed an innocent pedestrian. Mr. Khosa was convicted of criminal negligence and ordered deported back to India, his country of birth.[5] He applied to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada for a humanitarian and compassionate grounds exemption,[6] but the application failed. The IAD was divided on how much weight to give to Mr. Khosa's denial that he was racing, despite a criminal court finding to the contrary.[7] For the majority, this was significant; for the dissent, it was not. Mr. Khosa challenged the IAD decision, losing in the Federal Court, winning in the Federal Court of Appeal, and then losing again in the Supreme Court of Canada.[8] He was deported to India on April 28, 2008, two months after the Supreme Court's decision.[9]

---

5 *Ibid.* See also *R. v. Khosa* (B.C.C.A.), *supra* note 2 at paras. 28-36, and *Khosa v. Canada* (F.C.), *supra* note 2 at paras. 1-5.

6 Pursuant to s. 67(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*].

7 The IAD majority considered factors such as remorse, rehabilitation, and likelihood of reoffending. They concluded that overall, these factors weighed against a humanitarian and compassionate grounds exception. Although they found some of the evidence inconclusive, the majority were especially concerned at Mr. Khosa's denial that he had been street racing despite a criminal court finding to the contrary. They said that in view of Mr. Khosa's "failure...to acknowledge his conduct and accept responsibility for...street-racing...there is insufficient evidence upon which I can make a determination that [Mr. Khosa] does not represent a present risk to the public": member Kim Workun (member John Munro concurring), *Khosa v. Canada* (I.A.D.), *supra* note 2 at para. 23, quoted by Fish J. at para. 155 of *Khosa*, *supra* note 2. The dissenting member said that the majority placed too much weight on this denial: *Khosa v. Canada* (I.A.D.), *supra* note 2 at para. 53.

8 For the three court decisions, see *supra* note 2.

9 The Supreme Court's decision put an end to Mr. Khosa's stay in Canada, but not to the broader social questions raised by the case. Why, for example, do some young people take part in street racing? How can communities encourage safer, more legitimate activities? Should road designs be re-thought in residential areas? Should younger drivers' licence conditions be even more restrictive? When should sanctions for landed immigrants differ from those for permanent residents? For two recent legislative efforts to target street racing, see Bill C-19, *An Act to amend the Criminal Code (street racing) and to make a consequential amendment to the Corrections and Conditional Release Act*, 1st Sess., 39th Parl., 2006 (as passed by the House of Commons 14 December 2006), which created mandatory minimum driving prohibition periods for people convicted of street racing, and increased the maximum term of imprisonment for the most serious forms of the offence; and Bill 203, *An Act to amend the Highway Traffic Act and the Remedies for Organized Crime and Other Unlawful Activities Act, 2001 and to make consequential amendments to other Acts*, 2nd Sess., 38th Leg., Ontario, 2007 (assented to 4 June 2007), which imposed heavy penalties for offences such as street

II. IMMEDIATE QUESTIONS

Because Mr. Khosa challenged the IAD decision by way of judicial review, the courts first had to determine how and how extensively they should supervise the tribunal's decision. As a federal tribunal, the IAD was subject to the codified grounds of judicial review in section 18.1(4) of the *Federal Courts Act* and to a privative clause in s. 162(1) of the *Immigration and Refugee Protection Act*.[10] Section 18.1(4) succeeded ss. 18 and 28 of the former *Federal Court Act*.[11] The statute was enacted in the early 1970s to create a court of review for all federal administrative decisions, and to provide it with codified and streamlined grounds of review and procedures.[12]

Section 18.1(4) of the *Federal Courts Act* permits judicial review where a federal tribunal's decision is marred by one or more of six categories of defect.[13] For example, s. 18.1(4)(d)—the subsection most relevant to the situation in *Khosa*—permits review where the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." Section 18.1(4)(c) permits review where the tribunal "erred in law", whether or not the error is apparent on the face of the record. Both the scope and nature of this review are addressed by the statute. Section 18.1(4)(d) imposes specific—and rigorous-sounding—requirements before courts can review findings of fact, while s. 18.1(4)(c) makes a less demanding requirement (an error) a precondition to review of questions of law.

In contrast, current common law review principles have evolved through case law such as the Supreme Court's major 2008 restatement in *Dunsmuir*.[14] They require courts to weigh various contextual factors in order to determine the availability and intensity of review in a given situation. Among other things, *Dunsmuir* replaced the older patent unreasonableness–unreasonableness-correctness standards of substantive review with two: reasonableness and correctness.[15] The new reasonableness standard takes the

---

racing and empowered police to immediately impound vehicles and impose one-week driving suspensions. As of March, 2010, the street racing penalties had been declared constitutional: *R. v. Raham*, 2010 ONCA 206. Are these statutes likely to resolve the social questions?

10 *Supra* note 6. See also s. 72(1).

11 S.C. 1970-71-72, c. 1, enacted in 1971.

12 For an early comment on this legislation, see David J. Mullan, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform?" (1973) 23 U.T.L.J. 14.

13 *Supra* note 3.

14 *Supra* note 4.

15 *Ibid.* at paras. 43-64. See also *infra* note 103. *Dunsmuir* also attempted to shorten and simplify contextual factor analysis: see text after note 103. In regard to procedural review, *Dunsmuir*

place of both the original reasonableness standard and the low-intensity, highly deferential standard of patent unreasonableness.

Although the current common law standards might appear to correspond roughly to sections 18.1(4)(d) and 18.1(4)(c) of the *Federal Courts Act,* they are by no means identical. Statutory wording is only one of several contextual factors considered at common law,[16] and the common law standards have criteria of their own. For example, in *Dunsmuir,* common law reasonableness is concerned with the "justification, transparency and intelligibility"[17] of the administrator's decision-making process, and "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[18] At first glance, this is less restrictive than s. 18.1(4)(d) review, with its limited targets of perversity, capriciousness, or lack of regard for the material.[19] The common law/statutory review gap seems even greater in the case of ss. 58 and 59 of the British Columbia *Administrative Tribunals Act,* which provide specifically for review under the standard of patent unreasonableness.[20] How courts approach these differences is important: the less intense the review, the more likely that an administrative decision will be upheld, and *vice versa.*

In *Khosa,* then, the immediate legal questions were: (1) did the grounds of review in s. 18.1(4) of the *Federal Courts Act*[21] include or exclude any consideration of the common law standard of review principles?; (2) what was the relevant standard of review?; and (3) should the IAD decision be upheld? In the Federal Court, Lufty J. applied the pre-*Dunsmuir* standard of patent unreasonableness, and concluded that the IAD decision was not patently unreasonable.[22] A majority of the Federal Court of Appeal said the standard should be reasonableness, and held that the IAD majority decision

---

narrowed the scope of procedural fairness for most cases involving the dismissal of contractual public employees. For this situation, the Court largely reversed the presumption in *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653 in favour of public law procedural fairness principles, with a presumption in favour of contract principles. For a perceptive comment on the *Dunsmuir* efforts at reform, see David Mullan, "*Dunsmuir v. New Brunswick,* Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can. J. Admin. L. & Prac. 117.

16 See also *infra* note 103.

17 *Supra* note 4 at para. 47.

18 *Ibid.* See also *ibid.* at para. 48, where the main majority said that reasonableness review requires "deference as respect," and additional comments in paras. 45 and 49.

19 *Supra* note 3, s. 18.1(4)(d).

20 S.B.C. 2004, c. 45 [*ATA*].

21 *Supra* note 3.

22 *Khosa v. Canada* (F.C.), *supra* note 2.

was unreasonable.[23] Desjardins J.A., dissenting, took an approach similar to that of Lufty J. in the Federal Court.[24]

The five-judge main majority[25] in the Supreme Court applied the common law reasonableness standard articulated in *Dunsmuir*.[26] Speaking for the main majority, Binnie J. said that although the legislature can exclude common law standard of review analysis "by clear and explicit language,"[27] it did not do so here. He went further:

> Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context...[28]

The main majority concluded that the IAD decision was reasonable. Rothstein J., with Deschamps J. concurring in part, said that the relevant standard was set by the deferential grounds in s. 18.1(4)(d) of the *Federal Courts Act*.[29] He agreed, though, that the IAD decision should be upheld.[30] Fish J., dissenting, agreed with the main majority that the standard was reasonableness, but he concluded that the IAD decision was unreasonable.[31] In the end, seven of the eight judges found the removal order to be valid. Moreover, as a result of the main majority decision, the *Dunsmuir* standard of review analysis is likely to be a major—if uncertain—gloss on s. 18.1(4) of the *Federal Courts Act*,[32] and on most other review codes, including the B.C. *ATA*.[33]

---

23 *Khosa v. Canada* (F.C.A.), supra note 2. See paras. 1-25 for the position of Décary and Malone JJ.A.

24 *Ibid.* See especially paras. 45-55 and 58-61. She also considered an argument that had not been raised before the Federal Court judge: paras. 56-57.

25 *Khosa, supra* note 2. Majority judgment by Binnie J., with McLachlin C.J., and LeBel, Abella and Charron JJ. concurring. Unless otherwise indicated, references to *Khosa* are to this judgment.

26 *Supra* note 4.

27 *Khosa, supra* note 2 at para. 50.

28 *Ibid.* at para. 19.

29 *Supra* note 3.

30 Ironically, Binnie and Rothstein JJ. arrived at the same general conclusion after applying contrasting legal criteria, while Fish J. dissented after applying the same general criteria as the main majority. Binnie and Rothstein JJ. might have been less likely to reach the same result if there had been more controversy over the IAD's interpretation of the facts, or if its decision had turned on a question of law.

31 *Khosa, supra* note 2 at para. 157. At paras. 149 and 156, Fish J. said that Mr. Khosa's denial that he had been engaged in street racing could not contradict or outweigh "all the evidence in his favour on the issues of remorse, rehabilitation, and likelihood of reoffence" and that the IAD majority's "inordinate" emphasis on this issue rendered their decision unreasonable.

32 *Supra* note 3. See Parts 4 to 6 of the majority decision in *Khosa, supra* note 2 and the early post-*Khosa* cases in *infra* note 127.

III. STANDARD OF REVIEW CONTROVERSY

Because of the general, residual nature of common law, the question of the reach of a statutory review code invites an examination of common law standard of review principles. *Khosa* is of special interest, as it contains the first extended discussion of these principles since *Dunsmuir* in 2008. Since they set many of the criteria that determine if an administrative decision should be upheld or set aside, these principles are often controversial, and the doctrine has evolved rapidly in the past four decades. Modern substantive contextual review,[34] first called the "pragmatic and functional" approach, and then simply "standard of review," emerged in the 1970s. It was a reaction to the excessive intervention[35] and formalism[36] that was thought to characterize

---

33 *Supra* note 20. Sections 58 and 59 of this Act contain a statutory patent unreasonableness ground. Referring to it, the main majority said in *Khosa, supra* note 2 at para. 19 that "[d]espite *Dunsmuir*, 'patent unreasonableness' will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention". As seen below, it is not clear from *Khosa* how statutory grounds such as patent unreasonableness will live on, and how courts will "calibrate" their requirements. For the early impact of *Khosa* on the British Columbia Court of Appeal's interpretation of *ATA* patent unreasonableness, see *infra* note 128. It remains to be seen whether and how procedural review codifications such as the Ontario *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 and the Quebec *An Act respecting administrative justice*, R.S.Q. c. J-3 [*Administrative Justice Act*] will be affected by *Khosa's* pro-common law orientation in regard to substantive judicial review.

34 Courts generally distinguish between substantive review, which is concerned with non-procedural defects related to the reasoning and mental process of the administrator, and procedural review, which is concerned with fairness and process issues such as the right of a party to be heard, the impartiality and independence of the decision maker, and the general absence of abuse of process. The difference between the two kinds of review is sometimes just a question of degree. Both take a contextual factor-weighing approach to determining the intensity of review, although the factors are not identical: see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*], describing the substantive contextual factors at paras. 58-61 and the procedural contextual factors at paras. 22-27. As well, procedural review has a range of potential safeguards (e.g., the right to notice, an opportunity to respond to the contrary case, etc.) that are not found in substantive review. See also David W. Elliott, "Suresh and the Common Borders of Administrative Law: Time for the Tailor?" (2002) 65 Sask. L. Rev. 469 at 487-89. On procedural review generally, see David Phillip Jones & Anne S. de Villars, Principles of Administrative Law, 4th ed. (Scarborough: Carswell, 2004), c. 8; and *Dunsmuir, supra* note 4 at paras. 85-90.

35 See e.g. the criticisms of interventionism made in Paul Weiler, In the Last Resort: A Critical Study of The Supreme Court of Canada (Toronto: Carswell/Methuen, 1974) c. 5.

36 See generally infra note 37. The rejection of "classical" review in the 1970s and 1980s was driven heavily by the realist critique that law is indeterminate, and that statutory interpretation must take account of contexts as well as texts. For an influential example of

earlier classical[37] forms of review. Courts shifted from looking for jurisdictional and non-jurisdictional grounds of review, to identifying and weighing various contextual factors—both inside and outside the statutory text—in order to determine the relevant level of review.[38]

The new approach was broader based, more transparent, and more concerned about judicial restraint.[39] After several decades, though, commentators and judges began to complain that contextual review had become too unwieldy and unpredictable.[40] The Supreme Court responded to some of these concerns in *Dunsmuir*.[41] However, a year after *Dunsmuir*,[42]

---

this critique, see H. Wade MacLauchlan, Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986) 36 U.T.L.J. 343.

37 Under what might be called the "classical review" approach in Canada until the 1970s, there were three general grounds of review: jurisdictional errors, a collection of nominate jurisdictional defects, and a non-jurisdictional ground of error of law on the face of the record that could be excluded by the presence of a privative clause. Other failings within jurisdictional boundaries could not be reviewed. They were considered part of the "merits" of the administrator's decision, and were subject to judicial control only pursuant to a statutory appeal. See generally Ontario, Royal Commission Inquiry into Civil Rights: Report Number One, Vol. 1 (Toronto: Queen's Printer, 1968). Classical review was highly text-based, with little explicit reference to non-textual sources. In the 1960s and at the beginning of the 1970s, it was becoming increasingly interventionist. This trend culminated in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425. There, in a very terse judgment, the Supreme Court set aside a decision of a labour relations board, despite the presence of strong privative clauses.

38 For aspects of this development see *supra* note 15; Elliott, *supra* note 34; The Honourable Mr. Justice Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002) 27 Queen's L.J. 859; and Colleen M. Flood & Lorne Sossin, eds., Administrative Law in Context (Toronto: Emond Montgomery Publications, 2008), c. 8-10.

39 See e.g., H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001) 80 Can. Bar Rev. 280.

40 See e.g., the concerns raised in *Toronto (City) v. Canadian Union of Public Employees Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 [*Toronto*] at paras. 61-134; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 at paras. 190-02; *Voice Construction v. Construction & General Workers' Union, Local 92*, 2004 *SCC 23*, [2004] 1 S.C.R. 609 at paras. 40-41; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at paras. 102, 279; *Dunsmuir, supra* note 4 at paras. 32-63, 120-155, 158-67. In *Toronto*, at para. 63, LeBel J. referred to "growing criticism with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied". Further, at para. 64, he said that, "[t]his 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". In *Dunsmuir*, at para. 32, the main majority said that "[d]espite efforts to refine and clarify it, the present system has proven to be difficult to implement". For academic criticisms, see the works referred to in the decisions above.

41 *Supra* note 15. See also Part 4, below.

42 *Supra* note 4. Two post-*Dunsmuir* decisions of interest before *Khosa* were *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 [*Lake*]; and *Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195 [*Proprio*

standard of review controversy was as strong as ever, and, as will be seen, *Khosa* did not do much to clarify the relationship between judicial review and legislative intent.

IV. SHOULD THE COMMON LAW APPLY?

There were two main contexts for the debate between the majority judges in *Khosa*—the wording of the code itself, and the nature of common law standard of review analysis. Speaking for the main majority, Binnie J. said that the general and discretionary nature of the code makes common law supplementation both necessary and possible. He then tried to show how the code and common law standard of review principles interrelate. Binnie J. based his generality argument on the view that s. 18.1(4) of the *Federal Courts Act* must address a wide range of different federal tribunals. To apply it flexibly, courts must be able to draw on the common law.[43]

In contrast, Rothstein J. considered s. 18.1(4) to be an exhaustive statement of the standard of review.[44] He said that s. 18.1(4) *is* flexible, as it addresses several different types of questions,[45] and that there is consequently no need to apply the common law. Moreover, because this provision indicates clearly what grounds and standards are required, it "occupies the field" of

---

Direct]. In *Lake*, the Supreme Court upheld a Minister's assessment of the constitutional validity of his decision to surrender a fugitive. *Dunsmuir* had implied at para. 58 that constitutional questions should be subject to the correctness standard. In *Lake*, however, the Court applied a full contextual review and concluded that the appropriate standard of review was reasonableness. In *Proprio Direct*, the Court split 7-2 on the appropriate standard to be applied in a statutory appeal from the decision of a real estate association disciplinary committee that a real estate company had violated the association's standards. The majority said that this was an expert committee interpreting its home statute, decided on the reasonableness standard, and concluded that the decision was not unreasonable. The dissenting judges said that this was a wide statutory appeal from a decision that involved issues of general concern: paras. 66-67. They said that no deference was needed, but that even if the reasonableness standard were applied, they would have found the decision to be unreasonable: paras. 70-71. See also *Société de l'assurance automobile du Québec v. Cyr*, 2008 SCC 13, [2008] 1 S.C.R. 338, where the majority applied procedural fairness under Quebec's *Administrative Justice Act*, *supra* note 33, rather than contract principles, to the revocation of a mechanic's accreditation.

43 *Khosa*, *supra* note 2 at para. 28.

44 *Ibid.* at paras. 128-29. Rothstein J. said that the issue was not whether s. 18.1(4) was a self-contained code, excluding reference to other statutory provisions and to relevant common law rules, but whether it was exhaustive of the common law standard of review. In his view it did oust *Dunsmuir*, *supra* note 4.

45 *Ibid.* at paras. 108-10. Rothstein J. also said that *Dunsmuir*, *supra* note 4 itself has only two standards, and that *Dunsmuir* analysis is available under s. 18.1(4) where there is a privative clause.

standard of review analysis.[46] As seen,[47] s. 18.1(4)(d) refers to a decision or order of a tribunal that was based on "an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[48] For Rothstein J., these words are "clear and unambiguous".[49] They permit review for only the most "egregious cases"[50] of errors of fact. Thus, s. 18.1(4)(d) excludes further recourse to the common law.

The view that s. 18.1(4) is non-exhaustive seems preferable to the closed-door view of Rothstein J. Section 18.1(4)(d) itself is relatively detailed, and "perverse," "capricious," and "without regard" is strong language. It suggests a high threshold for review of erroneous questions of fact.[51] On the other hand, the *Federal Court Act* does not specifically immunize s. 18.1(4) from common law consideration.[52] Nor does the Act define the terms in s. 18.1(4)(d). Most grounds in s. 18.1(4) were originally identical or similar to traditional common law grounds, while s. 18.1(4)(d) was a little more distinct.[53] However, the inclusion of this subsection in s. 18.1(4) suggests that it too might permit some common law interpretation. The courts themselves had acted on this

---

46 *Ibid.* at para. 75.

47 See Part 2, above.

48 *Supra* note 3.

49 *Khosa, supra* note 2 at para. 72.

50 *Ibid.* at para.118.

51 See *Rohm & Haas Canada Ltd. v. Canada (Anti-Dumping Tribunal)*, (1978), 91 D.L.R. (3d) 212 (F.C.A.), describing "perversity" as "wilfully going contrary to the evidence" and "without regard for the material before it," and "[ignoring or refusing to take notice of] that material or some significant part of it" at para. 6. See also *Crupi v. Canada (Employment and Immigration Commission)*, [1986] 3 F.C. 3 (F.C.A.), saying that the provision required a decision to be "manifestly wrong in relation to the entire file." At para. 27 in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, the Supreme Court said that in reviewing a decision of the IAD on a question of fact under s. 18.1(4)(d), a court should accord "great deference," and, at para. 38, referred, with apparent approval, to a Federal Court of Appeal decision saying that the patent unreasonableness standard should apply.

52 *IRPA, supra* note 6. The privative clause in s. 162(1) of the *IRPA* protects the decision-making power of the IAD, not the statutory review power of the courts. To the extent that this provision restricts judicial review, it seems to be intended to restrict statutory as well as common law review.

53 Section 18.1(4)(d) had no close analogue in Canadian judicial review, except perhaps for the evolving ground of "no evidence". On the other hand the phrase "perverse and capricious" bore some resemblance to the "arbitrary, capricious, an abuse of discretion" criteria in s. 10(e) of the American *Administrative Procedure Act* (U.S.A., 1946), now 5 U.S.C.§§ 706, which was subject to interpretation by American courts. See e.g. the decisions referred to in *Citizens to Preserve Overton Park Inc. v. Volpe, Secretary of Transportation*, 401 U.S. 402; 91 S. Ct. 814; 28 L. Ed. 2d 136 (U.S.S.Ct.) at para. 24.

assumption in the years before *Khosa*. They had elaborated, to varying degrees, on the meaning of its grounds, including s. 18.1(4)(d).[54]

Binnie J. supported his generality argument with another argument based on discretion. He claimed that the power of reviewing courts to set the standard of review is similar to a judge's discretion to refuse judicial relief in cases of, for example, misconduct on the part of an applicant.[55] In this case, he said, the wording of s. 18.1(4) recognizes the discretion of reviewing courts not just to refuse relief, but to adjust the level of review. He said that this provision prescribes grounds, rather than standards, of review. The grounds permit, but do not require, the relevant standards.[56] Thus, although the ground of error of law in s. 18.1(4)(c) normally attracts correctness review, "the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute."[57]

As Rothstein J. suggested, this analogy to access and relief discretion conflates two distinct concepts. The first power is a broad equitable or public interest discretion, exercised by judges to uphold the integrity and fairness of the litigation process.[58] It applies to an otherwise unauthorized administrative decision. In contrast, both the grounds of review and standard of review analysis are concerned with the legal validity of an administrative decision. Further, courts assess legal validity by reference to the enabling legislation, and subject to review criteria contemplated by the legislature.[59] This is not just

---

54 *Supra* note 51. The decisions tend to follow one or both of two main patterns: (1) elaborating on the wording of s. 18.1(4)(d), and (2) equating s. 18.1(4)(d) with the patent unreasonableness standard (and, after *Dunsmuir*, the reasonableness standard: see e.g., *Obeid v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 503 (F.C.)). But see *Stelco Inc. v. British Steel Canada Inc.*, [2000] 3 F.C. 282 (Fed. C.A.) [*Stelco*] (Evans J.A. for himself, Desjardins and Rothstein JJ.A.). At paras. 14-16, Evans J.A. said that although courts should not try to equate s. 18.1(4)(d) with either the reasonableness or patent unreasonableness standard, they can look at common law contextual factors to help determine if the decision was rationally supported by any material before it. This is close to the approach being recommended in this comment.

55 *Khosa, supra* note 2 at paras. 36, 38, 49.

56 *Ibid.* at para. 36.

57 *Ibid.* at para. 44. Binnie J. said that in this situation, the decision would be upheld if it were found to be reasonable. *Quaere*, whether this general discretion to convert correctness review to reasonableness review in certain cases could ever include errors of law that involve "true" jurisdictional issues?

58 E.g., to deny a remedy where there has been misconduct by the applicant or to refuse access to a court where a more appropriate forum is available. See the authorities referred to by Rothstein J. in *Khosa, supra* note 2 at para. 135.

59 Of course, when a court weighs contextual factors in standard of review analysis, it might arrive at a lower or higher intensity of review than it would if it had applied the traditional common law review grounds on their own. However, this is simply the result of applying

an equitable or public interest matter, but a question of statutory interpretation. Why should *it* be subject to a discretionary judicial override?

V. HOW SHOULD THE COMMON LAW APPLY?

Binnie J. did not need an argument about discretion to support the view that the code can be read in light of common law standards of review. However, he did need to show *how* the common law supplements statutory grounds such as those in s. 18.1(4). Although Binnie J. referred at one point to the *Dunsmuir* statement that common law standard of review analysis is concerned with determining legislative intent,[60] many of his comments were limited to whether there was a clear legislative intent to *oust* this analysis.[61]

If the legislature has *not* ousted the common law by means of "clear and explicit language," how do legislation and common law relate in practice? Should s. 18.1(4) always be subject to a general common law override? What weight, if any, should attach to the fact that s. 18.1(4) is part of a statutory text? At one point, Binnie J. said that s. 18.1(4)(d) "intended a high degree of deference for administrative fact finding," and can provide "legislative precision" to the reasonableness standard for findings of fact under the *Federal Court Act*.[62] However, when Binnie J. went on to determine the relevant level of review in this case, s. 18.1(4)(d) faded into the background. He made no reference at this stage to perversity, capriciousness, lack of regard for the evidence, or even a high degree of deference. Instead, he went directly to the *Dunsmuir* analysis, found that the standard should be reasonableness, and concluded that the IAD's decision did not fall outside *Dunsmuir's* "range of reasonable outcomes."[63] Within this analysis, Binnie J. described the privative

---

broader modern review criteria to the question of administrative validity and legislative intent, not a discretionary "staying" of judicial hands.

60 *Khosa, supra* note 2 at para. 30.

61 See e.g. *Khosa, ibid.* at paras. 19, 30, 40, and 51. Most of Binnie J.'s other references were to legislative intent on specific issues, such as, at para. 28, whether the general nature of s. 18.1(4) implied a need for common law supplementation, and, at para. 39, whether legislative intent should prevail over the common meaning of individual words. Binnie J. did draw a link between privative clauses and legislative intent at para. 55: see text accompanying note 64.

62 *Khosa, supra* note 2 at para. 46. See also para. 3. This sounds like the statute supplementing the common law, rather than *vice versa*. For the latter approach, see Binnie J.'s suggestion at para. 19 that the common law can calibrate the content of a statutory review ground such as patent unreasonableness in the B.C. *ATA, supra* note 20: see text accompanying notes 22 and 25; and his suggestion at para. 48 that s. 18.1(4) the *Federal Court Act* is to be interpreted and applied against the "backdrop" of the common law.

63 *Ibid.* at para. 67.

clause in s. 162(1) of the *IRPA* as "an important indicator of legislative intent."[64] But all he required of s. 18.1(4)(d) of the *Federal Court Act* was that it not "conflict" with *Dunsmuir*'s reasonableness standard.[65] So much for legislative precision![66]

Rothstein J. had a simple answer to the question about when to apply the *Dunsmuir* analysis: rarely. He based this view on a wide-ranging theory about legislative and judicial roles, and about the importance of privative clauses. This theory went beyond the generality and discretion issues discussed above. Rothstein J. suggested that in the absence of a strong privative clause, the *Dunsmuir* analysis should not apply to *any* administrative decision involving law or related matters.[67] In Rothstein J.'s view, supervision of questions of law—and of jurisdiction, constitutionality, and natural justice, etc.—is a special responsibility of courts, and should normally be subject to correctness review. Conversely, where it is clear at common law or in a statute where deference is required, *Dunsmuir's* contextual analysis is unnecessary.[68] Rothstein J. said that tribunals are "better situated" than courts to decide questions of fact or policy, and should be deferred to in these areas. In the *Federal Courts Act,* he said, Parliament has indicated expressly where it wanted deference—in regard to the fact-related matters in s. 18.1(4)(d). Elsewhere, in the absence of a strong privative clause, the correctness standard should apply.

In Rothstein J.'s view, the deferential approach in modern contextual review started as a means of reconciling the rule of law with a legislative intent to protect some expert decision makers from review, but then it strayed from this path.[69] According to Rothstein J., *C.U.P.E.,*[70] the 1979 decision credited with starting modern substantive contextual review, was a response to a specific legislative signal.[71] Its policy of deference relaxed full correctness review on

---

64 *Ibid.* at para. 55.

65 *Ibid.* at para. 58. *Cf. Baker, supra* note 34, where the Supreme Court applied a reasonableness standard to a humanitarian and compassionate grounds decision without even referring to the wording of s. 18.1(4) of the *Federal Court Act.*

66 As seen, Binnie J.'s concept of broad common law discretion to alter the effect of grounds of review left some of the other grounds in s. 18.1(4) in a similar fluid state. See text accompanying notes 55-57.

67 See e.g. *Khosa, supra note* 2 at para. 74.

68 *Ibid.* at paras. 90-91, 95, 120.

69 *Ibid.* at paras. 76-92.

70 *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 [*C.U.P.E*]. Although *C.U.P.E.* is generally regarded as being the foundation of modern contextual review, some of the ground had been laid in Dickson J.'s earlier decision in *Service Employees International Union, Local No. 333 v. Nipawin District Staff Nurses Association et al.*, [1975] S.C.R. 382.

71 In Rothstein J.'s view, the main majority in *Dunsmuir* was wrong to see the deference policy under standard of review analysis as a response to the tension between the rule of law and

questions of law where the legislature expressly indicated its intent to restrict or exclude review.[72] In these areas, courts were to look only for patent unreasonableness or—at a later date—unreasonableness. This policy, said Rothstein J., *applied only where there was a strong privative clause*, in recognition of the legislature's prerogative to determine the relevant level of judicial review.[73]

Rothstein J. said the Supreme Court began to deviate from this policy in its 1994 *Pezim*[74] decision. There the Court assumed the power to substitute reasonableness for correctness review of errors of law: i) in the absence of a privative clause, ii) despite the presence of a legislative appeal provision, and iii) on the basis of the Court's own appraisal of administrative expertise.[75] Then, the Court downgraded the privative clause further by treating it as just one of a number of factors to consider in determining deference.[76] From its origins as a specific judicial response to privative clauses, deference policy came to be seen as a general judicial response to the legislature's initiatives in *creating* administrative bodies,[77] and judicially determined expertise—not

---

the legislative desire to create administrative bodies. He said the creation of administrative bodies may bypass courts as primary decision makers, but does not interfere with their supervisory role: *Khosa supra* note 2 at paras. 77, 79. Rothstein J. said that it is privative clauses that create a tension between the rule of law and legislative supremacy, as they *do* purport to interfere with the courts' supervisory role: *Khosa supra* note 2 at paras. 75, 79-81.

72 *Khosa, supra* note 2 at paras. 82-84.

73 *Ibid.* at para. 81. Rothstein J. said that strong privative clauses typically purport "to preclude review not only of factual findings, but also legal and jurisdictional decisions". By implication, other privative clauses would *not* have triggered *C.U.P.E.* deference.

74 *Ibid.* at paras. 87-88. Referring to *Pezim v. British Columbia (Superintendent of Brokers) (sub nom. Pezim v. British Columbia (Securities Commission))*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385 [*Pezim*].

75 *Ibid.*

76 *Khosa, supra* note 2 at para. 92. Rothstein J. here referred to *Pushpanathan v. Canada (Minister of Citizenship & Immigration*, [1998] 1 S.C.R. 982 [*Pushpanathan*]. See also *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 [*Bradco*], where the Court treated a legislative provision that purported to confer finality as being merely one of a number of factors to consider.

77 *Khosa, ibid.* at para. 78, referring to the statement at para. 27 in *Dunsmuir, supra* note 4 that "[j]udicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers." As Rothstein J. noted, the legislature does not contradict or oust the supervisory power of courts merely by creating special administrative bodies to decide matters at first instance. This process merely bypasses courts as primary adjudicators. Instead, in *Khosa, supra* note 2 at para 79, Rothstein J. said it is privative clauses that create this tension, by purporting to exclude judicial review. Rothstein J.'s critique is sound if the term "tension" is construed as meaning outright conflict, as where a statute seeks to exclude common law review. However, the *Dunsmuir* main majority may have had a softer meaning, such as "strain" or "potential divergence," in mind.

actual but imputed expertise—came to rival legislative intent as the polar star of standard of review analysis.[78]

In *Khosa*, Rothstein J. said there was no strong privative clause,[79] and the question was one of fact.[80] On this question, he said, s. 18.1(4)(d) of the *Federal Courts Act* occupied the field in regard to standard of review.[81] Accordingly, there should be no resort to the common law standard of review analysis in *Dunsmuir*.[82] Privative clauses, then, should move to the front page, and *Dunsmuir* should be demoted from landmark to footnote.

In contrast with modern mainstream review, Rothstein J.'s suggested alternative framework promises simplicity, clarity, and fidelity to legislative intent. What could be more explicit than a strong privative clause? And why resort to judicial inferences and deference policy where there is no need to reconcile legislative intent with the rule of law? As Rothstein J. suggests, the mere creation of an administrator to adjudicate at first instance does not target judicial review in the way that a privative clause does.

However, Rothstein J.'s theory makes these gains at a high price. One of the merits of modern contextual review is that it broadened the base for judicial review by recognizing openly that many factors are relevant to the standard of review, not simply privative clauses. Why give this up? Paradoxically, by limiting the legislature to a single mechanism for signalling judicial restraint on legal and related questions, Rothstein J.'s theory *restricts* the mechanisms of legislative intent. Indeed, his theory is not satisfied with a privative clause; only a "strong" one will do.

Rothstein J.'s theory also overstates the role of privative clauses in earlier contextual review. *C.U.P.E.* did link deference policy to a privative clause,[83] and the Supreme Court did downgrade the role of privative clauses in the 1990s.[84]

---

78 The court stated in *Khosa, supra* note 2 at para. 96 "[T]he majority's common law standard of review approach seeks two polar stars — express legislative intent and judicially determined expertise— that may or may not align."

79 *Ibid.* at para. 112.

80 *Ibid.* at para. 137. Rothstein J. said at para. 89 that tribunal decisions on matters of fact and of closely mixed law and fact merit deference because tribunals are "better situated" than courts to decide these matters. Hence, he might have found *Dunsmuir* factor analysis to be unnecessary in *Khosa,* even if s.18.1(4)(d) of the *Federal Courts Act* did *not* apply. Cf. his views in *Dunsmuir, supra* note 4 at para. 164.

81 *Ibid.* at paras. 75, 117-135.

82 *Ibid.* at para. 127.

83 Dickson J., *supra* note 70 at 235, said that the privative clause constituted "a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board".

84 For example, the Court said that deference may be required even in the absence of a privative clause: *Douglas Aircraft Co. of Canada v. McConnell,* [1980] 1 S.C.R. 245 at 275; *Bell Canada v.*

However *C.U.P.E.* referred to other factors as well, and was vague as to which factors were essential.[85] In fact, both the pre-contextual and modern case law have always recognized deference factors other than privative clauses.[86]

Another paradox with the theory is its reliance on some of the criteria it criticizes. The idea that deference must be determined by a privative clause seems at odds with Rothstein J.'s own position on review of fact and policy. Rothstein J. criticized the use of expertise as a free-standing basis for judicial deference in law, jurisdiction, and related matters. Yet he supported intervention in these areas and deference to administrators in matters of fact and policy, on grounds that were based—at least partly—in assumptions about relative expertise.[87]

Binnie J.'s response to this theory was as follows:

> *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not

---

Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at 1746 [*Bell*], and, in *Bradco, supra* note 76 at para. 35, that if there is no special expertise, there may be no need for deference, even in the presence of a weak privative clause. Conversely, in *Bell* at 1744, where there was special expertise, the Court applied deference even in the face of statutory appeal provisions.

85 For example, Dickson J., at *supra* note 70 at 236, said that the board was a specialized tribunal that administered a comprehensive statute and had an accumulated experience in labour relations. Its members, he said, were required to exercise "[c]onsiderable sensitivity and unique expertise".

86 In classical review, for example, a broad discretion made higher level review for error less likely: see e.g. *Re Ashby,* [1934] 3 D.L.R. 565 at 568 (O.C.A.). In the presence of a privative clause, review could depend on whether the defect was jurisdictional or non-jurisdictional. This, in turn, could be influenced by such considerations as whether the administrator was interpreting his or her enabling act or a general question of law: see e.g. *Parkhill Bedding & Furniture Ltd. v. International Moulders & Foundry Workers Union of North America, Local 174 and Manitoba Labour Board*, (1961), 26 D.L.R. (2d) 589 at 598. See also discussion in *supra* note 37.

87 In *Khosa, supra* note 2 at para. 90, Rothstein J. said that courts have "greater law-making expertise" than administrators in questions of law, in addition to their capacity to ensure the uniformity of legal rules. Similarly, at *supra* note 80, although Rothstein J. opposed judicial deference on questions of law (except where there is a strong privative clause), he advocated judicial deference on questions of fact or policy, because tribunals are "better situated" in regard to these matters. Is this another way of saying that in regard to questions of fact, tribunals are likely to have greater expertise or access to better sources of expertise than courts? In effect, Rothstein J. was using a general assumption about relative expertise to suggest that questions of law should be subject to a correctness standard, except where a strong privative clause requires a *Dunsmuir* analysis to determine if reasonableness is more appropriate. For its part, the main majority said that some questions of law can be subject to a reasonableness standard on the basis of considerations such as relative expertise, apart from a privative clause. As well, on the basis of assumptions about relative expertise, both Rothstein J. and the main majority favoured a deferential standard for questions of fact. In these respects, at least, the two approaches do not seem very far apart!

> only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments...[and may extend to situations] 'where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context'.[88]

Unlike Rothstein J., Binnie J. and the rest of the main majority affirmed the *Dunsmuir* view that deference can apply not only to decisions protected by privative clauses or to questions of fact or policy, but also to questions of law in regard to which a tribunal has special expertise. This is a broader approach, but it is not a very certain one. Is deference *always* appropriate where a tribunal interprets its constituent statute? Is deference *necessarily* appropriate for every tribunal assessment of facts or policy? Where should deference *not* extend to an expert tribunal's application of a general legal rule to a specific statutory context? And how should courts determine what constitutes special expertise? As in the main majority's discussion of the relationship between s. 18.1(4) of the *Federal Court Act* and common law standard of review analysis,[89] the answers are not clear.

VI. GUIDES AND GAPS IN *DUNSMUIR*

The weaknesses in Rothstein J.'s theory and in the main majority's approach appear to lead *Khosa* to an impasse. Overall, the more inclusive approach to the common law *Dunsmuir* analysis seems preferable. However, the main majority do not show clearly how this approach should work, or how the *Dunsmuir* common law analysis can supplement the statute without supplanting it. In this respect, Rothstein J.'s concern for legislative intent is worth further thought, and some of the problems and potential answers here may lie in *Dunsmuir* itself.

The main majority in *Dunsmuir* described judicial review as a balance between the rule of law and legislative supremacy. In their view, "the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent."[90] They also saw judicial review as addressing "an underlying tension between the rule of law and democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow

---

88 *Khosa, supra* note 2 at para. 25 quoting in part from *Dunsmuir, supra* note 4 at para. 54.

89 See text accompanying notes 60-65.

90 *Supra* note 4 at para. 30. See also *Dunsmuir, supra* note 4 at para. 31, where they referred to the judiciary's power to review "for compliance with the constitutional capacities of government", and said that "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits."

them with broad powers."[91] They described the rule of law itself as a general requirement that administrators comply with the law—the Constitution, statute law, or the common or civil law.[92] After articulating this general concept of balance or tension, the main majority moved on to discuss the guaranteed minimum core of review and to try to simplify and clarify the levels and categories of standard of review analysis.[93] Although this was a helpful start, it did not go far enough.

In the first place, the balance-tension concept would have benefitted from a more thorough discussion of both the rule of law-guaranteed review and democracy-legislative intent sides of the equation, especially the latter.[94] In its discussion of theory, for example, the *Dunsmuir* majority could have gone on to show how legislative supremacy is tied to the democratic principle. There are at least two complementary ways this is so. On one hand, the elected status of Canadian legislatures legitimates their authority to confer power on administrative bodies and to determine how this power should be enforced. On the other hand, it is important that government be kept accountable to the electorate. To help ensure this, legislatures are required to act through statutes, and virtually all administrative power must be authorized by statute.[95] Despite ongoing electoral system flaws and the continued dominance

---

91 *Ibid.* at para. 27. See the comments of Rothstein J. on this passage, discussed at *supra* note 77.

92 *Ibid.* at para. 28.

93 *Ibid.* at paras. 34-64.

94 *Ibid.* at para. 31. The Court should have clarified that Parliamentary supremacy is subject to the Constitution of Canada, which includes the rule of law, and it could have noted that Parliamentary legislation is itself one element of the "law" component of the rule of law. It should also have considered if the minimum core idea could be supported by the unwritten legal constitutional principle of the separation of powers. Conversely, the main majority did not need to support the core idea with *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220. That was essentially a division of powers decision, despite its reinterpretation in decisions such as *MacMillan Bloedel Ltd. v. Simpson* [1995] 4 S.C.R. 725 at para. 35. Finally, the content of the guaranteed minimum core of judicial review (referred to at *supra* note 90) needs clarification. What kind of jurisdictional questions does it include? To what extent does it include constitutional questions? Non-jurisdictional questions? See also *infra* note 123.

95 The Court said that the Crown cannot legislate to bind its citizens without the support of a statute: *Re: Anti-Inflation Act* , [1976] 2 S.C.R. 373 at 433. This is a proposition with deep roots: see *The Case of the Proclamations* (1611), 12 Co. Rep. 74, 77 E.R. 1352. However, statutory authorization is normally also required for exercises of coercive power that fall short of executive legislation: see e.g., *Entick v. Carrington*, (1765) 19 Howell's State Trials 1030; 2 Wils. 275, 95 E.R. 807. It is the capacity to exercise coercive power, and to do so legitimately, that distinguishes the state from ordinary individuals: Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther Roth & Claus Wittich, trans. by Ephraim Fischoff *et al.* (New York: Bedminster Press, 1968) at vol. 1 at 54, 56. The reference in *Babcock v. Canada (A.G.)*, 2002 SCC 57, [2002] 3 S.C.R. 3 at para. 20 to "the well-established rule that official actions must flow from statutory authority clearly granted and properly exercised," is a little too broad, though. In exceptional circumstances, and subject to possible legislative modification or revocation, official actions may be based on the royal prerogative

of political executives, these are not simply theoretical ideals. Government must still ultimately answer to voters, and statutes remain its key legal link to the administrative process.[96]

This suggests that there may be good democratic reasons for taking legislative intent seriously. Realist critics may object that because statutes are always collectively authorized, often ambiguous, and never self-applying, there are gaps to be filled by reviewing courts.[97] As a result, standard of review

---

power: see *Ross River Dena Council Band v. Canada,* 2002 SCC 54, [2002] 2 S.C.R. 816 at para. 54.

96 Canada, of course, is a constitutional as well as Parliamentary democracy, with a vital democratic role for basic principles such as the rule of law, constitutionalism, federalism, and protection of basic and minority rights: see *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217. Arguably, though, at the very heart of the democratic notion of rule by the people are the Parliamentary and electoral processes. The state of this democracy is to some extent a question of perspective. On one hand, policy making power is concentrated in strong political executives as opposed to the houses of Parliament and the provincial legislative assemblies. Ethical debacles such as the federal sponsorship scandal put a strain on public confidence. The first-past-the-post electoral system distorts voter preferences. Only 64.7% of eligible voters took part in the 2006 federal election: Elections Canada, "Appendix 5: Statistics on voter turnout, 1867-2006" *The Electoral System of Canada* (23 April 2008), online: Elections Canada, http://www.elections.ca/content.asp?section=gen&document=part4&dir=ces&lang=e&textonly=false. On the other hand, Canadians still complain when they feel that Parliament is being bypassed altogether: see e.g. *Little support for proroguing Parliament: poll* CBC News (7 January 2010), online: CBC News <http://www.cbc.ca/politics/story/2010/01/07/ekos-poll-prorogue.html>. Canadians have secret ballots, universal adult suffrage, multiparty political systems, and relatively regular elections. As well, Canada rates high in international state surveys, according to criteria such as electoral process and political participation, pluralism, political culture, civil liberties, and accountability: see e.g. *The World in 2007: Economist Intelligence Unit Democracy Index 2006,* online: The Economist <http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf>; Laza Kekic, *The Economist Intelligence Unit's index of democracy,* online: The Economist <http://www.economist.com/media/pdf/Democracy_Index_2007_v3.pdf>; and Freedom in the World 2009: *Table of Independent Countries,* online: Freedom House <http://www.freedomhouse.org/uploads/fiw09/FIW09_Tables&GraphsForWeb.pdf.>.

The significance of statutes, too, may be partly a matter of perspective. On one hand, the number of statutes in Canada is greatly exceeded by delegated legislation created by the administrative process. On the other hand, all but a handful of delegated legislation is based on statutes, and all delegated legislation is subject to change by statute. Although most statutes are formulated largely by senior public servants and Cabinet before they are processed in Parliament, the House of Commons and the Senate can expose them to one of the most powerful of all checks—publicity.

97 For these and other realist criticisms, see *supra* note 36, and Hanoch Dagan, "The Realist Conception of Law" (2007) 57 U.T.L.J. 607. Realist critics in Canada tended to focus their fire on the influential and controversial nineteenth century English constitutional writer, Albert Venne Dicey, who popularized the concepts of the rule of law and Parliamentary sovereignty: see A.V. Dicey, *An Introduction to the Study of the Law of the Constitution,* 10th ed. (London: MacMillan, 1965). These critics have tended to view Dicey as a strict positivist who overemphasized the role of legislatures and statutes, fail to adequately recognize the legitimacy of administrative discretion, and neglect non-Parliamentary and non-judicial

analysis can't generate scientifically verifiable findings from legislative intent. At best, it generates a judicial inference as to what was *likeliest* to have been intended. Thus, there is an approximate, even normative[98] dimension to standard of review analysis, but, it needn't be dismissed as anchorless,[99] or regarded as a stand-alone exercise of judicial power. It has a definite legislative target—the interpretation of a statute[100]—and this interpretation is

---

influences on law: see e.g. H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J 1; Alan C. Hutchinson, "The Rise and the Ruse of Administrative Law and Scholarship" (1985) 48 Mod. L. Rev. 293; Robert Yalden, "Deference and Coherence in Administrative Law: Rethinking Statutory Interpretation" (1988) 46 U.T. Fac. L. Rev. 136; David Dyzenhaus, "Developments in Administrative Law: The 1992-93 Term" (1994) 5 Sup. Ct. L. Rev. (2d) 189; and Matthew Lewans, "Rethinking the Diceyan Dialectic" (2008) 58 U.T.L.J. 75. Even accepting these criticisms, though, it is arguable that statutes have significant communicative potential and importance: see *infra* note 100. If so, there is surely a core of insight in Dicey's view that judicial enforcement of administrative compliance with statutory mandates supports legislative supremacy (subject, in Canada, to the Constitution) and, in turn, electoral supremacy: see especially Dicey at 411-14. David Dyzenhaus argues—accurately, in my view—that Dicey's rule of law has both positivist and realist elements, but he finds in Dicey an "irresolvable tension" between "utter judicial deference to clearly expressed legislative intent" on one hand and a belief in "the constitutional morality of the common law", on the other: "Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review", in Christopher Forsythe, ed., *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 141 at 151 ["Form and Substance"]. However, some tension is inevitable when one institution has legal supremacy and the other has power to interpret and apply it to specific situations. Dicey stressed the power of judicial interpretation at 413-414 for example, but he also affirmed at 60-61 that common law can be overridden by statutes. It was *because* Dicey's rule of law was based on interpretation that its precepts were not absolutes, but presumptions. The clearer the statute, then, the more a presumption must yield. Arguably, Dyzenhaus' own suggested approach to the rule of law is based on presumptions too: see *infra* note 102.

98 A judicial inference as to what the legislature intended is likely, even bound, to be coloured by what a judge thinks the legislature *should* have intended. However, is this much different from what happens when a judge makes an inference as to meaning of an unwritten legal constitutional principle? Presumably, it too is bound to be influenced by what the judge feels *should* be the meaning of the principle.

99 *Cf.* The well-known House of Lords decision about "the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Reid L.J. at 71. Lord Reid was speaking of natural justice, which is presumably no easier to cut and dry than legislative intent!

100 In the classic work, Samuel Hayakawa & Alan R. Hayakawa, *Language in Thought and Action*, 5th ed. (San Diego: Harcourt Brace Jovanovich, 1990), Hayakawa highlighted the many ways in which language can generate different understandings, depending on the words used and their contexts. However, Hayakawa considered that most meanings are "public" in the sense that they are likely to produce a high level of agreement among participants. Otherwise, communication would be impossible. Statutes, with their multiple authorship and general focus, present special communication challenges, but their deliberative background, non-colloquial style, written format, and public accessibility can facilitate communication, especially where their language is relatively precise and explicit. Can statutory texts be automatically dismissed as indeterminate? And with their approval by elected representatives, can they be dismissed as unimportant?

itself subject to legislative change.[101] The challenge, then, is to provide a reasoned basis for combining the court's gap-filling role with its target of statutory interpretation.[102] *Dunsmuir* neglected this challenge. It failed to provide a systematic and coherent approach to determining legislative intent. Until that approach is found, Rothstein J. is right in saying that the polar star has become blurred.

Dunsmuir's specific standard of review reforms, like its theoretical foundations, were incomplete. *Dunsmuir* is well known for prescribing two standards of judicial review, a higher correctness standard and a more deferential reasonableness standard.[103] *Dunsmuir* also tried to fine-tune the

---

101 The legislature's ongoing power to correct a non-constitutional judicial interpretation is arguably a kind of negative mechanism of legislative intent: what isn't amended is presumably intended.

102 The focus here is on the relevant standard or level of judicial review in a given situation. Arguably, *Dunsmuir*, *supra* note 4 also fell short in its prescriptions for reform of the content of judicial review once the relevant level of review was established. For example, in *Dunsmuir's* tests for reasonableness, *supra* notes 17 and 18, how *much* "justification, transparency and intelligibility" is needed? Must outcomes be "acceptable" *as well as* being "defensible in respect of the facts and law"? And how do the new reasonableness tests relate to old review grounds such as bad faith? The focus here is also different from that of David Dyzenhaus, whose concept of "deference as respect" was endorsed in *Dunsmuir* at para. 48. Dyzenhaus supports general presumptions in favour of principles such as fairness (David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process /Substance Distinction: *Baker v. Canada*" (2001) 51 U.T.L.J. 193 at 241), participation and accountability ("Form and Substance", *supra* note 97 at 170), and equality and dignity (David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis" (2005) 55 U.T.L.J. 691 at 714), that can be displaced by explicit legislative wording or by adequate administrative justification (Dyzenhaus & Fox-Decent at 240). Dyzenhaus claims that this approach is inherently democratic, because it addresses process and participation, rather than a specific result or morality and because it permits (and requires) legislatures and administrators, respectively, to authorize or justify exceptions: "Form and Substance", *supra* note 97 at 170 and "The Rule of Law as the Rule of Liberal Principle" in Arthur Ripstein, ed., *Ronald Dworkin* (New York: Cambridge University Press, 2007) 56 at 74-76. This approach leaves open the question: what *level* of review—or "respect"—was intended by the legislature in a given situation, in the first place?

103 See text accompanying note 15. The main majority dropped the standard of patent unreasonableness, mainly because of their view that the two criteria used to distinguish between unreasonableness and patent unreasonableness—the magnitude and the immediacy of the defect —were difficult to draw and illogical: *supra* note 4 at paras. 39-42. The criterion of immediacy was indeed difficult to draw, but the main majority's concern about magnitude was less convincing. In *Dunsmuir* at para. 41 they quoted from a commentator's statement that there cannot be shades of irrationality, a proposition that makes sense if reasonableness and rationality are equated with logical reasoning. However, patent unreasonableness also included defects such as bad faith that are unrelated to the reasoning process, and defects of this kind *can* vary in magnitude. At para. 42, they justified dropping patent unreasonableness rather than unreasonableness on the ground that it would be unpalatable and contrary to the rule of law to require parties to accept an unreasonable decision. But doesn't the retention of the reasonableness ground require some parties to accept some *incorrect* decisions?

factor weighing part of substantive contextual review. As described in the 1998 *Pushpanathan* decision,[104] this approach required courts to determine the relevant review standard in a particular case by reference to contextual factors such as: (1) the presence or absence of a privative clause, (2) the statutory purpose,[105] (3) the administrator's relative expertise, and (4) the nature of the question before the administrator.[106] No single factor was dispositive. Although courts tried to assess the cumulative weight of the *content* of the various factors, there was no clear set of priorities as between the factors themselves.[107] As one commentator said about a 2003 decision, "[w]e know the various considerations identified by the court with respect to each of the four factors, and the outcome, but we don't know the weight applied to each of the factors."[108]

The Court tried to guide and simplify this analysis in *Dunsmuir*. The main majority reaffirmed a "policy of deference" that required:

> ...respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.[109]

Then *Dunsmuir* encouraged reviewing courts to avoid a contextual factor analysis wherever the relevant standard had been established "in a satisfactory manner" by precedent.[110] For other situations, *Dunsmuir* kept the four *Pushpanathan* contextual factors,[111] but related them to a number of general propositions relating to the nature of the question before the administrator.[112] Some questions, such as constitutional questions, "true" and

---

104 *Supra* note 76, at paras. 29-38.

105 For example, whether the statute conferred a broad discretion to balance policy considerations or prescribed a more confined power to determine rights between two parties.

106 Usually, whether the question was one of fact, law, or mixed fact and law.

107 Expertise was sometimes described as the most important factor, but the rationale and implications of this description were left unclear.

108 David P. Jones, "Recent Developments in Administrative Law" in Pushing the Boundaries: Standing, Privacy and Practical Issues: Proceedings of the National Administrative Law and Labour & Employment Law CLE Conference, Ottawa, 2003 (Ottawa: Canadian Bar Association, 2003) at 7, cited in Deborah K. Lovett, "That Enigmatic Curial Deference and the Continuing and Most Curious Search for Legislative Intent – What to Do, What to Do?" (2004) 17 Can. J. Admin. L. & Prac. 207 at 218.

109 *Supra* note 4 at para. 49; reaffirmed in *Khosa, supra* note 2 at para. 25 by Binnie J.

110 *Ibid.* at paras. 57, 62.

111 *Ibid.* at para. 64.

112 In *Khosa, supra* note 2 at para. 4, Binnie J. said that *Dunsmuir* contextual review is "particularly" concerned with the nature of the issue before the administrator.

boundary line jurisdictional questions[113] and "general questions of law,"[114] were removed from the full factor weighing process, and were apparently automatically subject to the correctness standard. The rationale for this appears to be the view that courts have a special role in regard to these questions.[115]

Thus, other questions of law give rise to a presumption in favour of correctness that can be rebutted if a tribunal is interpreting its own enabling statute or if it has special expertise in applying a common law or civil law rule to a specific statutory context.[116] Questions of fact, policy, or discretion create a strong but rebuttable presumption in favour of the more deferential reasonableness standard.[117] The rationale is presumably that administrators are assumed to have, or to have access to, special expertise in these areas.[118] As well, these subject matter presumptions can be confirmed or negated if they are outweighed by other contextual factors.[119]

Dunsmuir's categorical approach may look relatively simple at first, but the package as a whole is uncertain. For one thing, it is unclear where the full package applies. *Dunsmuir* included legislative provisions such as privative clauses in its standard of review analysis. However, it failed to say when or whether statutory review codifications could exclude common law standard of review analysis at the outset. *Dunsmuir* directed reviewing courts to dispense with its full contextual factor analysis where they find that the deference level

---

113 In *Dunsmuir, supra* note 4 at paras. 59 and 61, a "true" jurisdictional question was described as one that arises "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter." *Quaere,* where do these situations arise? More recently, in *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 at para. 34, 309 D.L.R. (4th) 513 [*Nolan*], the Supreme Court described this kind of question as one that raises "a broad question of the tribunal's authority". *Quaere,* must all specific questions of authority be considered to fall within a tribunal's jurisdiction?

114 *Ibid.* at para. 60.

115 See e.g. *ibid.* at paras. 58, 60-61 where the Court referred to the special status of s. 96 [of the *Constitution*] courts with regard to constitutional questions; to the requirements of consistency and uniformity in regard to general questions of law; and, perhaps implicitly, with regard to boundary jurisdictional questions between competing tribunals.

116 *Dunsmuir, ibid.* at para. 55.

117 *Ibid.* at para. 53.

118 *Dunsmuir, ibid.* did not say this expressly, but in *Khosa, supra* note 2 at paras. 58, 89 respectively, Binnie J. and Rothstein J. noted that administrative tribunals are better situated than reviewing courts to make findings of fact. Rothstein J. compared these tribunals to courts of first instance, while Binnie J. referred to the IAD's "advantage of conducting the hearings and assessing the evidence presented". For Rothstein J., the situational advantage extends to questions of policy as well. This situational advantage of tribunals could also be seen as an aspect of the different roles of tribunals and courts.

119 *Dunsmuir, ibid.* at para. 56, where the Court said that the question is whether the factors, "*considered together,* point to a standard of reasonableness" [emphasis added].

has already been established "in a satisfactory manner" in earlier case law.[120] But how can they do this without comparing the contextual factors in earlier case law with those in the case before them?

As in *Pushpanathan,*[121] it is hard to find an overall ordering principle. Deference policy appears to have three potentially distinct foundations—legislative choices, expertise, and the special role of the judiciary—and it is not always clear how the three interrelate. Although *Dunsmuir* endorsed the four sets of *Pushpanathan* contextual factors,[122] it withdrew several categories of question from the full factor weighing process. Why should some questions of law always require correctness, while other categories or factors merely raise a rebuttable presumption in favour of one standard or another? Is context sometimes relevant and sometimes not?[123] Although some *Dunsmuir* presumptions can be rebutted, it is sometimes unclear how. What, for example, is meant by the statement that deference will "usually apply automatically" to discretion, fact, or policy?[124] Although *Dunsmuir* seemed to put considerable weight on the nature of the question before the administrator,[125] it also said that a privative clause is a "strong indication" that reasonableness was

---

120 *Ibid.* at para. 62.

121 See *supra* notes 76, 107.

122 *Dunsmuir, supra* note 4 at para. 64.

123 Why, for example, should "true" jurisdictional questions and division of powers and *Charter* questions be immune from contextual analysis as suggested in *Dunsmuir, ibid.* at paras. 58-59, 61? In *Pushpanathan, supra* note 76 at para. 28, the Court suggested that jurisdictional questions are simply those to which the correctness standard applies as a result of contextual factor analysis. In other words, they are a product of contextual analysis. In *Dunsmuir*, at paras. 59, 61, however, where the main majority discussed "true" and boundary line jurisdictional questions, they seemed to assume that these questions can be identified on an *a priori* basis. This attracted indirect criticism in *Canadian Federal Pilots Assn. v. Canada (Attorney General),* 2009 FCA 223 at paras. 36-52 [*Canadian Pilots*]. There, Evans J.A. said jurisdictional issues, other than those that draw lines between competing administrative regimes, should not be designated abstractly and independently of contextual analysis as criteria for correctness. Assuming, though, that these jurisdictional questions can be identified *a priori* (by express statutory language, perhaps?), do they necessarily require correctness review? The main majority in *Dunsmuir* put jurisdictional and constitutional questions at the centre of the guaranteed core of judicial review, but must the constitutionally guaranteed core always entail correctness review? Similarly, why shouldn't courts be able to look at the context of constitutional questions to see if a lower standard is appropriate in special situations? In one post-*Dunsmuir* decision, *Lake, supra* note 42, the Supreme Court seems to have pulled back from the blanket correctness approach. It subjected a constitutional question to contextual analysis, and concluded that the standard appropriate to that case was unreasonableness.

124 *Supra* note 4 at para. 53.

125 *Supra* note 112.

intended.[126] If so, how should a privative clause be weighed against the nature of the question and against expertise? Which should prevail where, and why?

With all this uncertainty, it is not surprising that the main majority in *Khosa* had trouble relating the common law *Dunsmuir* analysis clearly to s. 18.1(4) of the *Federal Courts Act*. Until the uncertainty is reduced, lower courts are likely to have similar trouble—with s. 18.1(4),[127] with other statutory review codifications such the British Columbia *ATA*,[128] and with statutory texts in general.[129]

---

126 *Supra* note 4 at para. 52. See also *Khosa, supra* note 2 at para. 55 where Binnie J. said merely that a statutory appeal "may be at ease with [judicial intervention], depending on its terms." He did not address the effect of a broad statutory appeal to the courts, which has been described as a factor that points to a "more searching standard of review": *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 27, referring to *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 46. In *Dunsmuir* at para. 130, Binnie, J. said that a full statutory appeal is an indication that the correctness standard was intended.

127 Since *Khosa, supra* note 2, for example, the Federal Court has arrived at a wide variety of conclusions as to the standard now required by s. 18(4)(d), with little discussion as to how these results derive from the application of common law principles to the statutory text. For variations, see *Odetoyinbo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 501 at para. 3 (the text's capriciousness/lack of regard for evidence requirements plus *Dunsmuir*'s "range of outcomes" and justification tests); *Espinoza v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 806 at para. 31 (the text's lack of regard for evidence requirement plus *Dunsmuir*'s "range of outcomes" test. After referring at the outset to the lack of regard textual test and to the range of outcomes common law test, and after considering the Board's consideration of the evidence, Frenette D.J concluded at para. 31 that " [a]n analysis of the Board's decision leads to the conclusion that it considered adequately the issue of state protection and particularly the issue of an IFA and concluded the applicants had a viable, acceptable IFA by moving to the city of Guadalajara, Mexico. Finally the impugned decision falls well within the range of acceptable outcomes that flow from the facts and the law."); *Canada (Minister of Public Safety and Emergency Preparedness) v. Iyile*, 2009 FC 700 at para. 33 (reasonableness with "a high degree of deference"); *Shaath v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 731 at para. 39 (*Dunsmuir*'s "range of outcomes" test). The Federal Court of Appeal (FCA) has addressed another provision of the federal code, s.18(4)(c). In *Canadian Pilots, supra* note 123 at paras. 37-52, the FCA attempted to relate this provision directly and systematically to *Dunsmuir*'s contextual analysis. Its efforts were complicated by *Dunsmuir*'s concept of "true questions of jurisdiction or *vires*": *supra* note 4 at para. 59. At para. 37, the FCA said this concept is "apt to cause confusion" if it is identified as a correctness criterion independently of contextual review analysis. At para. 51, it described jurisdiction in this sense as "legal authority to interpret and apply the disputed provision of 'the tribunal's enabling legislation'". Does this beg the question as to the scope of the relevant provision, and as to whether legal authority means unreviewable legal authority?

128 Before *Khosa, supra* note 2, the British Columbia Court of Appeal (BCCA) said that *Dunsmuir, supra* note 4 did not change the meaning of the *ATA, supra* note 20: *Manz v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCCA 92 at para. 36, 91 B.C.L.R. (4th) 219 [*Manz*]. A month after *Khosa*, the BCCA said that *Dunsmuir* "has not altered *the express words* of s. 59(3) of the *Administrative Tribunals Act*": *Carter v. Travelex Canada Ltd.*, 2009 BCCA 180 at para. 27, 310 D.L.R. (4th) 39 [emphasis added]. A month later, the BCCA said that "*Khosa*...directs an interpretation of the *ATA* statutory criteria in the context of the principles

VII. FOCUSSING THE SEARCH

How, then, should legislative intent be determined? First, reviewing courts need to keep the broad contextual base that has been a key strength of modern substantive review. Statutory texts are rarely unambiguous, and should not be interpreted in a vacuum. Without the most explicit authorization, codes should not be able to prevent a consideration of relevant common law review principles. Standard of review analysis should not be limited to situations

---

of administrative law": *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229 at para. 8, 310 D.L.R. (4th) 367 [*Victoria*]. Although the BCCA stressed that patent unreasonableness requires deference "at the high end of the *Dunsmuir-Khosa* range", it seemed to move away from *Manz's* "no evidence" or "openly, clearly, evidently unreasonable" requirement for fact toward *Dunsmuir* reasonableness criteria, including the "range of outcomes test": *Victoria* at para. 10. The situation under the *ATA* is complicated by the fact that that for a discretionary decision, ss. 58-59 prescribe the patent unreasonableness standard and specify its content, but for a finding of fact or law protected by a privative provision, s. 58 prescribes the patent unreasonableness standard without specifying its content: see generally Robin Junger, "British Columbia's Experience with the *Administrative Tribunals Act*", (2008) 21 Can. J. Admin. L. & Prac. 51 at 60-65. Thus far, there has not been much direction as to the extent to which common law should affect the statutory patent unreasonableness ground, either where the *ATA* specifies and defines patent unreasonableness, or where the *ATA* merely specifies it.

129 The Supreme Court did not provide much more direction in two post-*Khosa* decisions. *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764 involved appeals on "any question of law or of jurisdiction" under s. 64(1) of the *Telecommunications Act*, S.C. 1993, c. 38. The issue was whether the Canadian Radio-television and Telecommunications Commission (CRTC) had authority to order the disbursement of funds from deferral accounts for particular purposes. Before addressing this, the Court decided on the reasonableness standard. At paras. 34-48, it said that the CRTC orders were 1) specific, rather than an exercise of general disbursement authority (*cf.* the description of jurisdiction in *Nolan, supra* note 113); 2) part of the CRTC's rate-setting power; 3) within the CRTC's specialized expertise; and 4) polycentric and discretionary. At para. 37, it noted that CRTC decisions on questions of fact are protected from appeal by a "strong privative clause". However, if the issue was one of fact, why was it relevant to consider the appeal on law or jurisdiction? Conversely, if the appeal provision did apply here, why was it not cited as a factor to be weighed against the others? Also what weight should it merit? In *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54 at para. 34, the Court addressed the standard of review issue in a single sentence: "The decision of the CRT [the Commission des relations du travail] on the proper interpretation of a provision of its constituent statute is entitled to a measure of deference and should be reviewed by the courts on a reasonableness standard." The judgment did not indicate why this factor was decisive, or relate it to other relevant considerations, such as the general scope and nature of the CRT's statutory mandate, the privative clause, and the question of the specificity or generality of the relevant question of law. See also *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14 at paras. 30-36, where the Court noted the presence of a statutory discretion, observed that it served the practical requirements of the statutory scheme, and treated these considerations as conclusive support for the reasonableness standard.

involving strong privative clauses,[130] as this would narrow both the contextual base of review and legislators' options for influencing review intensity. Similarly, there should be no automatic exemptions from the common law's contextual factor weighing process,[131] except to preserve a guaranteed core of judicial review. Second, reviewing courts need a unified priority approach to common law standard of review analysis. It is not enough to weigh the content of various factors without regard to possible priority differences between the factors themselves. Nor is it enough to assign some priorities, as was done in *Dunsmuir*, if these are piecemeal and disconnected. Third, in standard of review analysis, there should be more recognition of the legislative role in the balance between the rule of law and the democratic principle. Standard of review should be linked more coherently to legislative intent.

Arguably, these needs could be addressed by two main measures. In the first place, courts should apply a strong presumption in favour of common law contextual review in the face of review codes and similar statutory review provisions. Only the most express statutory language should be able to exclude it.[132] Then, within contextual review, the *Dunsmuir* contextual factors themselves should be ordered in relation to their apparent proximity to legislative intent. In this way, the factor weighing process could take account of the structure of the contextual factors as well as their content. The first measure would help preserve the broad contextual base of modern common law review; the second would help sharpen its focus and deepen its reach. In this latter respect, legislative proximity criteria could help courts to take account of both the content *and* the relative status of contextual factors.

Assuming that common law contextual review has not been excluded by express statutory language, reviewing courts should be able to rely on a number of simple structural criteria to help them weigh contextual factors in terms of their proximity to legislative intent. The most important proximity criterion should be the legislation itself. Statutory texts have the approval, however nominal at times, of our elected representatives. The same cannot be said for contextual signals such as apparent relative expertise. On the other hand, because statutory texts are rarely unequivocal, they should virtually always be supplemented by a look at their context.

Another key proximity criterion should be the directness of the legislative provision. For standard of review purposes, legislative intent is a *relational* concept. Its concern is the relevant level of judicial review. A legislative provision that has the purpose of regulating the intensity of judicial review is a

---

130 As suggested by Rothstein J. in *Khosa*, *supra* note 2.

131 As suggested in *Dunsmuir*, *supra* note 4.

132 Even this, of course, should be subject to the constitutional bar against excluding a minimal core of review referred to in *Dunsmuir*, *supra* note 4 at paras. 29-31.

stronger indicator of intent than a legislative provision that merely has the effect of doing this. A legislative codification of grounds of review would fall in the first group. So, too, would a privative clause.[133] A grant of discretionary power to the administrator would fall into the second group. It would have the effect—but not necessarily the purpose—of restricting the intensity of review. Subject to these two main organizing concepts of legislative status and directness, more specific and more recent signals of intent should carry more weight than those that are more general, imprecise, or older.[134]

Applying these proximity criteria, it is possible to assign tentative priorities to the *Dunsmuir* and other relevant contextual factors for determining the intensity of judicial review. Included in the top priority level are direct legislative signals such as legislative codifications of grounds of review, appeal provisions, and privative clauses that are intended to enhance, restrict, or otherwise regulate the intensity of judicial review. In the middle priority level are indirect legislative signals such as grants of statutory discretion[135] and (rare) cases of jurisdiction-limiting language. By expanding or restricting administrative power, these provisions have the converse effect of restricting or expanding the potential intensity of judicial review. In the lower priority level are auxiliary signals—legislative provisions and non-textual factors that support inferences in favour of lower or higher levels of judicial

---

133 Privative clauses tend to be less direct than judicial review codifications and statutory appeal provisions. This is because most privative clauses purport to affect review intensity only in negative terms, by restricting its availability. Read literally, many privative clauses might be construed as unconstitutional attempts to block judicial review, including jurisdictional review: see *supra* notes 93, 94, and 123. Instead of doing this, courts tend to interpret all but the most extreme privative clauses as evidence of a legislative intent to lower, rather than exclude, judicial review. However, by according no special priority to privative clauses, especially those that fail to qualify as "strong," courts encourage legislators to continue to frame privative clauses in broad exclusionary language. By giving a general presumptive priority to privative clauses and other textual provisions, courts could help encourage less sweeping privative language on the part of legislators.

134 For example, a highly specialized tribunal interpreting its enabling statute should have priority over more general indicators, such as the assumption that courts have more expertise in deciding questions of law, the assumption that administrators are better placed than judges to decide questions of fact because they can hear evidence at first hand, and inferences that are derived from an examination of statutory purpose. Note that there may be more than one criterion of specificity or currency. For example, although a statutory review code normally affects more administrators than does a privative clause, its provisions may be more specific in indicating the level of review that should apply. Moreover, directness, specificity, and currency are questions of degree, so the assessment of proximity criteria must be a cumulative weighing process, not a simple list of either-or allocations.

135 This factor and factors such as the presence of polycentric or bipolar issues are sometimes regarded as indicators of statutory purpose, which is treated as a separate factor. Arguably, though, the purpose of the statute is really an aspect rather than a determinant of legislative intent.

review intensity. These include administrative or judicial expertise, formal qualifications, capacity to address polycentric or bipolar issues, the need for legal consistency or uniformity, and other functional considerations, whether referred to in legislation or inferred from the context of a particular administrative decision.

Higher level signals such as privative clauses should normally give rise to a strong presumption in favour of lower intensity review, and *vice versa*. Such a presumption should be rebuttable by lower level signals, but only where their cumulative content weight is very significant. The stronger the presumption, the greater the contrary weight that would be needed to rebut it. In the case of the strongest presumptions, the statutory ground or standard would normally prevail, leaving common law signals with the secondary task of clarifying any ambiguities.[136] All these signals, of course, would be subject to the core of judicial review that is guaranteed by the rule of law and to other relevant constitutional constraints.

The framework suggested here is not an analytical shortcut or a guarantee of predictable results, but a means of structuring the search for legislative intent.[137] It is meant to refine, rather than replace, the Supreme Court's general "modern" approach to statutory interpretation on the specific question of determining the intensity of judicial review.[138] The suggested approach can draw on traditional presumptions of statutory interpretation where these seem helpful. It is *not* a single-solution or text-limited approach. Privative

---

136 For example, s. 18.1(4)(d) of the *Federal Courts Act*, *supra* note 3, is the kind of direct legislative signal that would normally create a very strong presumption in favour of both a low level of review, and of its own specific deferential criteria. In the absence of strong contrary signals or of questions about the application of these criteria to a particular fact situation, the statutory wording would prevail: see text accompanying *infra* note 143.

137 Because context is a comprehensive, but situation-specific concept, it is hard to shorten contextual analysis by referring courts to precedent, to simplify it by removing key questions or contextual factors, or to standardize its outcomes. As suggested here, though, there is another alternative available.

138 The "modern" approach, which has been repeatedly endorsed (if not uniformly interpreted) by the Supreme Court, is based on the following passage from E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See *R. v. Middleton*, 2009 SCC 21 at para. 78, [2009] 1 S.C.R. 674; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at paras 55-56, [2007] 2 S.C.R. 610; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26, [2002] 2 S.C.R. 559; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 at paras. 95-96, [2005] 1 S.C.R. 533; *Marche v. Halifax Insurance Co.*, 2005 SCC 6 at para. 54, [2005] 1 S.C.R. 47; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para. 154, [2002] 4 S.C.R. 45. Driedger's formula is very general. It provides a broad starting point for a more specific approach directed at the question of standard of review by beginning with statutory wording and stressing context.

clauses and legislative codifications must share the stage with other less direct indicators of statutory intent, unless they exclude them beyond doubt. Indirect and even direct legislative signals can be outweighed by auxiliary signals where the latter are especially strong. This is only a tentative framework that will need elaboration or modification as circumstances require.[139] On the other hand, by relating the standard of review to legislative intent on a non-exclusionary but prioritized and coherent basis, this approach may help to supply the link to legislative intent that was missing in *Pushpanathan*, *Dunsmuir*, and the two majority judgments in *Khosa*.

It might be helpful to show how this approach could help to guide review analysis in a situation like the one in *Khosa*. Section 18.1(4) of the *Federal Courts Act* is a relatively comprehensive code, applicable to virtually all federal tribunals. However, if s. 18.1(4)(d) appears to occupy the standard of review field, it does not do so exclusively. It does not define its criteria, and nowhere does it expressly oust common law review principles. Hence s. 18.1(4)(d) should be capable of clarification, even modification, as a result of common law standard of review analysis. On the other hand, s. 18.1(4)(d) seeks to regulate the intensity of review in regard to matters of fact. It, then, is a direct legislative signal that deserves top priority. Arguably, so too is s. 162(1) of the *IRPA*. Whether or not it is a strong privative clause, its intent seems to be to restrict judicial review.[140]

Therefore, the starting point for judicial review should be whether the decision of the IAD was based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."[141] Although they are not legislatively defined, these terms are detailed and stringent. S. 162(1) of the *IRPA* suggests that they should be strictly construed. Hence, an opposite view would require strong contrary cumulative evidence from the other *Dunsmuir* factors. However, as Binnie J. noted in *Khosa*, the

---

139 For example, as suggested in *supra* notes 94 and 123, considerable work is still needed to clarify the basis and the content of the guaranteed minimum content of judicial review. This will require a clearer exposition of the central, but often troublesome concept of jurisdiction. As well, the framework suggested here focuses on substantive review. Changes would be needed to accommodate some of the special features of procedural review, especially those that involve a claimed opportunity to be heard.

140 Arguably, "sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction" (s. 162(1) of the *IRPA*, *supra* note 6) is strong language. It goes beyond what would be needed if the provision were intended only to allocate administrative responsibility as between the divisions of the Board. This allocation of interdivisional responsibility is addressed by other provisions of the *IRPA*. Hence s. 161(2) must have been intended to restrict judicial review. See also s. 72(1) of the *IRPA*. This provision requires leave of the Federal Court in order to commence review of decisions made under the *IRPA*.

141 *Federal Courts Act*, *supra* note 3.

other *Dunsmuir* factors also tend to point to deference.[142] For example, the broad humanitarian grounds discretion in s. 67(1)(c) and the IAD's expertise in regard to factual matters under this provision *reinforce* the deferential wording of s. 18.1(4)(d). Giving priority to s. 18.1(4)(d), and reading it in light of the privative clause and the other *Dunsmuir* factors, a judge would set aside an erroneous factual decision of the IAD only if it were clearly perverse, capricious, or made without regard for the material.[143]

If *Khosa* had involved a question of law, s. 18.1(4)(c) would have given rise to a presumption in favour of the correctness standard. As s. 18.1(4)(c) is less detailed than s. 18.1(4)(d), it should be even more open to common law supplementation. Section 18.1(4)(c) would be modified by the privative clause in s. 162(1) of the *IRPA* and by the discretionary and expertise factors from the *Dunsmuir* analysis. These, in turn, might be considered sufficient to rebut the correctness presumption and to lower the standard of review to reasonableness. Alternatively, if *Khosa* had involved a question of law, but no privative clause, factors such as discretion and expertise should still be relevant. However, in this situation, a judge would have to conclude that they were extremely important in order to justify outweighing the direct regulatory signal that favours correctness.

Finally, imagine that the facts in *Khosa* were subject to the British Columbia *ATA*[144] and not to s. 18.1(4) of the *Federal Courts Act*.[145] The *ATA* does not expressly exclude the common law, but it contains a very direct and specific legislative signal to apply the patent unreasonableness standard of review prescribed in its ss. 58(2)(a), 58(3), 59(3), and 59(4). Thus, although the common law has moved on since the creation of the *ATA*, it would require exceptional contextual evidence to the contrary to modify the meaning of these

---

142 *Supra* note 2 at paras. 54-58. The general objectives of the *IRPA*, *supra* note 6 seem mixed on this question. On one hand, they refer to a need to respect for the multicultural character of Canada and "to promote the successful integration of permanent residents into...Canadian society": ss. 3(1)(b), (e). As well, the fact that s. 174 makes the IAD a court of record may suggest a legislative recognition of the serious potential impact of its decisions on the rights and interests of the individuals before it. On the other hand, the general objectives also note that "integration...involves mutual obligations for new immigrants and Canadian society," and they refer to a need to protect the health and safety of Canadians: ss. 3(1)(e), (h).

143 At this point, any further common law analysis would be limited to clarifying the application of these terms to particular circumstances. The approach proposed here reaches a destination similar to that of Rothstein J. in *Khosa*, *supra* note 2 at para. 137, but with the benefit of a broad yet directed contextual analysis. See also the approach in *Stelco*, *supra* note 54, which has some broad similarities to the one suggested here.

144 *Supra* note 20.

145 *Supra* note 3.

provisions. Otherwise, this explicit and specific legislative choice should be respected unless and until the legislature changes it.[146]

Clearly, judges could disagree on all these points in *Khosa* and in other standard of review decisions. The approach suggested here will not bring the polar star into full focus, but it should help to focus the search!

---

[146] Thus, courts should normally assess discretionary decisions under ss. 58 and 59 of the *ATA*, *ibid.* according to the patent unreasonableness criteria that are provided expressly in ss. 58(3) and 59(4). In contrast, the *ATA* expressly stipulates that findings of fact or law under s.58 are to be assessed according to the patent unreasonableness standard, but it provides no criteria for this standard: see *supra* note 128. Accordingly, courts should normally assess these findings according to the common law patent unreasonableness standard that was in place prior to *Dunsmuir*, *supra* note 4.