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Justifying True Questions of Jurisdiction

THOMAS LIPTON*

In 2011, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, a majority of the Supreme Court questioned the continued viable of the true question of jurisdiction exception to reasonableness review announced by the Court in *Dunsmuir v New Brunswick*. This article seeks to provide a conceptual and constitutional justification for true questions of jurisdiction as an exception to reasonableness review, albeit in a narrowed form. The exception's promulgation and adjudication sub-categories are explained and defined. A test for each sub-category is articulated and applied. Finally, the article argues that claimants' rights in the administrative state will be best protected when the narrowly redefined true question of jurisdiction exception complements properly applied reasonableness review. Only then can substantive judicial review steer between the extremes of unwarranted judicial interference in the administrative state and unchecked administrative power.

En 2011, dans l'affaire *Alberta (Information and Privacy Commissioner) c Alberta Teachers' Association*, la Cour suprême a remis en cause, à la majorité, la survie de la véritable question de compétence en tant qu'exception à l'examen de la norme de la décision raisonnable établie par la Cour dans l'arrêt *Dunsmuir c New Brunswick*. Dans cet article, l'auteur tente d'apporter une justification conceptuelle et constitutionnelle pour les véritables questions de compétence en tant qu'exception à l'examen de la norme de la décision raisonnable, quoique sous une forme abrégée. Les sous-catégories de l'exception que sont la promulgation et la décision sont expliquées et définies et un examen applicable à chaque sous-catégorie est formulé et appliqué. Enfin, l'article soutient que les droits des demandeurs à l'égard de l'État administratif seront mieux protégés lorsque la véritable question de compétence en tant qu'exception étroitement redéfinie viendra compléter l'examen de la norme de la décision raisonnable. C'est dans ce cas seulement que la révision judiciaire de fond peut naviguer entre les extrêmes de l'ingérence judiciaire injustifiée dans l'État administratif et les pouvoirs administratifs non contrôlés.

* Thomas Lipton earned his BCL/LLB degree from the McGill Faculty of Law. He practices as a civil litigator in Toronto. He can be reached at thomas.lipton@gmail.com. I would like to thank the editorial staff of the *Ottawa Law Review* and the anonymous peer reviewers for their insightful comments that helped to improve this article. Any mistakes or omissions are my own.

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I. INTRODUCTION

In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[1] the Supreme Court of Canada grappled once again with the issue of when the "true question of jurisdiction" exception to reasonableness review applies when conducting judicial review[2] of an administrative tribunal's decisions.[3] The majority, written by Justice Rothstein, questioned the continued viability of the exception which has bedeviled Canadian administrative lawyers, in one form or another, for many decades. The majority suggested that "it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review."[4] Yet, the majority decided to forego this reconsideration given the lack of argument on the issue. Thus, the Court signalled its openness to hearing challenges to the "true question of jurisdiction" exception.

This article seeks to defend the exception by narrowing it and offering a theoretical and constitutional justification for this narrower version of the exception. Part II will explain the continued relevance of the concept of "jurisdiction" to administrative law. Despite the controversy around the concept, it remains fundamental to our understanding of administrative law. Part III will explain the proper place of the "true question of jurisdiction" exception by comparing it to the "competing tribunals" exception to reasonableness review

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1 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers' Association*].

2 I will use the phrase "judicial review" to mean substantive judicial review in this article. There is no discussion of procedural fairness and the concept of procedural judicial review.

3 I call the "true question of jurisdiction" category an exception to reasonableness review as the Supreme Court has repeatedly emphasized that an administrative tribunal interpreting its home statute should presumptively be given deference. See e.g. *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 11, [2012] 2 SCR 283 [*Rogers*].

4 *Alberta Teachers' Association*, *supra* note 1 at para 34.

articulated by the Court in *Dunsmuir v New Brunswick*.[5] That part will also examine how the concept of jurisdiction fits within the constitutional framework which underpins administrative law. Part IV will attempt to refine the "true question of jurisdiction" exception with reference to the existing jurisprudence. I will posit that the exception actually covers two sub-categories: promulgation cases and adjudication cases. Promulgation correctness review occurs only when a litigant challenges a tribunal's ability to make a general rule, as opposed to challenging the application of that general rule. Adjudication correctness review, which is far more common, occurs when a litigant challenges the application of a general rule by a tribunal. Part V urges courts to recommit to respectful yet attentive reasonableness review so that, together with a narrowed "true question of jurisdiction" exception, judicial review can provide robust protections to litigants in the administrative system.

II. JURISDICTION IN ADMINISTRATIVE LAW

A. Jurisdiction is Everywhere

Jurisdiction has become a contested concept in administrative law, and for good reason, but the concept itself is fundamental to our understanding of the proper exercise of public power. The rule of law requires that "all exercises of public authority must find their source in law."[6] This principle takes on particular importance in Canada where public power is far from unitary. Any exercise of public power must satisfy three distinct criteria in order to be valid.

First, sections 91 and 92 of the *Constitution Act, 1867*[7] impose a *division of powers* among the federal government and the provincial governments.[8] Only Parliament may, for example, make laws about the running of the postal service, the coining of money or patents.[9] Only the provinces may, for example, make laws about the solemnization of marriage or property and civil rights within the province.[10] Thus, to be valid, an exercise of public power must be performed by the proper level of government because only then does the exercise respect the division of powers.

Second, there is the constitutionally-mandated *separation of powers* whereby, classically, the executive, legislature, and judiciary all have different, important

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5 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

6 *Ibid* at para 28.

7 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

8 See e.g. *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 ("we must now determine whether the impugned provisions of the Wildlife Act are nevertheless applicable from the perspective of the *constitutional division of powers in ss. 91 and 92 of the Constitution Act, 1867*" at para 41) [emphasis added].

9 *Constitution Act, 1867*, *supra* note 7, ss 91(5), 91(14), 91(22).

10 *Ibid*, ss 92(12), 92(13).

roles to play.[11] The legislature makes the law, the executive enforces the law, and the judiciary interprets the law.[12] Each must "show proper deference for the legitimate sphere of activity of the other."[13] Thus, to be valid, an exercise of public power must be performed by the proper branch of government because only then does the exercise respect the separation of powers.[14]

Third, the exercise of power must not violate the *Charter*, the *Constitution Act, 1867*, and any other constitutional documents which protect individuals' rights.[15] Justice Bertha Wilson, in her concurring opinion in *R v Morgentaler*[16] described the *Charter* as "erect[ing] around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."[17] If the state does trespass, then its actions are unconstitutional, and hence contrary to the rule of law.

Together, then, there are three fences which any exercise of public power must not cross to be legally valid. First, the correct level of government must exercise the power. Second, the correct branch (of the correct level) of government must exercise the power. Third, the government actor must not violate the constitutional rights of the persons it affects through its exercise of public power. Only then may an exercise of public power be upheld in a court of law.[18]

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11 I emphasize the term "division of powers" and "separation of powers" because the two terms are often used interchangeably, even though they refer to very distinct concepts. I think referring to the allocation of authority between the federal government and provincial governments as a *division* of powers makes sense because it suggests that, what would otherwise be a unitary source of authority (as in the United Kingdom), is being divided among different levels of government. This term is also relatively consistently used in this sense in the jurisprudence. I think referring to the allocation of authority among the legislative, executive, and judiciary as a *separation* of powers makes sense because a different term should be used than that used to describe the allocation of authority between the federal government and the provincial governments and because this term has often been used in the jurisprudence. See e.g. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, [2004] 3 SCR 381 [*Newfoundland (Treasury Board)*].

12 *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 10, 140 DLR (4th) 193 [*Cooper*], citing *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, 23 DLR (4th) 122 [*Fraser*] ("[t]here is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary. In broad terms, the role of the judiciary is, of course, to interpret and apply the law; the role of the legislature is to decide upon and enunciate policy; the role of the executive is to administer and implement that policy" at 469–70).

13 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 33, [2003] 3 SCR 3.

14 I recognize that this description of the separation of powers is an oversimplification of how the separation of powers in fact operates in Canada. That said, this basic description of the concept is sufficient for the conceptual point I make in this part. In Part III.C, below, I address the objection that my analysis does not account for Canada's weaker separation of powers, especially as it relates to the requirement that the judiciary defer to legal interpretations of administrative tribunals.

15 The existence of so-called "quasi-constitutional" documents was recognized in *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 23, [2002] 2 SCR 773 (recognizing the *Official Languages Act* as quasi-constitutional).

16 [1988] 1 SCR 30, 44 DLR (4th) 385.

17 *Ibid* at 164.

18 There is, in fact, a fourth "fence" which restricts the exercise of public power by a Canadian governmental entity: the general principle (sometimes derogated from) that Canadian law does not have an extra-territorial effect. See e.g. *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 [*Hape*]. However, this fence is not relevant to the focus of this article and so will not be discussed.

"Jurisdiction" is the word that Canadian courts typically use to describe the space within which a person or entity may validly exercise public power—the space within all these fences. The word is used so often—more than 3,498 times by the Supreme Court of Canada alone[19]—that, in all areas of law except for administrative law, it is an unnoticed part of the legal background. For example, in *R v Punko*,[20] the Court referred to acts that could constitute criminal offences, some of which "fell within the prosecutorial jurisdiction of the provincial Crown, while others fell within that of the federal Crown."[21] Or, in *RP v RC*,[22] the Court noted that, in the context of divorce agreements, "parties cannot oust the jurisdiction of the court to make a variation under s. 17 of the *Divorce Act*."[23] Or, in *United Transportation Union v Central Western Railway Corp*, the Court framed the issue at hand as "whether the provincial or the federal government has jurisdiction, for the purposes of labour relations, over a 105 mile railway line situated wholly within the province of Alberta."[24] Jurisdiction is everywhere.

It is this broad sense of the word "jurisdiction" that the Supreme Court identified in *Alberta Teachers' Association*, an administrative law case in which it stated that, "[i]n one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged."[25] But the Court could have gone further. Using this broad sense of jurisdiction, *any* exercise of public power by *any* government body raises a question of jurisdiction. Canada is not a unitary state run by, say, a monarch who is the sole person authorized by law to exercise public power. Because, as explained above, public power is circumscribed in three overlapping ways, every exercise of power could raise a question about whether it is valid: did the proper person or entity exercise a power validly assigned to it without violating any individuals' rights under the constitution? Moreover, in theory, almost every exercise of public power can be judicially reviewed in court.[26] Thus, the potential reach of the concept of jurisdiction is virtually unlimited. Given the omnipresence of jurisdictional questions, the anxiety about the concept in administrative law cannot be explained by the concept *per se*. Instead, we must look to the particular history of the term in administrative law to understand the peculiar concerns it raises.

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19 Based on a CanLII search for the word "jurisdiction" within Supreme Court of Canada cases on June 22, 2013.

20 2012 SCC 39, [2012] 2 SCR 396.

21 *Ibid* at para 2.

22 2011 SCC 65, [2011] 3 SCR 819.

23 *Ibid* at para 27.

24 [1990] 3 SCR 1112, 76 DLR (4th) 1.

25 *Supra* note 1 at para 34.

26 See e.g. *Immeubles Port Louis Ltée v Lafontaine (Village)*, [1991] 1 SCR 326, 78 DLR (4th) 175 ("[t]he principle that public authorities are subordinate to the supervisory power of the superior courts is the cornerstone of the Canadian and Quebec system of administrative law" at 360).

B. The Peculiar History of Jurisdiction in Administrative Law

Jurisdiction became a four-letter word in administrative law because of a long-running conflict created by the birth of the administrative state in Canada. To put it mildly, the courts were less than pleased when the federal and provincial governments began to create administrative tribunals. The administrative state was founded when labour relations boards were created during the First and Second World Wars to stave off labour unrest.[27] The courts saw the creation of administrative bodies as an encroachment of the legislature and executive on their proper sphere of authority, since administrative decision-makers were now resolving disputes that would otherwise have come before the courts. To fight back, the courts put the broad concept of jurisdiction discussed above to us. They concluded that administrative tribunals' actions were legal as long as those actions were within the tribunal's jurisdiction.[28] But, as noted above, any exercise of public power can be discussed in jurisdictional terms. As a result, any administrative decision could be judicially reviewed by a court. The vast majority of this "judicial review" concerned whether the administrative tribunal had correctly interpreted the provisions in its enabling statute.[29] The supremacy of the courts over administrative tribunals—long asserted and debated—was cemented when the Court made this supremacy a constitutional necessity in *Crevier v AG (Quebec)*,[30] declaring that no legislature could completely immunize an administrative tribunal from judicial review on questions of jurisdiction.[31]

Jurisdiction, then, became the mechanism by which courts retained their primacy over administrative tribunals. Using this tool, courts regularly and unpredictably intervened in administrative decision-making, overturning decisions they did not like.[32] Courts' use of jurisdiction was unpredictable because it was often outcome-driven and not statutory interpretation-driven. A judge who wanted an administrative decision to stand would typically construe a tribunal's home statute in such a way to find that the tribunal acted within its jurisdiction, whereas a

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27 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 80, [2009] 1 SCR 339, Rothstein J, dissenting [*Khosa*].

28 See e.g. *CUPE v NB Liquor Corporation*, [1979] 2 SCR 227, 97 DLR (3d) 417 [*CUPE* cited to SCR] (quoting the New Brunswick Court of Appeal: "It is true the Board must determine the first question to vest itself with the jurisdiction to enquire into the second, but it is equally true the Board cannot by wrongly deciding the first question confer a jurisdiction on itself it cannot otherwise acquire" at 232). While this is not an early statement of the then-prevailing theory of judicial review of administrative action, it is a classic statement of the formerly dominant theory.

29 For example, the dispute in *CUPE*, *supra* note 28, centred on whether the Public Service Labour Relations Board of New Brunswick properly interpreted of subsection 102(3) of the *Public Service Labour Relations Act*, RSNB 1973, c P-25.

30 [1981] 2 SCR 220, 127 DLR (3d) 1 [*Crevier* cited to SCR].

31 *Ibid* at 236. The Court's reasoning behind this holding will be discussed below.

32 See e.g. *Metropolitan Life Insurance Co v International Union of Operating Engineers*, [1970] SCR 425, 11 DLR (3d) 336 (the bête-noire of administrative law scholars, symbolizing the Supreme Court's undue meddling with labour boards).

judge who wanted to overturn an administrative decision would typically construe a tribunal's home statute in such a way to find that the tribunal's actions exceeded its jurisdiction.[33]

Scholars were furious. In their view, the courts' retention of the power to decide whether a tribunal was acting within its jurisdiction led to very intrusive judicial review of administrative tribunals' interpretations of their home statutes.[34] Administrative decision makers are bodies with expertise in a particular area of law which had been empowered by the democratically-elected legislature to make decisions about that area. Courts, on the other hand, were unelected judges with no particular expertise in, say, labour relations, who were overturning the decisions of expert administrative decision-makers and contradicting the legislature's will. And judicial review also hampered the functioning of the expanding administrative state by interrupting the exercise of public power by administrative tribunals empowered by the people to act efficiently for the public good.[35] The courts had to be stopped from intervening willy-nilly in the administrative state.

In time, this view prevailed. A majority of the Supreme Court in *CUPE v NB Liquor Corporation* said that "[t]he question of what is and is not jurisdictional is often very difficult to determine."[36] The source of this difficulty was the fact a tribunal's home statute might "bristle[] with ambiguit[y]" and lend itself to multiple interpretations.[37] In response, the Court urged that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[38] Instead, they should take a deferential approach to a tribunal's interpretation of its home statute, because tribunals were specialized decision-makers and had vastly more experience in their particular areas of law than did the courts.[39]

CUPE was a watershed, marking the Supreme Court's (ultimately) definitive embrace of the administrative state. Deference replaced judicial review as the order of the day. But the issue of jurisdiction remained. After all, two years after *CUPE*, the Supreme Court held in *Crevier* that a legislature could not use a privative clause—a statutory provision which explicitly forbids courts from reviewing the decisions of administrative tribunals—to shield administrative tribunals from review on questions of jurisdiction, holding that such provisions violated the constitutionally-

33 A "home statute" or "enabling statute" is the legislative statute which creates a tribunal. For example, the Ontario Human Rights Commission's home statute is the Ontario *Human Rights Code*, RSO 1990, c H-19. The theory behind courts giving deference to a tribunal, which interprets its home statute, is that a tribunal interprets its home statute much more frequently than does a court.

34 See e.g. Gerald P Heckman, "Substantive Review in Appellate Courts Since *Dunsmuir*" (2009) 47 Osgoode Hall LJ 751 at 770.

35 See e.g. Hon Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2001) 27:1 Queen's LJ 859 at 862.

36 *CUPE*, *supra* note 28 at 233.

37 *Ibid* at 230.

38 *Ibid* at 233.

39 *Ibid* at 235–36.

protected separation of powers.[40] Since that time, the Court has flirted with eliminating the idea of jurisdiction,[41] re-embraced that idea[42] and now, once again, is questioning its existence.[43]

The Court's vacillation is understandable given that jurisdiction, as we have seen, is a very flexible concept. The Court's tentativeness in substantive judicial review of administrative action is motivated by two competing concerns. On one hand, there is the Scylla of unrestrained administrative power. This concern is classically embodied in *Roncarelli v Duplessis*.[44] There, the Premier of Quebec tried to personally order the Quebec Liquor Commission to cancel the license of a bartender who dared to bail his fellow Jehovah's Witnesses out of jail. To deter and punish such actions, courts have the power to intervene when state authorities abuse their administrative power. On the other hand, there is the Charybdis of unrestrained judicial intervention into the administrative state—criticized in *CUPE*—which undermines the authority and expertise of specialized administrative tribunals and interferes with their lawful and proper power.[45] Given the courts' struggle to create a sufficiently clear definition of what may constitute a true question of jurisdiction, an optimal balance has yet to be struck.[46] In light of the controversial history of jurisdictional questions in administrative law, a conceptual and constitutional justification for the "true question of jurisdiction" exception to reasonableness review is necessary.

III. THE CONCEPTUAL AND CONSTITUTIONAL SPACE FOR TRUE QUESTIONS OF JURISDICTION

This part will provide a conceptual and constitutional justification for the continued existence of the "true question of jurisdiction" exception to reasonableness review.

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40 *Crevier*, *supra* note 30 at 236. The Court's reasoning behind this holding will be discussed below in Section III.C. In essence, it held that, while courts continued to have the power to review administrative tribunals on the basis of jurisdiction, that power had to be very carefully exercised to avoid undue judicial meddling in the administrative state.

41 *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 60 DLR (4th) 193 [*Pushpanathan*] ("[i]n other words, 'jurisdictional error' is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown" at 1005).

42 *Dunsmuir*, *supra* note 5 ("[a]dministrative bodies must also be correct in their determinations of true questions of jurisdiction or vires" at para 59).

43 *Alberta Teachers' Association*, *supra* note 1 at para 34.

44 [1959] SCR 121, 16 DLR (2d) 689 [*Roncarelli*].

45 See e.g. *CUPE*, *supra* note 28 at 233.

46 Obviously, there are other tools courts use to strike a balance within administrative law, including other exceptions to reasonableness review in the context of substantive judicial review of administrative action, and, outside of that context, procedural fairness. And, within the context of substantive judicial review of administrative action, the "true question of jurisdiction" exception to reasonableness review has been by far the most controversial of all four exceptions articulated in *Dunsmuir*. However, a discussion of how these other theories help to strike the right balance in administrative law is beyond the scope of this article.

First, I will delineate the "competing tribunals" exception to reasonableness review. Second, I will use this (relatively) uncontroversial exception to illuminate how the "true question of jurisdiction" exception is an analogue to it. Third, I will explain that *Dunsmuir*'s theory of substantive judicial review of administrative action is a constitutional theory that can overpower the express words of the legislature, and thereby, the "true question of jurisdiction" exception which forms part of that theory may also be constitutionally required. Finally, I will provide a discrete constitutional justification for the "true question of jurisdiction" exception.

A. Comparison to the "Competing Tribunals" Exception

The best way to conceptualize the appropriate place for the "true question of jurisdiction" exception to reasonableness review is to compare it to its uncontroversial theoretical neighbour: the "competing tribunals" exception.[47] In *Dunsmuir*, the Court affirmed that "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis."[48] This exception, unlike the "true question of jurisdiction" exception, has been relatively uncontroversial.

In the Canadian constitutional scheme, every administrative tribunal is co-equal to every other administrative tribunal.[49] So, if one tribunal makes a decision and another tribunal makes a directly contrary decision, a rule of law problem arises. A party subject to these two competing decisions is unable to comply with both, neither decision enjoys automatic supremacy, and hence the party will violate the law no matter what it does. To overcome this problem, the Court has designated the judiciary as the tie-breaker that will decide which tribunals decision ought to be followed.[50] Crucially, the reviewing court need not give the inferior tribunals' decisions' any deference. That is, the court need not decide if the tribunals' interpretations of their home statutes—and therefore their assertion of jurisdiction—were reasonable. Instead, the reviewing court must decide whether the tribunals' interpretations were correct.[51]

The *Dunsmuir* Court did not explain why there is no deference when two competing tribunals clash, but a persuasive explanation for this position is readily

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47 See *Dunsmuir*, *supra* note 5. The Supreme Court created four exceptions to reasonableness review: constitutional questions, questions outside a tribunal's specialized area of expertise and of central importance to the legal system as a whole, true questions of jurisdiction and "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (*ibid* at paras 58–61).

48 *Ibid* at para 61.

49 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 SCR 185 ("[t]here is no easy answer to the question of which of two possible tribunals should decide disputes that arise in the labour context where legislation appears to permit both to do so" at para 7).

50 *Dunsmuir*, *supra* note 5 at para 61.

51 *Ibid*.

discernible. If deference existed, then ambitious tribunals would be motivated to assert as large a jurisdiction as possible by interpreting their power under their home statutes in broad terms, thereby pushing out other tribunals in the same general area. We can imagine, for example, a human rights tribunal that interprets its jurisdiction in sufficiently broad terms to cover workplace injuries, thereby asserting its authority over an area that is typically covered by a workers' compensation board. The courts would be relatively powerless to stop the expansion of such a tribunal's jurisdiction because they would only be able to overturn unreasonable assertions of jurisdiction—and courts have been repeatedly cautioned to uphold a tribunal's interpretation of its home statute if it "falls within a range of possible, acceptable outcomes."[52] Thus, if our imagined human rights tribunal interpreted its jurisdiction reasonably, a reviewing court would have to confirm its jurisdiction, thereby reifying it and eliminating any jurisdiction the workers' compensation board might have claimed. The result of deference in this context would be a race among tribunals to grab as much jurisdiction as possible. To forestall this jurisdiction gold rush, the *Dunsmuir* Court wisely eliminated the requirement for deference by articulating the "competing tribunals" exception to reasonableness review. By applying the more stringent correctness standard, the reviewing court need not confirm the jurisdiction of the first tribunal that reasonably asserts its authority over an area.[53]

As an aside, there is good reason to believe that such a jurisdiction gold rush would happen. My example was not necessarily hypothetical: even within the existing scheme, human rights tribunals have attempted to usurp the jurisdiction granted to other administrative tribunals and declare themselves as the most equal among administrative tribunals. For example, in *British Columbia (Workers' Compensation Board) v Figliola*,[54] the three claimants sought compensation from the British Columbia Workers' Compensation Board for chronic pain they suffered while working at their respective jobs. The Board granted the claimants a fixed sum for this pain pursuant to the Board's chronic pain policy.[55] The claimants appealed, arguing that a fixed sum for chronic pain was unconstitutional under section 15 of the *Charter* and violated section 8 of the British Columbia *Human Rights Code*, RSBC 1996, c 210. The appellate division of the Board found the policy did not violate either the *Charter* or the *Code*.[56] Unbowed, the claimants filed a new complaint with

52 *Ibid* at para 47.

53 Which is not to say that a tribunal's interpretation of its own jurisdiction is irrelevant. As Paul Daly has pointed out, "[a] decision maker's expertise may often be relevant in answering jurisdictional questions." See Paul Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012) 50 Osgoode Hall LJ 317 at 347. Because of this expertise, a tribunal's insights may be invaluable to a reviewing court. Thus, a court would be well-advised to seriously consider the views of an administrative tribunal that has asserted jurisdiction over a novel area when deciding whether to affirm or reverse that assertion of jurisdiction.

54 2011 SCC 52, [2011] 3 SCR 422 [*Figliola*].

55 *Ibid* at paras 3–6.

56 *Ibid* at paras 7–10.

the British Columbia Human Rights Tribunal and made the same arguments. The Human Rights Tribunal decided to hear the case. The Board sought judicial review, arguing it had already decided the issue. The majority of the Supreme Court found the Human Rights Tribunal's decision to re-hear the claims unreasonable and set aside its decision to re-hear the complaints.[57] Similar cases can be seen in other jurisdictions.[58] It is precisely this sort of jurisdiction-grabbing interpretation that the Court guarded against by allowing the application of correctness review to "competing tribunals" cases.

Whatever the rationale for the heightened standard of review, the "competing tribunals" exception to reasonableness review has been applied without controversy in many settings. It is usually applied when the two entities are both creatures of the same legislature. For example, in *St-Pie (Municipalité de) v Commission de protection du territoire agricole du Québec*,[59] the City of St-Pie asked the Agricultural Commission to re-zone some land around the City as non-agricultural so that the City could grow. The Commission refused to remove all the land that the City had requested.[60] The City appealed to the Quebec Administrative Tribunal and, eventually, the decision was appealed up to the Quebec Court of Appeal. The Court applied the correctness standard of review, noting that it had to correctly decide the extent of the Quebec Administrative Tribunal's jurisdiction vis-à-vis the Agriculture Commission.[61] Ultimately, the Court decided that the Quebec Administrative Tribunal had exceeded its jurisdiction by conducting a *de novo* hearing when reviewing the agriculture commission's decision, instead of a more limited judicial review.[62] Like *Figliola*, this case illustrates how the "competing tribunals" exception works to manage the competition among tribunals for decision-making jurisdiction.[63]

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57 *Ibid* at para 54. True, the Court did not use correctness review to reach its outcome, but correctness review is the best approach because it is the device which allows courts to decide between tribunals with the fewest intellectual backflips. After all, using the example of *Figliola*, *supra* note 54, there is nothing *prima facie* unreasonable about a human rights tribunal deciding that the compensation for chronic pain resulting from a workplace injury is a human rights issue. Thus, correctness review provides the cleanest and most accurate analytic path to deciding what jurisdiction is proper to each of the competing tribunals.

58 See e.g. *College of Nurses v Trozzi*, 2011 ONSC 4614, 286 OAC 92.

59 2009 QCCA 2397, [2010] RJQ 23.

60 *Ibid* at paras 5–11.

61 *Ibid* at para 41.

62 *Ibid* at para 85.

63 Interestingly, the "competing tribunals" exception has played essentially no role when the two competing tribunals are from different levels of government. In this setting, the competition between a provincial entity and a federal entity raises classic constitutional division of power concerns that attract correctness review. For example, in *Federation of Canadian Municipalities v AT &T Canada Corp*, 2002 FCA 500, [2003] FC 379, the Federal Court of Appeal had to decide whether the CRTC could trump the City of Vancouver's decision to impose various conditions on a corporation which wanted to lay fibre optic cable. In essence, the majority held that the CRTC's jurisdiction over these types of decision was protected from provincial power by the doctrine of federal interjurisdictional immunity (*ibid* at para 23).

B. The Jurisdiction Neighbourhood

Having established the relatively uncontested nature of, and the (apparent) rationale for, the "competing tribunals" exception, we can now use that exception to illuminate the "true question of jurisdiction" exception. Picture jurisdiction as an empty field. Now picture a strong river dividing the field roughly in two: this is the constitutional division of powers between the federal government and the provincial governments.[64] Next, on the federal side of the river (or the provincial, if you prefer) picture a lot with a house that is bordered by a lot with another house on one side, and by a vacant lot owned by the city on the other side. The house is an administrative tribunal created by the legislature that controls the field on this side of the river. This administrative tribunal's jurisdiction extends to the edge of the house's lot.[65]

One day, the owner of the house decides to build a garage behind his house on the (unmarked) property line that separates his lot from his neighbour's. When he begins to build the garage, his neighbour comes out and complains that part of the garage is on her lot. A dispute ensues but, because the line between the two lots is not entirely clear, the neighbours cannot reach a resolution. To resolve their dispute, they go to court, where a judge decides where the line is and thus whether or not the garage may stand. At that hearing, the judge does not defer to the first neighbour's choice of where to build the garage. After all, the two neighbours are both equal residents of the city, and there is no reason to prefer one resident's opinion of the property line to the other's. Rather, the judge decides for herself whether the first neighbour was correct in deciding that the garage was entirely within his property. This story illustrates the operation of "competing tribunals" exception to reasonableness review. When a tribunal asserts jurisdiction over an issue that may fall within the jurisdiction of another tribunal, the tribunal's assertion of jurisdiction is reviewed on a correctness standard.

Now, we can extend this analogy to the "true question of jurisdiction" exception. Imagine that, instead of building on the property line between his lot and his neighbour's lot, the owner builds the garage on the (unmarked) property line that divides his lot from the vacant lot that borders his house on the other side. In this case, there is no neighbour to immediately come out and complain. The city owns the lot, but does not use it and certainly does not monitor it constantly. In this scenario, conflict is less likely and, given the non-use of the vacant lot, encroachment is less of a problem. Maybe the owner builds the garage slightly over the property line and nobody ever complains.[66]

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64 Although this topic is outside the scope of this paper, query whether the field might also be divided by another river—or series of rivers—representing the division between the federal and provincial governments, on one hand, and Aboriginal governments on the other hand.

65 I find it helpful to think about jurisdiction in spatial terms both because it is easier to conceptualize the idea through the use of a familiar concept (urban land use) and because the language courts use to describe jurisdiction is often spatial, for example, "encroach," "fall within," etc.

66 This scenario raises an interesting theoretical question: can a tribunal adversely possess jurisdiction?

Still, conflict could arise. Maybe, by chance, a city inspector comes by on the second day of construction and complains that the garage is slightly across the property line. In this case there is a conflict, but encroachment still may not be a problem if it is relatively slight. After all, if the encroachment amounts to a handful of metres on a vacant lot, what difference does it make? In other cases, encroachment may be a problem. For example, imagine that the city is using the lot, say, as a recreational field, and the owner decides build his garage slightly across the property line anyway. Here, although the encroachment is slight, it is still a problem given that the lot is obviously being used by the city. Or, suppose the owner decides to build his garage in the middle of the vacant lot. Here, encroachment is so great that the city is more likely to intervene.

These stories illustrate that the "true question of jurisdiction" exception is a conceptual corollary to the "competing tribunals" exception. The "competing tribunals" exception exists to ensure tribunals do not encroach upon one another's jurisdiction. The "true question of jurisdiction" exception exists to ensure that an administrative tribunal does not encroach upon the jurisdiction of the default entities: the legislatures and the courts.

To be clear, it is both the legislature and the judiciary whose jurisdiction is infringed upon when an administrative tribunal asserts jurisdiction over undefined jurisdictional space—that is, when the owner decides to build his garage on the vacant lot. In the Canadian constitutional scheme, if an area of rule-making authority is not assigned to any entity, it is exercised by the legislature as the default entity entrusted with this power. If an area of decision-making authority is not assigned to any entity, it is exercised by the judiciary as the default entity entrusted with this power.[67] When a tribunal asserts jurisdiction over unassigned space—as tribunals often exercise both legislative (rule-making/promulgation) and judicial (decision-making/adjudication) functions—it infringes on the both the rule-making jurisdiction of the legislature and the decision-making jurisdiction of the judiciary.

Thus, in theory, the purpose of the "true question of jurisdiction" exception is to police the line between an administrative tribunal's jurisdiction, and the unassigned default jurisdiction of the legislature and the courts. Without such policing, ambitious administrative tribunals could grab more and more of this unassigned territory, without the legislative support to do so (and perhaps, lacking the expertise to properly oversee the jurisdiction).

Now that the conceptual reason for the "true question of jurisdiction" exception has been explained, it is time to provide a constitutional explanation for its continued relevance—for the exception must make not only conceptual sense, but also constitutional sense if it continues to be a viable piece of Canadian law.

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67 *Cooper*, *supra* note 12 at para 10.

C. Judicial Review of Administrative Action is a Constitutional Requirement

Despite the contested nature of the "true question of jurisdiction" exception to reasonableness review, its constitutional place is well articulated. As briefly mentioned above, in the *Crevier* case, the Supreme Court decided that only superior courts are constitutionally empowered to determine the scope of their own jurisdiction.[68] The statute at issue was Quebec's *Professional Code*, RSQ 1977, c C-26, which established a discipline committee to adjudicate allegations of professional misconduct within the 38 professions governed by the *Code*.[69] Crucially, section 194 of the *Code* forbid parties from applying to superior court for judicial review of a decision of the discipline committee.[70] As discussed above, this type of provision is known as a privative clause or a privative provision.

The main question before the Court was whether it was constitutional for a province to completely insulate a statutorily-created administrative tribunal from any review of its decisions.[71] A unanimous Court held that such insulation was not constitutional. Section 96 of the *British North America Act* precluded any province from entirely ousting judicial review on questions of jurisdiction.[72] In particular, the Court noted that it is a "hallmark of a superior court" to determine the limits of its own jurisdiction, and that courts are the "ultimate interpreters of the *British North America Act*."[73] Tribunals are not courts, and hence cannot define the limits of their own jurisdiction. Thus, a legislature may use a privative clause to signal its intention that a tribunal should receive generous deference, but it may not eliminate judicial review on jurisdictional questions.[74] This constitutional reasoning remains in force today.[75]

The rationale behind the Court's reasoning can be easily discerned. It was long since decided that in Canada there is a constitutional separation of powers among the three branches of government.[76] As already mentioned above, broadly, the legislature makes the law, the judiciary interprets the law and the executive applies the law.[77] Administrative tribunals upset this classic separation of powers. These tribunals are executive bodies created by the legislature. They are often empowered to exercise the powers of all three branches of government. For example, the CRTC is empowered to make legally binding regulations, to interpret those regulations and to enforce those regulations against violators. The implications of this concentration of power in a single entity are still being considered today.

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68 *Crevier*, *supra* note 30 at 237.
69 *Ibid* at 222.
70 *Ibid* at 228.
71 *Ibid* at 234.
72 *Ibid* at 236–37.
73 *Ibid* at 237.
74 *Ibid* at 234.
75 See e.g. *Dunsmuir*, *supra* note 5 at para 29.
76 See e.g. *Fraser*, *supra* note 12 at 469–70.
77 *Cooper*, *supra* note 12 at para 10.

The Court's holding in *Crevier* was necessary to maintain the separation of powers. The key characteristic, which differentiates the judiciary from the administrative state, is judicial independence. Unlike any administrative tribunal, the judiciary was not created by the legislature and hence cannot be uncreated by the legislature. As a result, the judiciary is not inferior to the legislature, but rather co-equal to it. To maintain this co-equality in the face of significant legislative power, the Supreme Court has made judicial independence a constitutional requirement.[78] In contrast, administrative tribunals lack independence. As Chief Justice Lamer put it, "[m]ere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government" are not sufficiently independent to be entrusted with the power to be the ultimate interpreters of the law.[79]

The force of this logic is especially apparent in the legislative context at issue in *Crevier*.[80] If the Court had reached the opposite conclusion, it would be constitutionally permissible for a legislature to both create an administrative tribunal and to shield that tribunal's decision from judicial review. In such a circumstance, the separation of powers would be destroyed. The legislature would be allowed to entirely displace the judiciary by creating administrative tribunals empowered to fulfill all judicial functions, while maintaining the power to create and eliminate administrative tribunals (including appointing and removing their members) at will, and even to direct the policy of those tribunals.[81] The result would be a breath-taking concentration of powers, further exacerbated by the fact that the separation between the executive and the legislature in a majority government is more theoretical than actual.[82]

One could object at this point that the separation of powers in Canada is weak and thus should not be a central concern or driving principle when considering the proper scope of judicial review of administrative action. I recognize that the separation of powers I offered earlier in this article[83] is an oversimplification of how the separation of powers in fact operates in Canada. While it is true that "the separation of powers is a defining feature of constitutional order,"[84] it is clear that, in the context of substantive judicial review of administrative action, "courts do

78 *Ibid* at paras 12–16.
79 *Ibid* at para 13.
80 *Crevier*, *supra* note 30 at 228–29.
81 Notably, to a significant extent, this story describes what happened in *Roncarelli*, *supra* note 44.
82 *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297, citing Walter Bagehot, *The English Constitution* (London: Henry S King & Co, 1872) ("A cabinet is a combining committee -- a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state" at 559).
83 See Part II.A, above.
84 *Newfoundland (Treasury Board)*, *supra* note 11 at para 104.

not have a monopoly on adjudication in the administrative state."[85] Instead, within the administrative state, courts are required to defer to the legal interpretations of administrative tribunals. Not only must a court almost always defer to an administrative tribunal's interpretation of its home statute,[86] but courts must also defer to an administrative tribunal's interpretation of *Charter* values when the tribunal's interpretation is about the application of a general rule in an individual decision.[87] Thus, while the separation of powers undoubtedly exists in Canada, it operates differently in reality than my initial, classical articulation of the doctrine suggests.

Still, the separation of powers remains an important constitutional concept in Canadian administrative law for at least two reasons. First, the administrative state as it exists today is itself an expression of the separation of powers. Almost every administrative tribunal is an executive entity created by the legislature.[88] Indeed, the Court's current justification for the interpretive primacy of administrative tribunals is that the legislature intended this primacy.[89] This justification makes sense only by reference to the separation of powers: courts must defer to the legal interpretations of administrative tribunals because the legislature, by empowering an administrative tribunal to decide questions of law, stated its clear view that the administrative tribunal should engage in legal interpretation and courts, as bodies which—pursuant to the separation of powers—do not make the law but merely interpret it, should follow the legislature's clearly stated intention and defer to the legal interpretations of administrative tribunals.[90]

Second, the separation of powers is the idea underpinning reasonableness review, which stands as an as-yet unquestioned foundation of administrative law. No court or author has suggested in recent years that an administrative tribunal may unreasonably interpret a legal question and still avoid reversal on judicial review.[91]

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85 *Doré v Barreau du Québec*, 2012 SCC 12 at para 30, [2012] 1 SCR 395, citing *Dunsmuir*, *supra* note 5 at para 30 [*Doré*].

86 *Alberta Teachers' Association*, *supra* note 1 at para 39.

87 *Doré*, *supra* note 85 at para 57.

88 An exception to this general rule can be seen when a cabinet minister is treated as an administrative tribunal for the purposes of legal analysis. See e.g. *Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761. It is rather strained to say that the Minister of Justice is "created" by the legislature. But, the Minister of Justice, as a Member of Parliament, undoubtedly comes from the legislature—albeit in a somewhat different fashion than, say, the Canadian Human Rights Tribunal.

89 See e.g. *Doré*, *supra* note 85 at para 30, citing *Dunsmuir*, *supra* note 5 at para 49.

90 That said, although the Court has endorsed the legislative intent theory for deference in administrative law, it does not necessarily always follow this theory. For example, Paul Daly rightly criticized the majority's decision in *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2011 SCC 53, [2011] 3 SCR 471, for ignoring the legislature's intention that the tribunal should decide the question at issue by engaging in an overly-intrusive form of reasonableness review. See Paul Daly "*Dunsmuir*'s Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill LJ 483 at 500.

91 Even when the British Columbia legislature passed a statute that explicitly said the standard of review for some administrative decisions would be "patent unreasonableness," the Supreme Court decided that, where this standard was meant to apply, the standard of review to be used would be *Dunsmuir* reasonableness. See *Khosa*, *supra* note 27 at para 19.

Indeed, without reasonableness review—or an equivalent form of substantive judicial review—individuals subject to an exercise of public power would lack any substantive protection from arbitrary executive action. I do not think any jurist contends that a future Mr. Roncarelli should be so openly exposed to the whims of a future Premier Duplessis. Reasonableness review is, of course, based on the separation of powers: the judiciary reviews the executive administrative tribunal's interpretation of the legislature's statute to see if the tribunal's interpretation falls within the range of reasonable outcomes.[92] Of course, reasonableness review is far less intrusive than correctness review, and it represents a diminished separation of powers insofar as the executive is given significantly greater space to perform its own statutory interpretation. Still, reasonableness review means that the judiciary retains ultimate oversight over the administrative state, and its existence suggests the continuing relevance of the separation of powers.

Returning to *Crevier*, beyond wisely maintaining the separation of powers by constitutionalizing the judiciary's power to review administrative decisions on questions of jurisdiction, the Court's reasoning contains another important, but often overlooked, implication: the power to judicially review a tribunal's decision applies notwithstanding an explicit statutory provision to the contrary. After all, the Court endorsed judicial review even in the face of a statutory privative clause forbidding such review.[93] Although the *Crevier* Court clearly found the power of judicial review to be a constitutional necessity, the Supreme Court has persisted in calling the standards of judicial review "common law principles."[94] This persistence is puzzling given that *Dunsmuir* itself identifies legislatively-enacted privative clauses as just one factor among many in determining the appropriate standard of review and stresses that while a privative clause "provides a strong indication of legislative intent," such a clause "cannot be determinative."[95] With respect, there is nothing in common law about a power given to courts to override explicit statutory directions about the standard of judicial review of administrative action. Such a power is facially constitutional.

Indeed, the Supreme Court has even applied the *Dunsmuir* standard of review analysis in British Columbia, where the legislature passed the *Administrative Tribunals Act*, SBC 2004, c 45.[96] The Act explicitly sought to render some tribunals' decisions reviewable only on the standard of "patent unreasonableness." Despite this explicit statute directly dictating the applicable standard of review, the Supreme Court said in *Khosa* that although the term "patent unreasonableness" will continue to be used in British Columbia, "the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will

92 *Dunsmuir*, *supra* note 5 at paras 47–48.
93 *Crevier*, *supra* note 30 at 228, 234.
94 See e.g. *Khosa*, *supra* note 27 at para 1; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 78, [2010] 2 SCR 650.
95 *Dunsmuir*, *supra* note 5 at para 31.
96 See *Khosa*, *supra* note 27 at para 19.

necessarily continue to be calibrated according to general principles of administrative law."[97] No mere common law power is capable of reformulating an explicit statute directly on point in this manner. Thus, the *Dunsmuir* standard of review analysis, although called a common law power, is in fact a constitutional doctrine entitling courts to overpower statutory law.

Judicial review of administrative action generally, then, is constitutionally required by *Crevier* to maintain the separation of powers, and it applies even in the face of a contrary statutory provision. Judicial review serves an important function by policing the internal and external limits of an administrative tribunal's power. Internally, judicial review—as articulated in *Dunsmuir*—requires an administrative tribunal acting within its jurisdictional space to exercise its power reasonably. Externally, judicial review—as articulated in *Crevier*—requires that an administrative tribunal not infringe upon the judiciary's (and legislature's) jurisdictional space in a manner that exceeds the tribunal's jurisdiction.

Conceiving of *Dunsmuir* in constitutional terms provides some conceptual and jurisprudential benefits. One significant theoretical outcome of this characterization is that it fits snuggly with the theory that the constitution provides minimal protections for rights that can be augmented by the legislature, but not reduced. This theory has been articulated for rights protected by both the *Charter* and by the *Constitution Act, 1867*. For example, in *Multani v Commission scolaire Marguerite-Bourgeoys*, the majority of the Court, led by Justice Charron, wrote that the *Charter* establishes a "minimum constitutional protection that must be taken into account by the legislature and by every person or body subject to the Canadian *Charter*."[98] Similar reasoning has been applied to the *Constitution Act, 1867*, to find, for example, that section 133 requires a minimal protection for language rights.[99]

Following this reasoning, and treating *Dunsmuir*'s judicial review standard as a constitutional requirement, we can conclude that *Dunsmuir* establishes a constitutional minimum for the degree of judicial review required, but that this minimum can be exceeded. That is, a legislature can constitutionally allow more judicial review of administrative action than required under *Dunsmuir*, but it cannot allow less. Thus, a statute like the British Columbia *Administrative Tribunal Act* is constitutional insofar as it allows more judicial review than *Dunsmuir* in some circumstances; and in other circumstances where it purports to allow less judicial review than is dictated by *Dunsmuir*—for example, in its continued application of the "patent unreasonableness" standard[100]—the amount of judicial review required is dictated by *Dunsmuir*, not by the statute.[101]

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97 *Ibid*.

98 2006 SCC 6 at para 16, [2006] 1 SCR 256 [*Multani*].

99 *MacDonald v City of Montreal*, [1986] 1 SCR 460 at 498, 27 DLR (4th) 321.

100 Patent unreasonableness is the name of the most deferential standard of judicial review that the Supreme Court eliminated in *Dunsmuir*. See *Dunsmuir*, *supra* note 5 at para 45.

101 *Khosa*, *supra* note 27 at para 19. See *Administrative Tribunal Act*, SBC 2004, c 45, s. 58(2)(c).

Another conceptual and jurisprudential benefit of recognizing *Dunsmuir* as a constitutional doctrine is clarification of a separate issue that was noted but not resolved by the Supreme Court in *Multani*. There, the Court was faced with the question of whether it should address the school commission's decision to ban the Sikh kirpan from Montreal schools from a regular constitutional law perspective or from an administrative law perspective. The majority of the Court decided that the issue should be addressed through a regular constitutional analysis. It therefore assessed whether the claimant's section 2(a) *Charter* right was violated and, if so, whether that violation was justified by section 1, per the *Oakes* test.[102] In contrast, the dissent urged that the case be analyzed entirely within the context of administrative law.[103]

The dissent's view has since been adopted by a unanimous court in *Doré v Barreau du Québec* in cases when an administrative *decision* is challenged (as opposed to when an administrative *rule* is challenged).[104] Still, when an administrative *rule* of general application is challenged on *Charter* grounds, the question remains: should a court conduct an *Oakes* constitutional law analysis or an administrative law analysis first? If *Dunsmuir* is treated as a constitutional theory, then the answer is (somewhat contrary to the *Multani* majority): whichever will reach a dispositive result fastest because *Dunsmuir* and *Oakes* are co-equal constitutional doctrines. As described earlier in Part II.A of this article, the two doctrines embody different forms of constitutional protection. *Dunsmuir* protects the constitutional separation of powers, while *Oakes* protects individual rights from unconstitutional state action.[105] Because any administrative rule must satisfy both doctrines to be constitutional, there is no theoretical reason for starting with one doctrine or the other. If an administrative rule fails either test, it is unconstitutional and thus should be struck down. As a result, in accordance with the principle of judicial efficiency, decision-makers should start with whichever doctrine will lead most directly to a dispositive result.

In sum, there are sound reasons to view the standard of review analysis as a fully constitutional theory. The analysis is necessary to maintain the separation of powers dictated in the *Constitution Act, 1867*; it operates like a constitutional theory by overpowering explicit statutory language and by establishing constitutional minimums. There are also positive theoretical and jurisprudential implications if this characterization is accepted. Still, the question remains: if *Dunsmuir*, in general, expresses a constitutional theory, then is the "true question of jurisdiction" exception to reasonableness review also constitutionally required? I will argue in the next section that it is, but that the constitutional justification for the theory and its scope must be reimagined.

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102 *Multani*, *supra* note 98 at para 16.

103 *Ibid* at para 85.

104 *Supra* note 85 at para 43.

105 The third major form of constitutional protection is the division of powers between the federal government and the provincial governments embodied in sections 91 and 92 of the *Constitution Act, 1867*, *supra* note 7. See above at 2–3.

D. Revisiting Crevier: Colouring in Jurisdiction

The "true question of jurisdiction" exception—properly defined—is a constitutional necessity. This statement is bold given the ongoing battle in administrative law over the appropriateness of maintaining the exception. *CUPE*'s direction to courts not to treat questions as jurisdictional "when they are doubtfully so"[106] started a twenty-year trend that saw the concept of jurisdiction in administrative law pushed to near-extinction in *Pushpanathan*, where a majority of the Court said that a "jurisdictional error" is simply the name given to a tribunal interpretation that the court finds to be incorrect when it applies the correctness standard of review.[107] *Dunsmuir* revived the concept of jurisdictional error through its creation of the "true question of jurisdiction" exception.[108] *Alberta Teachers' Association* pushed the pendulum back, with the majority strongly questioning the continued need for the exception.[109]

Given the precarious existence of the "true question of jurisdiction" exception to reasonableness review, it needs a compelling justification. I hope to have provided a persuasive conceptual justification in Section II.B, above, where I described the exception as the conceptual analogue to the uncontested "competing tribunal" exception. But a conceptual justification is not enough; a constitutional justification is required. And the constitutional justification cannot simply be for substantive judicial review of administrative action in general, the entirety of which can be framed as a matter of "jurisdiction," as explained in Section II.C. A compelling justification must address the "true question of jurisdiction" exception specifically.

The essential tension inherent in the "true question of jurisdiction" exception is between the *CUPE* Court's well-founded concern that the concept of jurisdiction gives courts an ambiguous tool with which they can intrusively and unpredictably pry into the administrative state whenever they want, and the *Crevier* Court's equally well-founded concern that allowing tribunals to define the scope of their own jurisdiction destroys the separation of powers. The sharpness of the tension has been dulled somewhat by *Dunsmuir* insofar as it is now widely acknowledged that courts can review any administrative decision on a reasonableness standard.[110] Many, including, tentatively, the majority of the Supreme Court in *Alberta Teachers' Association*, would claim the tension has been resolved by the fact that reasonableness review is unavoidable.[111] Arguably, since a court can always limit a tribunal's ability

106 *CUPE*, *supra* note 28 at 233.

107 *Pushpanathan*, *supra* note 41 at para 28.

108 *Dunsmuir*, *supra* note 5 at para 59.

109 *Alberta Teachers' Association*, *supra* note 1 at para 34.

110 See e.g. Paul Daly, "The Scope and Meaning of Reasonableness Review" (2015) 52:4 Alta L Rev 799.

111 That said, Justice Cromwell's concurring opinion in *Alberta Teachers' Association*, *supra* note 1, disagreed with the majority's questioning of the existence of the true questions of jurisdiction exception to reasonableness review and is broadly consistent with my view that true questions of jurisdiction must exist as a matter of constitutional law. He states that it is a fundamental principle that, "as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is 'correct'" (*ibid* at para 94).

to define its own jurisdiction if the tribunal tries to claim an unreasonable amount of jurisdiction, the concern about the separation of powers has been addressed.

Although this is a constitutionally sound conclusion, I do not think it is ultimately correct because accepting it would lead to at least two anomalous results. First, accepting this outcome would likely cause the straining and (ultimately) the destruction of the concept of reasonableness. After all, if the only limit on administrative power is reasonableness review, then that concept will stretch from a discrete clear idea about statutory interpretation—that a tribunal faced with an ambiguous home statute may use its expertise to choose any reasonable interpretation of that statute and receive deference from the courts—to a concept which must provide any and all protection an individual receives in substantive judicial review. Already in *Figliola* we can see the Court stretching the concept of reasonableness by declaring as unreasonable a human rights tribunal's decision to intervene in a workers' compensation board chronic pain compensation ruling.[112] This stretching will only worsen with the essential elimination of correctness review of tribunals' constitutional interpretations mandated by the Court's majority opinion in *Doré*.[113] With time, unless the law changes, reasonableness will become the amorphous concept that jurisdiction once was. Courts should not journey down this path into further uncertainty.

Second, what if a tribunal makes a decision about a matter that is simultaneously under consideration by a court?[114] Without a "true question of jurisdiction" exception, once the tribunal decides the issue, the court may only review the tribunal's decision using the reasonableness standard of review.[115] Say the tribunal's decision is reasonable, but different from the decision the court would have arrived at

In support of this proposition, he cites the Court's majority in *Dunsmuir* that "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits" (*ibid* at para 102, citing *Dunsmuir*, *supra* note 5 at para 31). He goes on to argue that this fundamental principle applies to a tribunal interpretation of its home statute (*ibid* at para 98). I whole-heartedly agree with Justice Cromwell. As I have argued above in Parts III.C and III.D, judicial review of a tribunal's determination of its own jurisdiction—in the narrow manner I endorse in this article—is constitutionally required to maintain the separation of powers, even if the tribunal's determination springs from its home statute. Otherwise, a tribunal could use interpretations of its home statute to expand its jurisdiction, even at the expense of the courts, without any judicial intervention as long as its interpretation of its home statute meets the low bar of reasonableness.

112 See *supra* note 54.

113 *Doré*, *supra* note 85 at paras 45–58.

114 This possibility was faced by the Court of Appeal for Ontario in *Children's Aid Society of Waterloo v DD*, 2011 ONCA 441, 336 DLR (4th) 733. This case will be discussed in detail, below, at page 305.

115 It is worth noting that none of the other three exceptions to reasonableness review articulated in *Dunsmuir* apply. First, in this thought experiment where there is no "true question of jurisdiction" exception, there is no constitutional issue at play because the availability of reasonableness review is deemed sufficient to satisfy *Crevier* (*Dunsmuir*, *supra* note 5 at para 58). Second, there are no competing *tribunals* at issue (*ibid* at para 61). Third, there is no question of law of central importance to the legal system as a whole and outside the tribunal's area of expertise (*ibid* at para 60). In this alternative reality, there is no issue of central importance to the legal system as a whole because reasonableness review is sufficient to satisfy *Crevier*. Thus, without the "true question of jurisdiction" exception, there is no possibility of correctness review.

had it not been pre-empted by the tribunal. In that circumstance, the court may not overturn the tribunal's decision, unless, of course, it is willing to cast the decision as "unreasonable" in order to empower itself to alter the result—a maneuver that the Supreme Court forbid in *CUPE*.[116] Thus, the court's ability to decide the issue will have been pre-empted by an inferior body. The result is that a tribunal has defined its own jurisdiction *directly* at the expense of a court. Such a result is a violation of the separation of powers: the legislatively-created executive body has pre-empted the judicial body.

A similar problem arises if a tribunal is asked to decide whether a court has already decided an issue brought before the tribunal. The tribunal may look at ambiguous language in the court order or ruling under consideration—say, a divorce decree that makes reference to child custody—and reasonably interpret that language to have a limited scope, thereby giving the tribunal jurisdictional space to decide the issue brought before it. Without correctness review, a court would be forced to defer to any reasonable interpretation of the scope of its own ruling, even if the court thinks the tribunal's decision is incorrect.

While conflicts like these may be rare, they are nonetheless real. The continued existence of the "true question of jurisdiction" exception eliminates this jurisprudential gap while maintaining the Court's commitment to a (relatively) unobstructed administrative state and to the separation of powers.

This refined understanding of the "true question of jurisdiction" exception can be slotted into the Court's language in *Crevier*. There, the Court insisted that it was a "hallmark of a superior court" that it could "determine the limits of its jurisdiction."[117] As a result, inasmuch as some form of law, public or private, touches almost any human interaction one can think of, a superior court's jurisdiction is virtually unlimited, except by the private international law principles of extra-territoriality.[118]

A tribunal's jurisdiction-defining power is significantly more limited. In theory, its jurisdiction is completely defined at the moment its home statute becomes law. Still, in practice, its jurisdiction is defined over time by its decision to take, or not to take, certain cases and to decide, or not to decide, certain issues within the cases it does take, and by judicial review of these decisions. Thus, the tribunal is like a person who is given a map with loosely defined boundaries—dotted lines—and is told to colour it in. The person may colour in a space exactly along the already-included boundaries, or may draw slightly over or slightly under the boundaries. As long as the tribunal does not colour way outside the lines—that is, assert an unreasonably broad jurisdiction—and as long as the person does not colour on spaces already coloured on by others—that is, interfere with a court's assertion (or possible assertion) of jurisdiction—then the tribunal's colouring

116 *CUPE*, *supra* note 28 at 233.
117 *Crevier*, *supra* note 30 at 237.
118 See generally *Hape*, *supra* note 17.

should be accepted.[119] In the words of *Crevier*, the tribunal is not fully defining its own jurisdiction like a court does, but rather is defining the jurisdiction it was already granted—albeit in a sometimes messy manner that might go slightly beyond, or slightly short of, that grant.[120] Whatever (conceptual or constitutional) problems this messiness creates, we know the alternatives are worse: courts policing tribunals' every stray mark over (or under) the line.[121]

Given the jurisprudential gap created if the "true question of jurisdiction" exception is eliminated, and given the (as just refined) exception's consistency with the court's reasoning in both *Dunsmuir* and *Crevier*, I think it is preferable—and constitutionally sound—to continue to use it in certain limited circumstances. I will now discuss what those circumstances are.

IV. APPLYING THE REFINED "TRUE QUESTION OF JURISDICTION" EXCEPTION

At the outset, it is important to remember a key principle from the Court's analysis of the issue of jurisdiction in administrative law: true questions of jurisdiction are rare.[122] My application will cleave closely to this principle, which has been consistent over the decades, and for good reason. Canada has many administrative tribunals that cover many areas of jurisdiction. The imaginary neighbourhood, described above in Part III.B, is not populated by one or two houses, but hundreds of houses (if not thousands). As a result, there are not many "vacant lots," and so many claims will clearly fall within the jurisdiction of one or another tribunal, while relatively few will fall on the uneasy boundary between a tribunal's jurisdiction and the judiciary's (and legislature's) default jurisdiction. Moreover, few tribunals will be asked to take a case or to decide an issue that is clearly outside their jurisdiction. What lawyer would bring an environmental claim to a labour board? It is not efficient, cost-effective advocacy to bring legal action in an incorrect jurisdiction. And, of course, many tribunals are sensitive about their jurisdictional limits and work hard to ensure the cases and issues they decide are properly within their jurisdiction.[123] So, for a variety of precedential and practical reasons, true questions of jurisdiction both must be rare and are rare.

Rare as they may be, it is necessary to develop relatively clear and consistent guidelines for deciding jurisdictional conflicts when they arise. Without such guidelines, as we have seen, the exception creates significant judicial contradiction

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119 In terms of our earlier analogy of the houses and the lots: as long as a home owner builds a garage only a little over the property line that divides his lot from the adjacent vacant lot owned by the city.

120 *Crevier*, *supra* note 30 at 238.

121 It is important to remember that it is an equally important problem when a tribunal wrongfully declines jurisdiction as when it wrongfully asserts jurisdiction. Both are—in theory—inconsistent with the tribunal's home statute.

122 *Alberta Teachers' Association*, *supra* note 1 at para 42.

123 See e.g. *Godden v Bell Mobility Inc*, 2012 HRTO 937 (CanLII) at para 6.

and litigation costs.[124] Yet, despite the significant conceptual and constitutional reasons for the "true question of jurisdiction" exception's continued existence, it is headed for extinction because courts have not yet managed to define its proper scope.

One of the trickiest aspects of the "true question of jurisdiction" exception is that it covers not one type of case, but two. The exception applies both when a tribunal uses its rule-making power and when it uses its decision-making power. These are, respectively, the promulgation cases and the adjudication cases.[125] The paradigmatic promulgation case is the sole case cited by the *Dunsmuir* court as an example for the "true question of jurisdiction" exception: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*.[126] The issue in *United Taxi* was whether the City of Calgary's regulating freezing the number of taxi plate licences available was *ultra vires* the city's power under the newly-passed *Municipal Government Act*, RSA 2000, c M-26.[127] The new Act, following the trend of broad and purposive interpretation of municipal powers in the jurisprudence, granted the city a short list of generally defined powers, rather than a long list of enumerated powers in specific subject areas.[128] Section 7 of the Act stated that "[a city] council may pass bylaws for municipal purposes respecting the following matters:…(d) transport and transportation systems; (e) businesses, business activities and persons engaged in business…" Similarly broadly, section 8 said that "a [city] council may in a bylaw passed under this Division…(a) regulate or prohibit;…(c) provide for a system of licences…."[129] In the face of these provisions, the respondents argued that, unlike the previous *Municipal Government Act*, the new Act neither expressly nor implicitly gave the city the power to limit the number of taxi plate licenses, and thus the city lacked that power to freeze the number of licenses it granted.[130] The Court disagreed. It found the new Act gave the city broad powers over a number of areas, including the number of taxi licenses issued by the city.[131]

The *Dunsmuir* court cited *United Taxi* as the paradigmatic example of a true question of jurisdiction that must be decided on the correctness standard.[132] Although the *Dunsmuir* Court also said the case involved the "decision-making powers" of a tribunal—i.e. the City of Calgary—I think this language is more confusing than illuminating. Many tribunals are given the power both to make rules about their area of specialized expertise, and to make decisions about how those rules are applied.[133]

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124 *Alberta Teachers' Association*, *supra* note 1 at para 38.

125 These two categories reflect the fact, described above, that tribunals exercise both legislative, rule-making powers and judicial, decision-making powers.

126 2004 SCC 191, [2004] SCR 485 [*United Taxi*].

127 *Ibid* at paras 1–2.

128 *Ibid* at para 6.

129 *Municipal Government Act*, RSA 2000, c M-26, ss 7–8.

130 *United Taxi*, *supra* note 126 at para 9.

131 *Ibid* at paras 12–13.

132 *Dunsmuir*, *supra* note 5 at para 59.

133 For example, the CRTC is empowered to both make rules and decide how those rules are applied.

The issue in *United Taxi* was not the city's decision-making power as the claimants were not challenging any particular decision involving a city official applying the taxi plate license freeze to a particular person. Rather, they were challenging the taxi plate license freeze rule in general. Thus, I think it is clearer to say that *United Taxi* tested the city's rule-making authority.

The Court's use of this single example in *Dunsmuir* created a problem because *United Taxi* is not the typical case where a true question of jurisdiction arises. Instead, it is an example of a true question of jurisdiction in the promulgation, rule-making context. But the "true question of jurisdiction" exception usually arises—and has caused the most conceptual and jurisprudential difficulty—in cases where a tribunal's adjudication, *decision*-making authority is at issue. For example, in *Public Service Alliance of Canada v Senate of Canada*, the issue was whether the rule already established by the tribunal's home statute was correctly applied to the particular case before the tribunal.[134] Of course, the difference between a rule and a decision is not crystal clear, but it has been accepted by the Court,[135] and I think it is clear enough for the purposes of the discussion here.

Thus, the "true question of jurisdiction" exception actually covers two kinds of cases: the promulgation, rule-making cases (*United Taxi*) and the adjudication, decision-making cases (*Senate of Canada*). I will discuss the scope and rationale of each in turn.

A. The Promulgation Cases

Unlike the adjudication cases, it is relatively easy to identify where true questions of jurisdiction arise in the promulgation cases. As we have seen, the true question of jurisdiction arose in *United Taxi* because the claimants challenged the city's power to make the rule at issue. Thus, applying the Court's reasoning in *Dunsmuir*, anytime the challenge is to the tribunal's power to make a rule, as opposed to its power to make a decision, correctness applies.

For example, in *Sciberras v Workers' Compensation Board (Man)*, the Manitoba Court of Appeal was asked to decide if the Workers' Compensation Board had the power to define the term "apprentice" for the purposes of the *Workers' Compensation Act*, CCSM, c W200, section 45(3).[136] The Board had enacted Policy No. 44.80.30.30, section 1(a)(i), which defined apprentice as a person defined as such by the *Apprenticeship and Trades Qualifications Act*.[137] The reviewing court adopted the following statement of Justice MacFarland of the Court of Appeal for Ontario in *Toronto Hydro-Electric System Ltd v Ontario (Energy Board)*: "If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling

134 2011 FCA 214 at paras 4–11, 336 DLR (4th) 540 [PSAC]. See below at pages 303 to 304.
135 *Doré*, *supra* note 85 at paras 36–37.
136 2011 MBCA 30 at para 7, [2011] 6 WWR 606 [*Sciberras*].
137 *Ibid* at para 1.

statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal."[138] The court went on to find that the policy defining the word "apprentice" fell well within the Board's broad grant of power.[139]

The court's decision is largely consistent with the Supreme Court's reasoning in *United Taxi*. In both cases, the power of the tribunal to enact the general rule was challenged: in *United Taxi*, the City of Calgary; in *Sciberras*, the Manitoba Workers' Compensation Board. In both cases, a rule of general application was at issue: in *United Taxi*, the regulation limiting the number of taxi plate licenses; in *Sciberras*, the definition of "apprentice." And in both cases, the court concludes the tribunal's general rule fell within the broad grant of power given to the tribunal by the legislature. The only difference is that in *United Taxi*, the Court applied the correctness standard of review while in *Sciberras*, the court applied a reasonableness standard of review.[140] To the extent that *Sciberras* applies a reasonableness standard of review, it is contrary to the precedent of *United Taxi* and therefore incorrect.

The essential holding of *United Taxi* is that when a tribunal's rule of general application is challenged, the tribunal's power to make the rule is reviewable on the standard of correctness. This reasoning makes sense for several reasons for the collection of cases which I have termed the promulgation cases.[141] First, it is easy to identify when a promulgation case arises and thus there is no concern that applying correctness review in this context will lead to uncertainty about when the standard is applicable. Promulgation cases arise whenever a rule of general application created by a tribunal is challenged directly. The litigant disputes the tribunal's ability to make the rule at all, as opposed to disputing the application of that rule to the litigant. Thus, what is at issue in these cases is a regulation itself, like the taxi plate license freeze in *United Taxi*, or a general policy itself, like the definition of apprentice in *Sciberras*.

Second, the kind of correctness review demanded in the promulgation cases is not very onerous. Almost every tribunal empowered to make rules is given a broad grant of rule-making authority. Thus, although a tribunal must be correct when it promulgates a general rule, it is not very hard for it to be correct because the provisions against which correctness are measured are so broad.[142] Applying correctness in this context therefore does not raise the prospect of allowing courts to easily interfere with tribunals' rule-making.

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138 2010 ONCA 284 at para 24, 317 DLR (4th) 247.

139 *Sciberras*, *supra* note 136 at para 75.

140 *Ibid* (stating that "we are considering is not a 'true' question of jurisdiction or *vires*, and thus not automatically subject to the application of a correctness standard of review" at para 66).

141 See e.g. *Hibernia Management and Development Co v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2008 NLCA 46, 277 Nfld & PEIR 248 (about whether the tribunal had the power to issue a guideline about benefits plans; but incorrectly holding the standard of review is reasonableness).

142 See e.g. *United Taxi*, *supra* note 126.

Third, this category eliminates the need for deference in the theoretically possible—but, in practical terms, unlikely—case where a tribunal promulgates a rule completely and obviously outside of its jurisdiction. For example, say a labour board promulgated a regulation about stock trading—perhaps limiting the availability of derivative trading products. Say also that this regulation was (keeping the jurisdictional problems aside for the moment) entirely reasonable and rational. Without a promulgation sub-category of the "true question of jurisdiction" exception to reasonableness review, a reviewing court would have to ask itself if the labour board's stock trading regulation was reasonable. But the reasonableness, or lack of reasonableness, of such a regulation is beside the point. The labour board simply is not empowered to promulgate a rule about stock trading. Returning to the neighbourhood analogy from earlier, a person cannot go fifteen streets over from his house and start building a garage in another person's lot and then demand a judge defer to his or her decision to do so. Even with a broad mandate to make rules about "labour markets," the labour board would simply have strayed too far.[143]

Fourth, because general rules—unlike specific decisions—affect a large number of people, it is especially important that the entity making the rule either has sufficient specialized expertise or democratic legitimacy. Correctness review in promulgation cases serves this rationale by requiring the rule-making entity to correctly act within its (broad) legislative grant of rule-making power. Outside of this grant, a tribunal may lack expertise and—unless it is an elected tribunal like the City of Calgary in *United Taxi*—does not have any democratic legitimacy. Without either basis for deference, such a tribunal has no more legitimacy to enact a general rule which purports to bind countless others than an individual citizen: if you're not an expert on the subject and we did not elect you, why should you be able to make legally binding rules? Correctness review therefore protects the public from bad laws by requiring that general rule makers have either expertise or democratic legitimacy.

Cases where tribunals promulgate rules of general application, then, fit the first of two sub-categories of the "true question of jurisdiction" exception to reasonableness review. Such cases are easy to identify and quite rare. Thus, both of the Supreme Court's criteria for the types of cases which may fall within the "true question of jurisdiction" exception that the Supreme Court articulated in *Alberta Teachers' Association* are met.[144]

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143 One could retort that such a regulation would also be unreasonable, but such an argument is harder to make. After all, labour markets are undoubtedly affected by the stock market insofar as companies with strong stock market performance tend to hire more people and companies with weak stock market performance tend to hire fewer people. Thus, in theory, it could be reasonable for a labour board to pass a regulation on stock trading to ensure better stock market performance and thus a stronger labour market.

144 *Supra* note 1 ("[t]he 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.... The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional...." at para 43).

B. The Adjudication Cases

The harder nut to crack is the adjudication cases. These are cases where a tribunal must apply a rule of general application either from its home statute (or, in theory, another statute) or from rules the tribunal itself has promulgated to a specific person. These cases make up the vast majority of judicial review. The classic example of an adjudication case is *CUPE*, where the New Brunswick Labour Board was asked to decide if subsection 102(3) of the New Brunswick *Public Service Labour Relations Act* allowed managers of striking liquor stores to run those stores during a strike.[145] There was no rule of general application at issue because no party challenged the validity of subsection 102(3). Instead, the *application* of that general rule was at issue.

The Court itself has struggled with defining true questions of jurisdiction in the adjudication context. In *Dunsmuir*, the majority said that a true question of jurisdiction exists "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter."[146] Thus, explicitness was the conceptual hook the Court hung the exception on. Evidently, this explanation did not succeed, as the Court noted in *Alberta Teachers' Association* that there is "continuing uncertainty" about the standard of review when a tribunal is interpreting its home statute.[147]

The problem with using the idea of explicitness to identify true questions of jurisdiction is that tribunals are often asked to explicitly determine if they have the authority to decide a particular matter. For example, in *Public Service Alliance of Canada v Senate of Canada*, an arbitrator's application of subsection 55(2) of the *Parliamentary Employment and Staff Relations Act*, RSC 1985, c 33 (2nd Supp) was challenged.[148] It states:

> No arbitral award shall deal with the standards, procedures or processes governing the appointment, appraisal, promotion, demotion, transfer, lay-off or release of employees, or with any term or condition of employment of employees that was not a subject of negotiation between the parties during the period before arbitration was requested in respect thereof.

The arbitrator declined jurisdiction over the case before it on the grounds that the question of whether the Senate should post bargaining unit vacancies as they occurred dealt with procedures governing appointment, transfer and promotion of employees and so was within the category of matters about which subsection 55(2)

145 *Supra* note 28 at 229–30.
146 *Supra* note 5 at para 59.
147 *Supra* note 1 at para 37.
148 *Supra* note 134.

said an arbitrator could not issue an award.[149] The Federal Court of Appeal decided reasonableness review applied.[150]

Although the court's ultimate disposition is sensible and, in my opinion, correct, it is contrary to *Dunsmuir*. Subsection 55(2) is quite explicit in laying out the categories about which an arbitrator may not issue an award. Based on the *Dunsmuir* majority's reasoning, correctness should apply whenever a party challenges an arbitral award on the basis that it falls within one of the enumerated categories because, due to the statutory language, such a challenge explicitly questions the tribunal's authority to decide the matter. But applying correctness would cause several problems. First, the arbitrator has a specialized expertise in categorizing the types of employment disputes which arise before him. Even if the issue of his jurisdiction is explicitly and squarely before him, his expertise remains and should be given deference. Second, many, many disputes adjudicated under the statute would be reviewable on a correctness standard if that standard applied whenever jurisdiction was explicitly at issue—an outcome which is inconsistent with the Court's repeated statements that true questions of jurisdiction should be rare.[151] Third, a party who artfully pleads its case may put a question of true jurisdiction "explicitly" before a tribunal while a party who inartfully pleads the exact same case may not. A tribunal's jurisdiction cannot possibly depend on clever lawyering.

Given that *Dunsmuir*'s definition of true questions of jurisdiction does not work, a substitute must be made. The "true question of jurisdiction" exception is meant to prevent a tribunal from encroaching not on the adjudication jurisdiction of another administrative tribunal, but on the default adjudication jurisdiction of the judiciary. To make this exception rare and clear, the exception should apply only where: (i) a court may have already decided the issue that has been brought before the tribunal and the tribunal is asked to interpret the scope of the court's ruling in order to determine if it is allowed to decide the issue or if *res judicata* prevents the tribunal from re-hearing the issue; or (ii) where a court is in the process of deciding the issue that is brought before the tribunal.

This definition of the adjudication sub-exception is very narrow. The narrowness is in stark contrast to the "competing tribunals" exception, where any case that raises the prospect of one tribunal encroaching upon the jurisdiction of another tribunal attracts correctness review. The narrowness of the "true question of jurisdiction" exception, in comparison to the broadness of the "competing tribunals" exception, makes sense for two reasons (beyond the already mentioned edict that cases falling within the exception must be rare). First, unlike a co-equal competing tribunal, the entity which a tribunal encroaches upon under the "true question of jurisdiction" exception has more than enough power to defend their jurisdiction territory. The judiciary—the default rule-interpreting body—can

149 *Ibid* at para 12.
150 *Ibid* at para 25.
151 See e.g. *Alberta Teachers' Association*, *supra* note 1 at para 42.

defend its adjudication territory though the use of reasonableness review.[152] Second, a narrow exception is consistent with the court's duty to give significant deference to the legislature's decision to create the specialized, expert administrative tribunal and to give it certain decision-making powers.[153]

Let me give an example of how this refined exception would operate. In *Children's Aid Society of Waterloo v DD*, a parent filed an application with the Child and Family Services Review Board ("CFSRB"), complaichning about the placement and treatment of her children by the Children's Aid Society of the Regional Municipality of Waterloo ("CAS").[154] The CAS replied by claiming that the CFSRB did not have the jurisdiction to decide the matter because the children were the subject of a protection application then pending before the court. The Board rejected this argument and heard the application. The CAS then brought an application for judicial review.[155] The provision at issue was paragraph 68.1(8)(a) of the *Child and Family Services Act*, which states: "The Board shall not conduct a review of a complaint under this section if the subject of the complaint…(a) is an issue that has been decided by the court or is before the court…."[156] The court held that correctness review applied because the issue before the court was a true question of jurisdiction.[157] This holding was appropriate and consistent with my approach.

This decision exemplifies the narrow circumstances in which the adjudication sub-category of the "true question of jurisdiction" exception to reasonableness review should apply. The tribunal had to assess whether its decision would trench on an existent or forthcoming court ruling. It makes sense to review this decision on a correctness standard of review for two reasons. First, the tribunal is a legal body inferior to a court and so should not be able to unduly narrow or to overturn a court's prior decision or to preempt a court which is in the process of making a decision and then turn around and demand deference.[158] Allowing such narrowing or preemption would be an affront to the constitutional separation of powers because a legislative creature would be usurping the independent judiciary. Such a result is entirely contrary to *Crevier* and cannot stand. Second, the tribunal lacks a competitive advantage in specialized expertise about the issue insofar as the legislative scheme in this circumstance gives the courts and the tribunal concurrent jurisdiction over the

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152 Although, of course, courts should not use reasonableness review to declare administrative decisions they do not like to be "unreasonable."

153 *Rogers*, *supra* note 3 at para 11.

154 *Supra* note 114 at paras 1–2.

155 *Ibid* at paras 3–4.

156 RSO 1990, c C-11, s 68.1(8)(a).

157 *Ibid* at paras 27–30.

158 *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 SCR 489 (stating the CRTC is not empowered to create rules which prevail over legislative acts at para 78). Also, when a court's existing decision is at issue, *res judicata* does not resolve the dispute because a tribunal is being asked to interpret not the existence of a court's decision, but rather the scope of the court's decision. If deference is given to the tribunal's interpretation of the court's decision, and the tribunal narrows the scope of the court's decision, *res judicata* by itself does nothing to protect the court's decision.

issue and so neither has greater expertise than the other. Without any difference in specialized expertise, there is no reason to grant deference to the tribunal.

The result is a narrow definition of the adjudication sub-category of the "true question of jurisdiction" exception to reasonableness review that is relatively clear and applies rarely, thereby satisfying the Court's demand in *Alberta Teachers' Association* and avoiding the Scylla of frequent and unpredictable judicial interventions in the administrative state. And the exception also prevents tribunals from defining the scope of their own jurisdiction directly at the expense of the judiciary, thereby satisfying *Crevier* and avoiding the Charybdis of unrestrained tribunal power which undermines the separation of powers.

V. CODA: RIGHTING REASONABLENESS REVIEW

Even with a better definition of the "true question of jurisdiction" exception to reasonableness review, the right balance between judicial review and administrative power cannot be struck without the proper functioning of reasonableness review. During my research for this article, I noticed that many courts have wrongly treated the standard of review analysis choice between correctness under the "true question of jurisdiction" exception and reasonableness as outcome-determinative: if the court wanted to overturn a decision it applied correctness, if the court wanted to sustain a decision it applied reasonableness. There is no theoretical basis for this trend because a tribunal's interpretation may be sustained on a correctness standard and may be overturned a reasonableness standard. This trend is unfortunate because outcome-driven judicial decisions create the unpredictability decried by the Supreme Court in *Alberta Teachers' Association*.[159]

I can only surmise that this trend has arisen because courts have become shy of declaring tribunal decisions to be unreasonable. After all, the Supreme Court stressed in *Dunsmuir* that reasonableness review "does not pave the way for a more intrusive review by courts," but instead courts should defer to tribunals' decisions when they "fall[] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[160] Given this deferential standard, courts appear to be generally unwilling to finding tribunal decisions to be unreasonable.[161] This unwillingness has produced some unfortunate results, especially with respect to the "true question of jurisdiction" exception.

For example, in *Mitchell v British Columbia (Superintendent of Motor Vehicles)*, the court was asked to review the driver's license suspension of a man caught

159 *Supra* note 1 at para 37.

160 *Supra* note 5 at paras 47–48. Commentators have emphasized that a court conducting a reasonableness review should identify the outer bounds of reasonable outcomes, not merely decide if it agrees with the tribunal's decision. See e.g. Alice Woolley & Shaun Fluker, "What has *Dunsmuir* Taught?", Case Comment (2010) 47:4 Alta L Rev 1017 at 1031.

161 Courts are much more willing to find a tribunal's decision is either reasonable or is incorrect.

driving with a significant level of alcohol in his blood.[162] Shortly after being caught, Mr. Mitchell applied for review of the driving prohibition that had been imposed upon him. Paragraph 94.5(1)(c) of the *Motor Vehicle Act* stated that, "[i]n a review of a driving prohibition under section 94.4, the superintendent must consider… (c) a copy of any certificate of analysis under section 258 of the Criminal Code with respect to the person served with the notice of driving prohibition…."[163] The superintendent reviewing Mr. Mitchell's application was not sent the certificate of analysis and did not receive it upon request.[164] Despite lacking the certificate of analysis, the superintendent considered and rejected Mr. Mitchell's application to have the driving prohibition lifted.[165] Mr. Mitchell sought judicial review. The British Columbia Court of Appeal decided that the issue of whether the superintendent could proceed without the certificate of analysis was a true question of jurisdiction within the meaning of *Dunsmuir* and so applied a correctness standard of review.[166] It proceeded to overturn the superintendent's decision.

This decision is an example of where the court seems to have decided that it wanted to overturn the tribunal's decision and so applied the "true question of jurisdiction" exception to reach correctness review. This decision is unfortunate because it does damage both to the concept of reasonableness and to the "true question of jurisdiction" exception. Reasonableness requires a court to decide if a tribunal's interpretation of its home statute falls within the range of reasonable interpretations.[167] Here, clause 94.5(1)(c) used the word "must": mandatory language. Thus, the only reasonable interpretations of the clause were ones in which it required the superintendent to consider the certificate of analysis when reviewing a claimant's application to have his driving ban lifted. Because the superintendent ignored the clear mandatory language of the statute and decided he could consider Mr. Mitchell's application without having his certificate of analysis, his decision was unreasonable. The court's failure to conduct a reasonableness review is disappointing, especially given that its correctness analysis reflected the aforementioned reasoning.[168] Reasonableness review requires courts to respect a tribunal's interpretation as long as it is consistent with open-ended principles of statutory interpretation.[169] But reasonableness does not require a court to ignore obvious errors, like the superintendent's dismissal of the statute's mandatory language here.

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162 2009 BCCA 272 at para 6, 94 BCLR (4th) 194.

163 RSBC 1996, c 241, s 94.5(1)(c).

164 *Ibid* at paras 8, 10.

165 *Ibid* at paras 12–13.

166 *Ibid* at para 20.

167 *Dunsmuir*, *supra* note 5 at para 47.

168 *Ibid* at paras 21–24.

169 For example, the word "copy" used in the provision at issue is sufficiently ambiguous to be open to different, reasonable interpretations: A photocopy and a clean fax are likely sufficient, but is a smudged fax?; If the certificate of analysis is partially unreadable is it still a valid "copy"?; Is a picture of a certificate of analysis a copy?; etc.

The court's interpretation also does violence to the "true question of jurisdiction" exception by applying it to an inappropriate case. The statute at issue in *Mitchell* was the superintendent's home statute. The issue at hand was about the administration of driving prohibitions: a topic well within the superintendent's specialized expertise. The provision at issue did not even "explicitly" put the superintendent's jurisdiction at issue.[170] And the superintendent was not asked to consider if the issue before him was already decided, or was being decided, by a court. Thus, there was no reason for correctness review to apply. However, the court could have reached the decision it did by applying the reasonableness standard of review and finding the superintendent's decision to be unreasonable.

A similar problem arose in *Western Forest Products Inc v Capital Regional District*.[171] The British Columbia government approved the removal of some land on Vancouver Island from tree licenses granted to a logging company, thereby opening up the possibility that the land could be developed for residential use. The local government body quickly enacted bylaws that placed the land in a holding pattern, thereby giving the body time to update its land use regulations, which it thought were inadequate for regulating the zoning of the land. The logging company challenged the new bylaws on the basis that the persons entitled to vote on them had been unlawfully limited.[172]

The key provision at issue was subsection 804.1(2) of the *Local Government Act*, which states that "[t]he board and a municipality may enter into an agreement that the municipality is to share in some but not all of the costs of services under Part 26, to the extent set out in the agreement and in accordance with the terms and conditions for the municipality's participation established by the agreement."[173] Part 26 services are those related to land development, including constructing sewage, water and highway facilities for new residential developments.[174] The local government body relied on this provision to sign bare bones Part 26 agreements with a few municipalities in which they agreed to pay $100 to the local government body for minimal Part 26 services in exchange for the right to vote on local bylaws.[175] Because only a few municipalities signed these bare bones agreements, the number of people entitled to vote on local bylaws was limited.[176] The logging company attacked the agreements and the resultant limitation as *ultra vires*.

The court decided that a true question of jurisdiction was at issue and so applied correctness review.[177] The court then agreed with the trial judge's reasoning

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170 Unless one thinks the mere use of the word "must" renders the jurisdictional question explicit, in which case correctness review would run rampant again.

171 2009 BCCA 356, 311 DLR (4th) 85 [*Western Forest*].

172 *Ibid* at paras 1–3.

173 RSBC 1996, c 323, s 804.1(2).

174 See e.g. *Local Government Act*, RSBC 1996, c 323, ss 933(2), 939.

175 *Western Forest*, *supra* note 171 at para 30.

176 *Ibid* at paras 31–32.

177 *Ibid* at para 47.

that the Part 26 agreements at issue were *ultra vires* the *Local Government Act*.[178] The court went on to conclude that the legislative scheme contemplated that Part 26 agreements allowed a municipality to partially participate in Part 26 services, partially pay for those services and have correspondingly partial voting rights.[179] But a municipality could not, as here, sign a minimal Part 26 agreement and in exchange be granted full voting rights, including on matters entirely beyond the scope of that agreement.[180] In essence, the statutory scheme contemplates proportionality between the amount and scope of Part 26 services received and the voting rights of the receiving municipality. As a result, the court agreed with the trial judge that the agreements were *ultra vires*.[181]

Although I agree with the court's outcome and its reasoning, I disagree with its decision to review the local government body's action using correctness. There is no true question of jurisdiction here. The provision cited above does not "explicitly" put the local government body's jurisdiction at issue any more than any other provision of the local government body's home statute. The local government clearly has a specialized expertise over the provision of local government services to municipalities. There is no promulgation exception at issue because the Part 26 agreements were not general rules. There is no adjudication exception at issue because the agreements do not interpret an existing judicial decision or trench on a forthcoming one. Thus, the court was wrong to invoke the "true question of jurisdiction" exception to reasonableness review.

But the court could have decided the local government's decision was unreasonable. The court read the broad wording of subsection 804.1(2) within the context of the other provisions in that section and against the specific wording of paragraph 791(12)(c), which states that, "[i]n relation to an agreement under section 804.1 (2) [cost sharing for Part 26 services]…(c) while the agreement is in force, the director for that municipality is not entitled to vote on any resolution or bylaw under Part 26 [Planning and Land Use Management] except in accordance with the agreement."[182] That is, a Part 26 Agreement could entitle a municipality to vote on matters related to Part 26 services, but not on broader mattes like land use planning.[183] Thus, given the restrictive wording of paragraph 791(12)(c), it was unreasonable for the local government body to conclude subsection 804.1(2) gave it the power to grant a municipality who signed a bare bones Part 26 agreement the unlimited power to vote on land planning bylaws. There was insufficient proportionality between the $100, bare bones Part 26 agreement and the municipalities' wide-ranging power to vote on land use planning issues.

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178 *Ibid* at para 49.
179 *Ibid* at para 56.
180 *Ibid*.
181 *Ibid* at para 49.
182 *Ibid* at paras 48–56.
183 *Ibid*.

A final example of a court misapplying the "true question of jurisdiction" exception where reasonableness review should have applied occurred in *Lysohirka v British Columbia (Workers' Compensation Board)*.[184] There, Mr. Lysohirka applied to the British Columbia Workers' Compensation Board (the "Board") for benefits after he was injured and some of his claims were rejected.[185] In total, the Board issued three decisions: two "Review Decisions" and a "Reconsideration Decision," which reconsidered the Review Decisions.[186] The statute set out two grounds for the Board to reconsider Review Decisions: (1) on the chief review officer's own initiative; or (2) if there is new evidence.[187] The parties agreed that neither ground applied.[188] Still, the Board reconsideration official decided to reconsider the Board's Review Decisions by conducting what he called a "common law review."[189] The reconsideration decision ultimately also rejected Mr. Lysohirka's claims.[190]

The court had to decide which standard of review applied to the reconsideration official's decision to reconsider the Review Decisions on "common law" grounds not provided by the statute. The court cited, among other things, Justice Cromwell's concurring opinion in *Alberta Teachers' Association* and held that the reconsideration officer's decision should be reviewable on correctness grounds because it had to be considered in the "jurisdictional context" and was "one of those exceptional cases" that was not "amenable to a reasonableness analysis."[191]

In my respectful opinion, the court erred in applying correctness review. There was no true question of jurisdiction here. There was no existent or pending court decision dealing with the issues that the claimant raised, so the adjudication sub-exception was not applicable. The claimant was challenging only how the Board applied the statute to him, so the promulgation sub-exception was not at issue. And, the reconsideration official clearly was exercising its specialized expertise within its home statute. Thus, the court was wrong to invoke the "true question of jurisdiction" exception to reasonableness review.

And, in this case, reasonableness review should have led the court to the result it ultimately reached. Section 96.5(1) of the statute clearly created only two grounds for the Board to reconsider its prior Review Decisions:

> 96.5 (1) The chief review officer may direct a review officer to reconsider a decision under section 96.4 (8) in either of the following circumstances:

184 2012 BCCA 457, 39 BCLR (5th) 15.
185 *Ibid* at para 3.
186 *Ibid* at para 13.
187 *Ibid* at para 17, citing *Workers Compensation Act*, RSBC 1996, c 492, s 96.5.
188 *Ibid*.
189 *Ibid* at para 26.
190 *Ibid* at para 9.
191 *Ibid* at paras 41–43.

> (a) on the chief review officer's own initiative;
> (b) on application from a party to a completed review of a decision that may not be appealed to the appeal tribunal, if the chief review officer is satisfied that new evidence has become available or been discovered that
>
> (i) is substantial and material to the decision, and
> (ii) did not exist at the time of the review or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.[192]

Because the statute says that a reconsideration may occur in "either" of two circumstances, and because neither circumstance was present, it was unreasonable for the reconsideration official to engage in the "common law" review he undertook. Thus, the reconsideration official's decision to engage in "common law" review was an unreasonable interpretation of its home statute, and so could be reversed through judicial review.

Mitchell, *Western Forest* and *Lysohirka* illuminate some of the pitfalls of many courts' approaches to reasonableness review. Given the Supreme Court's repeated exhortations that reasonableness review not become another vehicle by which judges may arbitrarily interfere in the administrative state, and given Chief Justice Dickson's statement in *CUPE* that statutes often "bristle[] with ambiguities," many courts have concluded that any time a sufficiently complicated statutory scheme is at issue, the only way to overturn a tribunal's decision is by applying correctness review.[193]

This approach is not one that the Court endorsed in *Dunsmuir* when it agreed with David Dyzenhaus that reasonableness entails "deference as respect," with the courts paying respectful attention to the reasons offered (or which could have been offered) in support of a tribunal's decision.[194] Although there are many reasonable interpretations of a complex statutory scheme, not every interpretation is reasonable. For judicial review to function properly, and for it to provide the necessary protections to individuals affected by the exercise of public power, courts must work to ensure those exercises of power are reasonable. Without a robust understanding of reasonableness review, judicial review of administrative action will become unbalanced, sliding towards the extreme of unrestrained administrative power.[195] It is important to stress that the "true question of

192 *Workers Compensation Act*, *supra* note 187, s 96.5(1).

193 *Supra* note 28 at 230.

194 *Supra* note 5 at para 48, citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggart, ed, *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286.

195 This slide would be especially apparent if the "true question of jurisdiction" exception is eliminated and courts do not begin to properly conduct reasonableness review.

jurisdiction" exception alone cannot restrain administrative power. As the history of the concept of jurisdiction in administrative law shows, if the concept of jurisdiction is not narrowly circumscribed, it can be applied to basically every exercise of administrative power. Similarly, as argued above, reasonableness alone cannot properly restrain administrative power because it does not provide a conceptually honest explanation for the narrow range of cases where the "true question of jurisdiction" exception applies.[196] Thus, the only road to conceptually consistent judicial review of administrative action is for the "true question of jurisdiction" exception to reasonableness review to be narrow and for reasonableness review itself to be respectfully yet fully conducted.

VI. CONCLUSION

Despite its ambiguity, the concept of jurisdiction remains central to our understanding of administrative law. It is the tool we use to describe whether a person who purports to exercise public power has done so lawfully. It helps us to describe both the division of powers between the federal and the provincial governments as well as the separation of powers within those governments among the executive, legislature and judiciary. But because of our history of courts meddling unnecessarily in the administrative state, it has become a bad word. Still, the Supreme Court should not follow through on its musing in *Alberta Teachers' Association* that the "true question of jurisdiction" exception to reasonableness review should be eliminated. It is possible to define the exception in a relatively clear way that will reduce uncertainty in its application and will limit its use to rare cases.

There are strong conceptual, constitutional and jurisprudential bases for retaining the exception. If we think of jurisdiction in terms of space—as a house on a plot of land in a neighbourhood—it helps us to better understand what jurisdiction is and how the "true question of jurisdiction" exception works. If we look at the Supreme Court's reasoning in *Crevier* and *Dunsmuir*, we can see that jurisdiction is the concept we use to describe the balance that must be struck between judicial interference in the administrative state and unrestrained administrative power. What's more, we can see that substantive judicial review of administrative action is a constitutional theory that protects the separation of powers.

Analyzing the existing jurisprudence points the way forward. There are two kinds of cases that fall within the "true question of jurisdiction" exception to reasonableness review: promulgation cases and adjudication cases. Part of the courts' confusion in applying the exception after *Dunsmuir* resulted from the fact that the majority announced the exception, and then provided only a single example of where the exception would apply—and that case was an example of the far less common promulgation sub-category. Correctness review should apply when a

196 See above at pages 295 to 296.

tribunal promulgates a general rule. We cannot have inferior bodies with statutorily defined powers creating new rules here and there, far beyond the rule-making power given to them by the legislature and their expertise. Correctness review should also apply in very limited circumstances when a tribunal adjudicates a case and makes a decision. Specifically, if a tribunal is asked to decide a matter that has been decided by, or may have been decided by, a court, then it must be correct in its determination. Otherwise an inferior body would be empowered to narrow a judicial decision or to preempt a court and then demand deference from that court upon judicial review. Such a result would upset the careful separation of powers that is central to the Constitution.

Finally, the refinement of the "true question of jurisdiction" exception to reasonableness review will not work unless courts conduct reasonableness review better. Reasonableness requires both that courts uphold any reasonable interpretation by a tribunal and that courts overturn unreasonable interpretations. While the rules of statutory interpretation are complex and open-ended, they are not endlessly so. Proper consideration of a tribunal's interpretation will ensure both that reasonableness does not become another vehicle for arbitrary judicial intervention in the administrative state, and that reasonableness review does not amount to judges abdicating their constitutional role of ensuring that public power is exercised reasonably. A more robust reasonableness review, combined with a clearer understanding of the promulgation and adjudication sub-categories of the "true question of jurisdiction" exception to reasonableness review, could help courts continue to strike this difficult balance going forward, and to sail Canadian administrative law between the twin extremes of unrestrained administrative power and unpredictable judicial intervention in the administrative state.