CHAPTER FOURTEEN

Top Ten Questions (and a Few Answers) About Substantive Review

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I. INTRODUCTION

Law professors live good lives—don't let them tell you otherwise. However, into these charmed lives, certain seasonal raindrops fall. One of the stormier moments occurs when the law professor is called to come up with good exam questions. This is especially true in administrative law. Since the subject matter of administrative law is "statutorily delegated

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decision-making," the first problem is fairly easy to understand. Hypothetical fact patterns in administrative law must generally include statutory provisions, and often provisions that delegate, describe, and give context to decision-making powers exercised by government officials or tribunals. The instructor knows that no one likes reading statutes and few people are good at it, and that these things are only truer under the time pressures produced by exams.

Finding a statutory setting is just the first difficulty. If an exam question is going to test students' abilities to perform a standard of review analysis, then other features need to be built into the problem: factors that make the choice between "reasonableness" and "correctness" somewhat arguable; an issue (of law, or of fact, or—oh no—of mixed fact and law) that can be identified and discussed, even if briefly; and reasons given by the decision-maker that are both plausible and flawed. Writing an administrative law problem dealing with substantive review is a job that calls for Lewis Carroll, performed by people like Homer Simpson.

This chapter is intended to give you some insight into how an instructor—perhaps even your instructor—goes about putting together a fact pattern exam question dealing with substantive review, and how you can go about answering it. The way in which this will be done is by raising and answering ten commonly asked questions about substantive review. The first five questions go to the first stage of analyzing a substantive review problem: "What is the applicable standard of review?" Questions 6 through 10 go to the second analytical step: "How should the appropriate standard of review be applied to a set of facts?" With each question, we provide a short description of what you can expect in an exam question that touches on the points raised. Before getting to this task, we first need to establish common ground about what "substantive review" means.

The term "substantive review" refers to judicial review of the merits, or substance, of administrative decision-making. The area of "procedural review" goes to the fairness of the processes leading to the making of a decision, including that the decision-maker be impartial. Administrative law is concerned with other matters going to the lawfulness of decision-making, including proper delegation of authority, the process of appointing decision-makers, and the evidence to be received and weighed in a hearing. However, substantive review deals with the actual decision or outcome of the process, and the bases on which it can be questioned in a superior court. The theoretical problem or dilemma for substantive review derives from the following contextual feature: in every instance of substantive review, legislators (either at the federal or provincial level) have delegated the making of a decision on the merits to a person or a tribunal *other than* a court. In a 1979 case called *CUPE v NB Liquor Commission*,[1] the Supreme Court of Canada decided that this context called on the judiciary to accord deference to the substantive decisions of statutory delegates, at least in some circumstances. The issues of what those circumstances are, and how to operationalize deference, have remained the central concerns of substantive review in Canada since that time.

1 [1979] 2 SCR 227 [*CUPE*].

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II. SELECTING THE APPROPRIATE STANDARD OF REVIEW

The Supreme Court of Canada (SCC) set out the contemporary approach to substantive review in 2008 in *Dunsmuir v New Brunswick*.[2] Although the justices wrote three separate opinions in *Dunsmuir*, they all agreed that there should be two standards of review applicable to statutorily delegated decision-making: (1) a standard of *reasonableness*, or of deference to the decision-maker; and (2) a standard of *correctness*, or no deference. The first issue in any substantive review case is that of identifying which of these two standards of review is appropriate to the decision-making in question. The stated hope of the SCC in *Dunsmuir* was to simplify the law of substantive review, in part by reducing the number of possible standards of review from three to two by eliminating a standard of high deference, known as "patent unreasonableness." However, almost a decade after *Dunsmuir*, the court's hope has not come to fruition. Lawyers and courts, including the SCC, continue to spend considerable time wrestling with the question of when to accord deference to a delegated decision-maker.

This ongoing difficulty is reflected in a decision by the SCC from late 2016, *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*.[3] The case concerned the annual property tax assessment of a shopping mall in Edmonton. No, not THAT mall. Here, the Capilano Shopping Mall in southeast Edmonton was assessed as being worth $31 million. The owners of the mall exercised their right under the provincial *Municipal Government Act* (MGA)[4] to file a "complaint" to the Assessment Review Board, seeking a lower valuation. In its response to the board, the City of Edmonton submitted that the original assessment had been made on a mistaken classification of the property, and the assessment should be *raised*. The board agreed with the city, and raised the assessed value to $41 million.

The mall owners appealed the board's decision to the Alberta Court of Queen's Bench, pursuant to a statutory right of appeal in s 470 of the MGA. The owners argued that the statute did not empower the board to *raise* an assessment on a complaint filed by a taxpayer. The argument turned on interpreting the following provisions of the MGA:

> 460(1) A person wishing to make a complaint about any assessment or tax must do so in accordance with this section….
>
> (3) A complaint may be made only by an assessed person or a taxpayer.
>
> 467(1) An assessment review board may, with respect to [a complaint], make a change to an assessment roll or tax roll or decide that no change is required.

Rooke J of the Court of Queen's Bench, affirmed by the Alberta Court of Appeal, ruled that the appropriate standard of review to apply to the board's decision was correctness, and went on to quash the decision. The City of Edmonton appealed to the Supreme Court of Canada. In a 5–4 decision, the court ruled that the appropriate standard of review was reasonableness, and found the board's decision reasonable. The four justices in the minority would have found the appropriate standard of review to be correctness, and set the board's decision aside.

2 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

3 2016 SCC 47, [2016] 2 SCR 293 [*Edmonton East*].

4 RSA 2000, c M-26.

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It may be useful to have the facts of *Edmonton East* in mind as we move through a series of five questions that students (and lawyers) often ask when confronted with the task of identifying the appropriate standard of review. Like a good exam question, the statutory and other facts are relatively straightforward, but the issues they give rise to are eminently arguable.

1. Are we dealing with judicial review or a statutory right of appeal?

There are two ways in which the decisions of statutorily delegated decision-makers can be challenged in superior courts—either through judicial review, or on appeal. Administrative law professors really want you to know the difference. Fortunately, it is fairly easy to tell the difference. Appeals to court exist only where granted expressly in a statute. Judicial review, on the other hand, is available to a party affected by an administrative decision as a matter of common law (or, more precisely, as part of the inherent jurisdiction of superior courts). If no reference is made in a statute to a right to appeal a delegated decision, then there will nevertheless still be recourse to judicial review. A legislature may grant an appeal right for a limited set of issues; if it does so, then issues not listed should be subject to judicial review.

For exam purposes, a question will give you enough to know whether you are dealing with an appeal or judicial review. If you are asked only to "challenge" a decision, then look to see if the fact pattern refers to a statutory appeal provision. If there is none, then any recourse will lie in judicial review.

Why does the difference between an appeal and judicial review matter for substantive review? In the 1990s, the SCC decided that regardless of which process is employed, the judiciary should apply the same analysis to determine the appropriate standard of review to apply to the decision in question.[5] The court made the question of whether the process was by appeal or by review into one of several contextual factors for determining the standard of review: if the matter arose by way of a statutory appeal, this pointed toward correctness review; if by judicial review, and especially if the tribunal's jurisdiction was protected by a "privative clause," this pointed to reasonableness review. In *Edmonton East*, the mall owners brought their challenge to the assessment board's decision by way of the appeal right set out in s 470 of the MGA. The discussion of the weight to be given this factor was a significant issue in the *Edmonton East* case, and will be discussed further below.

One more note about appeals: once a superior court makes a ruling with respect to an administrative decision, the court's ruling can be appealed to a higher court in the usual fashion. In *Edmonton East*, the first judicial decision was made by the Court of Queen's Bench. It decided on the applicable standard of review for the board's decision, and applied that standard. On appeal to the Alberta Court of Appeal, the latter court dealt with the standard of review issue as a legal issue subject to correctness. The same applied with respect to the appeal to the Supreme Court of Canada. Neither a standard of review analysis, nor any degree of deference, is owed by a higher to a lower court on legal questions.

5 *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 [*Southam*].

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2. What is the decision being challenged (the "impugned decision")? Is there only one decision or two?

The "impugned decision" refers, of course, to the administrative decision that is being or has been challenged, whether in an appeal or by judicial review. In an exam setting, just as in legal practice, it is important to be clear about what the impugned decision is (as well as who is supposed to make it, and under what authority). This is not always straightforward.

For example, it can be important to determine whether one is dealing with a single issue, or with multiple issues, each deserving separate analysis. The impugned decision in *Edmonton East* was that of the Assessment Review Board, which decided to raise the assessment of the Capilano Shopping Centre from $31 million to $41 million. However, neither the parties nor the Supreme Court addressed the question of what the precise assessment amount should be. Instead, the argument in the case concerned whether the board had the power or jurisdiction to award *any* increase in assessed value on a complaint by a taxpayer. The majority described this decision as "implicit" in the overall assessment appeal.[6]

This approach, of breaking a single overall outcome into multiple component issues, called "disaggregation" by some commentators, has generally been discouraged by the Supreme Court of Canada.[7] In moving to a position that favours deference in most instances of substantive review, the court has rejected the "preliminary questions" and related doctrines that imply a statutory delegate must "correctly" confirm its statutory jurisdiction before moving on to make a decision on the facts before them in an individual case. On occasion, however, it may make sense to identify a single decision as having distinct components. Is *Edmonton East* such a case? The issue of whether the board had the power to raise assessments did lie to some extent on the face of the statute. The provision giving the right to file a "complaint" with the board stated a "complaint may be made only by an assessed person or a taxpayer." This provided the basis for an argument, accepted by the minority justices, that since the city had no right to file a complaint saying that an assessment was too low, the board should not be able to rule on that basis.

For exam purposes, an instructor will not usually want students to be unnecessarily tangled up in the question of multiple, or implicit, decisions. Fact patterns will generally identify a single decision, and it will be up to you to characterize the nature of the issue as one of law, fact, or mixed fact and law. On occasion, however, a fact pattern may contain clues that there is more than one decision involved. This can be done, for instance, by separating a statutory provision that deals with liability from a provision that deals with remedy. The purpose of creating two issues in this way will almost always be to have you distinguish between the standard of review applicable to each issue, and explain why.

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6 *Edmonton East*, *supra* note 3 at para 13.

7 See majority judgment in *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650.

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A second vexed question concerns the nature of the issue being decided: is it an issue of law, fact, or mixed law and fact? The best statement on the question remains that made by Iacobucci J in *Southam* in 1997:

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult.[8]

Perhaps we can all take some comfort from that last sentence. In any event, there is one issue that is almost always understood to be a "question of law": the interpretation of a statutory provision. For that reason, instructors frequently base standard of review questions around situations in which an administrative decision-maker is engaged in interpreting a statutory provision.

3. Which approach should we use in selecting the appropriate standard of review to apply?

In *Dunsmuir*, agreement between the nine justices ended with the idea that correctness and reasonableness were the two available standards of review. The court divided over the method to be employed in choosing between these two standards in any particular case. The division reflected the fact that the court was caught between two approaches. The first, known by the ungainly name of the "pragmatic and functional" (P&F) approach had predominated since the mid-1990s. The P&F approach involved balancing four factors to determine the degree of deference owed to an administrative decision-maker:

1. the existence of a privative clause or, by contrast, a right of appeal;
2. the degree of expertise of the decision-maker relative to the issue being decided;
3. whether the decision was one of law, or fact, or mixed law and fact; and
4. whether the role of the decision-maker was more adjudicative, or policy-making.

In *Dunsmuir*, the court affirmed that these continued to be relevant factors. However, a majority of the justices also suggested that reasonableness would be the appropriate standard of review in most cases, with correctness being an exception.

Over the next several years, the court came to endorse the latter position in the form of a "presumption of reasonableness." In *Edmonton East*, Karakatsanis J, writing for the majority, described how the presumption should operate on these terms:

> Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque*

8 *Southam, supra* note 5 at para 35.

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> *québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts.[9]

She went on to cite four exceptional categories of issues that may rebut the presumption of reasonableness: constitutional questions regarding the division of powers; issues of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, true questions of jurisdiction, and issues regarding the jurisdictional lines between two or more competing specialized tribunals. In applying the presumption of reasonableness approach, then, we need to know something about the scope and meaning of these exceptions. We return to this discussion shortly.

The dissenting justices in *Edmonton East*, however, adopted an alternative approach to choosing the standard of review. In an opinion written by Brown and Côté JJ, the minority termed the alternative the "contextual approach." In some ways, the contextual approach can be viewed as a return to the multi-factoral approach (the "pragmatic and functional" approach) that predominated before *Dunsmuir*. The main purpose of the contextual approach, according to Brown and Côté JJ, is to identify what the legislature *intended* with respect to the standard of review to be applied to any particular decision-making power. Several contextual factors (related to the context of the statutory power) assist in revealing legislative intent. Chief among relevant factors in the *Edmonton East* case, according to the minority, was the appeal provision in s 470 of the MGA.[10]

The idea is that if the legislature has created a right of appeal to a court, and authorized the court to "give direction" to the administrative body as to how to deal with the issue in question, then this is tantamount to the legislators saying that the court should apply correctness review. In making this point, the minority was relying heavily on a 2014 decision by the SCC in a case called *Tervita Corp v Canada*.[11] In that case, a majority had concluded that an appeal clause represented a clear legislative preference for correctness review. The appeal clause read:

> 13(1) Subject to subsection (2), an appeal lies to the Federal Court of Appeal from any decision or order, whether final, interlocutory, or interim, of the Tribunal *as if it were a judgment of the Federal Court*.[12]

In *Edmonton East*, the majority distinguished *Tervita* on the basis that the appeal clause in the latter case was unambiguous with respect to legislative intent concerning standard of review. The majority found the kind of appeal right in the MGA insufficient to rebut the presumption of reasonableness.

What is going on here? The first thing to acknowledge is that there is a significant division on the SCC with respect to the degree to which correctness review should survive (or perhaps, even prosper) in Canadian administrative law. Justices who support the "presumption

9 *Edmonton East*, *supra* note 3 at para 22.

10 Following the decision in *Edmonton East*, the Legislative Assembly of Alberta replaced these appeal provisions with an express right of judicial review from the board to the Court of Queen's bench. In the circumstances, should this amendment be understood as the legislators' endorsing a deferential standard of review for board decisions?

11 *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 [*Tervita*].

12 *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp), s 13(1) (emphasis added).

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of reasonableness" approach believe that deference should be shown in the great majority of substantive review cases, with correctness being reserved for a tightly circumscribed list of exceptional circumstances. In recent years, Rosalie Abella J has been the strongest proponent of this position. Justices who support the "contextual approach" believe that courts should accord deference to administrative law-makers less frequently, and that there are numerous factors (including the existence of a broad appeal right) that point to correctness review.

The second thing to note is that the current Canadian approach to substantive review is the presumption of reasonableness approach. Applying the presumptive approach calls on us to understand the "exceptional circumstances," to which we turn momentarily. One benefit of the presumptive approach is its greater predictability. As the majority noted in *Edmonton East*, the contextual approach tends to throw the doors to argument open, and to draw in a number of possibly relevant factors.

For exam purposes, and until further notice, use the "presumption of reasonableness" approach. Almost certainly, this means that your analysis should address whether one or more of the four recognized exceptions to the presumption is arguable on the facts given. In addition, you should consider whether an argument could be made for one of the alternative approaches for determining standard of review. The principal alternatives are precedent, and the contextual approach. The latter might appear arguable where there is a strong indicator of legislative intent (such as a broad appeal right or a strong privative clause), or of another factor that has been important in the case law.

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4. What are "issues of central importance to the legal system as distinct from those viewed as falling within the adjudicator's specialized area of expertise?"

The presumption of reasonableness applies, subject to the four exceptions listed earlier. Only two of the four exceptions will be discussed here. The other two—constitutional issues involving the division of powers, and issues going to the drawing of jurisdictional boundaries between two tribunals—are relatively discrete and thus easier to identify. For this very reason, they make for good hypothetical facts tucked into exam questions, and so must not be forgotten. The discussion in this and the next question, however, address the two more ambiguous exceptions to the presumption of reasonableness: "issues of central importance to the legal system," and "true questions of jurisdiction."

In *Edmonton East*, Karakatsanis J termed one exception to the presumption of reasonableness as issues of central importance to the legal system as distinct from those viewed as falling within the adjudicator's specialized area of expertise. This phrasing draws then on two ideas, and puts them in opposition to each other: "issues of central importance to the legal system" versus "issues falling within the adjudicator's specialized area of expertise."

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a. Issues of central importance to the legal system

In general, the Supreme Court has drawn a high threshold for identifying an issue of law as being of "central importance to the legal system," and so calling for application of correctness review. This can best be seen in the case *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*,[13] where the issue in question was whether the statutory provision that authorized a tribunal to award compensation to a successful complainant "for any expenses incurred by the victim [complainant] as a result of the discriminatory practice" should be understood to include an order for legal costs. In finding that this question of costs was not one of central importance to the legal system, the court said:

> In addition, a decision as to whether a particular tribunal will grant a particular type of compensation—in this case, legal costs—can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount *would subvert the legal system*, even if a reviewing court found it to be in error.[14]

The idea that to be "central to the legal system" an issue of law must be one whose misapplication would "subvert the legal system" suggests few issues will rise to this level. The court in *Mowat* applied reasonableness to the tribunal's decision that the statute allowed it to award legal costs, but found this interpretation of the statute unreasonable.

The idea of "subverting the legal system" seems somewhat narrow. Another way of looking at "questions of central importance to the legal system" might involve the seriousness of the interest at stake, not so much for the individual parties in a case, but for others more generally. Issues of liberty, discrimination, immigration status, and other forms of personal status, might speak to that idea.

For exam purposes, the following things might be used to indicate "centrality to the legal system": interpretation of a phrase that is known to be, or said to be, used commonly in another area of law, such as contracts, torts, or damages; interpretation of a statutory phrase that appears in various statutes; interpretation of a term used in human rights law or international law; and matters going to interests, such as liberty, for which courts have traditionally been viewed as important protectors. If the issue involves interpreting a statute, then be clear whether this is the tribunal's "home statute" or one the tribunal does not usually consider.

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b. Specialized expertise

In *Southam*,[15] the SCC identified expertise of the decision-maker as the single most important factor for deciding whether deference was owed. In the ensuing years, expertise has

13 2011 SCC 53, [2011] 3 SCR 471 [*Mowat*].
14 *Ibid* at para 25 (emphasis added).
15 *Supra* note 5.

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ceased to be viewed as determinative. For one thing, the court made clear that "expertise" means expertise "relative to the judiciary," meaning that there must be grounds for believing the administrative decision-makers have an advantage over judges themselves. This connects up with a difficulty in defining what the sources of such expertise might be, and in what circumstances it can be recognized. The clearest indicator of expertise is likely where the governing statute requires that appointees to a tribunal have a certain professional or educational background. If the issue before the tribunal relates to that background, then this will strongly support the idea of expertise. However, instances of required backgrounds for appointment as a decision-maker are infrequent. Courts have looked instead at the function of the tribunal, in terms of the specialized area of its activity, and the volume of cases, as an experiential basis for finding tribunal members to have expertise. In *Edmonton East*, Karakatsanis J said the following about the expertise:

> Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: "… in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93 …. [E]xpertise is something that inheres in a tribunal itself as an institution: "… at an institutional level, adjudicators … can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68).[16]

This approach places emphasis on the institutional source of expertise. It links expertise to the other aspect of the "exceptional category" in question, whether the issue arises from the "home statute" or from a more general area of law. The minority in *Edmonton East* found the institutional approach to result too easily in findings of expertise:

> The majority's view that "expertise is something that inheres in a tribunal itself as an institution" risks transforming the presumption of deference into an irrebuttable rule. Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law.[17]

For exam purposes, identify what in the facts shows a degree of expertise on the part of the decision-makers. Is it a requirement that they have a certain educational or professional background, or is it simply that they would be expected to acquire experience by operating under their "home statute?" The former can be a stronger indicator of expertise, so long as the issue in question calls on that background. If the facts suggest the decision-makers have a role of developing policy, this supports the idea of a specialized or expert function.

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16 *Edmonton East*, *supra* note 3 at para 33.

17 *Ibid* at para 85.

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5. What are true questions of jurisdiction?

The concept of what is a "jurisdictional issue," or an issue that is "within a tribunal's jurisdiction" or outside that jurisdiction, has been one of the most fraught questions in substantive review in Canada. From *CUPE*[18] in 1979 to the mid-1990s, the question served as the starting place for assessing whether a statutory delegate's decision-making was entitled to deference. In 1998 with *Pushpanathan v Canada*,[19] the Supreme Court appeared to dispense with the question of jurisdiction in favour of moving directly to the issue of deference, to be determined by a series of contextual factors. Then, somewhat surprisingly, in its attempt to streamline and simplify the law of substantive review in *Dunsmuir*, the court revived the idea that some issues of law are "true questions of jurisdiction" in nature, calling for correctness review. Just three years later in *Alberta Teachers*,[20] a majority of the court all but finished off "true questions of jurisdiction" as a category for analysis. Rothstein J put it this way:

> As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.[21]

This kind of an invitation coming from a high court judge has more the character of a warning, even a dare, rather than encouragement to give it a try. Nevertheless, the court's having left the door open to the "exceptional" appearance of a true question of jurisdiction creates a major temptation for law professors: to conceive of fact patterns that might look like such an exception.

The problem with which the court has been concerned in trying to reduce the analytical importance of "jurisdiction" is that most examples of statutory interpretation can be easily transformed into a basis for casting doubt on the jurisdiction of a delegate to even answer the question. Getting the interpretive answer "right" can look very much like a necessary first step to the delegate's acquiring the jurisdiction to make a decision. This can be seen in *Mowat*, where the tribunal's interpretation of the phrase "any expenses" is, from one perspective, the necessary basis for its awarding legal costs for the complainant. The underlying concern of those advancing this perspective is that administrative decision-makers like the tribunal will, if unchecked by the courts, make decisions that expand their own statutory power. The Supreme Court in *Mowat*, of course, declined to view this as a "true question of jurisdiction." Similarly, in *Edmonton East*, the majority gave short shrift to the idea the board was dealing with a true question of jurisdiction:

> This category is "narrow" and these questions, assuming they indeed exist, are rare …. It is clear here that the Board may hear a complaint about a municipal assessment. The issue is simply one

18 *Supra* note 1.

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

20 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*].

21 *Ibid* at para 42.

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> of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.[22]

The dissenting justices rested their conclusion that the appropriate standard of review was correctness on the wording of the appeal provisions and what they disclosed of legislative intent, and declined to rule on the true question of jurisdiction issue.

It is possible the SCC could make the definitive ruling that true questions of jurisdiction do not exist for analytical purposes, but they have not yet done so. Unless and until they do so, this remains an area rife for speculation about what might constitute such a jurisdictional question. One possibility that comes to mind is where the outcome of the impugned decision forms the basis for a *different* decision-maker to assume its statutory authority. In the non-administrative sphere, an example might be the finding of guilt on a driving offence serving as a basis for a director of motor vehicle licensing deciding to suspend a licence. The first decision is jurisdictional for the second. The same concept might apply between two administrative decisions.[23] However, there could be another way to approach this relationship between overlapping authorities. The first decision-maker might be viewed not so much as the decision-maker in the statutory scheme but as a "screener" or referring agent. This would be similar to the analysis given by the court in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*.[24] In that case, the City of Halifax applied for judicial review to have the commission's decision to refer a complaint of discrimination against the city to a hearing tribunal set aside. The trial court applied correctness review to what it described as a jurisdictional issue. The Supreme Court, however, viewed the commission's ruling as merely preliminary to the final determination that would be made by a tribunal. In such circumstances, it was appropriate to apply the standard of reasonableness review, such that a reviewing court would intervene to stop the proceedings only where the referral decision was unreasonable:

> The Commission's referral decision did not involve the sort of determinations that the chambers judge thought it did. Instead, the Commission's function was simply one of exercising its statutory discretion to decide whether it was satisfied that, having regard to all of the circumstances of the complaint, an inquiry by a board of inquiry was warranted, a function "more administrative than judicial in nature."[25]

For exam purposes, it is appropriate to note that the SCC has questioned whether true questions of jurisdiction exist. Nevertheless, you should be prepared to identify what might make the grade as such a rare creature. Due to its presumed rarity, a possible "true question of

22 *Supra* note 3 at para 26.

23 For an example of such a situation, see *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, [2016] 2 FCR 459. In this case, judicial review was taken of a decision by a departmental official—a decision that arguably foreclosed the statutory jurisdiction of the Immigration and Refugee Board. The appeal of the Federal Court of Appeal decision was heard by the Supreme Court of Canada on January 19, 2017. This case, in simplified form, serves as the basis for the "Sample Exam Question" in the accompanying online materials.

24 2012 SCC 10, [2012] 1 SCR 364.

25 *Ibid* at para 26, Cromwell J.

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jurisdiction" in an exam will usually be highlighted. This might be done using the word "jurisdiction," or similar terms like "provide the authority to" or "the power to." Or, the facts might show that the impugned decision must be made before a second process of decision-making can be undertaken. Ways to highlight this include separating the decisions into different statutory provisions, or, even better, having them made by different decision-makers.

III. APPLYING CORRECTNESS AND REASONABLENESS REVIEW

The second stage of substantive review involves assessing the "merits" of the decision being reviewed, and deciding whether the decision meets the applicable standard. Here is a secret: the most challenging aspect of putting together a substantive review question for an exam in administrative law occurs at this second stage. This is so for two reasons. First, it can take a lot of exam space to create a factual matrix to which students can apply skills of interpreting language and applying and distinguishing case law—the usual tools of legal analysis—in order to form a view on the merits; moreover, an instructor is leery of creating a problem on the merits that deals with an area of law that is more familiar to some students than others. Those are drafting issues. The second problem is more serious, because it derives from the state of Canadian administrative law itself: the judiciary has largely been unable to articulate how deference, or reasonableness review, should operate.

6. What is the difference between correctness and reasonableness review?

The difference between the two standards of review is simply that of whether the reviewing body (a superior court) should show deference, or no deference, to a statutory delegate's decision. The standard of deference is called "reasonableness review," and the no-deference position is called "correctness review." The position of deference does not mean that the reviewing court will accept the administrative decision, but rather that the decision will be accepted so long as it is found to be "reasonable," or, in other words, not "unreasonable."

Correctness review is easy to define. The standard of correctness means that a reviewing court will uphold an administrative decision that it agrees with—that is, the decision is the one that the court itself would have made.

For exam purposes, should you decide that the appropriate standard of review is correctness, you may well not find a lot of material in the fact pattern that allows you to assess whether the impugned decision was correct or not. Be on the lookout for references to established case law on the issue, or to what appear to be clear dictionary definitions of words in dispute.

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All the difficulty we encounter in this area comes with trying to define the meaning of "reasonableness" review. By differentiating between the "correct" and the "reasonable," the law implies that there is a space or a margin between them. In that margin fall decisions that a reviewing court would not itself have made, but that it finds to be "reasonable." As some have put it, this means that in according deference, reviewing courts must be prepared to allow decisions to stand that they view as "incorrect," so long as they are not outside the scope of what is reasonable, or acceptable. This is a difficult distinction to articulate.

7. Are the reasons given by a decision-maker important to reasonableness review?

The short answer is that reasons are important, if given, but not necessary.

In *Dunsmuir*, the majority of the court made justification and transparency the hallmarks of a decision that would withstand scrutiny under a deferential standard—in other words, if administrative decision-makers explain and justify their decisions in a transparent fashion, those decisions will generally be found to be reasonable. This would seem to go beyond encouraging decision-makers to provide reasons, and to imply that in the absence of reasons, it will be difficult to find a decision to be reasonable. However, in the same passage, the court said that reasons for a decision are not the only matter under scrutiny:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. *But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*[26]

Accordingly, a reviewing court can uphold a decision or outcome as reasonable even when that decision is accompanied by poor reasons, or by no reasons at all. This concept has taken on more significance in the post-*Dunsmuir* years. In *Newfoundland Nurses*, the court found that the (in-)adequacy of reasons does not in itself constitute a ground of substantive review—that is, a decision could be upheld as reasonable even where the reasons given by the administrative official failed to justify it. The reviewing court can look to the evidence, the process, and other sources to find justification for the outcome reached by the official. Abella J quoted with approval this passage by Professor David Dyzenhaus: "[E]ven if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them."[27]

The idea that reasons are not needed for a decision to be reasonable has been taken at least one step further—there also may not be a need for a decision, or at least an express decision. In *Alberta Teachers*, the impugned decision was described as an "implied decision" by the Privacy and Information Commissioner in Alberta, who proceeded with a hearing into a complaint under the applicable provincial application after the lapsing of a limitation period. The commissioner did not advert to, much less give reasons for "ignoring" the limitation provision. The Supreme Court found the "decision" (perhaps better described as the

26 *Dunsmuir*, *supra* note 2 at para 47, Bastarache and Lebel JJ (emphasis added).

27 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 12.

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"action" or "outcome") to be reasonable, in that it corresponded with a justifiable interpretation of the statute as not having imposed a mandatory limitation period, an interpretation that the commissioner had given in earlier cases.

Similarly, in *Edmonton East*, the Assessment Review Board gave no reasons for deciding that it had the power to raise the assessed value on the complaint made by the shopping centre owners. It simply proceeded to do so. The majority at the SCC looked at the record, and found that counsel for the owners had conceded that the board had this jurisdiction. The majority continued:

> Therefore, it is hardly surprising the Board did not explain why it was of the view that it could increase the assessment: the Company expressly conceded the point. Parties "cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons" (*Alberta Teachers*, at para. 54). Accordingly, I shall review the Board's decision in light of the reasons which *could be* offered in support of it.[28]

For exam purposes, *read any reasons for decision carefully*. This is certainly what reviewing courts do. Any reasons for decision provided in an exam fact pattern are there to disclose an arguable issue or issues with respect to whether the decision is "correct" or "reasonable," depending on the standard applied. If no reasons are given, or scant reasons that appear not to explain anything, then this may raise the procedural fairness of a breach of the duty to provide reasons. However, the absence of reasons will not in itself answer the question of substantive "reasonableness."

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8. What does "reasonableness" review mean?

This is the most difficult question to answer in our list of the "Top Ten." We know that to be the case because the Supreme Court of Canada has not been able to answer the question satisfactorily. We can see this from looking again at *Dunsmuir*. The SCC's judgment in *Dunsmuir* was intended to introduce a new era of simplified substantive review into Canadian administrative law. By all accounts, this has failed to occur. One reason for this might be described as the "original sin" of the *Dunsmuir* case.[29] The majority sought to expand the basis for deference in judicial review. It made the first intimations of a presumption of reasonableness, which was later expressly adopted by the court. The majority found that the issue before the labour arbitrator—whether statutory provisions gave a non-union public employee the same right to challenge the cause given for dismissal from his job that a union employee had—was an issue that fell within the well-recognized expertise of labour

28 *Edmonton East, supra* note 3 at para 40.

29 Some might say the original sin of *Dunsmuir* was that of a 6–3 division in the court (with three strong opinions going in different directions). It seems difficult to simplify the law with other than a unanimous judgment on that law.

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arbitrators. The majority ruled that the appropriate standard of review was reasonableness. The majority then went on to find the arbitrator's decision to be unreasonable and set it aside. The justices said:

> The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the PSLRA [*Public Services and Labour Relations Act*], which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. *There can be no justification for this; no reasonable interpretation can lead to that result* …. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, *on any reasonable interpretation*, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.[30]

This statement effectively means that there was only one reasonable, or defensible, answer to the question asked of the arbitrator. The answer he gave could not be justified on the basis of any defensible reasons or logic. Nor is there any hint in the case that there was a "middle ground" result available that the arbitrator might have reached. In short, *Dunsmuir* is a case in which there was no "range of possible, acceptable answers." Where that is the case, it would not seem that "deference" can operate in any meaningful way.

This raises a serious problem for conceiving of reasonableness review with respect to issues of law, particularly of statutory interpretation. There is no doubt that deferential review is available for these issues. In fact, the major impetus for the contemporary Canadian approach to substantive review is to restrain superior courts from too readily interfering with the decisions of tribunals on issues of law and statutory interpretation within their spheres of specialized activity—in short, to give administrative decision-makers the scope to develop the law in those areas. But how does this fit with our general understanding of how courts approach the task of interpreting statutes?

The Supreme Court of Canada established a standard approach to that task in *Rizzo & Rizzo Shoes Ltd (Re)*.[31] Statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects. The principle underlying *Rizzo & Rizzo* is that the judiciary is capable of ascertaining the proper meaning of any statutory language, no matter how convoluted. This may be a fiction, but it is a useful fiction. For one thing, it has permitted our courts to limit the concept of unconstitutional "vagueness" in Canadian statutes to a disappearingly small number of instances, virtually removing this argument from the lawyer's toolbox. In short, statutory interpretation does not give rise to "a range of reasonable alternative interpretations."

If we accept this last point (and, if needed, please take it on faith for the moment), and if issues of statutory interpretation generally arrive at a dichotomous or "yes/no" decision point, it becomes difficult to describe a process of thinking or a set of techniques that can distinguish between a "reasonable" outcome and a "correct" outcome.

Allow me to set out three ways in which courts seem to have addressed this dilemma (this is by no means to say these are the only three ways). Each of them is, in my view, more

30 *Dunsmuir*, *supra* note 2 at para 75, Lebel and Bastarache JJ (emphasis added).

31 [1998] 1 SCR 27 [*Rizzo & Rizzo*].

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metaphorical than prescriptive about how to conduct reasonableness review of issues of law. They may nevertheless give some guidance.

First, there is the idea of ambiguity in the law. The Supreme Court referred to ambiguity in statutory language as both explaining and providing a basis for according deference to administrative decision-makers in the formative case of *CUPE*. Dickson CJ noted that the wording of the statutory provisions in question was "very badly drafted" and "bristles with ambiguities."[32] In such circumstances, he said, superior court judges should not insist on their preferred interpretation over that of an expert tribunal, in that case a labour relations board. This idea of leaving ambiguous questions of law to be decided by statutory delegates is appealing, but it has flaws. For one thing, it takes considerable legal analysis or "searching" to get to the point where two alternative answers could be seen as plausible; and, second, from a practical standpoint, one can find few if any instances (including *CUPE*) where a reviewing court let a decision stand without implying that it was the better decision. Truly ambiguous problems, where more than one solution is plausible or reasonable, are rare, for conceptually strong reasons.

Second, the Supreme Court has described deference as a kind of mental posture that reviewing courts should take to the decisions of administrative officials. One of the more commonly mentioned approaches is the idea of a "deference of respect," a term coined by Professor David Dyzenhaus. The court cited Dyzenhaus's idea with approval in *Dunsmuir*:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law …. We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."[33]

The description of a deferential state of mind is perhaps most helpful as a reminder of tone, and of making sure a decision-maker's written reasons for decision are treated seriously and carefully. It does not go very far toward saying what makes a decision "unreasonable." One cannot help wondering if the judgment in *Dunsmuir* itself reflected a "deference of respect" when it came to dealing with (or, more aptly, not dealing with) the arbitrator's lengthy reasons for decision.

Third, reasonableness review when applied to statutory interpretation and other questions of law may mean that on certain questions, superior courts simply cede interpretive authority to administrative decision-makers. That is, deference would best be understood as a "hands-off" operation, that once a court determined the appropriate standard of review was deference, it should not examine the issue any further. The law in the protected area would be left to be developed by decision-makers delegated by the legislators. However, judicial review in Canada has never been based on a full-scale cession of the authority to interpret law. As stated in *Crevier*[34] and confirmed in *Dunsmuir*, judicial review serves the rule

32 *CUPE, supra* note 1 at 230.
33 *Dunsmuir*, *supra* note 2 at para 48.
34 *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220.

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of law principle by ensuring that the courts will supervise and prevent government action outside its lawful boundaries. This requires that even if deferring to administrative interpretations of statutory statements, the courts must be prepared to intervene where any such interpretation is so improper, or unreasonable, as to threaten the rule of law.

For exam purposes, if called on to assess whether a particular administrative decision is reasonable or unreasonable, feel free to note that reasonableness review is different from correctness review, and that it involves deference to the decision-maker. Be able to articulate briefly an understanding of what deference means. Then apply this understanding to whatever facts are available, including apparent ambiguity (or its absence), thoughtfulness of written reasons, or a history of well-established tribunal jurisprudence. Don't be surprised or disappointed if you find little to go on for this part of an answer.

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9. How does one identify whether a particular issue gives rise to a "range of reasonable answers," and is that important?

In mid-2016, the Supreme Court of Canada released an intriguing judgment in substantive review, *Wilson v Atomic Energy of Canada Ltd*.[35] The case is notable for two principal reasons: (1) the 6–3 division in the court on the issue of standard of review, going to fundamental issues of jurisdiction and rule of law;[36] and (2) the *obiter* opinion of Abella J in which she set out a possible new approach to standard of review analysis. On the second point, Abella J, the strongest proponent of judicial deference on the court, suggested in *Wilson* that the court move from two to only a single standard of review, reasonableness, for all administrative decisions. This would, of course, dispense with the initial question of choosing between reasonableness and correctness review. On the other hand, it would seem to lead to an intensified inquiry into what reasonableness review means, including whether it could possibly be conceived as representing a single standard of review, and of how it could incorporate situations that previously were addressed as calling for correctness review. Abella J sought to answer these doubts:

> A single standard of reasonableness still invites the approach outlined in *Dunsmuir*, namely:
>
> > … reasonableness is concerned … with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para 47]
>
> Approaching the analysis from the perspective of whether the outcome falls within a range of defensible outcomes has the advantage of being able to embrace comfortably the animating

35 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*].

36 In *Wilson*, the majority found reasonableness to be the appropriate standard of review to apply to a labour arbitrator's interpretation of provisions of the *Canada Labour Code*, RSC 1985, c L-2. The minority found that the legislation was open only to a single interpretation. In circumstances where legal certainty was called for because of differing opinions by different arbitrators, the minority ruled that the appropriate standard should be correctness. This is, of course, similar to the points raised in the discussion of Question 7, above.

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> principles of both former categories of judicial review. Courts can apply a wider range for those kinds of issues and decision-makers traditionally given a measure of deference, and a narrow one of only one "defensible" outcome for those which formerly attracted a correctness review.[37]

Would it have been helpful in *Dunsmuir* for the court to ask as a first question: in the matter before us, is there a range of available outcomes? Possibly so. This approach would not foreshorten legal analysis in any particular case, as in many instances it might require a full argument on the merits to conclude whether such a range of answers exists. However, there may be some situations where one could say fairly quickly that a range of defensible outcomes is available. Such situations might include statutory powers to grant remedies, assess damages, or render evaluations. This suggestion appears, in one sense, to turn substantive review on its head. It replaces the question "What is the appropriate standard of review?" with the question "Does the issue involved in the particular case give rise to a range of reasonable (or defensible) outcomes?" If the answer to this question is "yes," then an adjudicator's decision should be upheld if it falls within that range; if the answer is "no, there is only a single defensible answer," then the adjudicator is upheld only if she gives that answer. Abella J believes that both situations can fall within the rubric of reasonableness review. Leaving aside that arguable point, the idea that multiplicity of possible outcomes is the basis for exercising deference may be helpful.

The existence of "multiplicity" may not inhere so much in a statutory statement of different possible outcomes as in the nature of the decision-making power. In a couple of post-*Dunsmuir* cases, the SCC has engaged in substantive review of delegated law-making powers. Legislative powers represent the height of discretionary action. The very nature of making laws or binding rules and regulations involves decision-makers taking in all the information they wish to gather by way of informing themselves, and then making what they deem to be the best rule to govern prospective circumstances. Law-making is policy-making, and by definition is open to disagreement. If any form of delegated decision-making calls to be reviewed on a standard of deference, it should be delegated law-making. In *Catalyst Paper Corp v North Cowichan (District)*,[38] the court dealt with a property tax assessment by-law enacted by the municipality. The paper company challenged the by-law for being unreasonable. The company agreed that deferential review applied to the making of by-laws, but argued that since *Dunsmuir*, reasonableness should be understood as a single standard that did not allow for a "high degree" of deference. The court disagreed, ruling that reasonableness review took on a different character depending on the decision-making context. In the law-making context at hand, this meant considerable leeway for the North Cowichan council:

> The applicable test is this: *only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside*. The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.[39]

Similarly, in *Green v Law Society of Manitoba*,[40] where a lawyer sought judicial review of a decision to discipline him for breach of a rule dealing with continuing legal education

37 *Wilson, supra* note 35 at paras 32-33.
38 2012 SCC 2, [2012] 1 SCR 5.
39 *Ibid* at para 24 (per McLachlin CJ) (emphasis added).
40 2017 SCC 20.

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adopted by the Society, the court identified the threshold for unreasonableness as "so long as no reasonable person could have come to the rule."

A statutory power to make subordinate legislation might often be described as a "discretionary" power. Discretion is a famous word in administrative law—it is perhaps shocking that it has not appeared earlier in this chapter. The notion of discretion as "choice," the power to select among different options, is often viewed as a near-automatic basis for according deference in substantive review. When talking about discretion, however, we are not necessarily talking about a multiplicity of outcomes. A discretionary decision, such as the approval of a licence, or the outcome of an environmental review process, may well come down to a "yes" or "no" result. Any "range of reasonable answers" would not lie so much in the outcomes, as in the reasons for decision—that is, the idea that there are a range of acceptable explanations or justifications for a decision, very much including the wisdom or judgment of the decision-maker. With this important caveat, we can fairly safely add powers that are described in discretionary terms—"in his or her opinion," "as they see fit," "should they be satisfied," and so on—to the class of issues that give rise to a range of possible answers.

For exam purposes, consider whether the impugned decision gives rise to a "range of alternative answers," including a range created by the submissions of the parties (e.g., one party submits that damages should be $250,000, while the other party argues for $1 million in damages) or whether it involves a question that can be answered only "yes" or "no." If the former, look for facts or factors that suggest the decision-maker has gone outside the accepted range. Also, be attuned to statutory language that implies or expressly calls for discretion on the part of the decision-maker. The presence of discretion implies a "range of alternative reasons, if not answers," on the part of a decision-maker.

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10. What role does the concept of "abuse of discretion" play in contemporary standard of review analysis?

The most celebrated decision in Canadian administrative law is *Roncarelli v Duplessis*.[41] The circumstances, the parties, the lawyers, the Supreme Court justices, and the ruling all contributed to the drama of the case. Frank Roncarelli was the owner of a restaurant in Montreal, and a member of the Jehovah's Witnesses. Maurice Duplessis was premier and attorney general of Quebec. In the mid- to late 1950s, government officials, at the behest of the Catholic Church, became concerned with proselytization by Jehovah's Witnesses in Montreal. On numerous occasions, adherents of that faith were arrested on public nuisance charges while handing out their literature. As a successful businessperson, Roncarelli posted their bail so they could be released from jail. Frustrated with this, Premier Duplessis instructed the provincial liquor commissioner to revoke the liquor licence for Roncarelli's restaurant. The commissioner did so under a statutory power that merely said the

41 [1959] SCR 121.

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"Commission may cancel any permit at its discretion." Roncarelli challenged the decision to revoke the licence. At the Supreme Court of Canada, Rand J famously said:

> In public regulation of this sort there is no such thing as absolute and untrammeled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.[42]

The court ruled that Duplessis and the commissioner had exercised the statutory power for an "improper purpose," that is, a purpose unrelated to those intended by the legislature in granting the power. This ruling is a classic example of one kind of "abuse of discretion," long known in Canadian administrative law as a substantive ground of judicial review. Other kinds of abuse of discretion included basing a decision on irrelevant considerations, failing to take into account relevant considerations, and fettering discretion. What these named abuses of discretion tend to have in common is a focus on *relevance*—what is relevant, and what is not relevant, for a decision-maker to take into account.

In the hallmark case of *Baker v Canada (Minister of Citizenship and Immigration)*[43] in 1999, the Supreme Court of Canada decided that "abuse of discretion" should no longer be a stand-alone ground of judicial review, but instead be brought within the standard of review analysis. That is, in judicial review of discretionary powers, just as with powers to decide issues of law, fact, and mixed law and fact, the first question to be answered is "What is the applicable standard of review—correctness or reasonableness?" Four years later, the court went a step further. It described the abuse of discretion categories as "nominate grounds" of judicial review that no longer played a principal analytical role:

> To determine standard of review … it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor …. The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.[44]

Since that time, it has been difficult to say what role the former abuses of discretion should play in substantive review. It seems clear that they no longer constitute, as they once did, a basis in and of themselves for setting aside an administrative decision.

In my view, however, the nominate abuses of discretion remain hallmarks for identifying faulty reasoning. In particular, where reasonableness is found to be the appropriate standard of review (which, as the court has stated on numerous occasions, including in *Baker*, will usually be the case with powers of a discretionary nature), an "abuse" such as failing to consider a relevant factor or deciding for an improper purpose constitutes a species of unreasonableness. In this way, the pre-*Baker* jurisprudence, including *Roncarelli v Duplessis*, remains relevant and helpful. For exam purposes, the suggested approach to substantive review—where the facts disclose a form of abuse of discretion—is to (1) perform a standard

42 *Ibid* at 140.

43 [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker*].

44 *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 SCR 226 at paras 22-24.

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of review analysis; (2) having identified reasonableness as the appropriate standard, cite the "abuse" as a basis for finding the impugned decision to be unreasonable; (3) recognize that this may not be conclusive, as deference may call for recognizing the decision-maker as having a role in deciding what is relevant to the decision.

One more point. The nominate abuses of discretion serve a purpose that goes beyond that of helping to analyze whether a certain administrative decision should be upheld or set aside. They also give guidance to administrative decision-makers about how to do their jobs, and how to avoid mistakes. They show what constitutes being "unreasonable." This is not something that is otherwise easily found in contemporary Canadian law of substantive review. That takes us to the tenth and last question to be addressed in this discussion.

For exam purposes, the nominate abuses of discretion remain among the easiest "flaws" in reasoning by decision-makers to build into an exam question. For this reason, they are not at all uncommon. As stated, these "abuses" go mostly to matters of relevance—whether the decision-maker has failed to take into account something that is relevant (especially if stated to be relevant by the statute) or, conversely, has drawn an arguably irrelevant factor into his thinking. An "improper purpose" may be denoted by a contrast between a statutory statement of purpose and the tribunal's reasons for decision.

IV. CONCLUSION: SUBSTANTIVE REVIEW, WHAT IS IT GOOD FOR?

A different way for an administrative law instructor to ask about substantive review is through a short essay question rather than a fact pattern question. That question—which might be politely phrased as "How does the jurisprudence on standard of review affect decision-makers?"—is a form of essay question. It is a way of asking about the contribution standard of review analysis makes to the administrative justice system as a whole. If we ask the same question of procedural justice law, we would say that it reminds decision-makers to employ fair processes in assembling evidence and hearing from affected parties, and eliminating bias from their consideration of the relevant issues. An individual judgment in judicial review dealing with fairness will provide guidance to the tribunal involved, and perhaps others, about how to handle a tricky problem in the future.

This idea of guidance for decision-makers is more ambiguous when it comes to substantive review. As has been noted, substantive review generally has two components: selection of the appropriate standard of review, and application of the standard to the merits of the case to ascertain if the impugned decision was "reasonable" or "correct." With respect to the first, the choice of standard of review provides little guidance to administrative decision-makers. The choice is done *ex post facto*, after the decision has been made. Every tribunal and tribunal member would likely *prefer* to be reviewed on a deferential standard, for a number of reasons, including that deferential review should mean a reduced scope for a tribunal's decisions to be overturned, relieving it both of the embarrassment that comes with reversal, and the additional workload of revisiting a case for a second time. In addition,

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being reviewed on a reasonableness basis betokens a degree of respect from the superior courts, a recognition that the tribunal has specialized business to do, and, perhaps, that it seems to know how to do that business. However, a decision-maker can do little to influence the selection of a standard of review. That will largely follow from the statutory context, and the nature of the issue in an impugned decision. The one thing a decision-maker might be able to do to win the respect of reviewing courts is consistently to produce thoughtful reasons for decision. This, it goes without saying, is difficult to do, and is also no guarantee.

Further, the selection of one standard of review over the other would not seem likely to have any impact on future decision-making of the tribunal in question. Knowing that one's decisions will or will not be deferred to does not lead to a different approach to making decisions. Always presuming good faith, every statutory decision-maker wants to make the best decision it can on the information available to it. None are satisfied with merely making a "reasonable" decision, that is, a decision that will pass muster at a lower standard of reasoning. That's as it should be.

The Canadian law of substantive review should be able to do a better job of providing guidance about good decision-making. It might be useful, for instance, to restore the language of "abuse of discretion" to its former place of honour as a way of pinpointing failures of logic. Identifying other types of flawed reasoning would be welcome. However, the law of substantive review has other important purposes as well. The main purpose is to provide substantive answers to difficult questions, and to do so in a principled way that respects a system of diverse governmental decision-making.

No one said this was supposed to be easy. What they frequently say, at the end of the last class of a term, is "Good luck with your exams!" Just know that in saying that, administrative law instructors mean that as much for themselves as for their audience.

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