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Once More unto the Breach: Confronting the Standard of Review (Again) and the Imperative of Correctness Review when Interpreting the Scope of Refugee Protection

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The Supreme Court of Canada's standard of review jurisprudence has been marked by the ascendancy of reasonableness as the presumptive standard of review of decisions involving an administrative tribunal's interpretation and application of its home statute. To the extent that this approach would lead to the reasonableness review of administrative decision-makers' interpretation of the scope and meaning of provisions of the Immigration and Refugee Protection Act that implement the basic human rights conferred in international conventions to which Canada is a party, it must be changed. Interpretations of the scope of the Refugee Convention and Convention Against Torture raise questions of law of central importance to the legal system and outside the relative expertise of decision-makers under the Act. Such questions warrant uniform and consistent answers that can ultimately only be provided by national courts. Moreover, given the serious impact of refugee protection decisions on the claimants' life, liberty and security of the person, tolerating divergent interpretations of basic human rights through reasonableness review is arbitrary and contrary to the rule of law. Accordingly, the potential for inconsistent interpretations must be resolved decisively through correctness review.

La jurisprudence de la Cour suprême du Canada en matière de contrôle judiciaire a été marquée par la prédominance du caractère raisonnable comme norme présumée quand il s'agit de statuer sur des décisions concernant l'interprétation et l'application par un tribunal administratif de sa propre loi. Dans la mesure où cette approche conduirait à l'examen du caractère raisonnable de l'interprétation par les décideurs administratifs de la portée et du sens des dispositions de la Loi sur l'immigration et la protection des réfugiés qui mettent en œuvre les droits fondamentaux de la personne conférés par les conventions internationales auxquelles le Canada est partie, elle doit être modifiée. L'interprétation de la portée de la Convention relative au statut des réfugiés et de la Convention contre la torture soulève des questions de droit d'une importance capitale pour le système juridique et ne relève pas de l'expertise relative des décideurs administratifs en vertu de la Loi. De telles questions justifient des réponses uniformes et cohérentes qui ne peuvent en fin de compte être fournies que par des juridictions nationales. De plus, étant donné les graves répercussions des décisions en matière d'asile sur la vie, la liberté et la sécurité des demandeurs d'asile, il est arbitraire et contraire à la primauté du droit de tolérer des interprétations divergentes des droits fondamentaux de la personne au moyen d'un contrôle du caractère raisonnable. Par conséquent, la possibilité d'interprétations incohérentes doit être résolue de façon décisive au moyen d'un examen de l'exactitude.

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Introduction

- I. *The standard of review analysis and judicial review of administrative interpretations of the Immigration and Refugee Protection Act*
 - II. *The case for correctness review*
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Introduction

Beginning in 2010 with the *Balanced Refugee Reform Act*¹ and culminating with the *Protecting Canada's Immigration System Act*² in 2012, Parliament engaged in a significant reform of Canada's immigration and refugee protection regime, which is the focus of this special issue.³ These legislative efforts were only the opening act in an ensuing legal drama in which refugee claimants and their advocates challenged the constitutionality of many of the new enactments before the courts.⁴ Far from the litigation spotlight, refugee protection decision-makers, including members of the Immigration and Refugee Board's (IRB) Refugee Protection Division (RPD) and Refugee Appeal Division (RAD), Pre-Removal Risk Assessment (PRRA) officers at Immigration, Refugees and Citizenship Canada and delegates of the Minister of Public Safety and

1. *An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act*, SC 2010, c 8 [*Balanced Refugee Reform Act*].

2. *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, SC 2012, c 17 [*Protecting Canada's Immigration System Act*].

3. Amendments to Canada's *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] relating to refugee protection included changes to the qualifications and manner of appointment for first instance refugee protection decision-makers in the Immigration and Refugee Board's (IRB) Refugee Protection Division (RPD), the creation of a Refugee Appeal Division (RAD) to hear appeals from RPD decisions, the tightening of timelines to accelerate the refugee protection process and the creation of new categories of refugee claimants (claimants from designated countries of origin deemed to be "safe" and "designated foreign nationals") that were subjected to refugee protection determination processes procedurally and substantially less favourable than those afforded to refugee claimants who did not fall within these categories: see, generally, Emily Bates, Jennifer Bond & David Wiseman, "Troubling Signs: Mapping Access to Justice in Canada as Refugee System Reform" (2015–16) 47 *Ottawa L Rev* 1 for a full description of reforms to Canada's Refugee Status Determination system.

4. See, e.g., *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892. The Federal Court decided that the provision denying an appeal before the RAD to protection claimants from designated countries of origin violated s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, Appendix II, No 44 [*Charter*].

Emergency Preparedness took up the task of interpreting and applying the new provisions of their home statute, the *Immigration and Refugee Protection Act*.

Around the time of these reforms, Canadian courts, including the Federal Court and Federal Court of Appeal, which are responsible for reviewing the decisions of federal administrative decision-makers under the *IRPA* and other federal statutes, were still coming to grips with an important shift in the evolution of Canada's approach to the judicial review of administrative action. In its 2008 decision in *Dunsmuir v. New Brunswick*,⁵ the Supreme Court of Canada had revisited the standard of review framework, under which reviewing courts seek to resolve the tension between their twin obligations: to uphold the rule of law by enforcing the legal limits of administrative decision-makers' statutory powers and to respect legislative supremacy by not interfering unduly "with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures."⁶ The most significant change arising from *Dunsmuir* was the emergence of reasonableness as the default standard of review, including for questions of statutory interpretation:

...[U]nless the situation is exceptional...the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.⁷

Whereas the Federal Court and Federal Court of Appeal once regularly reviewed decisions under the *IRPA* involving questions of statutory interpretation on the intrusive correctness standard, the "triumph of deference" heralded by *Dunsmuir* promised to place firmly in the hands of administrative decision-makers, including IRB members and PRRA officers, primary authority to decide the meaning and scope of the *IRPA*'s provisions.⁸ As important as the legislative reforms themselves, these

5. 2008 SCC 9 [*Dunsmuir*].

6. *Ibid* at para 27.

7. *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 34 [*Alberta Teachers' Association*].

8. The Federal Court of Appeal noted the shift from correctness to reasonableness review of interpretations of the *IRPA* in *JP v Canada (Public Safety and Emergency Preparedness)*, 2013 FCA 262 at para 74 (CA).

judicial reforms to the legal framework governing who gets to decide what the *IRPA* means are the focus of our contribution.

This article proceeds in four parts. Part I describes the current framework for determining the standard of review and demonstrates how the Supreme Court has severely constricted the application of correctness review by narrowly defining as exceptional those categories of questions that demand correctness review and by limiting resort to the analysis of contextual factors that could indicate that Parliament or the legislature intended correctness rather than reasonableness review. It briefly reviews recent jurisprudence on the standard applicable to the review of administrative decision-makers' interpretations of the provisions of the *IRPA*. While the Supreme Court has not yet expressly applied the correctness standard, it has on occasion engaged in an intrusive review of some interpretations of the *IRPA* that resembles correctness review. Part II discusses why, despite the ascendancy of reasonableness review in the Supreme Court's standard of review jurisprudence, correctness review still matters and remains appropriate in certain circumstances. In particular, it argues that correctness should be recognized as the applicable standard of review for decisions relating to the interpretation of those provisions of the *IRPA* that serve to implement basic human rights conferred in international conventions binding on Canada, including the *Convention Relating to the Status of Refugees*⁹ and the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.¹⁰ Though the article focuses on statutory interpretation in the refugee protection context, the arguments for correctness review apply with equal force to the interpretation of provisions in other statutes that define the scope of basic human rights, including the federal and provincial human rights codes. Part III explores the perils of applying a reasonableness standard to such questions, including the risk of divergent administrative interpretations of the scope of provisions of the *IRPA* that confer to refugee claimants basic human rights protection. Part IV explores statutory alternatives to the common-law approach to deciding the intensity with which courts review administrative decision-makers' interpretations of the *IRPA*. It asks whether Parliament should set down statutory standards of review for decisions under the *IRPA* and what such a scheme might look like.

9. *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954) [*Refugee Convention*].

10. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987) [*Convention Against Torture*].

We conclude that, to the extent that the Supreme Court's current approach to determining the standard of review would lead to the reasonableness review of the scope and meaning of provisions of the *IRPA* that serve to implement the basic human rights conferred in international conventions to which Canada is a party, this approach must be changed. The prospect of further reforms to the standard of review framework is far from hypothetical. In May 2018, the Supreme Court granted leave to appeal in three matters—two involving appeals from an order of the Canadian Radio-television and Telecommunications Commission¹¹ and a third involving judicial review of a decision of the Registrar of citizenship.¹² In doing so, it noted that the cases provided “an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir* (...) and subsequent cases” and invited the parties to address the question of standard of review in their submissions.¹³ After hearing oral submissions in December 2018 and receiving briefs from 27 interveners, amici curiae and the parties, the Court reserved judgment. We offer our views in this article in the hope that they may contribute to the Court's re-examination of the standard of review framework.

I. *The standard of review analysis and judicial review of administrative interpretations of the Immigration and Refugee Protection Act*

Canada's framework for judicial review seeks to reconcile the role of courts in upholding the rule of law by ensuring that administrative decision-makers do not overstep the jurisdictional bounds of their statutory authority with legislatures' intent to confer on these decision-makers the primary, if not exclusive, authority to decide certain questions. Before the Supreme Court's seminal decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*,¹⁴ reviewing courts subjected “questions that fall within a decision-maker's jurisdiction” to deferential review and “questions that affect its jurisdiction” to intrusive review. Unfortunately, these formalistic but highly manipulable categories did little to constrain creative advocates and judges who might be eager

11. *Bell Canada v Canada (Attorney General)*, 2017 FCA 249, leave to appeal to SCC granted, [2018] SCCA No 9.

12. *Canada (Citizenship and Immigration) v Vavilov*, 2017 FCA 132, leave to appeal to SCC granted, [2017] SCCA No 352.

13. *Ibid.*

14. [1979] 2 SCR 227, 97 DLR (3d) 417 [CUPE].

to overturn administrative decisions.¹⁵ For that reason, beginning in the 1980s, Canadian courts opted for a “pragmatic and functional” approach¹⁶ by which they selected one of three “standards of review” that governed the intensity with which they reviewed an administrative decision.¹⁷ “Correctness” review assumes a single right answer to the question under review. The reviewing court must undertake its own analysis of the question and, if it does not agree with the administrative decision-maker’s determination, substitute its own view and provide the correct answer.¹⁸ “Reasonableness simpliciter” required the court to assess whether the decision-maker’s reasons for a decision adequately supported the decision. “Patent unreasonableness” required the court to evaluate whether these reasons were marked by an obvious defect making the decision so clearly irrational that no amount of curial deference could justify letting it stand.¹⁹ In choosing the appropriate standard, reviewing courts sought to discern legislative intent keeping in mind their role in maintaining the rule of law and in a manner that paid more attention “to statutory purposes and structures and the sense they conveyed of the relevant tribunals’ expected areas of competence or expertise.”²⁰ As the Supreme Court stated in *CUPE v. Ontario (Ministry of Labour)*:

This “pragmatic and functional” approach to ascertain the legislative intent requires an assessment and balancing of relevant factors, including (1) whether the legislation that confers the power contains a privative cause; (2) the relative expertise as between the court and the statutory decision maker; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the question before the decision maker...The examination of these four factors, and the “weighing up” of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent.²¹

15. This classification approach was rejected by the Supreme Court as unhelpful, with Justice Dickson warning courts against branding as “jurisdictional, and therefore subject to broader curial review that which may be doubtfully so”: *CUPE, ibid.*, at 233. For a history of the development by Canadian courts of a deferential approach to the judicial review of administrative decisions, see Paul Daly, “The Struggle for Deference in Canada” in Hanna Wiberg & Mark Elliott, *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Oxford: Hart Publishing, 2015) 297.

16. This term was first coined by Justice Beetz in *Union des Employés de Service v Bibeault*, [1988] 2 SCR 1048 at 1088, 95 NR 161.

17. *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 24 [Ryan].

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

19. See generally *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 20 [Dr Q].

20. David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 63.

21. *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at para 149.

The pragmatic and functional approach was not without its problems. It provided “great flexibility but little real on-the-ground guidance” and offered “too many standards of review.”²² In *Dunsmuir*, the Court undertook to develop a “simpler test” that “offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise.”²³ Under its new approach, the Court collapsed the two deferential standards into a single reasonableness standard that recognized that some questions considered by administrative decision-makers may give rise to a number of acceptable and rational solutions. “Concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” but also “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law,”²⁴ reasonableness was defined as a single standard that took “its colour from the context.”²⁵ In practice, this has meant that requirements of process and the range of acceptable and rational solutions have varied with the circumstances, including the nature of the issue.²⁶ For example, under reasonableness review, the Supreme Court has more intensely scrutinized tribunals’ interpretation of their enabling statute, assessing whether sufficient attention is paid to the text, context and purpose of legislative provisions²⁷ as required by the modern approach to statutory interpretation.²⁸ By contrast, its reasonableness review of decision-makers’ exercise of broad discretionary powers with few legislative constraints²⁹ or involving matters of general policy and the weighing of facts³⁰ has been far less aggressive.

The framework for determining the applicable standard of review established in *Dunsmuir* and developed in subsequent decisions comprises several steps. First, the reviewing court surveys the jurisprudence to ascertain whether the standard has already been determined in a

22. *Dunsmuir*, *supra* note 5 at para 43.

23. *Ibid.*

24. *Ibid* at para 47.

25. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*].

26. *Catalyst Paper Corp v North Cowichan*, 2012 SCC 2 at paras 18 and 29 [*Catalyst*]; *Alberta Teachers’ Association*, *supra* note 7 at para 85, Binnie J.

27. *Canada (Human Rights Commission) v Canada (AG)*, 2011 SCC 53 at paras 32-33 [*Mowat*].

28. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.

29. See *Catalyst*, *supra* note 26 at para 18, which involved a municipality enacting a taxation by-law.

30. See *Khosa*, *supra* note 25 at para 60-67, which involved the decision of the Immigration Appeal Board that an individual had not shown “sufficient humanitarian and compassionate considerations” to warrant discretionary relief from a valid removal order.

satisfactory manner.³¹ If it has, the court applies that standard in reviewing the merits of the impugned decision. If not, *Dunsmuir* prescribed that, to identify the standard of review that appropriately balanced the rule of law and legislative supremacy, the court proceed to an analysis of contextual factors including the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the relative expertise of the tribunal.³² To simplify this analysis, the Court placed considerable emphasis on the nature of the question. Significantly, it affirmed reasonableness as the presumptive standard for the review of questions involving the tribunal's interpretation and application of its home statute or of a statute closely related to its function³³ but held that this presumption may be rebutted in two circumstances. First, a correctness standard applies where the nature of the question falls within one of four "correctness categories": (1) questions relating to the constitutional division of powers and other constitutional questions; (2) true questions of jurisdiction or *vires*; (3) questions regarding the jurisdictional lines between competing specialized tribunals; and (4) questions of law that are both of central importance to the legal system as a whole and outside the decision-maker's specialized area of expertise ["questions of law of central importance"].³⁴ Second, the presumption of reasonableness review is rebutted if the context indicates that the legislature intended correctness review³⁵ by, for example, including in the enabling statute an unusually-worded statutory appeal clause³⁶ or giving the administrative decision-maker and the courts concurrent jurisdiction in interpreting its enabling statute at first instance.³⁷

A clear trend in the Supreme Court's standard of review jurisprudence since *Dunsmuir* has been the ascendancy of reasonableness as the

31. *Dunsmuir*, *supra* note 5 at para 62; *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 20 [*Capilano*]; *Canada (Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 71, Rowe & Côté JJ [*CHRC*].

32. *Dunsmuir*, *supra* note 5 at paras 62, 64 and 68.

33. *Alberta Teachers' Association*, *supra* note 7 at para 30; *CHRC*, *supra* note 31 at para 27; *CHRC*, *supra* note 31 at para 73, Rowe & Côté JJ; *Dunsmuir*, *supra* note 5 at para 54, *Capilano*, *supra* note 31 at para 22. Questions of fact, discretion or policy or of intertwined legal and factual issues that cannot be easily separated also attract reasonableness review: *Dunsmuir*, *supra* note 5 at para 53. Where a tribunal has developed expertise in the application of a general common law or civil law rule in a specific statutory context, deferential review may also be warranted: *Dunsmuir*, *supra* note 5 at para 54.

34. *Dunsmuir*, *supra* note 5 at paras 58-61; *Capilano*, *supra* note 31 at para 24; *CHRC*, *supra* note 31 at para 28.

35. *Capilano*, *supra* note 31 at para 32.

36. *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 39 [*Tervita*].

37. *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at para 15 [*Rogers Communications*].

default or presumptive standard of review of administrative action and the concomitant contraction of the scope for correctness review. The presumption of reasonableness review of decisions taken under a decision-maker's home statute has gained such predominance within the categorical approach that it has been called a "black hole" whose "gravitational pull is so powerful that it threatens to swallow whole" the categories of correctness review.³⁸ Constitutional questions and questions regarding the jurisdictional lines between competing specialized tribunals are narrow categories by their very nature.³⁹ Describing true questions of jurisdiction or *vires* as "a narrow and exceptional category of correctness review,"⁴⁰ the Court has come to question their very existence.⁴¹ It has also "repeatedly rejected a liberal application"⁴² of the category of questions of law of central importance.⁴³ Such questions are reviewed for correctness because they require uniform and consistent answers⁴⁴ and because this safeguards a basic consistency in Canada's fundamental legal order.⁴⁵ To date, the category has only been successfully invoked on three occasions before the Supreme Court to justify correctness review of, respectively, the Alberta Information and Privacy Commissioner's decision on whether the *Freedom of Information and Protection of Privacy Act*⁴⁶ authorized the infringement of solicitor-client privilege,⁴⁷ the Québec Human Rights

38. Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 SCLR (2d) 233 at 235-236.

39. The category of constitutional questions extends to decisions involving the interpretation of the constitutional division of powers or challenges to the validity of statutory provisions under the *Canadian Charter of Rights and Freedoms*. Such pure questions of constitutional interpretation are reviewed on a correctness standard. In contrast, decisions that involve the exercise by administrative decision-makers of discretionary powers that engage *Charter* protections are reviewed for reasonableness and upheld if they proportionately balance limitations on *Charter* protections with the statutory objectives pursued by the decision-maker: *Doré v Barreau du Québec*, 2012 SCC 12; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

40. *CHRC*, *supra* note 31 at para 31.

41. *Alberta Teachers' Association*, *supra* note 7 at para 34; *CHRC*, *supra* note 31 at para 37.

42. *CHRC*, *supra* note 31 para 42.

43. *Dunsmuir*, *supra* note 5 at para 60.

44. *Ibid* at para 60.

45. *Ibid* at para 60; *Mowat*, *supra* note 27 at para 22; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 27 [*McLean*].

46. RSA 2000, c F-25.

47. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 [*University of Calgary*]. Because solicitor-client privilege was a legal privilege concerned with the protection of a relationship of central importance to the legal system as a whole that had acquired constitutional dimensions as a principle of fundamental justice and a part of a client's fundamental right to privacy, this question had potentially wide implications on other statutes. Moreover, there was nothing to suggest that the Commissioner had particular expertise with respect to solicitor-client privilege, an issue traditionally adjudicated by courts.

Tribunal's views on the scope of the state's duty of neutrality⁴⁸ flowing from the guarantees of freedom of conscience and religion in s. 3 of the *Québec Charter of human rights and freedoms*⁴⁹ and a labour arbitrator's conclusions on the existence and scope of parliamentary privilege in a labour dispute involving Québec's National Assembly.⁵⁰ As well as narrowly construing the correctness categories, a majority of the Court has confined the contextual analysis, once at the core of its standard of review framework, to a "subordinate role". To avoid uncertainty in identifying the applicable standard, it has applied it "sparingly" and in a summary fashion "in the exceptional cases" where it may be justified to rebut the presumption of reasonableness.⁵¹ Justice Abella has even mused about the elimination of correctness as a standard of review, opining that questions that once invited correctness review based on rule of law principles would on reasonableness review yield only one reasonable outcome.⁵²

What impact have these developments had on the standard of review applied to questions of law that arise in decision-making under the *IRPA*? In the decade following *Dunsmuir*, the Supreme Court decided six appeals that squarely raised this question. *Ezokola v. Canada (Citizenship and Immigration)*⁵³ and *Febles v. Canada (Citizenship and Immigration)*⁵⁴ concerned the interpretation by the RPD of Articles 1F(a) and 1F(b) of the *Refugee Convention*, incorporated through s. 98 of the *IRPA*. *B010 v. Canada (Citizenship and Immigration)*⁵⁵ and *Tran v. Canada (Public Safety and Emergency Preparedness)*⁵⁶ involved, respectively, the interpretation by the IRB's Immigration Division (ID) and by a delegate of the Minister of Public Safety and Emergency Preparedness of provisions of the *IRPA* that define the grounds on which permanent residents or foreign nationals may be found inadmissible to Canada. *Agraira v. Canada (Public Safety and Emergency Preparedness)*⁵⁷ concerned the decision of the Minister of Public Safety and Emergency Preparedness to refuse to exempt a non-

48. *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16. The Court held, at para 51, that "the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner were undeniable." While agreeing that the question was important, Justice Abella held at para 168 that, far from being "outside the adjudicator's specialized area of expertise", it was the Tribunal's "daily fare."

49. CQLR c C-12.

50. *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 at para 17.

51. *CHRC*, *supra* note 31 at para 46. See also *Capilano*, *supra* note 31 at para 35.

52. *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 36 [*Wilson*].

53. 2013 SCC 40 [*Ezokola*].

54. 2014 SCC 68 [*Febles*].

55. 2015 SCC 58 [*B010*].

56. 2017 SCC 50 [*Tran*].

57. 2013 SCC 36 [*Agraira*].

citizen from a finding of inadmissibility on security grounds. *Kanhasamy v. Canada (Citizenship and Immigration)*⁵⁸ dealt with the decision of an immigration officer refusing to grant a non-citizen a humanitarian and compassionate exemption from the statutory requirement to seek a visa from outside Canada. In *Ezokola* and *Febles*, the Court did not expressly mention the appropriate standard of review. In *B010* and *Tran*, the Court declined to determine the standard of review, finding that the impugned decision could not stand under either a reasonableness or correctness standard. In *Agraira* and *Kanhasamy*, the Court determined that a reasonableness standard applied. In all six cases, the Court arrived at its own view of the appropriate interpretation of the treaty or statute through its own analyses, effectively applying an intrusive review akin to correctness.⁵⁹

With little guidance from the Supreme Court after *Dunsmuir*, the Federal Court and Federal Court of Appeal struggled with the question of what standard of review to apply to decisions that interpreted ss. 96-98 of the *IRPA*, provisions that incorporate basic human rights protections conferred by the *Refugee Convention* and the *Convention Against Torture*. Some Federal Court judges applied a correctness standard on the ground that these provisions involved the interpretation of Canada's obligations under international treaties and were therefore matters of general law beyond the decision-makers' expertise.⁶⁰ Others conducted reasonableness review⁶¹ based on their view that the presumption of reasonableness review had not been rebutted.⁶² The Federal Court of Appeal also adopted different views on this question. Applying *Dunsmuir* in *Ezokola* and *Febles*, the Federal Court of Appeal determined that the appropriate standard of review for the RPD's interpretation of the scope of Article 1F(a) and (b) of the *Refugee Convention* was correctness.⁶³ Writing the majority judgment in *Febles*, Justice Evans noted that while Article 1F(b) was incorporated into s. 98 of the *IRPA*, the presumption of reasonableness review that applies to a

58. 2015 SCC 61 [*Kanhasamy*].

59. For a similar assessment of *Kanhasamy*, *Febles*, *B010* and *Ezokola*, see *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 132 at para 37, Stratas JA.

60. See, for example, *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paras 26-27 [*Portillo*].

61. See *Canada (Minister of Citizenship and Immigration) v B380*, 2012 FC 1334.

62. For a discussion of the conflicting decisions, see *Portillo*, *supra* note 60 at paras 19-26 and *Canada (Minister of Citizenship and Immigration) v B472*, 2013 FC 151 at paras 11-22.

63. Articles 1F(a) and (b) exclude from refugee protection under the *Refugee Convention* any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; and (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

tribunal's interpretation of its home statute was rebutted. Article 1F(b) was "a provision of an international Convention that should be interpreted as uniformly as possible" and correctness review was "more likely than reasonableness review to achieve this goal."⁶⁴ However, in *B010*, the Federal Court of Appeal determined that the ID's interpretation of a provision of the *IRPA* providing for the inadmissibility to Canada of non-citizens engaging, in the context of transnational crime, in activity such as "people smuggling, trafficking in persons or money laundering" was reviewable on a reasonableness standard.⁶⁵ It held that the presumption of reasonableness review for a tribunal interpreting its home statute was not rebutted by any of the correctness categories from *Dunsmuir*. While the question may have been important, it was not outside the ID's specialized area of expertise.⁶⁶ The Court of Appeal distinguished its finding in *Febles* that a correctness standard would ensure the uniform interpretation of international conventions because *B010* focused on the interpretation of a statutory provision and because the uniformity concerns in *Febles* did not apply since the relevant international instruments left to states the implementation of their objectives.⁶⁷ This reason for distinguishing *Febles* is, with respect, unconvincing. In its decision in *B010*, the Supreme Court noted that the refugee protection aspects of the *IRPA* served to discharge Canada's obligations under the *Refugee Convention* and the *Smuggling Protocol*.⁶⁸ Applying both the common law interpretive presumption that legislation conforms with Canada's international obligations and the analogous statutory interpretive presumption set out in s. 3(3)(f) of the *IRPA*, the Court gave these international obligations a meaning that played a determining role in its interpretation of the inadmissibility provision. Thus, the case for correctness review of the interpretation of statutory provisions that serve to implement an international convention is as compelling as that for the interpretation of the convention itself. In any event, the Court of Appeal reasoned, the application of a reasonableness standard would not lead to conflicting interpretations because the range of possible, acceptable outcomes on a reasonableness review of the

64. *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324 at para 24 [*Febles FCA*]. See also *Feimi v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325.

65. *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 [*B010 FCA*].

66. *Ibid* at paras 63-70.

67. *Ibid* at para 71.

68. *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004). The Supreme Court noted in *B010*, *supra* note 55, at para 53 that the *Smuggling Protocol* was drafted with a view to the need of states parties to meet their obligations under the *Refugee Convention*.

ID's interpretation of the *IRPA* could be narrow.⁶⁹ In *Majebi v. Canada (Minister of Citizenship and Immigration)*, contrary to its holding in *Febles* and without advertent to the distinction it drew in *B010*, the Court of Appeal upheld the Federal Court's view that the RAD's interpretation of art 1E of the Refugee Convention should be reviewed on a reasonableness standard.⁷⁰ After noting the different opinions in *Febles* and *B010* regarding the standard of review applicable to questions of statutory interpretation involving a consideration of international instruments,⁷¹ the Federal Court decided that the presumption of reasonableness review was not displaced—a conclusion with which the Court of Appeal agreed.⁷²

In sum, the Federal Court and Federal Court of Appeal are now reviewing decisions involving administrative decision-makers' interpretation of provisions of the *IRPA* that implement the basic human rights conferred by international conventions on a reasonableness standard because in their view, the presumption of reasonableness review of these decision-makers' interpretations of their home statute has not been rebutted. While it has intrusively reviewed such questions in the decade since *Dunsmuir*, the Supreme Court has not yet expressly confirmed what standard of review applies. In Part II of this article, we discuss why the correctness review of administrative decisions involving certain categories of questions of law is justified. Focusing on the refugee protection context, we argue that administrative interpretations of provisions of the *IRPA* that serve to implement human rights conferred by international conventions, including fundamental rights to life, liberty,⁷³ security of the person and freedom from persecution, must be reviewed for correctness. We then demonstrate that, consistent with the approach we are advocating, the Supreme Court

69. *B010 FCA*, *supra* note 65 at para 72. The Court of Appeal reiterated this view in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 10, [2016] 1 FCR 428 [*Kanagendren*]. The parties disagreed on the standard applicable to a review of the ID's interpretation of the term "member" in s. 34(1)(f) of the *IRPA*, a section that parallels art 1F(a) of the *Refugee Convention* and that designates as inadmissible on security grounds permanent residents or foreign nationals who are members of an organization that engages in terrorism. The Court of Appeal held that nothing turned on the standard of review because, based on the required textual, contextual and purposive analysis, there was only a single reasonable interpretation of the term member.

70. 2016 FCA 274 [*Majebi*], leave to appeal to SCC refused.

71. *Majebi v Canada (Minister of Citizenship and Immigration)*, 2016 FC 14 at para 21. This was also noted by the Supreme Court of Canada in *B010*, *supra* note 55 at para 24.

72. *Ibid* at para 22. But see *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 300 at para 11, where the Federal Court of Appeal did not dismiss out of hand the argument that correctness review of a decision of the RPD was required where issues of international law were involved. It held instead that international law did not bear on the issue for review—the interpretation of the RPD's power, under s. 107(2) of the *IRPA*, to determine that there was no credible basis for a refugee claim.

73. Including fundamental freedoms such as the freedom of expression and belief.

has in fact conducted an intrusive review of such interpretations both before and, arguably, after *Dunsmuir*.

II. *The case for correctness review*

Thousands of administrative decisions are rendered in Canada each year. When the courts are called upon to review these decisions on their merits, the driving ethos that governs their review process is deference to administrative decision-makers. This applies to a wide variety of questions including pure questions of law. Courts presume that decision-makers have the requisite expertise to interpret their enabling statutes or those closely related to their mandate or subject-matter expertise. Yet, the Supreme Court has carved out specific types of questions of law that demand a non-deferential approach on judicial review. With respect to these questions, courts determine whether an administrative decision-maker's determinations are correct. If the reviewing court disagrees with a decision-maker's decision on a question of law, the correctness standard permits the court to replace the "erroneous" interpretation with its own. As noted in Part I, the Supreme Court has explicitly designated four categories of questions of law that mandate a correctness standard. The first category includes constitutional questions regarding the division of powers and other constitutional issues. A second category concerns questions of law that are both of central importance to the legal system as a whole and that are outside the expertise of the administrative decision-maker. The third category focuses on true questions of jurisdiction or *vires*. The last category relates to questions of law regarding the jurisdictional lines between competing specialized tribunals.

Canadian jurists have clearly articulated the sound reasons that justify correctness review of such significant questions of law. Correctness review of administrative decisions dealing with questions of constitutional law, including those involving the division of powers set out in the *Constitution Act, 1867*, is justified primarily by the constitutional role of Canada's superior courts as interpreters of the Constitution.⁷⁴ Correctness review of true questions of jurisdiction or *vires* also has a constitutional source. The judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867* guarantee judicial review of administrative action with regard to "the

74. *Dunsmuir*, *supra* note 5 at para 58.

definition and enforcement of jurisdictional limits” in order to maintain the rule of law.⁷⁵

Another reason for correctness review is the need for consistency and certainty in the interpretation of statutes. This need is particularly pressing where different decision-makers sitting on different panels within an administrative agency arrive at divergent interpretations of the statute they administer.⁷⁶ A failure to ensure consistency leads to uncertainty, may offend the rule of law by allowing the meaning of a law to depend on the identity of the particular decision-maker and can erode public confidence in the administration of justice.⁷⁷ The need for consistency also engages reviewing courts’ law-making (or law-settling) role to provide definitive and binding conclusions about the meaning and scope of important legal rights, provisions or principles.⁷⁸ Correctness, in this context, functions to safeguard “a basic consistency in the fundamental legal order of our country.”⁷⁹ Questions of law that are both of central importance to the legal system as a whole and outside the expertise of the administrative decision-maker are significant matters that require consistent interpretation. While various questions could arguably qualify as questions of law of central importance,⁸⁰ our claim in this article is that questions of law relating to the scope of basic human rights guarantees conferred by domestic human rights codes or international human rights conventions implemented by domestic laws should be included in this category. Indeed, given its broad application in the legal system and its primacy over other laws, human rights legislation has been designated by the Supreme Court on numerous occasions as being quasi-constitutional in nature,⁸¹ a source of “fundamental law.”⁸²

75. *Ibid* at para 31; *Crevier v Attorney General of Quebec*, [1981] 2 SCR 220 at 237-38, 127 DLR (3d) 1. But see *Alberta Teachers’ Association*, *supra* note 7 at para 43, where Rothstein J notes that the constitutional guarantee of judicial review with regard to the definition and enforcement of jurisdictional limits does not necessarily mandate correctness review.

76. See, e.g., *Starson v Swayze*, 2003 SCC 32 at para 110

77. *Housen v Nikolaisen*, 2002 SCC 33 at para 9.

78. *Ibid*.

79. *Mowat*, *supra* note 27 at para 22.

80. Though as discussed at 9-10 above, the number of cases in which the Supreme Court has identified such questions since *Dunsmuir* appears rather limited.

81. *Québec (Commission des normes, de l’équité, de la santé et de la sécurité du travail) v Caron*, 2018 SCC 3 at paras 32-34; *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 at para 17; *New Brunswick (Human Rights Commission) v Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 at para 19; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*; *Québec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27 at para 27.

82. *Québec (Commission des droits de la personne et des droits de la jeunesse) v Communauté urbaine de Montréal*, 2004 SCC 30 at para 20.

We argue that a non-deferential approach to judicial review is required for questions of law arising from administrative decision-makers' interpretation of statutory provisions that serve to implement human rights conferred in international conventions that bind Canada. In the refugee protection context, these include administrative decisions that require, for example, the interpretation of what constitutes persecution, the scope or meaning of one of the grounds for persecution, or the exclusion clauses prescribed in the *Refugee Convention* and incorporated into Canadian law through sections 96 to 98 of the *IRPA*. Section 96 incorporates article 1A(2) of the *Refugee Convention* which defines who qualifies as a refugee.⁸³ Section 98 incorporates article 1F of the *Refugee Convention* and sets out who is excluded from refugee status by virtue of their commission of certain criminal activity. As recognized by the Supreme Court of Canada, such protections are at the core of the purposes underlying the *Refugee Convention*: the international community's commitment "to the assurance of basic human rights without discrimination."⁸⁴ In addition, section 97 of the *IRPA* incorporates, explicitly, protections arising from the *Convention Against Torture*. Seen holistically, such provisions are basic or fundamental in the sense that by failing to afford to protection claimants the full measure of protection guaranteed by the terms of these instruments, Canada would expose them to treatment that threatens their life, liberty and security of the person. Given the serious implications of the erroneous interpretation of statutory provisions that implement these international human rights guarantees, there is a compelling argument that such questions are of central importance to the legal system as a whole and that courts be responsible for establishing their correct interpretation. These provisions are of central importance because they implement human rights obligations that are binding on Canada at international law. As further developed below, Courts must ensure their consistent interpretation,

83. Questions of law connected to the definition of who qualifies as a refugee include defining the scope of key terms and concepts arising explicitly or implicitly from art 1A(2) and s. 96, such as persecution, state protection, internal flight alternatives, as well the enumerated grounds of persecution—namely race, religion, nationality, membership in a particular social group and political opinion. For example, as discussed below, the Supreme Court of Canada provided definitions for "political opinion" and "membership in a particular social group" in *Canada (AG) v Ward*, [1993] 2 SCR 689 at 739, 746-747, 103 DLR (4th) 1. The Court in *Ward* also discussed at length the concept of persecution and the notion of state complicity. See *ibid* at 709-726. It is worth noting that the definitions that the Supreme Court formulates can give rise to different interpretations by lower courts and administrative decision-makers requiring clarification from the Supreme Court or the Federal Court of Appeal. See, e.g., *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327, 179 FTR 253.

84. *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 46, 160 DLR (4th) 193 [*Pushpanathan*].

particularly where several different administrative decision-makers share responsibility for their interpretation at first instance.

Questions of law of central importance, as noted by the Supreme Court, require uniform and consistent answers. In the refugee protection context, such answers are provided by national courts, which play a key role in ensuring the domestic application of the provisions of the *Refugee Convention* and other international legal instruments protecting human rights. As Geoff Gilbert observes, while the Convention is international, its implementation occurs at the domestic level.⁸⁵ “There is no International Refugee Court or Tribunal to oversee treaty implementation. This means that protection of refugees through the 1951 Convention is dependent on domestic legislation and national judges.”⁸⁶ Analogously, with regards to the domestic application of the *International Covenant on Social, Economic and Cultural Rights*, the Committee on Economic, Social and Cultural Rights has stated:

Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the state’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.⁸⁷

The correctness standard is an essential tool for courts to properly discharge these responsibilities. By contrast, reasonableness is a deferential standard animated by the principle that “certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.”⁸⁸ Reasonableness review of the interpretation of statutory provisions that implement basic international human rights thus sits uncomfortably with these norms’ proclaimed universality. Justice John Evans, writing for a majority of the Federal Court of Appeal, recognized in *Febles v. Canada* that while art 1F(b) of the *Refugee Convention* was incorporated into s. 98 of the *IRPA*, the RPD’s home statute, the presumption of reasonableness was rebutted because it remained “a provision of an international Convention

85. Geoff Gilbert, “Running Scared Since 9/11: Refugees, UNHCR and the Purposive Approach to Treaty Interpretation” in James C Simeon, ed, *Critical Issues in International Refugee Law: Strategies Toward Interpretive Harmony* (New York: Cambridge University Press, 2010) at 93.

86. *Ibid.*

87. *General Comment No. 9: The domestic application of the Charter*, UNCESCROR, 1998, E/ C12/1998/24.

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

that should be interpreted as uniformly as possible” and correctness review was “more likely than reasonableness review to achieve this goal.”⁸⁹

The national courts of other countries have acknowledged that they are responsible for settling the meaning of the provisions of certain international human rights treaties. In *R v. Secretary of State for the Home Department, ex parte Adan*; *R v. Secretary of State for the Home Department, ex parte Aitseguer*,⁹⁰ a statutory provision allowed the UK’s Secretary of State to send an asylum seeker to a third country provided that he certified, *inter alia*, that in his opinion the government of that third country would not send the asylum seeker to another country “otherwise than in accordance with” the *Refugee Convention*. The Secretary of State claimed that to comply with that provision, it was sufficient for third countries (in this case, Germany and France) to adopt an interpretation of the *Convention* that was, in his view, “reasonably open” to those countries. Unlike most contracting states to the *Refugee Convention*, including the UK, Germany and France limited “persecution” to conduct attributable to the state. The House of Lords was asked to consider whether there was “a true and international meaning” of art 1A(2) of the *Refugee Convention* or “simply a range of interpretations some of which the Secretary of State may be entitled to regard as legitimate and others not.”⁹¹ Lord Steyn, whose views were accepted by a majority of the House of Lords, held that:

...[A]s in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in arts 31 and 32 [of the Vienna Convention on the Interpretation of Treaties] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: art 38 [of the Refugee Convention]. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. *And there can only be one true meaning.*⁹²

Because there can be only one true interpretation of the scope of the protection that is conferred by the *Refugee Convention* and other

89. *Febles FCA*, *supra* note 64 at para 24.

90. [2000] UKHL 67, [2001] 2 AC 477 [*Ex parte Adan* citing to *AC*].

91. *Ibid* at 515, Lord Steyn.

92. *Ibid* at 516-517, Lord Steyn [emphasis added].

international conventions implemented in key provisions of the *IRPA*, absent a binding interpretation by a competent international tribunal, it is the role of the Federal Court of Appeal and, ultimately, the Supreme Court of Canada, to provide that interpretation in judgments that bind administrative decision-makers under the *IRPA*.

The imperative of giving a uniform and consistent meaning to provisions of the *IRPA* that implement basic human rights conferred in international conventions makes their interpretation a question of law of central importance to the legal system. However, this imperative does not flow solely from the source of these provisions in conventional international law. The *IRPA* is interpreted and applied by several administrative decision-makers, including the IRB's RPD and RAD and PRRA officers working within Immigration, Refugees and Citizenship Canada. Divergent lines of authority regarding basic elements of the *Refugee Convention* have arisen⁹³ and the creation of the RAD has not resolved this problem by ensuring their consistent interpretation.⁹⁴ Moreover, no formal mechanism exists to ensure that PRRA officers follow an interpretation of the provisions at issue that is consistent with that followed by the RPD members and RAD panels. Accordingly, the answer to questions key to establishing the scope of protection under the *Refugee Convention*, such as how state protection must be assessed, may ultimately depend on the identity of the adjudicator. Under the rule of law, one of the twin pillars that underlie our law of judicial review, the meaning of a law should not differ depending on the identity of the decision-maker.⁹⁵ While the Supreme Court has often repeated that conflicting lines of authority do not, on their own, warrant correctness review, it has done so in decisions involving pipeline arbitrations,⁹⁶ unjust dismissal adjudications,⁹⁷ whether a minister can be represented by non-lawyers before a specific tribunal⁹⁸ and the availability of an income

93. See Jamie Chai Yun Liew, "Creating Higher Burdens: The Presumption of State Protection in Democratic Countries" (2009) 26:2 *Refugee* 207.

94. See Jamie Chai Yun Liew, "Denying Refugee Protection to LGBTQ and Marginalized Persons: A Retrospective Look at State Protection in Canadian Refugee Law" (2017) 29 *CJWL* 290. While the *IRPA*, *supra* note 3, s 171(c) confers on decisions of three-member panels of the RAD the same precedential value for the RPD or one-member RAD panels as a decision of an appeal court has for a trial court, divergences have continued: see *Minister of Citizenship and Immigration v Vavilov*, [2017] SCCA No 352 (Factum of the Intervener Canadian Council for Refugees) at paras 7-14, online: <https://www.scc-csc.ca/Web/Documents-DocumentsWeb/37748/FM110_Intervener_Canadian-Council-for-Refugees.pdf>.

95. *Wilson*, *supra* note 52 at paras 84-87, Moldaver, Côté and Brown JJ; *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628 at para 67; *CHRC*, *supra* note 31 at paras 86-87, Rowe and Côté JJ.

96. *Smith v Alliance Pipeline*, 2011 SCC 160 at para 38.

97. *Wilson*, *supra* note 52 at para 17.

98. *Barreau du Québec v Québec (AG)*, 2017 SCC 56 at para 19.

replacement indemnity for disabled workers during a plant closure.⁹⁹ The interests at stake in such decisions are fundamentally different than those present in the refugee protection context. Where different decision-makers adopt different interpretations of the scope of refugee protection under the *IRPA*, one refugee claimant may receive refugee protection while another presenting an identical claim may be refused protection and returned to his or her country of origin to face persecution, torture and possibly death. Given the momentous impact of refugee protection decisions on the life, liberty and security of the person of protection claimants, the existence of divergent interpretations of these key provisions is arbitrary and antithetical to the rule of law, which demands that the inconsistencies be immediately resolved through correctness review. In this context, it is impermissible that administrative decision-makers be allowed to “work inconsistencies pure” over time¹⁰⁰ and in so doing, put protection claimants’ lives at risk. Moreover, Parliament’s provision, in section 74(d) of the *IRPA*, of an exceptional appeal to the Federal Court of Appeal on questions certified as serious and of general importance is an objective indicator that there are questions of statutory interpretation for which judicial intervention on a correctness standard is justified.¹⁰¹

To warrant correctness review, the interpretation of a statutory provision must, in addition to being a question of general law of central importance to the legal system as a whole, fall outside the specialized expertise of the decision-maker.¹⁰² On numerous occasions, the Supreme Court has identified the notion of expertise as a relative concept.¹⁰³ A deferential approach to the review of an administrative decision is

99. *Domtar Inc v Quebec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 SCR 756, 105 DLR (4th) 385.

100. Paul Daly, “The Principle of Stare decisis in Canadian Administrative Law” (2015) 49:3 RJTUM 757 at 775-777 [Daly].

101. *Ibid* at para 38, citing *Kanthisamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 35.

102. See *University of Calgary*, *supra* note 47 at para 20.

103. See *Dr. Q*, *supra* note 19, where the Court stated, at para 28, that relative expertise recognizes “that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise”; *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554 at 584-585, 100 DLR (4th) 658 [Mossop]; *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 592, 114 DLR (4th) 385; *Pushpanathan*, *supra* note 84 at para 33-34; *Dunsmuir*, *supra* note 5 at para 68; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at paras 42 and 53; *Rogers Communications*, *supra* note 37 at para 15; *Capilano*, *supra* note 31 at paras 66, 84-86, Côté and Brown JJ dissenting; *University of Calgary*, *supra* note 47 at paras 20 and 22.

indicated only when the decision-maker has greater or “special” expertise relative to the reviewing court with respect to the particular issue before it.¹⁰⁴ Is the scope of the protections conferred in sections 96-98 of the *IRPA* a question of law that falls outside the relative expertise of the various federal decision-makers charged with interpreting these provisions? The *IRPA* provides that only 10% of members of the RAD need to be members of at least five years standing of the bar of a province and does not impose similar requirements for members of the RPD tasked with deciding refugee protection claims at first instance.¹⁰⁵ Parliament has thus made it clear that the majority of decision-makers do not need to possess formal legal education and be a member of the bar. Similarly, other federal employees responsible for interpreting and applying provisions of the *IRPA*, including officers in the Canada Border Services Agency (under the supervision of the Minister of Public Safety and Emergency Preparedness),¹⁰⁶ officers within Immigration, Refugees and Citizenship Canada (under the supervision of the Minister of Immigration, Refugees and Citizenship), as well as embassy/consular officials (under the authority of the Minister of Foreign Affairs) are not statutorily required to be experienced lawyers or notaries.¹⁰⁷ Where questions of law concern the scope of fundamental human rights protections that impact refugee claimants’ right to life, liberty and security of the person, it is doubtful that these various officials have, relatively, more expertise than those of the courts in interpreting key *IRPA* provisions and the international conventions they implement. While there are sound reasons to presume that administrative decision-makers have expertise in the interpretation of their enabling legislation or closely related statutes, this presumption is rebutted here. By expressly providing that most members of the RAD, the refugee protection tribunal with the greatest claim to expertise, need not be experienced lawyers or notaries, Parliament has clearly signalled that at an institutional level, it is not relying on that tribunal to expertly and definitively interpret the scope

104. See Gerald Heckman, “Developments in Administrative Law: The 2014–2015 Term” (2016) 72 SCLR (2d) 1 at 35-36.

105. Or at least five years standing at the *Chambres des notaires du Québec*. See *IRPA*, *supra* note 3, s 153(4).

106. The Minister of Public Safety and Emergency Preparedness is responsible for several aspects of *IRPA* including examinations at ports of entry and acts of enforcement including arrest, detention and removal. *IRPA*, *supra* note 3, s 4(2).

107. Canadian visa offices operating abroad process applications for refugee status and permanent residence. Refugee applicants outside of Canada may apply for refugee status and permanent status if they have been referred by the United Nations High Commissioner for Refugees, a designated referral organization or a private sponsorship group. See <<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-outside-canada.html>>.

of basic human rights guarantees defined in an international convention.¹⁰⁸ Indeed, as noted below, Parliament's choice to retain this feature of the *Immigration Act* when it enacted the *IRPA*, while fully cognizant of the Supreme Court's earlier finding, in *Pushpanathan v. Canada*, that it attracted correctness review for such questions, strongly supports the inference that it intended correctness review.

As noted in Part I, the Supreme Court has narrowly defined the correctness category of questions of law of central importance. The interpretation of sections 96-98 of the *IRPA* is specific to the regime set out under that statute and, having arguably no precedential value outside of that context, could be held not to be a question of law of central importance to the legal system. Moreover, by analogy to Justice Abella's reasons in *Saguenay*, it could be said that the interpretation of these key provisions is the "daily fare" of RPD and RAD members as well as PRRA officers and does not fall outside of their specialized expertise. If the Court were to exclude the only potentially relevant correctness category through such reasoning, it would still be possible to argue that the presumption of reasonableness review for decisions involving the interpretation of these provisions is rebutted by a contextual analysis. While a majority of the Court has sought to confine it to a subordinate role, to be applied sparingly in exceptional cases, a contextual analysis strongly supports correctness review in this context. In *Pushpanathan*, a pre-*Dunsmuir* decision, the Supreme Court applied a contextual analysis and expressly adopted correctness as the applicable standard of review. The case concerned the scope of article 1F(c) of the *Refugee Convention*, which excludes from refugee protection persons with respect to whom there are serious reasons for considering that they have been guilty of "acts contrary to the purposes and principles of the United Nations."

As part of its full contextual analysis of the appropriate standard of review, the majority considered the nature of the question, the relative expertise of the IRB's Convention Refugee Determination Division, the purpose of the *Refugee Convention* and of article 1F(c) and the statutory mechanism of review. First, the majority's characterization of the nature of the question was key to its adoption of a correctness standard. The scope of the exclusion clause was a question at the core of the human rights purpose underlying the *Refugee Convention*: the international community's commitment to the assurance of basic human rights without discrimination.¹⁰⁹ Because it could result in the disqualification of

108. *Pushpanathan*, *supra* note 84 at para 57.

109. *Ibid.*, at para 46.

many refugee claimants from protection under the *Refugee Convention*, the question was (and had been certified as such by the Federal Court) a serious question of general importance, which could have applied to numerous future cases and been of great precedential value. Second, on the question of the scope of protection under the *Refugee Convention*, the Immigration and Refugee Board enjoyed no relative expertise compared to reviewing courts since only 10% of Board members were required to be lawyers and there was no requirement that there be a lawyer on every panel.¹¹⁰ It was thus unthinkable to repose “the broad definition of basic human rights guarantees,” a question easily separable from the facts and of wide precedential value, exclusively in the hands of a Board whose expertise lay mainly in assessing the nature of the risk of persecution faced by refugee claimants if returned to their country of origin.¹¹¹ The Court further observed that the Board’s expertise in connection with human rights was far less developed relative to that of the courts (or even human rights tribunals).¹¹² Third, the Court determined that the purpose of the *Refugee Convention* and its exclusion clauses was to confer minimum human rights protection. Far from engaging in the polycentric decision-making that attracted judicial deference, the Board’s adjudicative function sought to vindicate a set of relatively static human rights and ensure the protection of those who fell within the prescribed categories.¹¹³ Finally, Parliament’s intent, as revealed in its decision to provide in s. 83(1) of the *Immigration Act*¹¹⁴ (now s. 74(d) of the *IRPA*) an “exceptional appeal” to the Federal Court of Appeal on serious questions of general importance, was that the reviewing court be permitted to substitute its own opinion for that of the IRB.¹¹⁵ Recently writing for a majority of the Supreme Court in *Kanthisamy*,¹¹⁶ Justice Abella held that certified questions were “not decisive” of the standard of review and that the fact that the reviewing judge considered the question to be of general importance was “relevant, but not determinative.” This may be so, but the statutory provision at issue in *Kanthisamy*—a broad ministerial discretion to exempt a foreign national from the ordinary requirements of the *IRPA* on humanitarian and compassionate grounds—is very different from sections 96-98. As

110. *Immigration Act*, RSC, 1985, c 1-2, s 61(2) [*Immigration Act*], now *IRPA*, *supra* note 3, s 153(4).

111. *Pushpanathan*, *supra* note 84 at para 47.

112. *Ibid* at paras 45-47.

113. *Ibid* at para 48.

114. *Immigration Act*, *supra* note 110. Section 83(1) provided that an appeal to the Court of Appeal was available where the Federal Court of Canada judge hearing the judicial review application had certified that a serious question of general importance was involved and stated the question.

115. *Pushpanathan*, *supra* note 84 at para 43.

116. *Kanthisamy*, *supra* note 58 at para 44.

indicated in *Pushpanathan*, where the decision under review involves the interpretation of statutory provisions implementing core aspects of the *Refugee Convention* that define basic human rights guarantees against refoulement to persecution, Parliament's provision of an exceptional appeal to the Federal Court of Appeal should be read as strongly indicating its intention that the decision be reviewed on a correctness basis.¹¹⁷

Several other Supreme Court decisions strongly support the use of a correctness standard of review for decisions involving broad questions of law in the refugee law context. In these, the Court effectively conducted correctness review even though no standard was expressly identified.¹¹⁸ Five years before *Pushpanathan*, in its 1993 decision in *Canada (Attorney General) v. Ward*, the Supreme Court provided, among other things, an interpretation of the concept of a "well-founded fear of persecution," the notions of state protection and complicity, as well as key definitions for "political opinion" and "membership in a particular social group," grounds for persecution included in the *Refugee Convention's* definition of a refugee and incorporated into the *Immigration Act*.¹¹⁹ The issue of whether the asylum seeker's conduct manifested a political opinion was raised for the first time before the Supreme Court; it was not raised before the IRB or lower courts.¹²⁰ The Court reviewed several definitions articulated by several prominent refugee law jurists. After settling on the definition posited by Guy S. Goodwin-Gill, the Court made two further refinements of its own. Although the Court did not engage in a standard of review analysis or explicitly identify a standard of review, the manner in which

117. With respect, Justice Abella's view unduly discounts how strongly the *IRPA's* provision of an exceptional appeal supports an inference that Parliament recognized that correctness review would be appropriate for certain questions. In contrast, the four dissenting judges in *Capilano*, *supra* note 31, gave due weight to appeal provisions of this nature. Section 470 of the *Municipal Government Act*, RSA 2000, c M-26 granted a statutory right of appeal with leave to the Court of Queen's Bench on a "question of law or jurisdiction" where a judge "is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance to merit an appeal and has a reasonable chance of success." The dissenting judges read this as a signal by the Legislature of its intention that important questions of law and jurisdiction that transcend the particular context of a disputed assessment and have broader implications for the municipal assessment regime be treated differently than other questions and reviewed for correctness. Noting that s. 470 was similar to the appeal provisions under the *IRPA*, the dissent endorsed Justice Bastarache's reasoning, in *Pushpanathan*, that the exceptional appeal to the Federal Court of Appeal on questions of general importance indicated Parliament's intention that a review of such questions be conducted on a correctness standard. Their reasoning on this point has been endorsed by leading academic observers: see David Mullan, "Recent Developments in Administrative Law—2015–16" in *Continuing Legal Education Society of British Columbia, Administrative Law Conference 2016 Course Materials*, at 26. See also Daly, *supra* note 100 at 775.

118. *Pushpanathan*, *supra* note 84.

119. *Ward*, *supra* note 83 at 709-717, 721-726; 726-750.

120. *Ibid* at 745-746.

the *Ward* Court formulated the definitions of these grounds for persecution strongly suggests the application of a correctness standard.

Since *Dunsmuir*, the Court has approached similar exercises in statutory interpretation in the refugee protection context as it did in *Ward* and *Pushpanathan*. In *Ezokola*, the Court formulated a new legal test with respect to determining an individual's complicity in the commission of crimes against peace, war crimes or crimes against humanity for the purposes of Article 1F(a) of the *Refugee Convention* and s. 98 of the *IRPA*.¹²¹ Notably, the Court articulated its function on judicial review as follows: "The task for this Court is to determine what test for complicity will be applied by the art. 1F(a) decision maker."¹²² It was *not* assessing whether the IRB's interpretation of art. 1F(a) was reasonable, but asserting its responsibility to determine the test for complicity. The *Ezokola* Court went on to articulate the proper test by examining the purposes of the *Refugee Convention* and art. 1F(a), the role of the IRB, the international law to which art. 1F(a) expressly refers, the approach to complicity under art. 1F(a) taken by other state parties to the *Refugee Convention* and the extensive international criminal jurisprudence.¹²³ As in *Ward*, the Court in *Ezokola* did not conduct a standard of review analysis or explicitly articulate the applicable standard of review. Rather, it undertook its own legal analysis of the legal question—the very definition of correctness review.¹²⁴ As it did in *Ward* and *Pushpanathan*, the Court exercised its law-making role rather than determining whether the legal definitions arrived at by the administrative decision-makers were reasonable. Put another way, by clearly identifying what the law was, the Court conducted a correctness review.

The Supreme Court of Canada next engaged in a very similar implied "correctness" review in *Febles v. Canada*. As in *Ezokola*, the majority in *Febles* abstained from addressing the appropriate standard of review for the question of law before the Court. *Febles* involved the interpretation of article 1F(b) of the *Refugee Convention*, which excludes persons from eligibility for refugee protection where there are serious reasons for considering that such individuals have committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee. In arriving at its conclusion, the Court undertook a textual analysis of Article 1F(b), an examination of the context (including

121. *Ezokola*, *supra* note 53.

122. *Ibid* at para 28.

123. *Ibid* at para 30.

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

Canadian and foreign case law and the travaux préparatoires to the *Refugee Convention*), and an evaluation of the object and purpose of the *Refugee Convention* as a whole and specifically of article 1F(b). The Court agreed with the IRB's interpretation of the provision as well as the Federal Court of Canada's and Court of Appeals' opinions. Its agreement with the IRB's interpretation of article 1F(b) does not signal reasonableness review. A reviewing court that undertakes its own analysis of a question of interpretation on correctness review may well come to the same result as that of the administrative decision-maker in the first instance. Indeed, in *Febles*, the Federal Court of Appeal, which expressly applied a correctness standard of review, also affirmed the IRB's interpretation.¹²⁵

We have argued in this Part that decisions involving the interpretation of provisions of the *IRPA* that serve to implement human rights conferred by international conventions, including the *Refugee Convention*, should be reviewed on a correctness standard of review because they raise questions of law of central importance to the legal system and outside the relative expertise of the administrative decision-makers. As noted by the Supreme Court, questions of general law of central importance require uniform and consistent answers. In the refugee protection context, such answers are provided by national courts, which, absent a binding interpretation by a competent international tribunal, play a central role in ensuring the domestic application of the provisions of the *Refugee Convention* and other international legal instruments protecting human rights. In light of the serious impact of refugee protection decisions on the protection of claimants' life, liberty and security of the person, the existence of divergent interpretations of these provisions is arbitrary and contrary to the rule of law, which requires that the inconsistencies be immediately resolved through correctness review. By expressly providing in *IRPA* that refugee protection claims need not be decided by experienced lawyers or notaries, and cognizant that this feature of the *Immigration Act* had attracted correctness review in *Pushpanathan*, Parliament clearly indicated that questions of law involving the interpretation of provisions of the *IRPA* that implement basic human rights conferred by international conventions are outside the relative expertise of the various administrative decision-makers under *IRPA*. As demonstrated in *Pushpanathan*, a contextual analysis would also rebut the presumption that administrative decision-makers' interpretation of their enabling statute be reviewed for reasonableness. The Supreme Court's approach to the interpretation of these provisions, both before and after *Dunsmuir*, is to supply its own legal analysis of the questions at issue.

125. *Febles FCA*, *supra* note 64 at paras 24-25.

While the case for a correctness standard is, in our view, overwhelming, the Federal Court and Federal Court of Appeal have reviewed administrative interpretations of provisions of the *IRPA* incorporating key elements of the *Refugee Convention* on a reasonableness basis.¹²⁶ Part III explores the perils of such an approach.

III. *The perils of reasonableness review*

As noted in Part I, as a single standard of review that takes its colour from the context, reasonableness has often been applied by reviewing courts to intensively scrutinize tribunals' interpretation of their enabling statutes. Accordingly, the Federal Court of Appeal has dismissed concerns that applying the reasonableness standard to the review of administrative decision-makers' interpretations of the *IRPA* could give rise to conflicting interpretations of its provisions, an unlikely result because the range of possible, acceptable outcomes for the interpretation of statutory provisions could be narrow. In other words, since there is likely only a single reasonable interpretation of the statutory provision, applying a reasonableness standard would lead to the same outcome as correctness review.¹²⁷ Former Federal Court of Appeal Justice John Evans has noted that deference, which "assumes that there is no uniquely correct answer" to a question of statutory interpretation, does not arise "in the absence of a range of reasonable options defensible on the law from which the tribunal could choose."¹²⁸ This, in his view, is a common occurrence:

In theory, a reviewing court may conclude on the basis of a textual, contextual and purposive analysis that the legislation admits of a range of reasonable choices from which the tribunal could select. In practice, however, reviewing courts somewhat rarely reach this conclusion: the principles of statutory interpretation are designed to enable the interpreter, whether tribunal or court, to determine the legislative intent in enacting the provision in question. In other words, once the court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference.¹²⁹

126. See *Majebi*, *supra* note 71.

127. See *Kanagendren*, *supra* note 69 at para 10, where the Court of Appeal concluded that "nothing turns on the standard of review" because "on the basis of the required textual, contextual and purposive analysis conducted below, there is only a single reasonable interpretation of the word 'member'" in s. 34(1)(f) of the *IRPA*. See also *B010 FCA*, *supra* note 65 at para 72.

128. John M Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014) 27 *Can J Admin L & Prac* 101 at 108 [*Evans*].

129. *Ibid* at 109.

This position is certainly supported by *Agraira*¹³⁰ and *Kanhasamy*,¹³¹ two decisions in which the Supreme Court conducted a reasonableness review of the decision-maker's interpretation of provisions of the *IRPA* that could be mistaken for correctness review. Rather than focusing on the decision-makers' reasons to decide whether their interpretations fell within a range of possible, acceptable outcomes defensible in respect of the facts and the law, it launched into its own exercise in statutory interpretation and came to its own view of the meaning of the statutory provision.

But things are not always so straightforward, as illustrated in the Federal Court of Appeal's decision in *Vavilov v. Canada (Minister of Citizenship and Immigration)*.¹³² *Vavilov* involved a review of the decision of the Registrar of citizenship to cancel *Vavilov*'s Canadian citizenship on the grounds that, though he was born in Canada, he was not a citizen because his parents, who had operated in Canada as Russian spies, were at that time "employee[s] of a foreign government" under s. 3(2)(a) of the *Citizenship Act*. A key element in the interpretation of that provision was that it had been enacted with a view to implement the *Vienna Convention on Diplomatic Relations*¹³³ into Canadian law and was to be interpreted in accordance with that international treaty as well as with the customary international law principle of *jus soli*. Justice Stratas applied a reasonableness standard to the Registrar of citizenship's interpretation of the *Citizenship Act* because, in his view, the presumption of reasonableness had not been rebutted. Noting that the standard of review debate was "not of great practical import," he succinctly summarized the Supreme Court's approach to the judicial review of interpretations of the *IRPA* as follows:

On issues of statutory interpretation in the immigration context, the Supreme Court recently has also been applying reasonableness in an exacting way. Not surprisingly, because of the presumption of reasonableness, it is acting under the reasonableness standard of review, but it assesses the administrative decision-maker's interpretation of a statutory provision closely, in fact sometimes in a manner that appears to be akin to correctness: see, e.g., *Kanhasamy* (...); *B010* (...); *Febles* (...); *Ezokola* (...). In fact, it has been a while since the Supreme Court has afforded a decision-maker in the immigration context much of a margin of appreciation on statutory interpretation issues.¹³⁴

130. *Supra* note 57.

131. *Supra* note 58.

132. 2017 FCA 132 [*Vavilov FCA*].

133. *Vienna Convention on Diplomatic Relations*, 24 April 1963, 500 UNTS 241 (entered into force 19 March 1967).

134. *Vavilov FCA*, *supra* note 132 at para 37 [case citations omitted].

Applying the principles of statutory interpretation and looking at the text, context and purpose of s. 3(2)(a), Justice Stratas determined that “employee[s] in Canada of a foreign government” could include only those who enjoy diplomatic privileges and immunities under the *Vienna Convention on Diplomatic Relations*.¹³⁵ As Vavilov’s parents did not, they were subject to Canadian laws. In the majority’s view, “a child born to parents subject to Canadian laws is a person born in Canada for the purposes of Canadian citizenship laws and, thus, under paragraph 3(1)(a), becomes a Canadian citizen upon birth in Canada.”¹³⁶

Justice Gleason’s dissent in *Vavilov* illustrates that in some cases, the selection of a reasonableness standard of review could make all the difference. Unlike the majority, she believed that the context and purpose of the statutory provision did not “clearly necessitate” adopting the majority’s interpretation of the text of the provision over the Registrar’s broader view of the meaning of “employee of a foreign government.” She would have allowed the Registrar’s decision to stand:

To conclude otherwise is to engage in correctness review as in such circumstances the reviewing court is substituting its views for those of the tribunal on the basis of disagreement as to the correct interpretation of the provision in question, even though the interpretation of the administrative decision-maker is defensible as a rational textual interpretation that is not necessarily negated by the context or purpose of the provision.¹³⁷

Had Justice Gleason written the majority judgment, the Registrar would have been free to adopt either one of two very different interpretations of the *Citizenship Act*. There is no reason in principle why such a result could not obtain when courts are reviewing decisions involving the interpretation of the *IRPA*. In *Pushpanathan*, for example, the Supreme Court was divided on the correct interpretation of the term “acts contrary to the purposes and principles of the United Nations” in art 1F(c) of the *Refugee Convention*.¹³⁸ Could it have been argued that the competing interpretations offered by Justices Bastarache and Cory fell within a range of possible, acceptable outcomes? In that context and for such a provision, which determines whether or not a refugee claimant benefits from the basic human rights protections afforded by the *Refugee Convention*, a finding that several inconsistent interpretations are reasonable and open to

135. *Supra* note 133.

136. *Vavilov FCA*, *supra* note 132 at para 46.

137. *Ibid* at para 96.

138. See also *Febles*, *supra* note 54 where the Court divided on the interpretation of art 1 F(b).

adjudicators cannot be countenanced. The scope of universal protections against refoulement cannot depend on whether a refugee claimant has the good fortune of having her claim decided by an adjudicator who happens to subscribe to a narrower view of the exclusion clause rather than a broader yet equally reasonable alternative interpretation. The provisions of an international convention defining the scope of basic human rights protections can only have one true meaning.

Reflecting on the nature of reasonableness review of an administrative tribunal's interpretation of its enabling statute, Justice Evans observed that it would differ from correctness or appellate review in three ways. It is instructive to consider whether these differences would apply to the review of a decision-maker's interpretations of ss. 96-98 of the *IRPA*. First, a court conducting reasonableness review must take seriously the full reasons offered by a tribunal justifying its interpretation as a "judicial recognition that the legislature has entrusted to the tribunal primary responsibility for interpreting its enabling legislation whether for reasons of relative expertise, cost or speed of decision-making or all three."¹³⁹ As argued in Part II, Parliament's inclusion in the *IRPA* of an exceptional appeal for serious questions of general importance together with a statutory provision that dispenses of the need for adjudicators to have formal legal training is clearly inconsistent with an intention to entrust them with primary responsibility for the interpretation of provisions of the *IRPA* that serve to implement the basic human rights conferred by an international convention. Second, Justice Evans suggests that courts conducting reasonableness review should pay attention to the tribunal's view of the consequences on the "efficacy and coherence of the statutory scheme of interpreting a provision in one way rather than another".¹⁴⁰

Tribunals' knowledge of the substantive regulatory issues arising from the program they administer and their familiarity with the design, detail and operation of the statutory scheme will have informed their interpretation and provide a perspective that courts generally will not have.¹⁴¹

In interpreting ss. 96-98 of the *IRPA*, which directly incorporate provisions of the *Refugee Convention* and the *Convention Against Torture*, the key question is the scope of the basic human rights protections that States Parties have agreed to confer on protection claimants through these treaties. It is questionable whether, in applying the refugee definition to the facts of

139. *Evans*, *supra* note 128 at 110.

140. *Ibid.*

141. *Ibid.*

numerous individual claims, decision-makers will gain an advantage over reviewing courts in applying the principles of treaty interpretation to the provisions of international human rights conventions. Third, Justice Evans notes, reasonableness review means that reviewing courts should be open to the possibility that the statutory text, context and purpose may not “all point unequivocally to the same result” and that the interpretation preferred by the court may not be “the only authentic interpretation of legislative intent.”¹⁴² As argued in Part II and for the reasons expressed by the House of Lords in *ex parte Adan*, while core human rights guarantees conferred by international conventions could conceivably be open to different but equally authentic interpretations, it falls to the national courts of the State Party to decide the preferable interpretation by which the State will meet its treaty obligations. In the refugee protection context, where protection claimants’ lives, liberty and security of the person depend on the meaning ascribed to these treaties, leaving the choice of “authentic interpretation” up to individual adjudicators, some of whom are not fully independent from the government, would be antithetical to the rule of law and breach Canada’s obligation to implement its treaty obligations in good faith.

Finally, even if reviewing courts conduct “disguised” correctness reviews¹⁴³ under the guise of a reasonableness review of decision-makers’ interpretation of ss. 96-98 of the *IRPA*, calling this correctness would have the advantage of transparently and accurately describing how reviewing courts are actually approaching their supervisory role, and would further *Dunsmuir*’s ambition of developing a “principled framework” to the judicial review of administrative action. In the event that the Supreme Court persists in restricting opportunities for correctness review or opts to eliminate correctness as a common law standard of review altogether in favour of a deferential approach across the board, Part IV explores legislative reforms that could ensure the correctness review of certain questions of law.

IV. *Legislating the standard of review in the refugee protection context*

As noted in Part I, recent decisions of the Supreme Court of Canada indicate that the continued existence of correctness as a common law standard of review may be in peril. We have argued that correctness should be retained as a common law standard of review. If the Court decides to abolish correctness, Parliament should mandate a correctness standard

142. *Ibid* at 111.

143. David Mullan, “The True Legacy of *Dunsmuir*—Disguised Correctness Review” (15 February 2018), *Double Aspect* (blog), online: <<https://doubleaspect.blog/2018/02/15/the-true-legacy-of-dunsmuir-%E2%80%95-disguised-correctness-review>>.

within relevant statutes for the review of crucial questions of law. In the refugee determination context in particular, Parliament should require the correctness review of decisions involving the interpretation of provisions of the *IRPA* that serve to implement basic human rights protections guaranteed by international conventions.

The notion of legislatures specifying a particular standard of review is not unheard of, though not entirely common.¹⁴⁴ British Columbia's *Administrative Tribunals Act*, for example, specifies for certain tribunals particular standards of review, including correctness, based on the nature of the question and on the presence of a privative clause in the statute under which the application arises.¹⁴⁵ The correctness standard was indeed applied by the Supreme Court of Canada in *British Columbia Human Rights Tribunal v. Schrenk*,¹⁴⁶ a case involving a question of law and statutory interpretation arising out of the province's *Human Rights Code*.

Based on the arguments presented earlier in this article, it may behoove Parliament to establish, explicitly, a correctness standard of review in connection with questions of law arising from Part 2 of the *Immigration and Refugee Protection Act* concerning refugee protection, or at the very least specific provisions, including the scope of the protections arising from the *Refugee Convention* and implemented into the *IRPA*, through sections 96 and 98.¹⁴⁷ A correctness standard could also be applied to other portions of Part 2 of the *IRPA* such as section 97 which concerns persons in need of protection who face torture within the meaning of the *Convention Against Torture* as well as those facing cruel and unusual punishment. In addition, the provisions in part 2 of the *IRPA* are not the only ones that apply to persons seeking refugee status. For example, the provisions that determine when foreign nationals are inadmissible to Canada have been applied to refugee claimants as well as those seeking to immigrate to Canada.¹⁴⁸ The interpretation of such provisions by the ID and IAD may have a tremendous impact on would-be applicants in a manner no less

144. *Capilano*, *supra* note 31 (stating: "Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, SBC 2004, c 45, ss 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common" at para 35).

145. *Administrative Tribunals Act*, *supra* note 144, ss 58-59.

146. *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at para 28, [2017] 2 SCR 795.

147. *Ward*, *supra* note 83 at 739, 746-747; *Pushpanathan*, *supra* note 84 at paras 65-74; *Ezokola*, *supra* note 53; *Febles*, *supra* note 54. There may be other provisions of the *IRPA* whose interpretation may demand correctness review. These include s. 112(3), which provides for the conferral of refugee protection in the context of a pre-removal risk assessment and s. 115, which sets out the principle of non-refoulement.

148. See *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077.

consequential than would their exclusion under Article 1F of the *Refugee Convention*, incorporated by s. 98 of the *IRPA*. Accordingly, correctness may be a suitable standard of review for questions of law respecting non-*Refugee Convention*-derived provisions within the *IRPA* that directly impact on the refugee status determinations of asylum applicants and their eligibility.

The explicit establishment of a correctness standard of review for questions of law that arise in connection with these provisions of the *IRPA* is in the government's interest. While refugee protection claimants, foreign nationals and permanent residents most frequently apply for judicial review of IRB decisions, there are occasions where the government is the party seeking judicial review. Where the federal government is of the view that an administrative decision-maker has erred in interpreting a key provision of the *IRPA*, it has an interest in securing a definitive interpretation from the courts which may work to its advantage as it has in past cases.¹⁴⁹ This interest has been recognized in the *IRPA* through a mechanism by which the parties, including the government, can formulate questions, including questions of statutory interpretation, and seek their certification as serious questions of general importance meriting consideration by the Federal Court of Appeal and, if leave is granted, by the Supreme Court.¹⁵⁰

Conclusion

The proper approach to be taken in judicial review of administrative decisions has been a recurring if not troubling question in Canadian administrative law.¹⁵¹ The Supreme Court of Canada is now revisiting the matter and may even be contemplating the further curtailment or even the complete abolition of correctness as a standard of review available at common law. In this article, we have taken the position that particular questions of law must be reviewed on a correctness standard. Specifically, in the context of refugee protection decision-making, we have argued for a non-deferential approach to the review of administrative decision-makers' interpretation of sections 96-98 of the *IRPA* which, in defining the scope of refugee protection, implement fundamental international legal norms and human rights protections. Such questions, in our view, qualify as questions of law that are both of central importance to the legal system as a whole

149. See *Mossop*, *supra* note 103; *B472*, *supra* note 62.

150. *IRPA*, *supra* note 3, s 74(d). Though the certification of a serious question of general importance triggers an appeal, review by the Federal Court of Appeal and the Supreme Court is not limited to the certified question but extends to all available grounds of review, including the unreasonable exercise of discretion: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193; *Agraira*, *supra* note 57.

151. *Dunsmuir*, *supra* note 5 at para 1.

and outside the relative expertise of the tribunals and officials empowered to make decisions under the *IRPA*. The fundamental importance of these questions and the serious impact of refugee protection decisions on refugee claimants' life, liberty or security of the person require uniform and consistent answers that only national courts can provide. In addition, we posit that a contextual standard of review analysis also militates in favour of correctness review. The non-deferential approach that we advocate, far from breaking new ground, is consistent with the Supreme Court's handling of such questions before and after *Dunsmuir*. To the extent that the Court's current approach precludes correctness review in this context by narrowly defining the correctness category of general questions of law and limiting the application of the contextual analysis, it must be changed.

The application of the correctness standard to the review of administrative decision-makers' interpretation of provisions of the *IRPA* that implement basic human rights conferred by international conventions will not necessarily advantage asylum seekers. In some cases, the reviewing courts' interpretations could very well lead to a lower level of protection for refugee claimants, as evidenced in several cases where the courts' interpretations favoured the government's position.¹⁵² Nevertheless, it is vital that, absent a binding interpretation by the International Court of Justice, Canadian courts, and ultimately Canada's Supreme Court, determine in accordance with the rules of treaty interpretation the one true meaning of the *Refugee Convention's* basic human rights protections and of the provisions in the *IRPA* that implement them. Reasonableness review, which by definition recognizes that some questions do not lend themselves to one specific, particular result, does not guarantee that courts will fulfill this important role. Disguised correctness review under a reasonableness standard obfuscates the transparency and true nature of the undertaking and requires all actors to participate in a legal fiction. It is time for the Supreme Court to recognize once more that the appropriate standard of review in this context is correctness.

152. See, e.g., *Febles FCA*, *supra* note 64; *B472*, *supra* note 62.