

RULES, PRINCIPLES, AND THE REFORMATION OF JUDICIAL REVIEW

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This article analyzes two different approaches to judicial review: the model of rules (whereby the legal validity of an administrative decision hinges on its formal attributes) and the practice of principle (whereby the legal legitimacy of an administrative decision hinges on whether it has been rendered fairly and justified reasonably in light of its legal context). The author argues that the shift toward the practice of principle facilitates the type of complex and contextual normative assessments that are required to promote the rule of law across a broad range of administrative decision-making. However, the author finds that the Supreme Court, in recent cases, has favoured developing and clarifying a new model of rules which has inadvertently created “grey holes” of legality, which exacerbate the risk of arbitrary dismissal in the realm of public employment and stultifies the culture of justification where administrative decisions are subject to a statutory right of appeal.

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INTRODUCTION

Over the past 20 years, the narrative of Canadian administrative law has been punctuated by consecutive attempts to rewrite the law of judicial review. In retrospect, the Supreme Court of Canada’s interventions in *Dunsmuir v. New Brunswick*¹ and *Canada (Citizenship and Immigration) v. Vavilov*² resemble the latest chapters in a chain novel with a disjointed plotline.³ When one reads those chapters in isolation, it seems like the point is to provide judges with a new and improved model of rules to determine the applicable standard of review without being distracted by contextual considerations that might otherwise complicate that task. By contrast, the point of the preceding landmark decisions was to develop a more nuanced, contextually sensitive practice of principle to preserve the dignity of individuals affected by administrative action.⁴ Because the narrative shifts dramatically between these different ways of thinking about the point or purpose of judicial review, one might wonder

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¹ 2008 SCC 9 [*Dunsmuir*].

² 2019 SCC 65 [*Vavilov*].

³ Ronald Dworkin, *Law’s Empire* (Cambridge, Mass: Belknap Press, 1986) at 229–32.

⁴ See e.g. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC) [*Pushpanathan*]; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) [*Baker*].



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whether a theoretical perspective might help make sense of the different plotlines up to this point and consider where it might lead in the future.⁵

In order to better understand the recent impulse to reform the law of judicial review, I will briefly compare and contrast these two different modes of thinking about its point or purpose. Along the way, I will tease out their underlying theoretical foundations to situate *Vavilov* in relation to previous case law. As we will see, both *Dunsmuir* and *Vavilov* are motivated by the same impulse to simplify and clarify the standard of review analysis by abandoning the more nuanced, contextual analysis previously recommended by the Supreme Court. However, upon closer inspection it appears that both of those frameworks have troubling practical implications, because they simultaneously undercut foundational public law principles that regulate the production of administrative law.

In order to elaborate and assess each of these points, the argument of this article will unfold in three sections. In Part I, I will explain how the practice of judicial review shifts when it is conceived as a model of rules as opposed to a practice of principle. I will argue that, from an historical perspective, the model of rules is exemplified by the doctrine of jurisdictional error, whereas the practice of principle is exemplified by the doctrines of procedural fairness and reasonableness review. When cast in this light, the transition from a model of rules based on Parliamentary intent to a practice of principle based on fundamental values of fairness and reasoned justification marks one of the most important developments of Canadian public law in the twentieth century. Among other things, I will argue that the practice of principle enables administrative lawyers and judges to grapple more thoughtfully and directly with the types of complex and contextual normative assessments involved in judicial review of administrative decisions.

In Part II, I will explore the theoretical foundations for these two different approaches to judicial review. Drawing on Friedrich Hayek's influential account of the rule of law, I will argue that lawyers and judges might be attracted to the model of rules, because it revolves around formal, *ex ante*, rule-like constraints that simultaneously minimize the scope of legitimate state action while maximizing individual freedom. However, Hayek's rule-based account lacks the intellectual resources for grappling with the complex normative assessments posed by cases concerning the legality of administrative decisions, because it ignores how the legality of an administrative decision is shaped by a purposive understanding of legislation in light of the relevant context. The inherent limitations and deficiencies of Hayek's model of rules is apparent in cases like *Pezim v. BC (Superintendent of Brokers)*, which illustrate how the model of rules approach disregards administrative expertise and disrupts the purposive interpretation of law by assuming that the meaning of legislation should ultimately be determined by judges.⁶ It also explains why other theorists prefer an account of the rule of law based on the practice of principle, whereby relevant legal standards are interpreted through fair and reasoned decision-making processes. Among other things, this alternative account of the rule of law motivates two of David Dyzenhaus' groundbreaking insights regarding the point or purpose of judicial review. The first is that judicial review should facilitate a culture of justification, whereby judges hold administrative officials to account publicly for decisions that affect individual interests. The second is that,

⁵ For an illuminating diagnosis of this problem, see Megan Pfiffer, "What's the Problem with Substantive Review?" (2024) 69:3 McGill LJ 325.

⁶ [1994] 2 SCR 557 [*Pezim SCC*].

while judges play an important role in holding administrative officials to account, that role does not necessarily entail that judges are entitled to bootstrap themselves to the apex of a democratic legal order. Rather, judges should respect and uphold administrative decisions that rendered fairly and justified reasonably in light of the relevant factual and legal context.

Finally in Part III, I will demonstrate how the Supreme Court's recent attempts to develop a new and improved model of rules in both *Dunsmuir* and *Vavilov* undercuts more foundational commitments to procedural fairness and reasoned justification in Canadian administrative law. While the model of rules for determining the standard of review in *Dunsmuir* has since been eclipsed by *Vavilov*, that case established another rule-like proposition — that a contract of employment excludes the public law principle of fairness. As we will see, the Supreme Court proposed this new exclusionary rule in order to simplify and clarify the scope of procedural fairness. However, because the new exclusionary rule in *Dunsmuir* enhances the risk of arbitrary dismissal, it effectively creates a new grey hole of legality in the context of public employment relationships without clarifying the law of procedural fairness. Similarly, while the Supreme Court in *Vavilov* aimed to articulate a new and improved model of rules for determining the standard of review, that framework includes an open-ended catalogue of rule-like exceptions or carve-outs that weaken (as opposed to strengthening) the culture of justification in Canadian administrative law.

I. RULES, PRINCIPLES, AND JUDICIAL REVIEW

Despite the apparent differences between the *Dunsmuir* and *Vavilov* frameworks, they share the same motivation to simplify the law of judicial review by establishing a new model of rules for judicial review. A model of rules enables judges to determine the legal validity of a proposition by examining its formal (as opposed to its procedural or substantive) attributes.⁷ In legal theory, the proposition a valid will must be signed by three witnesses is a famous example of a legal rule, because it applies in an “an all-or-nothing” fashion⁸ — a document signed by three witnesses is deemed to have testamentary effect whereas a document signed by fewer than three witnesses is deemed to be a nullity.⁹ In addition to having clearly defined parameters, the validity of the rule about wills and witnesses can be determined without probing the content of the document or weighing contextual factors or considerations.

While legal positivists have proposed different variations of the model of rules, the common thread that unites them is a more fundamental claim that legal validity is ultimately grounded by social facts. John Austin, for example, argued that the legal validity of a proposition is determined exclusively by reference to social facts about Parliamentary will or intent reflected in the text of legislation.¹⁰ H.L.A. Hart, on the other hand, argued that the legal validity of a proposition is determined by applying criteria reflected in a master rule of recognition whose efficacy is ultimately grounded by judicial acceptance.¹¹ But despite espousing different tests of legal validity grounded either by Parliamentary commands or

⁷ Ronald Dworkin, *Taking Rights Seriously: New Impression with a Reply to Critics* (London: Duckworth, 1977) at 17–22 [Dworkin, *Taking Rights Seriously*].

⁸ *Ibid* at 24.

⁹ *Ibid* at 25.

¹⁰ John Austin, *The Province of Jurisprudence Determined*, ed by Wilfred Rumble (Cambridge: Cambridge University Press, 1995).

¹¹ HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1994) [Hart, *The Concept of Law*].

judicial behaviour, they both subscribe to the separation thesis that legal validity is determined independently of any moral assessment regarding the intrinsic merit of a legal proposition.¹²

For the better part of the twentieth century, the ultra vires doctrine functioned like an Austinian model of rules for determining the validity of administrative decisions. The basic constitutional premise was relatively simple — the validity of an administrative decision depends on *ex ante* jurisdictional limits imposed explicitly or implicitly by Parliament.¹³ If an administrative decision fell within the jurisdictional parameters set down by Parliament, judges would validate the decision so as to give legal effect to Parliament's intention to delegate discretionary power to administrative officials. By contrast, if an administrative decision exceeded the jurisdictional parameters set by Parliament, judges would invalidate the decision in order to vindicate Parliament's intention to impose legal limits on administrative discretionary power.¹⁴ Over time, an elaborate set of abstract rules, exceptions, definitions, and categories were developed (like the distinction between quasi-judicial and administrative functions that set formal limits on natural justice,¹⁵ or the distinction between judicial review and an appeal on the merits that limited judicial scrutiny of administrative decisions)¹⁶ to instruct judges on how to assess the validity of administrative decisions without subverting a formal understanding of the separation of powers according to which Parliament has exclusive power to create law, judges have exclusive power to interpret the law, and administrative officials have exclusive power to implement laws created by Parliament and interpreted by the judiciary.¹⁷ The upshot of this understanding of the separation of powers excludes the possibility of administrative law — the idea that administrative officials might exercise any independent interpretive judgment about law's content — because Parliament and the judiciary are assumed to be the exclusive sources of law under the Constitution.

However, because judges shuttled between different conceptions of parliamentary intent, the ultra vires version of the model of rules eventually collapsed under the heap of arcane rules, exceptions, definitions, and categories that were deployed in an ultimately confused and unpersuasive attempt to rescue its basic constitutional premise.¹⁸ At times, judges adopted a relatively thick conception of jurisdictional error, which effectively ignored statutory delegations of responsibility to administrative officials and enabled judges to run roughshod over administrative interpretations of law; at other times, judges adopted a relatively thin conception of jurisdictional error, which effectively enabled administrative

¹² HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593.

¹³ HWR Wade, *Administrative Law* (Oxford: Clarendon Press, 1961) at ch 3; Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Oxford: Clarendon Press, 1965).

¹⁴ See e.g. *Rex v Nat Bell Liquors Ltd*, [1922] 2 AC 128 (JCPC) [*Nat Bell Liquors Ltd*].

¹⁵ See e.g. *R v Legislative Committee of the Church Assembly*, [1928] 1 KB 411; *Nakkuda Ali v Jayaratne*, [1951] AC 66 (JCPC). For a critical treatment of these decisions, see HWR Wade, "The Twilight of Natural Justice?" (1951) 67 Law Q Rev 103.

¹⁶ See e.g. *Nat Bell Liquors Ltd*, *supra* note 14.

¹⁷ David Dyzenhaus, "Formalism's Hollow Victory" [2002] 4 NZLR 525; David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27:2 Queen's LJ 445. As Dyzenhaus notes, the formal understanding of the separation of powers is designed to preserve an a priori distinction between law and politics that can be mapped onto different institutional roles, as opposed to upholding fundamental values such as individual rights to liberty, equality, or due process.

¹⁸ Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" in Christopher Forsyth, ed, *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) 29.

officials to rule by unreviewable fiat within their regulatory bailiwicks.¹⁹ In short, judges treated parliamentary intent as having exclusionary or peremptory effect. Under the thick conception of jurisdictional error, judges did not bother to consider the substantive rationale or reasons supporting an administrative decision, on the ground that the judiciary had exclusive responsibility for interpreting the law. Under the thin conception of jurisdictional error, judges did not bother to consider the substantive rationale or reasons supporting an administrative decision, on the ground that the statutory delegation of power rendered the administrative decision-maker a “law unto itself.”²⁰

This “all-or-nothing” approach to judicial review prompted D.M. Gordon to observe in 1929 “that in no branch of English law is there more confusion and conflict.”²¹ Nevertheless, the *ultra vires* doctrine would remain the *sine qua non* of judicial review in Canada for another 50 years. For his part, Gordon hoped that the model of rules could be purified by anchoring it more firmly to a particularly austere, textualist understanding of legislative intent and a more clearly defined conceptual distinction between jurisdictional and non-jurisdictional issues. According to Gordon’s “pure” theory of administrative jurisdiction, judges should treat the statutory delegation of administrative power as a peremptory or exclusionary reason for upholding an administrative decision no matter how it was produced and regardless of its content.²² Although Gordon aimed to improve the *ultra vires* model of rules by clarifying the concept of jurisdictional error, his purified model of rules was riddled with legal grey holes — non-justiciable zones of administrative discretionary power bounded by nominal legal constraints “so insubstantial that they pretty well permit government to do as it pleases.”²³

By contrast, a more nuanced practice of principle aims to protect the dignity of individuals who are subject to the coercive power of the state by upholding fundamental values whose normative impact varies according to the circumstances. In legal theory, the proposition that “no one may profit from her own wrong” is a famous example of a legal principle, because its normative impact is a matter of degree that depends on the broader context of a particular case.²⁴ As Ronald Dworkin famously argued, rules and principles figure differently in legal reasoning, because “they differ in the character of the direction they give.”²⁵ As he puts it,

Principles have a dimension that rules do not — the dimension of weight or importance. When principles intersect ... one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of principle that it has this dimension, that it makes sense to ask how important or how weighty it is.²⁶

¹⁹ Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016) at ch 3.
²⁰ *Roncarelli v Duplessis*, 1959 CanLII 50 at 168 (SCC), Cartwright J, dissenting.

²¹ DM Gordon, “The Relation of Facts to Jurisdiction” (1929) 45:4 Law Q Rev 459 at 459.

²² DM Gordon, “Conditional or Contingent Jurisdiction of Tribunals” (1960) 1:2 UBC L Rev 185. Joseph Raz defines an exclusionary reason as a second-order reason that excludes or pre-empts a broader evaluation of otherwise eligible first-order reasons for action: Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at ch 1.

²³ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: University of Cambridge Press, 2006) at 42 [Dyzenhaus, *The Constitution of Law*].

²⁴ Dworkin, *Taking Rights Seriously*, *supra* note 7 at 26.

²⁵ *Ibid* at 24.

²⁶ *Ibid* at 26–27.

Instead of propping up a model of rules that judges use to determine the validity of an administrative decision, a practice of principle is based on the constitutional conviction that individuals affected by the coercive power of the state should be treated with concern and respect. In the context of judicial review, this means ensuring that an administrative decision was rendered fairly and reasonably in light of the evidence and relevant legal standards. One clear advantage of the practice of principle is that it expands the reach of fundamental legal principles into legal grey holes — those realms of the modern administrative state where procedural rights and judicial review have historically lacked traction.²⁷ But because the normative demands of fairness or reasonableness must be weighed in light of the prevailing factual and legal context, lawyers and judges sometimes worry that the practice of principle is not as clear, determinate, efficient, or predictable as a model of rules. If the basic constitutional premise is to ensure that administrative officials treat individuals with a requisite (but nonspecific) degree of concern and respect, how can one anticipate what degree of procedural fairness or reasonableness is legally required when the character of administrative decisions varies according to different institutional, procedural, and legal contexts? This concern might partly explain why administrative lawyers and judges sometimes resort to bright-line rules, exceptions, definitions, and categories as proxies for more nuanced, principled assessments regarding the legality of an administrative decision.²⁸

Nevertheless, a doctrinal shift away from the model of rules to a practice of principle is apparent in landmark decisions that anchor the common law doctrines of procedural fairness and substantive review in Canadian administrative law.²⁹ In *Nicholson*, Chief Justice Laskin held that even though neither the Ontario *Police Act* nor private law doctrine granted procedural rights to probationary police officers, Arthur Nicholson was nevertheless entitled to be treated fairly by the Board of Police Commissioners.³⁰ The practical effect was to extend the practice of principle into the realm of public employment, even though the principle of procedural fairness was not imposed explicitly by legislation or contract. At the time, Chief Justice Laskin observed that “the old common law rule ... that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined,” because “[i]t has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders.”³¹ While he did not define the precise degree of procedural fairness required under the circumstances, it was sufficient to say that at the very least the Board of Police

²⁷ See e.g. *Ridge v Baldwin*, [1960] AC 40 (HL); *Goldberg v Kelly*, 397 US 254 (1970); *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, 1978 CanLII 24 (SCC) [*Nicholson*]; *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC).

²⁸ It might also explain why the standard of review has become a fetish recently in Canadian public law discourse. See e.g. *Dunsmuir*, *supra* note 1 at paras 121–22, per Binnie J. As Lorne Sossin and Colleen Flood point out: “[I]t is here that the jurisprudence is particularly unsatisfying, with great quantities of ink spilt in determining the category of review and short shrift given to its application”: Lorne Sossin & Colleen M Flood, “The Contextual Turn: Iacobucci’s Legacy and the Standard of Review in Administrative Law” (2007) 57:2 UTLJ 581 at 598.

²⁹ See generally David Dyzenhaus & Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker v Canada*” (2001) 51:3 UTLJ 193; Sossin & Flood, *supra* note 28.

³⁰ *Nicholson*, *supra* note 27 at 323, discussing the *Police Act*, RSO 1970, c 351 as it appeared in February 1978.

³¹ *Ibid* at 322–23.

Commissioners should have told Nicholson why his services were no longer required and given him an opportunity to respond in some way, shape, or form.³²

Justice L'Heureux-Dubé echoes this same principled understanding of procedural fairness in *Knight v. Indian Head School Division No. 19*. Like Justice Laskin in *Nicholson*, she held that “the duty to act fairly does not depend on doctrines of employment law, but stems from the fact that the employer is a public body whose powers are derived from statute.”³³ More importantly, she frames the issue of procedural fairness as a matter of principle by saying “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.”³⁴ While the contextual framework was revised in *Baker v. Canada*, the common denominator that unites this line of cases is “to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.”³⁵

A similar, but more tentative, shift can be detected in relation to the law of substantive review. In *C.U.P.E. v. N.B. Liquor Commission*, Justice Dickson held that because the New Brunswick legislature had delegated primary responsibility for adjudicating unfair labour practice complaints to a specialized tribunal — the Public Service Labour Relations Board — it would be inappropriate for judges to intervene whenever they disagreed with the Board’s interpretation of its enabling legislation. Instead, he held that the main question is whether the Board’s decision was justified reasonably in the public domain.³⁶ Justice Dickson’s point was that judicial review should not be construed exclusively as a means for judges to determine legislative intent nor did it require an elaborate attempt to define the standard of review in abstraction from the broader context of the case. Rather, the point of judicial review is to ensure that the Board’s resolution of the complaint was reasonable in light of relevant facts and publicly accessible legal standards. If administrative reasons are the focal point of the inquiry, then statutory provisions like privative clauses and statutory rights of appeal are no longer treated as *ex ante* rules with conclusive or peremptory force. Instead, they are weighed *ex post* alongside other contextual considerations like the relative expertise of the decision-maker, the transparency of the decision-making process, and the reasons offered in support of an administrative decision.³⁷

While this important shift was obscured initially by terminology in *CUPE* that repurposed (rather than replaced) the concept of jurisdictional error (for instance, the suggestion that judicial intervention is limited to correcting errors that are patent on the face of the record³⁸ or “patently unreasonable”³⁹), it became increasingly apparent that the law of substantive review should be reorganized around relevant contextual factors that enabled judges to locate

³² *Ibid* at 328.

³³ [1990] 1 SCR 653 at 668.

³⁴ *Ibid* at 682.

³⁵ *Baker*, *supra* note 4 at para 22.

³⁶ 1979 CanLII 23 at 242 (SCC) [*CUPE*].

³⁷ *Pezim* SCC, *supra* note 6; *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 323 (SCC) [*Southam*]. See also Sossin & Flood, *supra* note 28.

³⁸ See e.g. *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw*, [1952] 1 KB 338.

³⁹ *CUPE*, *supra* note 36 at 242.

the applicable standard of review along a continuum or spectrum.⁴⁰ Thus, Justice L’Heureux-Dubé held in *Baker* that the legality of both discretionary and non-discretionary administrative decisions should be assessed according to the same standard of reasonableness, which had to be calibrated in light of “the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”⁴¹ The important point is that the relevant legal standards change depending on the context of the decision under review. In the context of *Baker*, this meant that the legality of the immigration officer’s decision depended crucially upon whether the reasons offered in support of that decision were demonstrably “alert, alive and sensitive” to the best interests of Ms. Baker’s children.⁴² The flexible nature of reasonableness review explains why, in recent years, some Supreme Court justices have latched onto the idea that “[r]easonableness is a single standard that takes its colour from the context.”⁴³

II. RULES, PRINCIPLES, AND THE RULE OF LAW

How one perceives this shift from a model of rules to a practice of principle is shaped to a degree by one’s broader perspective about the relationship between the rule of law and the legitimacy of the state. Friedrich Hayek, for example, believed that the model of rules is a paradigm for the rule of law because a framework of general, determinate, *ex ante* rules imposes tight legal constraints on governmental action and maximizes freedom of contract.⁴⁴ Thus, Hayek argued that the rule of law required “that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge.”⁴⁵ For Hayek, the rule of law works best when it functions like a highway traffic code, which sets out the rules of the road in advance without telling individual drivers where to go.⁴⁶ But he also worried that legislators might be tempted to insert principled standards like fairness and reasonableness into economic legislation. In a striking passage, Hayek claims that the road to serfdom is paved with principles like fairness and reasonableness, asserting that “[o]ne could write a history of the decline of the Rule of Law, the disappearance of the *Rechtsstaat*, in terms of the progressive introduction of these vague formulas into legislation and jurisdiction.”⁴⁷

While Hayek’s conception of the rule of law remains influential in certain quarters today, it is deeply problematic as a paradigm for judicial review in constitutional democracies that rely on administrative institutions and officials to interpret and develop a purposive understanding of social policies regarding public health, environmental protection,

⁴⁰ *Pushpanathan*, *supra* note 4; *Law Society of New Brunswick v Ryan*, 2003 SCC 20.

⁴¹ *Baker*, *supra* note 4 at para 56.

⁴² *Ibid* at para 75.

⁴³ *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, per Binnie J. See also *Catalyst Paper Corp v North Cowichan*, 2012 SCC 2 at paras 17–18, per McLachlin CJC. See also Lorne Sossin, “Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law” (2003) 66:1 Sask L Rev 129.

⁴⁴ For further elaboration of the distinction between positive and negative conceptions of liberty, see Isaiah Berlin, “Two Concepts of Liberty” in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) 118.

⁴⁵ Friedrich A Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944) at 72.

⁴⁶ *Ibid* at 74.

⁴⁷ *Ibid* at 78.

immigration, and preventing market failures. Most importantly, it cannot explain how judges can reconcile broad, purposive delegations of administrative responsibility for developing social policies enacted through legislation (on the one hand) with their constitutional responsibility to ensure that particular administrative decisions are rendered in a manner that is consistent with an equally complex array of relevant legal standards (on the other). Instead of reconciling this tension by ascribing weight to normative considerations that both empower and constrain administrative officials, judges who subscribe to the model of rules are confronted with a stark all-or-nothing choice between treating the statutory delegation of authority as an exclusionary reason for upholding an administrative decision or ignoring it altogether by substituting their interpretation of the law in place of an administrative decision. Furthermore, because Hayek's template rejects, on ideological grounds, the economic policies and purposes that are typically hardwired into enabling legislation, it exposes judges to the charge of constitutional overreach when they engage in heavy-handed correctness review of administrative decisions.⁴⁸

These deficiencies are apparent in cases like *Pezim v. BC (Superintendent of Brokers)*, which illustrate how an approach to judicial review inspired by the model of rules (reflected in the majority opinion from the British Columbia Court of Appeal) discounts reasons offered in support of an administrative decision and thereby distorts the purposive interpretation of law.⁴⁹ The case concerned a series of charges against three corporate executives — Murray Pezim, Lawrence Page, and John Ivany — under timely disclosure provisions of the British Columbia *Securities Act*. All three were directors of Prime Resources Group Inc., which in early 1989 agreed to provide financing to a junior resource company, Calpine Resources Inc, in exchange for managerial control. Calpine, in turn, used the money provided by Prime to commission a geological survey to confirm potential, but unproven, gold deposits on one of its properties.⁵⁰

Over the course of that summer, Pezim (with the assistance of Page and Ivany) pursued an investment strategy that directly benefited himself, his fellow corporate directors, his brother, and another close business associate. As visual observations and detailed assay data from core samples began flowing in from the property, Prime's senior management team approved a series of securities transactions (including options to purchase shares at a reduced price) immediately prior to the issuance of public press releases announcing official test results. In one instance, they approved the issuance of options to purchase 3,351,383 shares to themselves the day before its chief geologist announced "spectacular" test results containing visual traces of gold. The collective profit realized by Pezim, Page, and Ivany from these transactions was \$2.1 million, based on the estimated difference between the fixed

⁴⁸ David Dyzenhaus, "The Legitimacy of Legality" (1996) 46:1 UTLJ 129 at 154. Thus, Dyzenhaus prefers Jürgen Habermas's discursive theory of legality to Hayek's formal account. The latter, he suggests, "is both impractical because of the institutional complexity of the contemporary state and politically unacceptable in an era in which at least some legally established welfare floor is conceded by most to be a condition of the legitimacy of the state" (*ibid*).

⁴⁹ *Pezim SCC*, *supra* note 6; *Pezim v British Columbia (Superintendent of Brokers)*, 1992 CanLII 5963 (BCCA) [*Pezim BCCA*].

⁵⁰ *Pezim BCCA*, *supra* note 49 at paras 85–93.

price of the share options and the closing market price of the shares the day after the press release was issued.⁵¹

At the hearing before the Securities Commission, Prime's senior management team argued that they had not technically breached their duty to disclose "material changes" in the business affairs of Prime and Calpine, because they had erected a "Chinese Wall" to prevent them from vetting detailed assay results from core samples collected from the property. The geological survey was being managed by one of Prime's corporate subsidiaries (Prime Explorations) under the supervision of a respected geologist, Chet Idziszek, whose office was located on a different floor in the same building. While Idziszek adopted a practice of issuing press releases regarding official assay results approximately every two weeks, he nevertheless reported to Pezim daily about matters relating to the geological survey including visual observations of core samples.⁵²

The Commission rejected the "Chinese Wall" defense, because the factual context triggered a positive duty that required Prime's senior management team to investigate and disclose any material changes in the business affairs of Prime and Calpine prior to approving the issuance of options to purchase shares. In summing up its reasoning on this point, the Commission stated:

Nothing in the evidence indicated that the "Chinese Wall" was a respected or accepted procedure or, indeed, whether it had ever been used in this way by anyone other than the Respondents. No evidence was provided of any legal advice supporting the "Chinese Wall." There was testimony that the "Prime philosophy" was discussed with regulators but there was no suggestion in the evidence that this included the "Chinese Wall." Nor was there any evidence that the existence of the "Chinese Wall" was disclosed to or known by the public.

Even if Senior Management thought the "Chinese Wall" was appropriate when it was set up, it should have been obvious to them that it was inappropriate to rely on it in the circumstances that prevailed in July and August 1989. How could persons with the vast experience of Pezim, Page and Ivany have considered it reasonable to engage in securities transactions, most notably in repricing their own options in the midst of an active and increasingly successful drilling program, without even considering whether all material changes had been disclosed!

...

The Respondents had no reasonable basis to consider that they could absolve themselves of their disclosure obligations by setting up a "Chinese Wall." It has been well established in previous decisions of this Commission that directors are responsible for ensuring that an issuer complies with its disclosure obligations. Our findings are based not on a new policy but on well established and fundamental principles of securities regulation.

Public confidence in the fairness of securities markets is damaged when directors and officers of reporting issuers, and their associates and employees, are seen to benefit substantially from unfairly priced options. Whether they intended it or not, Senior Management received a benefit of \$2.1 million as a result of their failure to ensure that Prime complied with its disclosure obligations and their abuse of the options pricing formula. The public capital markets can be fair, and be seen to be fair, only if participants of the stature and

⁵¹ *Ibid* at paras 135–43.

⁵² *Ibid* at paras 137, 145.

experience of the Respondents are willing to comply with the basic regulatory requirements that govern trading in securities.⁵³

In the result, the Commission suspended the trading privileges of Pezim, Page, and Ivany under the *Securities Act* for one year and ordered them to pay two thirds of the costs related to the hearing.

When Pezim, Page, and Ivany challenged the decision before the British Columbia Court of Appeal, they argued that the Commission had committed an error of law by rejecting their “Chinese Wall” defense. More specifically, they argued that the Commission had erred in holding that geological information from the survey constituted “material changes” to Prime or Calpine’s business affairs within the meaning of the *Securities Act*. And because the Commission’s decision was subject to a statutory right of appeal, Pezim argued that the appropriate standard of review was correctness, which meant that the Court was entitled to determine the meaning of “material change” that was fixed at the time of enactment.⁵⁴ The British Columbia Court of Appeal agreed. In a relatively terse majority opinion, Justice Lambert held that the information generated by the geological survey could not constitute a “material change” in the business, operations, assets, or ownership of an issuer of securities “no matter what information is obtained from the drilling results.”⁵⁵ In his view, “[s]uch information may constitute a basis for a perception that there has been a change in the value of an asset. But that is a far different thing than a change in an asset.”⁵⁶

In a scathing critique published in the *University of British Columbia Law Review*, two lawyers specializing in securities regulation described Justice Lambert’s opinion as “astonishing” because it could not be reconciled with a purposive understanding of the *Securities Act*, which was to protect public confidence in capital markets.⁵⁷ As they colorfully put it, “[e]very drill hole leads not merely to a change of perception of the asset: it is a piece in the puzzle that ultimately determines whether the asset is moose pasture or ore.”⁵⁸ This pointed criticism explains why the Supreme Court of Canada decided to restore the Commission’s decision on appeal. In a unanimous Court, Justice Iacobucci held that the Court of Appeal had erred by discounting the Commission’s purposive interpretation of the *Act*, stating that “the definitions in the Act exist in a factual or regulatory context.... They are not to be analyzed in isolation but rather in their regulatory context. This is something that requires expertise and thus falls within the jurisdiction of the Commission.”⁵⁹ Thus, he concluded that even though the Commission’s decision was subject to a statutory right of appeal, there were nevertheless good reasons for judges to defer to the Commission’s well-reasoned decision.⁶⁰

⁵³ *Calpine Resources Inc* (19 December 1990), BCSECCOM 90/12/19, online: BC Securities Commission [perma.cc/SAU4-UQUK].

⁵⁴ *Pezim BCCA*, *supra* note 49 at paras 7–8, 14, 17.

⁵⁵ *Ibid* at para 20.

⁵⁶ *Ibid*.

⁵⁷ George C Stevens & Stephen D Wortley, “Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation” (1992) 26:2 UBC L Rev 331 at 337.

⁵⁸ *Ibid* at 336.

⁵⁹ *Pezim SCC*, *supra* note 6 at 595.

⁶⁰ For further elaboration of this point see *Southam*, *supra* note 37; Frank Iacobucci, “Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis” (2002) 27:2 Queen’s LJ 859.

Practically speaking, *Pezim* illustrates how a Hayekian approach to judicial review, in which judges determine the meaning of legislation according to a positivist understanding of legislative intent, tends to ignore or discount fair and well-reasoned administrative decisions based on a broader, purposive interpretation of relevant legal standards in light of the regulatory context. What might an alternative approach based on the practice of principle look like?

Despite Hayek's warning about using principled standards like fairness and reasonableness instead of formal rules to assess the legitimacy of state action, most legal theorists argue that the practice of principle is essential to the rule of law.⁶¹ Lon Fuller, for example, argued that law's inner morality includes more than just general, determinate, *ex ante* rules that prevent administrative regulation of a free market economy. He preferred to characterize law's inner morality as "procedural" in a special and expanded sense of the word,⁶² arguing that government in accordance with law required legal officials to abide by principles (generality, publicity, prospectivity, intelligibility, consistency, practicability, stability, and congruent administration of legal standards).⁶³ In setting out these standards, Fuller was clearly not suggesting that enabling legislation is *pro tanto* illegal or unconstitutional to the extent that it contains broad delegations of administrative interpretive authority. Rather, he was arguing that governmental action in accordance with the principles of legality conveys a modicum of concern and respect for individuals who are capable of understanding, interrogating, and interpreting the legal standards that apply to their particular situation.⁶⁴ Fuller's account of legality is thus more dynamic than Hayek's static model of rules, because it aims to develop a *modus vivendi* for resolving interpretive disputes about what the law requires in a given context or circumstance. It also has important substantive implications, because the content of the law is determined through reasoned deliberation and argument between free and equal citizens. Thus, Fuller argues that "when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are."⁶⁵

Following Fuller's lead, Jeremy Waldron argues that the ancient common law principles of procedural fairness — *audi alteram partem* and *nemo iudex in sua causa* — are also principles of law's inner morality because they help to ensure that administrative decisions are congruent with previously announced legal standards, and treat individuals as "thinkers who can grasp and grapple with the rationale of the way they are governed and relate it in complex but intelligible ways to their own view of the relation between *their* actions and purposes and the actions and purposes of the state."⁶⁶

Nevertheless, Waldron also points out that procedural safeguards "probably [bring] with [them] a diminution in law's certainty," because it requires legal officials and institutions to "sponsor and facilitate reasoned argument in human affairs" that may compromise the values

⁶¹ See e.g. Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law*, 2nd ed (Oxford: Oxford University Press, 2009) 210 at 217 [Raz, "The Rule of Law and its Virtue"].

⁶² Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 96–97.

⁶³ *Ibid* at 39.

⁶⁴ *Ibid* at 96–97; Lon L Fuller, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 [Fuller, "The Forms and Limits of Adjudication"].

⁶⁵ Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 at 636.

⁶⁶ Jeremy Waldron, "The Rule of Law and the Importance of Procedure" (2011) 50 Nomos 3 at 19 [emphasis in original].

of legal clarity, determinacy, and predictability that are central to Hayek's model of rules. As Waldron puts it:

The formal picture, particularly as it is put forward by thinkers like F.A. Hayek, emphasizes clarity, determinacy, and predictability as features of governance that make private freedom possible. The procedural idea sponsors a certain conception of freedom also, but it is more like positive freedom: active engagement in the administration of public affairs, the freedom to participate actively in the way that one is governed. And that positive freedom may stand in some tension with private freedom in Hayek's vision of liberty, which presupposes that law is determinate enough to allow people to know in advance where they stand and to have some advance security in their understanding of the demands that law is likely to impose upon them.⁶⁷

This way of framing the contrast between a model of rules and a practice of principle has subtle, but significant, implications for judicial review. It suggests that, instead of conceiving judicial review primarily as a means of enabling judges to determine the content of the law according to a positivistic understanding of legislative intent, it should be understood as an institutional guardrail that helps to ensure that administrative decisions are produced through transparent, inclusive, and reasoned processes of proof and argumentation.⁶⁸ In other words, the value of judicial review in a society committed to the rule of law has more to do with promoting the practice of principle than it does with simplifying or clarifying the formal criteria by which judges are to assess the validity of an administrative decision.

Another way to understand this point is to juxtapose two insights from the world's leading administrative law theorist, David Dyzenhaus, that have become recurrent themes in Canadian administrative law. The first is that, when well-executed, the practice of judicial review facilitates a culture of justification, in which individuals have a valuable opportunity to participate in administrative decision-making processes and administrative officials are held to account meaningfully for their decisions. Thus, the practice of judicial review should aim to ensure that administrative decisions are reasonably justifiable, as opposed to ensuring that judges maintain a monopoly over the interpretation of law.⁶⁹ The second, related insight is that even though judges have a constitutional responsibility to sustain a culture of justification, that responsibility does not require judges to determine what decision they would have rendered had they been seized with the responsibility for rendering the decision at first instance, but to consider whether the administrative decision is supported by reasons that adequately justify the outcome in light of relevant facts and legal standards. In other words, judicial responsibility in the context of judicial review includes "deference as respect," which requires "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision, whether that decision be the statutory decision of the legislature, a judgment of another court, or the decision of an administrative agency."⁷⁰

⁶⁷ *Ibid* at 19–20.

⁶⁸ Fuller, "The Forms and Limits of Adjudication", *supra* note 64 at 364.

⁶⁹ David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14:1 SAJHR 11 at 35.

⁷⁰ David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.

III. A NEW MODEL OF RULES FOR JUDICIAL REVIEW?

While references to both of Dyzenhaus' groundbreaking insights crop up in Supreme Court decisions, those references sometimes sound like hollow slogans because there is little effort made to explore how these ideas are connected to the contextualized practice of principles like procedural fairness and reasonableness review.⁷¹ Because the Supreme Court's primary objective in the most recent decisions is to articulate a model of rules that will render the law of judicial review more efficient, clear, determinate, and predictable, people often lose sight of how these decisions create new grey zones of legality and frustrate reasoned discourse between administrative officials and judges about what the law requires in a given context.⁷²

The Supreme Court's first attempt to develop a new and improved model of rules, like previous decisions in *Nicholson* and *Knight*, concerned the legality of a decision to dismiss a public employee. While the standard of review analysis in *Dunsmuir* has since fallen by the wayside, the case lives on for another rule-like proposition — that a contract of employment excludes the public law principle of fairness. Whereas the majority in *Nicholson* held that the Board of Police Commissioners should at least have told Nicholson why his services were no longer required and given him an opportunity to respond prior to dismissing him, the Supreme Court in *Dunsmuir* held that the public law principle of procedural fairness does not apply when there is a contract of employment.⁷³ Thus, instead of considering whether the contextual factors set out in *Baker* triggered a public law duty of fairness under the circumstances, the Supreme Court based its conclusion on a formal characterization of the employment relationship.

The reason why this point is often overlooked is because the main objective of the majority opinion in *Dunsmuir* was to simplify the model of rules for determining the standard of review, an issue that could be analyzed independently of any procedural or substantive assessment of adjudicator's decision. At the outset of the decision, Justices Bastarache and LeBel noted that "[t]he recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges."⁷⁴ In order to rectify this problem, they set out to articulate a new set of rules, exceptions, definitions, and categories to enable judges to identify the applicable standard of review more efficiently. The patent unreasonableness standard was jettisoned;⁷⁵ the remaining standards of correctness and reasonableness were redefined;⁷⁶ and the Supreme

⁷¹ See e.g. Mark D. Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015) 395.

⁷² Dyzenhaus, *The Constitution of Law*, *supra* note 23 at 42.

⁷³ *Nicholson*, *supra* note 27 at 329–30; *Dunsmuir*, *supra* note 1 at 117.

⁷⁴ *Dunsmuir*, *supra* note 1 at para 1.

⁷⁵ *Ibid* at paras 34–42.

⁷⁶ *Ibid* at para 47:

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.

Court instructed judges to rely on precedent instead of contextual analysis whenever possible to determine the applicable standard of review.⁷⁷ In addition, the Supreme Court set out a series of abstract categories or rules of thumb that could be used to determine the standard of review without sifting through otherwise relevant contextual considerations.⁷⁸ The inference was that this new model of rules would not only simplify the law of judicial review, but it would also enhance its legitimacy by rendering judicial review more efficient and predictable.

However, none of these new rules, exceptions, definitions, and categories were particularly relevant to assessing the legality of the adjudicator's decision in the context of the case at hand. In his decision at first instance, the labour adjudicator made two important holdings. First, he held that the provisions of the *Public Service Labour Relations Act*, which gave non-unionized public employees the right to grieve a "discharge, suspension or financial penalty,"⁷⁹ authorized him to determine whether Dunsmuir had in fact been discharged or otherwise disciplined for cause. He reasoned that the employer could not preempt or preclude an inquiry into its actual reasons for dismissal simply by alleging that Dunsmuir had been given adequate notice. Second, citing *Knight* as authority, the adjudicator held that the employer breached its common law duty of fairness by sending Dunsmuir a termination letter instead of proceeding with a previously scheduled performance review.⁸⁰ Put simply, the adjudicator's decisions on both points buttressed a culture of justification in the public employment context, because they upheld Dunsmuir's participatory rights and required the employer to account for a decision that directly targeted and significantly impacted Dunsmuir's material interests.

Surprisingly, the Supreme Court concluded that the Adjudicator's decision was "fatally flawed" and should therefore be quashed. In relation to the Adjudicator's first holding, Justices Bastarache and LeBel stated that "[b]y giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for the discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract."⁸¹ In other words, the Adjudicator had exceeded the jurisdictional bounds of his authority by holding the employer

Ibid at para 50:

When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

⁷⁷ *Ibid* at para 57.

⁷⁸ Thus, the Supreme Court suggested that the correctness standard applies to constitutional questions, true questions of jurisdiction or *vires*, general questions of law that are of central importance to the legal system as a whole and outside the decision maker's specialized area of expertise, and questions regarding the jurisdictional lines between two or more competing specialized tribunals (*ibid* at paras 57–61). By contrast, it suggested the reasonableness standard applies to questions of fact, discretion or policy, mixed questions of law and fact, and situations where the tribunal is interpreting its own enabling legislation or the decision maker has developed expertise in applying the common law or civil law in relation to a specific statutory context (*ibid* at para 54).

⁷⁹ *Public Service Labour Relations Act*, RSNB 1973, c P-25, s 92(5).

⁸⁰ *Dunsmuir*, *supra* note 1 at paras 15, 73.

⁸¹ *Ibid* at para 74.

to account, because the employer was entitled to terminate *Dunsmuir*'s employment for any reason or no reason at all.

Furthermore, while Justices Bastarache and LeBel acknowledged that the principle of procedural fairness in *Knight* was "easy to grasp," they were concerned that it was not "easy to apply" because its weight depended on the specific context that varied according to the circumstances of each case.⁸² Instead of applying the *Baker* framework for procedural fairness, they retrenched the principle of procedural fairness by articulating a new exclusionary rule that "[w]here a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law."⁸³ Because this rule remains subject to a number of new exceptions and carve-outs (for judges, ministers of the Crown, and other at pleasure appointees), it is debatable whether the new model of rules that delineates the parameters of procedural fairness for public employees is any clearer or easier to apply than the contextually sensitive principle of fairness.⁸⁴ But one thing is certain — the *Dunsmuir* exclusionary rule creates a new grey hole in which public employers can dismiss non-unionized public employees for no reason while refusing them an opportunity to be heard, which would seem to be a textbook example of arbitrary decision-making.⁸⁵

Interestingly, the *Dunsmuir* exception to the general duty of procedural fairness has spawned case law beyond the public employment context. In *Canada (Attorney General) v. Mavi*, the federal and provincial Attorneys General argued that sponsorship undertakings given in an immigration context should be considered contracts that excluded the public law duty of fairness;⁸⁶ and in *Irving Shipbuilding Inc. v. Canada (Attorney General)*, the Federal Court of Appeal considered whether the *Dunsmuir* contractual exception applied to government decisions regarding the procurement of goods and services.⁸⁷ In the former case, the Supreme Court declined the government's invitation to expand the *Dunsmuir* exception, because the contextual factors laid out in cases like *Nicholson*, *Knight*, and *Baker* weighed in favour of a duty of procedural fairness under the circumstances.⁸⁸ And even though the Federal Court of Appeal concluded that a duty of fairness was not owed in *Irving Shipbuilding*, Justice Evans took pains to point out that "if a case arose where the misconduct of government officials was so egregious that the public interest in maintaining the essential integrity of the procurement process was engaged, I would not want to exclude the possibility of judicial intervention at the instance of a subcontractor."⁸⁹ The suggestion in both *Mavi* and

⁸² *Ibid* at para 79.

⁸³ *Ibid* at para 81.

⁸⁴ *Ibid* at paras 115–16. 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 at 140–43; Nicolas Lambert, "Dunsmuir v. New Brunswick: The Perceived Choice between Fairness and Flexibility in Public Service Employment" (2009) 59 UNBLJ 205; Matthew Lewans, "Dunsmuir's Disconnect" (2019) 69:1 UTJL 18 [Lewans, "Dunsmuir's Disconnect"].

⁸⁵ See Raz, "The Rule of Law and its Virtue", *supra* note 61 at 219: "'Arbitrary power' is a difficult notion.... It seems, however, that an act which is the exercise of power is arbitrary only if it was done either with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them."

⁸⁶ 2011 SCC 30 at paras 47–51 [*Mavi*].

⁸⁷ 2009 FCA 116 at paras 59–60 [*Irving Shipbuilding*].

⁸⁸ *Mavi*, *supra* note 86 at paras 38–46.

⁸⁹ *Irving Shipbuilding*, *supra* note 87 at para 61.

Irving is that the *Baker* framework provides a better vehicle for explaining and justifying whether the duty of fairness applies and how demanding that duty should be.

The Supreme Court's second attempt at rewriting the law of judicial review in *Vavilov* also aims to clarify the rules, exceptions, definitions, and categories that judges use to determine the standard of review — a legal exercise that is analytically prior to and separable from any assessment of the reasons offered in support of an administrative decision.⁹⁰ But like *Dunsmuir*, it is debatable whether the *Vavilov* model actually simplifies things or focuses attention appropriately on the reasons offered in support of administrative interpretations of law.

Vavilov begins with a presumption of reasonableness review unless an administrative decision involves questions that fall within certain categorical exceptions. The point of the general presumption is to obviate the task of sifting through contextual factors that explain why judges should respectfully consider the reasons offered in support of an administrative decision instead of leaping to their own conclusions about what the law requires. Thus, there is no need for judges to consider whether the decision-maker's experience or relative expertise might otherwise recommend a more cautious approach. While a framework premised on the presumption of reasonableness review might arguably render the practice of judicial review more efficient in some cases, it does so by truncating the underlying reasoning process.

However, in those cases where the presumption is rebutted because the decision concerns issues that fall within categorical exceptions, the culture of justification between courts and administrative institutions is abandoned. The most prominent exception concerns administrative decisions that are subject to a statutory right of appeal, which marks a striking change to the law of judicial review. Recall that in *Pezim*, Justice Iacobucci held that the British Columbia Court of Appeal erred by ignoring or discounting the Securities Commission's rationale for its decision, which explained at length why *Pezim*, Page, and Ivany had a duty to disclose information regarding material changes in corporate affairs prior to approving the issuance of share options.⁹¹ Whereas the Commission's decision was supported by detailed reasons grounded by a purposive interpretation of the *Securities Act*, the Court of Appeal held that the statutory right of appeal rendered the Commission's rationale irrelevant. Instead of asking whether the Commission's decision was reasonable, in the sense that it was demonstrably alert, alive, and sensitive to relevant facts and legal standards, Justice Lambert quashed the Commission's decision because information gleaned from drilling tests could never amount to a "material change" in the business affairs of a junior resource company whose shares were being traded publicly on the Vancouver Stock Exchange.⁹² In doing so, the Court of Appeal discounted the Commission's purposive interpretation and application of the *Securities Act*, and replaced it with a much narrower, textualist interpretation of the words "material change" grounded by a positivistic understanding of legislative intent. This stark contrast in the quality of the two decisions illustrates how an approach to judicial review that sidelines administrative expertise through correctness review can distort the purposive interpretation of economic legislation and

⁹⁰ *Vavilov*, *supra* note 2 at paras 5–10.

⁹¹ See above notes 49–56 and accompanying text.

⁹² *Pezim* BCCA, *supra* note 49.

exacerbate the risk of market failure that the Commission was authorized to regulate in the public interest.

Instead of focusing judges' attention on the quality of the reasons offered by administrative officials in support of their decisions, the exceptional categories in the *Vavilov* model incentivizes vapid, formalistic debates about nomenclature. In a recent appeal from a decision from the Ontario Securities Commission regarding multiple charges of securities fraud, the Ontario Divisional Court noted that *Vavilov* now required the Court to review the Commission's decision according to appellate standards of review.⁹³ So instead of considering whether the Commission's decision was substantively reasonable in light of relevant facts and legal standards, the Court first had to parse the Commission's decision to determine what standard of review applied to each of the 23 grounds of appeal raised by the appellants.⁹⁴ A similar point can be made with respect to other exceptions that automatically trigger correctness review in relation to constitutional issues, general questions of law, the jurisdictional boundaries between administrative bodies, and situations where courts and administrative bodies share concurrent jurisdiction.⁹⁵ Like the *Dunsmuir* exception to the duty of procedural fairness, these categories are likely to remain focal points of litigation in the near future. But this arcane, abstract, and unproductive analysis is the sort of "law office metaphysics" that ultimately distracts attention from more principled assessments regarding the substantive legality of an administrative decision.⁹⁶

More importantly, once one cuts through the verbiage, it appears that the appellate standards of review resurrects the "all-or-nothing" approach to judicial review that characterized the ultra vires doctrine.⁹⁷ For questions of law, the correctness standard applies, which means "a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question."⁹⁸ Thus, in *Bell Canada v. Canada (Attorney General)*, the majority opinion gave surprisingly short shrift to a detailed decision of the Canadian Radio-television and Telecommunications Commission⁹⁹ that had been upheld as reasonable in an equally detailed decision from the Federal Court of Appeal.¹⁰⁰ As one commentator aptly noted, "the Majority applied correctness with a vengeance, showing no deference to the CRTC and barely considered its reasons."¹⁰¹

By contrast, all other questions (that is, questions of fact and mixed questions of law and fact) are reviewable on a palpable and overriding error standard that sounds a lot like the old *Wednesbury* definition.¹⁰² "*Wednesbury* unreasonableness," like the concept of "patent unreasonableness," has been criticized at length because it recommends a form of judicial quiescence. Instead of requiring administrative officials to account meaningfully for their

⁹³ *Quadrex Hedge Capital Management Ltd v Ontario Securities Commission*, 2020 ONSC 4392.

⁹⁴ *Ibid* at para 82.

⁹⁵ *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30 at paras 55–65.

⁹⁶ *Dunsmuir*, *supra* note 1 at para 122.

⁹⁷ See above notes 12–23 and accompanying text.

⁹⁸ *Dunsmuir*, *supra* note 1 at para 50.

⁹⁹ 2019 SCC 66 at paras 25–28; Canadian Radio-television and Telecommunications Commission, *Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335* (Ottawa: CRTC, 2016), online: [perma.cc/UG4J-FJQF].

¹⁰⁰ *Bell Canada v Canada (Attorney General)*, 2017 FCA 249.

¹⁰¹ For an insightful critique of these decisions, see Mary Liston, "Bell is the Tell I'm Thinking Of" (8 May 2020), online: [perma.cc/2K2G-XJNR].

¹⁰² *Associated Provincial Picture Houses Limited v Wednesbury Corporation*, [1948] 1 KB 223 (CA).

decisions, those standards instruct judges to stand pat unless and until a litigant can prove an error on the face of the record “so absurd that no sensible person could ever dream that it lay within the powers of the authority.”¹⁰³ By importing the palpable and overriding standard in *Vavilov*, the Supreme Court has simply repackaged “*Wednesbury* unreasonableness” and the “patent unreasonableness” that was found wanting in *Dunsmuir*,¹⁰⁴ because it lacked sufficient teeth to ensure the requisite degree of “justification, transparency and intelligibility within the decision-making process.”¹⁰⁵

IV. CONCLUSION

When asked to reflect on *Dunsmuir*’s legacy not long ago, I said it was a peculiar case.¹⁰⁶ By that point, the decision had been cited in over 10,000 cases and been the subject of empirical studies designed to assess whether it had, in fact, simplified the practice of judicial review.¹⁰⁷ At the time, there was broad agreement (at least at an empirical level) that *Dunsmuir* was a resounding success, because the data indicated that judges were expending less effort determining the standard review, relying increasingly on precedent to determine the standard of review, reviewing most decisions according to a reasonableness standard, and upholding administrative decisions more often than not. Now that *Vavilov* has rewritten the law of judicial review, one might anticipate another spate of empirical investigations. When it comes to settling constitutional controversies regarding the validity of administrative decisions, perhaps Hart was correct to conclude that “all that succeeds is success,” meaning the only relevant metric is that the controversies are settled in whatever manner sustains judicial acceptance.¹⁰⁸

What made *Dunsmuir* peculiar was that it fetishized the rules for determining the standard of review while ignoring the more pressing matters of principles framed by the facts of the case. The practical consequence was that the new rules for determining the standard of review became unmoored or detached from the more fundamental question of whether *Dunsmuir* had been treated fairly. According to a more principled metric that takes that question more seriously, as in landmark decisions like *Nicholson* and *Knight*, *Dunsmuir* not only falls short of the mark, but does lasting damage by creating an exclusionary rule that enhances the risk of arbitrary decision-making.

Vavilov is peculiar in a similar way. While it is true that *Vavilov* recommends a more robust standard of administrative accountability, that methodology is prefaced by a new

¹⁰³ *Ibid* at 229.

¹⁰⁴ *Dunsmuir*, *supra* note 1 at paras 39–42.

¹⁰⁵ *Ibid* at para 47.

¹⁰⁶ Lewans, “*Dunsmuir*’s Disconnect”, *supra* note 84.

¹⁰⁷ Robert Danay, “Quantifying *Dunsmuir*: An Empirical Analysis of the Supreme Court of Canada’s Jurisprudence on Standard of Review” (2016) 66:4 UTLJ 555; Diana Ginn et al, “How Has *Dunsmuir* Worked? A Legal-Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the Federal Courts” (2017) 30:1 Can J Admin L & Prac 51; Diana Ginn, William Lahey & Madison Veinotte, “A Legal-Empirical Analysis of Substantive Review: Findings from the British Columbia Courts” (2017) 30:2 Can J Admin L & Prac 173; William Lahey et al, “How Has *Dunsmuir* Worked? A Legal-Empirical Analysis of Substantive Review of Administrative Decisions after *Dunsmuir v. New Brunswick*: Findings from the Courts of Nova Scotia, Quebec, Ontario and Alberta” (2017) 30:3 Can J Admin L & Prac 317.

¹⁰⁸ Hart, *The Concept of Law*, *supra* note 11 at 153. See also Andrew Green, “How Important are the Groundbreaking Cases in Administrative Law?” (2023) 73:4 UTLJ 426.

model of rules that includes a catalogue of exceptions and carve-outs that weaken (instead of strengthen) a culture of justification in which administrative officials are held to account meaningfully for their decisions, and judges pay respectful attention to reasons offered in support of an administrative decision. Thus, in cases where a statutory right of appeal is available, administrative reasons are either deemed to be irrelevant or practically conclusive, in the sense that the decision will be upheld unless the applicant can show that there is a clear or egregious error that warrants judicial review. What is equally worrying is that the fetish for developing a model of rules for determining the standard of review is beginning to creep into the law of judicial review relating to procedural fairness.¹⁰⁹ Based on recent history, there is no reason to believe that rewriting the law of judicial review in this way will make the production of administrative law any more fair, transparent, or well-reasoned. All of which suggests that, when lawyers, judges, and legal scholars regard the law of judicial review primarily or exclusively as a model of rules for determining the standard of review, they may be missing an important point of the practice.

¹⁰⁹ See e.g. Derek McKee, “The Standard of Review for Procedural Fairness” (2016) 41:2 *Queen’s LJ* 355.