

# A Lawyer's Judge: Justice Marshall Rothstein and the Rule of Law

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## I. INTRODUCTION

Before his appointment to the bench, Marshall Rothstein was one of Canada's top civil litigators. From Winnipeg, he appeared as counsel in many of the country's most important transportation cases.<sup>1</sup> He was a lawyer's lawyer while in practice, and a lawyer's judge on the bench. In each role, he embodied the steadfast commitment to the rule of law that is the hallmark of our profession.

As a civil litigator, Marshall Rothstein well understood two of the fundamental requirements of effective civil litigation: the importance of carefully reading statutes, and the need for a court to have a full evidentiary basis before making a ruling. He brought this knowledge to the bench at all levels, from the Federal Court Trial Division to the Federal Court of Appeal and the Supreme Court of Canada. While Justice Rothstein made significant contributions to the law-making and policy-making roles of the courts, he never forgot that the first duty

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<sup>1</sup> See, e.g., *Canada (Director of Investigation & Research) v. Air Canada (sub nom. American Airlines Inc. v. Canada (Competition Tribunal))*, [1988] F.C.J. No. 1049, 89 N.R. 241, 54 D.L.R. (4th) 741 (F.C.A.), affd [1989] S.C.J. No. 12, [1989] 1 S.C.R. 236, 26 C.P.R. (3d) 95 (S.C.C.); *Melville (City) v. Canada (Attorney General)*, [1981] F.C.J. No. 178, [1982] 2 F.C. 3, 129 D.L.R. (3d) 488 (F.C.T.D.), revd [1982] F.C.J. No. 194, [1983] 2 F.C. 123, 141 D.L.R. (3d) 191 (F.C.A.); *Jasper Park Chamber of Commerce v. Canada (Governor-General in Council)*, [1982] F.C.J. No. 193, 44 N.R. 243, 141 D.L.R. (3d) 54 (F.C.A.); *Canadian Pacific Ltd. v. Canada (Canadian Transport Commission)*, [1990] F.C.J. No. 528, 111 N.R. 232 (F.C.A.); *Canadian Pacific Ltd. v. Canada (Canadian Transport Commission)*, [1979] F.C.J. No. 95, 26 N.R. 482, 99 D.L.R. (3d) 52 (F.C.A.), affd [1980] S.C.J. No. 4 (S.C.C.); *CSP Foods Ltd. v. Canada (Canadian Transport Commission)*, [1977] F.C.J. No. 71, 21 N.R. 361, 84 D.L.R. (3d) 541 (F.C.A.).

of a judge is to do justice between the parties in accordance with the rule of law.

That basic commitment supplies the common thread that runs throughout Justice Rothstein's contributions as a jurist. His judicial philosophy was consistent and straightforward: the role of a judge is to protect the separation of powers, but not to overstep his or her bounds. The need to tread that careful line explains why a judge must sometimes be deferential to administrative decision-makers or legislatures, as when interpreting legislative intent, but must also be ready to dispense with deference, such as when demanding a full evidentiary foundation in constitutional review.

Justice Rothstein respected the intention of Parliament in statutory interpretation. He was careful not to treat the Constitution as an excuse for judicial law-making. He respected precedent, even when he had previously been in the minority, and was cognizant of the high bar to overturn prior decisions. At the same time, he was not blindly deferential and believed in the importance of appellate review of tribunals and other bodies on questions of law — matters that lie at the heart of an appellate court's place in our constitutional order.

This article is about Justice Rothstein's judicial philosophy. It celebrates his contributions as a lawyer's judge, one who contributed enormously to the jurisprudence of some of a civil litigator's most essential tools of the trade: statutory interpretation, the requirement of an evidentiary basis for a legal decision and the function of appellate review in administrative law.

## II. A CONSISTENT APPROACH TO INTERPRETATION

Justice Rothstein was a master of reading and applying statutes, an exercise that was essential to both his career as a civil litigator — particularly given the importance of specific statutes to the area of transportation law — and as a judge. While the importance of proper statutory interpretation is not controversial at a general level, some lawyers, commentators and judges may treat statutes as simply the jumping-off point for an exposition of their own views rather than as the heart of the legal matter under consideration. Justice Rothstein searched for the meaning of the statute in light of the words used and the specific terms promulgated, and avoided the apparent tendency of some to search for meaning substantially divorced from the text of the statute itself.

He was, in this respect, a jurist who embodied the Supreme Court of Canada's articulation of the judicial role in the *Secession Reference*:

The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law.<sup>2</sup>

The fact that both democracy and the rule of law are fundamental Canadian constitutional principles means that, subject to constitutional limitation, it is for elected representatives in Parliament and the provincial legislatures to make policy choices and to promulgate the laws and regulations necessary to effectuate them. The role of judges, as independent arbiters unconstrained by electoral politics, is to interpret those laws to give effect to the intentions of the legislators who enacted them.

Accordingly, the Supreme Court of Canada has repeatedly endorsed Elmer Dreidger's now-seminal articulation of the "modern approach" to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>3</sup>

Legislative intention is thus the touchstone of statutory interpretation, and the point of reference from which purported ambiguities may be assessed and resolved.<sup>4</sup> The judicial role in statutory interpretation begins with the analytical task of identifying Parliament's intention.

This is not an open-ended exercise. It is constrained by the words of the statute itself.<sup>5</sup> And few judges have understood (and fulfilled) this textual and contextual obligation with as much diligence as Justice Rothstein.

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<sup>2</sup> *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, at para. 67 (S.C.C.) (emphasis added) [hereinafter "*Secession Reference*"].

<sup>3</sup> Elmer A. Dreidger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at 87 [hereinafter "*Dreidger*"]; see *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26 (S.C.C.), revg [2000] B.C.J. No. 1803 (B.C.C.A.) [hereinafter "*ExpressVu*"]; *Re Rizzo & Rizzo Shoes Ltd.*, [1998] S.C.J. No. 2, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at para. 21 (S.C.C.), varg [1995] O.J. No. 586 (Ont. C.A.).

<sup>4</sup> *ExpressVu*, *id.*, at paras. 29-30.

<sup>5</sup> *Verdun v. Toronto-Dominion Bank*, [1996] S.C.J. No. 50, [1996] 3 S.C.R. 550, 139 D.L.R. (4th) 415, at para. 22 (S.C.C.), affg [1995] O.J. No. 4288 (Ont. C.A.) [hereinafter "*Verdun*"].

## 1. Statutory Interpretation

Justice Rothstein's reasons for the Supreme Court of Canada in *Cogeco* exemplify his approach.<sup>6</sup> The Canadian Radio-television and Telecommunications Commission (the "CRTC") had for decades been the jurisdictional "pampered darling" of federal institutions.<sup>7</sup> Until *Cogeco*, the Supreme Court had not held that a purported exercise of jurisdiction by the CRTC was *ultra vires* its statutory jurisdiction on non-constitutional grounds for more than 30 years, whether pursuant to the *Broadcasting Act*, the *Telecommunications Act* or predecessor provisions in the *Railway Act*.<sup>8</sup>

The issue in *Cogeco* was whether the CRTC had jurisdiction under the *Broadcasting Act* to implement what it described as a "value for signal regime" for the retransmission of local over-the-air television signals by cable companies and other broadcasting distribution undertakings ("BDUs"). The proposed regime would have given local television stations the right to opt out of the standard package of regulatory protections for retransmission of their signals and instead negotiate directly with BDUs for the right to transmit their signals to consumers.<sup>9</sup>

BDUs disputed the CRTC's jurisdiction to impose the value for signal regime, arguing that the proposed policy would conflict with various provisions of the *Copyright Act* and was beyond the CRTC's jurisdiction. In response, the CRTC referred the issue of its jurisdiction to

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<sup>6</sup> *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] S.C.J. No. 68, 2012 SCC 68, [2012] 3 S.C.R. 489 (S.C.C.), revg [2011] F.C.J. No. 197 (F.C.A.) [hereinafter "*Cogeco*"].

<sup>7</sup> See Bora Laskin, *Canadian Constitutional Law*, 3d ed. (Toronto: Carswell, 1966), at 586.

<sup>8</sup> *Confederation Broadcasting (Ottawa) Ltd. v. Canada (C.R.T.C.)*, [1971] S.C.J. No. 72, [1971] S.C.R. 906, 19 D.L.R. (3d) 290, at 928-32 (S.C.C.); *Capital Cities Communications Inc. v. Canada (C.R.T.C.)*, [1977] S.C.J. No. 119, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609, at 169 (S.C.C.), affg [1995] F.C.J. No. 25 (F.C.A.) [hereinafter "*Capital Cities Communications*"]. An arguable exception to this statement is the Supreme Court of Canada's decision in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] S.C.J. No. 27, 2003 SCC 28, [2003] 1 S.C.R. 476 (S.C.C.), affg [2001] F.C.J. No. 1150 (F.C.A.) [hereinafter "*Barrie Public Utilities*"], which is discussed *infra*. While it is also possible to view the decision in *Reference re Broadcasting Act*, [2012] S.C.J. No. 4, 2012 SCC 4, [2012] 1 S.C.R. 142 (S.C.C.), affg [2010] F.C.J. No. 849 (F.C.A.) [hereinafter "*Broadcasting Reference*"] as a curtailment of the powers of the CRTC, the case is more properly viewed as an affirmation of the traditionally broad approach to the CRTC's jurisdiction, since it linked the presence of such jurisdiction to whether the CRTC was acting in furtherance of the *Broadcasting Act* policy objectives. See generally Brandon Kain, "Developments in Communications Law: The 2012-2013 Term – The *Broadcasting Reference*, the Supreme Court and the Limits of the CRTC" (2014) 64 S.C.L.R. (2d) 63, at 69-83.

<sup>9</sup> *Cogeco*, *supra*, note 6, at paras. 1, 7.

the Federal Court of Appeal, which concluded in a 2-1 decision that the CRTC would not exceed its statutory authority by implementing the value for signal regime.<sup>10</sup> The BDUs appealed, and the Supreme Court of Canada granted leave,<sup>11</sup> with Justice Rothstein ultimately writing a 5-4 majority decision allowing the appeal. Before examining his reasons in *Cogeco*, some additional background regarding the CRTC's broadcasting jurisdiction will be helpful.

In the Federal Court of Appeal, where the arguments centred mainly on the *Copyright Act*, Justice Sharlow based her decision for the majority on the CRTC's purported ability to define the extent of its own jurisdiction with reference to "the objectives of Canada's broadcasting policy". This conclusion was far from unprecedented.<sup>12</sup> In its 1978 decision in *R. v. CKOY Ltd.*,<sup>13</sup> the Supreme Court of Canada upheld as valid a CRTC regulation prohibiting the broadcast by a station or network operator of all or part of a telephone interview or conversation without the other party's consent. Writing for a majority of the Supreme Court, Justice Spence took the view that the CRTC had very broad authority to make regulations, with the prime determinant of their validity simply being whether they were aimed at one of the policy objectives in section 3 of the *Broadcasting Act*:

... I agree with the courts below that the validity of any regulation enacted in reliance upon s. 16 must be tested by determining whether the regulation deals with a class of subject referred to in s. 3 of the statute and that in doing so the Court looks at the regulation objectively. However, I also agree with Evans J.A. when he states:

It is obvious from the broad language of the Act that Parliament intended to give to the Commission a wide latitude with respect to the making of regulations to implement the policies and objects for which the Commission was created.<sup>14</sup>

Because section 16(1)(b)(ix) of the *Broadcasting Act* at the time permitted the CRTC to make regulations "respecting such other matters as it deems necessary for the furtherance of its objects," Justice Spence concluded that the CRTC had a very wide discretion in deciding whether

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<sup>10</sup> *Reference re Broadcasting (Canada)*, [2011] F.C.J. No. 197, 2011 FCA 64, 413 N.R. 312 (F.C.A.), rev'd [2012] S.C.J. No. 68 (S.C.C.).

<sup>11</sup> *Broadcasting Reference*, *supra*, note 8.

<sup>12</sup> See, e.g., *Capital Cities Communications*, *supra*, note 8, at 148-49.

<sup>13</sup> [1978] S.C.J. No. 64, [1979] 1 S.C.R. 2, 90 D.L.R. (3d) 1 (S.C.C.), aff'g [1976] O.J. No. 2185 (Ont. C.A.) [hereinafter "*CKOY*"].

<sup>14</sup> *CKOY*, *supra*, note 13, at 11-12.

a regulation was sufficiently aimed at a section 3 policy objective to meet this test.<sup>15</sup>

The Supreme Court took a similar view in *CRTC v. CTV Television Network*,<sup>16</sup> where it rejected a challenge to the CRTC's exercise of jurisdiction — this time, by its Executive Committee — in imposing minimum content requirements as a condition of a broadcaster's licence renewal. What was then section 17 of the *Broadcasting Act* provided, in pertinent part, that, “[i]n furtherance of the objects of the Commission, the Executive Committee ... may ... issue broadcasting licenses ... subject to such conditions ... as the Executive Committee deems appropriate for the implementation of the broadcasting policy enunciated in section 3.”<sup>17</sup> The issue in *CTV* was not whether the CRTC had statutory jurisdiction to regulate content at all, but rather whether its Executive Committee had jurisdiction to do so by means of placing content-related conditions on licence renewals. *CTV* argued that any such content control could only be imposed by the CRTC through regulation.<sup>18</sup>

A unanimous Supreme Court, speaking through Chief Justice Laskin, rejected *CTV*'s submission. He noted that “[t]he *CKOY* case ... reflected the broad interpretation given to the *Broadcasting Act* and to the powers thereunder vested in CRTC and in the Executive Committee respectively.”<sup>19</sup> The Chief Justice adopted the Federal Court of Appeal's conclusion that:

The authority conferred by section 17 to further the objects of the Commission is a broad one. Under it, for the purpose of regulating and supervising all aspects of the Canadian broadcasting system with a view to implementing the policy enunciated in section 3, the Executive Committee may issue, amend at the request of the licensee, renew or suspend broadcasting licences or may exempt persons carrying on broadcasting receiving licences from the requirement of having a licence. For the same purpose when issuing or renewing a licence, the Committee may make the licence subject to such conditions related to the circumstances of the licensee as the Committee deems appropriate for the implementation of the broadcasting policy enunciated in section 3. *Prima facie* it seems to be well within the power of the Committee under section 17, when renewing the appellant's licence, to impose a

<sup>15</sup> *Id.*, at 13.

<sup>16</sup> [1982] S.C.J. No. 24, [1982] 1 S.C.R. 530, 65 C.P.R. (2d) 19 (S.C.C.), revg [1980] F.C.J. No. 264 (F.C.A.) [hereinafter “*CTV*”].

<sup>17</sup> *CTV*, *id.*, at 536.

<sup>18</sup> *Id.*, at 543.

<sup>19</sup> *Id.*, at 545.

condition designed to further one of the objects of the broadcasting policy, provided the condition is one that is “related to the circumstances of” the appellant and provided that its imposition is not contrary to the Act or to a regulation that has been made in exercise of the power to make regulations contained in section 16.<sup>20</sup>

So broad had been the judicial view of the CRTC’s jurisdiction that, in the *Canadian Broadcasting League* case,<sup>21</sup> the Federal Court of Appeal accepted the argument that the CRTC could assume the power to regulate rates or fees by necessary implication of its mandate to further the objectives of Canada’s broadcasting policy<sup>22</sup> — objectives that, the court determined, the CRTC was mostly empowered to interpret itself.<sup>23</sup>

In *Canadian Broadcasting League*, the Court of Appeal pointedly rejected the League’s submission that “there must be express statutory authority for a power to regulate rates or fees and that the *Broadcasting Act* does not confer such authority on the Commission.”<sup>24</sup> The objectives of Canada’s broadcasting policy, as set out in section 3 of the *Broadcasting Act*, were a sufficient answer.

A decade before *Cogeco*, Justice Rothstein was on the Federal Court of Appeal panel that decided the *Barrie Public Utilities* case.<sup>25</sup> This was an appeal from a CRTC order granting cable companies access to electricity transmission poles owned by provincially regulated electric power utilities. The CRTC pinned its authority to make the order on section 43(5) of the *Telecommunications Act*, which provides that:

Where a person who provides services to the public cannot, on terms acceptable to that person, gain access to the supporting structure of a transmission line constructed on a highway or other public place, that person may apply to the Commission for a right of access to the supporting structure for the purpose of providing such services and the Commission may grant the permission subject to any conditions that the Commission determines.<sup>26</sup>

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<sup>20</sup> *Id.*, at 543.

<sup>21</sup> *Canadian Broadcasting League v. Canadian Radio-Television & Telecommunications Commission*, [1982] F.C.J. No. 91, [1983] 1 F.C. 182, 138 D.L.R. (3d) 512 (F.C.A.), aff’d [1985] S.C.J. No. 9, [1985] 1 S.C.R. 174, 57 N.R. 76 (S.C.C.) [hereinafter “*Canadian Broadcasting League*”].

<sup>22</sup> *Canadian Broadcasting League, id.*, at 190-91.

<sup>23</sup> *Id.*, at 192.

<sup>24</sup> *Id.*, at 189.

<sup>25</sup> *Barrie Public Utilities, supra*, note 8.

<sup>26</sup> *Telecommunications Act*, S.C. 1993, c. 38, s. 43(5).

Other subsections of section 43 limit the definition of “transmission line” to those of Canadian carriers, such as a telephone company or a distribution undertaking. Section 43(5) does not. This, the CRTC concluded, broadened the meaning of the term as used in section 43(5) to include lines used to transport electricity.<sup>27</sup> For further justification, it turned to a familiar source: the objectives of Canada’s broadcasting policy, as set out in section 3 of the *Broadcasting Act*.<sup>28</sup>

On appeal, the electric power utilities argued, among other things, that the CRTC had erred in its interpretation of section 43(5). In their submission, the *Telecommunications Act* did not give the CRTC jurisdiction to require the owners of electricity transmission lines to give cable companies access to their poles.

The Federal Court of Appeal agreed. In his reasons, Justice Rothstein undertook a characteristically thorough analysis of the text and context of section 43(5), the skills he had honed as a civil litigator on full display:

[T]he word formula “transmission line constructed on a highway or other public place” in subsection 43(5) bears a remarkable similarity to the words describing the transmission lines contemplated in subsections 43(2), (3) and (4), which are transmission lines of Canadian carriers or distribution undertakings. The similarity in the description of the transmission lines between subsections 43(2), (3) and (4) on the one hand, and subsection 43(5) on the other, is a strong indicator that Parliament had in mind the same transmission lines, that is, the transmission lines of a Canadian carrier or distribution undertaking in all subsections....<sup>29</sup>

The terms “transmission line” or “transmission lines” are found in subsections 43(2), (3), (4) and (5). Where, in prior subsections, transmission lines are those of Canadian carriers or distribution undertakings, I would think it implicit, unless the context requires a contrary interpretation, that the transmission lines in a subsequent subsection of the same section would be similarly qualified. This is known as the presumption of consistency of expression. As subsections 43(2), (3) and (4) each deal with transmission lines constructed by Canadian carriers or distribution undertakings on highways or other public places, the reference in subsection 43(5) to a transmission line constructed on a highway or other public place, is intended to mean the same transmission

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<sup>27</sup> *Barrie Public Utilities*, *supra*, note 8, at para. 10.

<sup>28</sup> See *Barrie Public Utilities*, *supra*, note 8, at para. 11.

<sup>29</sup> *Id.*, at para. 32.

line, that is, a transmission line of a Canadian carrier or distribution undertaking....<sup>30</sup>

I conclude that in the context of section 43 as a whole, the term “transmission line” in subsection 43(5) refers to a transmission line of a Canadian carrier or distribution undertaking and not to all transmission lines.<sup>31</sup>

He then turned to the CRTC’s assertion that its interpretation of section 43(5) was supported — and its jurisdiction to order access to the electric power utilities’ poles buttressed — by the objectives of Canada’s broadcasting policy, as set out in section 3 of the *Broadcasting Act*:

It is not for the Court to approve or disapprove of policy objectives expressed in legislation. They must be accepted as being the objectives Parliament had in mind in enacting the *Telecommunications Act* and *Broadcasting Act*. However, the CRTC does not have plenary power to implement these policies. The CRTC’s power is established under the Acts (and other relevant legislation) and the policy objectives of those Acts may be implemented by the CRTC only in accordance with the powers and duties conferred on it under those Acts.<sup>32</sup>

Rather than uphold the CRTC’s assertion of jurisdiction, as the Court of Appeal had done in *Canadian Broadcasting League*, on the basis of the CRTC’s having “latitude or discretion that has been committed to the Commission to determine what may be necessary in a particular case for the furtherance of its policy objectives”,<sup>33</sup> Justice Rothstein looked to the text and context of the statute for the grant of power to which the CRTC claimed it was entitled. He found it wanting. The Supreme Court of Canada agreed.<sup>34</sup>

This reasoning, moored as it was to the statutory text and context, is a fine expression of how lawyers — and lawyers who become judges — are trained to uphold the rule of law. No jurist deserves more credit than Justice Rothstein for insisting on a legislative basis in deciding the scope of the CRTC’s authority to determine its own jurisdiction.

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<sup>30</sup> *Id.*, at para. 39. In the following paragraphs, Rothstein J. cites Cory J.’s discussion of the presumption of consistency of expression in *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] S.C.J. No. 13, [1992] 1 S.C.R. 385, 89 D.L.R. (4th) 218, at 400-401 (S.C.C.), revg [1990] F.C.J. No. 444 (F.C.A.) and Ruth Sullivan’s praise for the same in Ruth Sullivan, ed., *Dreidger on the Construction of Statutes* (Toronto: Butterworths, 1994), at 1-64.

<sup>31</sup> *Barrie Public Utilities*, *supra*, note 8, at para. 45.

<sup>32</sup> *Id.*, at para. 53.

<sup>33</sup> *Canadian Broadcasting League*, *supra*, note 21, at 192; see also *CKOY*, *supra*, note 13, at 13.

<sup>34</sup> *Barrie Public Utilities*, *supra*, note 8, at para. 42.

Returning to *Cogeco*, the Federal Court of Appeal had exhumed the *CKOY* line of cases by using Canada's broadcasting policy to justify and uphold an expansive interpretation of the CRTC's powers — in this case, to impose the value for signal policy. That logic was finally undone by Justice Rothstein at the Supreme Court. Even though the principal arguments against the CRTC's jurisdiction in the Court of Appeal below had focused on the *Copyright Act*, Justice Rothstein undertook a detailed review of the *Broadcasting Act* itself, parsing the precise grants of power in the statute rather than conducting a broader, policy-driven assessment unconnected to the actual statutory provisions.

In interpreting the jurisdiction of the CRTC, Justice Rothstein began by looking at the express statutory grants of power in the text of the *Broadcasting Act*.<sup>35</sup> He was careful to distinguish between provisions in the statute that are designed to confer jurisdiction and mere policy provisions, which are not:

Policy statements, such as the declaration of Canadian broadcasting policy found in s. 3(1) of the *Broadcasting Act*, are not jurisdiction-conferring provisions. They describe the objectives of Parliament in enacting the legislation and, thus, they circumscribe the discretion granted to a subordinate legislative body (Sullivan, at pp. 387-88 and 390-91). As such, declarations of policy cannot serve to extend the powers of the subordinate body to spheres not granted by Parliament in jurisdiction-conferring provisions.

In my opinion, to find jurisdiction, it was not sufficient for the CRTC to refer in isolation to policy objectives in s. 3 and deem that the proposed value for signal regime would be beneficial for the achievement of those objectives....

A broadly drafted basket clause, such as s. 10(1)(k), or an open-ended power to insert “such terms and conditions as the [regulatory body] deems appropriate” (s. 9(1)(h)) cannot be read in isolation.... Rather, “[t]he content of a provision ‘is enriched by the rest of the section in which it is found’.... In my opinion, none of the specific fields for regulation set out in s. 10(1) pertain to the creation of exclusive rights for broadcasters to authorize or prohibit the distribution of signals or programs, or to control the direct economic relationship between the BDUs and the broadcasters.”<sup>36</sup>

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<sup>35</sup> *Cogeco, supra*, note 6, at para. 20 (emphasis added; citation omitted).

<sup>36</sup> *Id.*, at paras. 22-23, 29 (emphasis added; citations omitted).

Thus, in response to the *CKOY* line of cases that had informed the ruling of the Federal Court of Appeal, Justice Rothstein stated:

In my opinion, *CKOY* cannot stand for the proposition that establishing any link, however tenuous, between a proposed regulation and a policy objective in s. 3 of the Act is a sufficient test for conferring jurisdiction on the CRTC. Such an approach would conflict with the principle that policy statements circumscribe the discretion granted to a subordinate legislative body.<sup>37</sup>

Having examined the technical structure of the statute, Justice Rothstein then went on to place it in its full legislative context. He concluded that the limited nature of the policy objects in section 3 confirmed his view that the specific power-conferring provisions in sections 9 and 10 of the *Broadcasting Act* did not give the CRTC jurisdiction to implement the proposed value for signal regime:

This interpretation is consistent with a reading of the Act in its entire context. The *Broadcasting Act* has a primarily cultural aim. The other powers enumerated in s. 10(1) deal with such matters as the allocation of broadcasting time and the setting of standards for programs. In addition, the objectives of the *Broadcasting Act*, declared in s. 3(1), when read together, target “the cultural enrichment of Canada, the promotion of Canadian content, establishing a high standard for original programming, and ensuring that programming is diverse”.... While such declarations of policy may not be invoked as independent grants of power, they should be given due weight in interpreting specific provisions of an Act.... Parliament must be presumed to have empowered the CRTC to work towards implementing these cultural objectives; however, the regulatory means granted to the CRTC to achieve these objectives fall short of creating exclusive control rights.

In sum, nowhere in the Act is there a reference to the creation of exclusive control rights over signals or programs. Reading the *Broadcasting Act* in its entire context reveals that the creation of such rights is too great a stretch from the core purposes intended by Parliament and from the powers granted to the CRTC under the *Broadcasting Act*.<sup>38</sup>

It is also noteworthy that, after finding that the CRTC lacked authority for the value for signal regime when the *Broadcasting Act* was interpreted on its own, Justice Rothstein went on to hold in the

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<sup>37</sup> *Id.*, at paras. 24-25.

<sup>38</sup> *Id.*, at paras. 32-33 (emphasis added; citations omitted).

alternative that the CRTC could not exercise such authority even if it existed, because this would bring the *Broadcasting Act* into conflict with the *Copyright Act*. Along with the *Radiocommunication Act* and the *Telecommunications Act*, he noted that these statutes formed “an interrelated scheme”<sup>39</sup> and, “[a]lthough the Acts have different aims, their subject matters will clearly overlap in places.”<sup>40</sup> From this observation, Justice Rothstein proceeded to read the Acts in their collective context in order to determine the precise legislative limitations on the CRTC’s competence to define its own jurisdiction:

...where multiple interpretations of a provision are possible, the presumption of coherence requires that the two statutes be read together so as to avoid conflict....

Ordinarily, ... an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation.... Consequently, as it would be impermissible for the CRTC, a subordinate legislative body, to implement subordinate legislation in conflict with another Act of Parliament, the open-ended jurisdiction-conferring provisions of the *Broadcasting Act* cannot be interpreted as allowing the CRTC to create conflicts with the *Copyright Act*.<sup>41</sup>

This, he concluded, is what the CRTC had done. Its value for signal policy conflicted with the *Copyright Act* “because it would grant broadcasters a retransmission authorization right against BDUs that was withheld by the scheme of the *Copyright Act*.”<sup>42</sup> In interpreting the *Copyright Act*, Justice Rothstein began as he did when interpreting the *Broadcasting Act* — that is, with the text:

Section 21(1) grants broadcasters a limited copyright in the over-the-air signals they broadcast. This copyright gives the broadcaster the sole right to authorize or to do four acts in relation to a communication signal or any substantial part of it:

- (a) to fix it;
- (b) to reproduce any fixation of it that was made without the broadcaster’s consent;
- (c) to authorize another broadcaster to retransmit it to the public simultaneously with its broadcast; and

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<sup>39</sup> *Id.*, at para. 34.

<sup>40</sup> *Id.*, at para. 37.

<sup>41</sup> *Id.*, at paras. 37-39 (emphasis added; citations and internal quotation marks omitted).

<sup>42</sup> *Id.*, at para. 62.

- (d) in the case of a television communication signal, to perform it in a place open to the public on payment of an entrance fee, and to authorize any act described in paragraph (a), (b) or (d).

The aspect relevant for this appeal is in para. (c). Under this paragraph, a broadcaster has the sole right to authorize another broadcaster to retransmit simultaneously a communication signal. Section 2 of the *Copyright Act* defines “broadcaster” as a body that, in the course of operating a broadcasting undertaking, broadcasts a communication signal in accordance with the law of the country in which the broadcasting undertaking is carried on, but excludes a body whose primary activity in relation to communication signals is their retransmission.

The underlined portion of the definition refers to BDUs. BDUs are not a “broadcaster” within the meaning of the *Copyright Act* because their primary activity in relation to communication signals is their retransmission. Thus, the broadcaster’s s. 21(1)(c) right to authorize, or not authorize, another broadcaster to simultaneously retransmit its signals does not apply against BDUs. In other words, under s. 21 of the *Copyright Act*, a broadcaster’s exclusive right does not include a right to authorize or prohibit a BDU from retransmitting its communication signals.<sup>43</sup>

From this careful reading of the *Copyright Act* and Parliament’s exclusion of BDUs from the definition of “broadcaster”, Justice Rothstein concluded that:

[Section] 21(1) represents the expression by Parliament of the appropriate balance to be struck between broadcasters’ rights in their communication signals and the rights of the users, including BDUs, to those signals. It would be incoherent for Parliament to set up a carefully tailored signals retransmission right in the *Copyright Act*, specifically excluding BDUs from the scope of the broadcasters’ exclusive rights over the simultaneous retransmission of their signals, only to enable a subordinate legislative body to enact a functionally equivalent right through a related regime. The value for signal regime would upset the aim of the *Copyright Act* to effect an appropriate balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator.<sup>44</sup>

As a Federal Court of Appeal judge in *Barrie Public Utilities* and as a judge of the Supreme Court of Canada in *Cogeco*, Justice Rothstein resisted what had become a tradition: judicial deference to the CRTC’s

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<sup>43</sup> *Id.*, at paras. 48-50 (emphasis in original).

<sup>44</sup> *Id.*, at para. 67 (citation and internal quotation marks omitted).

expansive definition of its own jurisdiction, relying on the objectives of Canada's broadcasting policy. He did so through the craft of statutory interpretation, following the approach endorsed by the case law but not always consistently adhered to therein. The patience required to understand where and how enactments intersect and how Parliament's design can be discerned from their interrelation is difficult work, particularly with respect to such a complex scheme involving multiple statutes, and demands patience and technical skill that only the finest litigators possess. Marshall Rothstein was one of them. In Justice Rothstein's reasons, it showed.

## 2. Contractual Interpretation

Justice Rothstein's interpretive approach, faithful as it was to text and context, extended beyond statutory interpretation cases. Perhaps the clearest evidence of his consistency appeared in his reasons in one of the most significant judgments of his time on the Court: *Sattva Capital Corp. v. Creston Moly Corp.*<sup>45</sup> *Sattva* is and will remain famous for Justice Rothstein's statement that:

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.<sup>46</sup>

Yet, what makes *Sattva* so remarkable is Justice Rothstein's unmistakable respect for the autonomy and role-integrity of the various actors involved in making and enforcing a contract. The theme is respect: respect for the intentions of the parties, respect for the institutional limitations of the courts, respect for the functions of fact-finders — respect, in other words, for the mechanisms that ensure the rule of law.

Justice Rothstein recognized that the “historical approach”, under which contract interpretation was considered a question of law, had largely been eclipsed by time, as well as by developments such as the advance of widespread literacy and judge-alone civil trials.<sup>47</sup> He observed that:

[T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction.

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<sup>45</sup> [2014] S.C.J. No. 53, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), revg [2012] B.C.J. No. 1631 (B.C.C.A.) [hereinafter “*Sattva*”].

<sup>46</sup> *Sattva, id.*, at para. 50.

<sup>47</sup> *Id.*, at paras. 43-44.

The overriding concern is to determine “the intent of the parties and the scope of their understanding”.... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.<sup>48</sup>

Where, in his statutory interpretation decisions, Justice Rothstein faithfully read “the words of an Act ... in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”,<sup>49</sup> here he instructed trial judges and commercial arbitrators to “read the contract as a whole” and “giv[e] the words ... their ordinary and grammatical meaning”, in harmony with “the surrounding circumstances”.<sup>50</sup> As he himself did in interpreting the *Copyright Act* in *Cogeco*, Justice Rothstein emphasized the importance of beginning with the text itself:

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement.... The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract.... While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.<sup>51</sup>

Thus, while *Sattva* is now the leading case on the standard of review to be applied in cases of contractual interpretation, it also stands more broadly as a powerful affirmation of the roles of contract parties, fact-finders and appellate judges. Justice Rothstein’s game-changing conclusion about the standard of review followed from his assessment of these institutional competencies:

The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation...

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<sup>48</sup> *Id.*, at para. 47 (emphasis added; citations omitted).

<sup>49</sup> Dreidger, *supra*, note 3, at 87; see *ExpressVu*, *supra*, note 3, at para. 26.

<sup>50</sup> *Sattva*, *supra*, note 45, at para. 47.

<sup>51</sup> *Id.*, at para. 57 (citations omitted).

...[T]his Court in *Housen [v. Nikolaisen]*<sup>52</sup> found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.<sup>53</sup>

This approach marked a clear departure from what Justice Rothstein characterized as courts' "historical" attitude in contract cases, marked by an insistence that questions of contractual interpretation were questions of law, to be answered with recourse to universal legal principles. In *Sattva*, Justice Rothstein did not deny broad legal rules their proper place<sup>54</sup> — this is why the questions raised by contracts are "of mixed fact and law", after all — but he insisted that the judicial role ultimately be constrained by the words of the contract and the intentions of the parties who formed it.<sup>55</sup> But the judge's view of the law in a particular case must always be guided by his reading of the contract, not the other way around.

This, ultimately, is what marks Justice Rothstein's approach, both to statutory interpretation and to contract interpretation. Where a legal instrument is put in place, whether by legislative action or by the assent of private parties, and where that legal instrument provides structure and form to the relationships between persons or between persons and the state, the words of the instrument are paramount. Without text and context, there can be no consistency in application. And where there is no consistency, the vacuum can too readily be filled by the very opposite of justice and the rule of law: arbitrariness.

### 3. Constitutional Interpretation

The need for an emphasis on text and context, to avoid the spectre of arbitrariness, is all the more essential for constitutional interpretation. And yet, for courts, the temptation to rely on extra-textual authority is

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<sup>52</sup> [2002] S.C.J. No. 31, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), affg [1997] S.J. No. 759 (Sask. Q.B.).

<sup>53</sup> *Sattva*, *supra*, note 45, at paras. 51-52 (citation omitted).

<sup>54</sup> *Id.*, at para. 53.

<sup>55</sup> *Id.*, at para. 64.

heightened because constitutional questions are subject to appellate review on a standard of correctness,<sup>56</sup> and so the appellate judge is entitled to start from scratch in fashioning the answer. Where judges differ in their approaches to constitutional interpretation is in where “scratch” is.

For Justice Rothstein, the answer was unsurprising: the words are the starting point.

*Ontario (Attorney General) v. Fraser*<sup>57</sup> concerned collective bargaining and the right to freedom of association under section 2(d) of the *Charter of Rights and Freedoms*.<sup>58</sup> In *Dunmore v. Ontario (Attorney General)*,<sup>59</sup> the Supreme Court of Canada had found the Ontario legislature’s exclusion of farm workers from the statutory framework governing labour relations in the province to be unconstitutional. Ontario had responded by passing the *Agricultural Employees Protection Act, 2002* (“AEPA”), which excluded agricultural workers from the province’s *Labour Relations Act* but created a separate, parallel regime for them. The applicants in *Fraser* argued that, because the AEPA excluded farm workers from the same protections enjoyed by workers in other sectors, it failed to sufficiently protect their right to organize and to participate in collective bargaining with their employers, and therefore infringed the farm workers’ rights under sections 2(d) and 15 of the Charter.

At the Supreme Court of Canada Justice Rothstein wrote a concurring opinion disagreeing with the majority with respect to the scope of the right at issue. The majority determined that the applicants could have established a breach of section 2(d) of the Charter, but had failed to do so on the facts of the case. Justice Rothstein disagreed.

The *Fraser* majority held that:

[W]hat s. 2(d) protects is the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless. It is in this derivative sense that s. 2(d) protects a right to collective bargaining; see *Ontario (Public Safety and Security)*

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<sup>56</sup> See *Sattva*, *supra*, note 45, at para. 75.

<sup>57</sup> [2011] S.C.J. No. 20, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.), revg [2008] O.J. No. 4543 (Ont. C.A.) [hereinafter “*Fraser*”].

<sup>58</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

<sup>59</sup> [2001] S.C.J. No. 87, 2001 SCC 94, [2001] 3 S.C.R. 1016 (S.C.C.), revg [1999] O.J. No. 1104 (Ont. C.A.).

*v. Criminal Lawyers' Association*, ... However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.<sup>60</sup>

The Chief Justice and Justice LeBel declined to revisit the Court's 2007 decision in *Health Services*,<sup>61</sup> in which the Court first announced that the section 2(d) right encompasses a guarantee of a "meaningful" collective bargaining process.<sup>62</sup>

Justice Rothstein was not inclined to leave that precedent undisturbed. In one of the more remarkable judgments in recent Supreme Court history, he undertook a deep and detailed examination of section 2(d) and the Court's jurisprudence, concluding that the previous decision was ripe for reversal.

What is most noteworthy — and compelling — about Justice Rothstein's reasons in *Fraser* is his acknowledgment of, yet detachment from, the ideological undercurrents of the case. "A constitutionally imposed duty to bargain in good faith strengthens the position of organized labour *vis-à-vis* employers", he acknowledged. "I express no opinion on the desirability of such an outcome."<sup>63</sup> He concluded that: "The decision to impose a duty of collective bargaining should be made by the legislature, and not by the court."<sup>64</sup>

In *Fraser* — as in *Sattva* and *Cogeco* — Justice Rothstein made no secret of his method; he began, as ever, with the text. From the words of the Charter, he offered five reasons for why the right to collective bargaining announced in *Health Services* could not properly be located in section 2(d).

**First**, the Court in *Health Services* "reinterpreted an individual freedom" — that is, the freedom to associate — "as giving rise to collective rights with no individual rights foundation".<sup>65</sup> This upset the apple cart of the Charter's textual scheme, since it assigned "greater constitutional rights" to "individuals who are members of specific

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<sup>60</sup> *Fraser*, *supra*, note 57, at para. 46 (internal citations and quotation marks omitted).

<sup>61</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, [2007] 2 S.C.R. 391(S.C.C.), varg [2004] B.C.J. No. 1354 (B.C.C.A.) [hereinafter "*Health Services*"].

<sup>62</sup> *Health Services*, *id.*, at para. 90.

<sup>63</sup> *Fraser*, *supra*, note 57, at para. 126.

<sup>64</sup> *Id.*, at para. 126.

<sup>65</sup> *Id.*, at para. 178.

groups ... than those who are not.”<sup>66</sup> He found support for this view in the language of the Charter itself:

While the *Charter* may protect certain collective rights, freedom of association does not fall into that category. Where a particular *Charter* guarantee extends greater rights to a group than to an individual, that effect is made clear in the text of the particular guarantee. For example, the right to minority language education in ss. 23(1) and 23(2) is subject to there being a sufficient number of eligible children to warrant public expenditures on minority language education (s. 23(3)). In this way, the guarantee in s. 23 is predicated on the existence of a group. Minority language educational rights thus have a unique collective aspect even though the rights are granted to individuals .... Similarly, s. 35(1) of the *Constitution Act, 1982* recognizes the “existing aboriginal and treaty rights of the aboriginal peoples”. Treaty rights, being rights established in a treaty between a group of aboriginals and the Crown, undoubtedly have a collective dimension to them insofar as they vest rights in a particular group. ... By contrast, s. 2(d) provides that “[e]veryone has . . . freedom of association”. This language supports an interpretation of s. 2(d) as an individual freedom.<sup>67</sup>

**Second**, Justice Rothstein argued that the Court had erred in *Health Services* when it had “transform[ed] s. 2(d) from a freedom into a ‘positive’ right by imposing an obligation to act on third parties (*i.e.*, the employer).”<sup>68</sup> Here, too, he turned to the text:

A freedom exists to protect a sphere of autonomy, an area within which the individual will encounter no obstacles. A right, on the other hand, exists to provide an individual with a claim to some specific thing. Generally, a freedom can be described as a right only if it is recognized that the right is “negative” in character, that is, only if it is described as an entitlement to be free of restriction or prohibition.

An example of how a freedom can sometimes be described using the word “right” can be found by examining ss. 7 to 12 of the *Charter*. When the *Charter* uses the term “right”, as it does in ss. 7 to 12, either a positive entitlement is introduced, or a right to be free of some restriction or prohibition (*i.e.* a freedom) is introduced. For the positive rights, an individual is given a right to some form of state action, *e.g.* to be advised of a right to counsel upon arrest. For the negative rights, the

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<sup>66</sup> *Id.*, at para. 179.

<sup>67</sup> *Id.*, at para. 180 (emphasis added; internal citations and quotation marks omitted).

<sup>68</sup> *Id.*, at para. 190.

individual is given a right to be free from some form of restriction or prohibition, e.g. a right not to be arbitrarily detained or imprisoned. As discussed above, the right to be free of a restriction or a prohibition is a description that encompasses the “negative” character of the right, and is simply another way to describe a freedom.<sup>69</sup>

*Third*, Justice Rothstein took issue with *Health Services*’ “privileging some associations over others”.<sup>70</sup> The *Health Services* Court found fault in previous cases’ “decontextualized” approach, wherein “[w]hatever the organization — be it trade union or book club — its freedoms were treated as identical.”<sup>71</sup> What was instead warranted, said the Court in *Health Services*, was a “purposive” approach to section 2(d), which required recognition of a corresponding duty of an employer to bargain with a trade union (but not a book club) in good faith. This, Justice Rothstein wrote in *Fraser*, is erroneous because it fails to “place freedom of association in its linguistic, philosophic and historical contexts”.<sup>72</sup> He said:

The origins of the concept, the words used to describe it, and the philosophical principles on which it relies will define the scope of s. 2(d) protection. The extent of that protection should not change depending on the particular factual context or circumstances in which s. 2(d) is being applied....<sup>73</sup>

.....

[The majority’s] approach diverges from the purposive approach to *Charter* interpretation explained in *Big M*. Rather than focussing on the linguistic, philosophic and historical contexts of the right itself, their approach focusses on the particular aims and goals of the association in question. The inquiry shifts from a consideration of the purpose and context of the *Charter*, to a consideration of what activities the courts believe are normatively and subjectively more important.<sup>74</sup>

Justice Rothstein’s criticism of the *Fraser* majority is that they privileged the circumstances of the case — and, impliedly, their opinions

<sup>69</sup> *Id.*, at paras. 191-192 (emphasis added).

<sup>70</sup> *Id.*, at para. 203.

<sup>71</sup> *Health Services*, *supra*, note 61, at para. 30.

<sup>72</sup> *Fraser*, *supra*, note 57, at para. 207 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, at 344 (S.C.C.), *per* Dickson J., affg [1983] A.J. No. 766 (Alta. C.A.)).

<sup>73</sup> *Fraser*, *supra*, note 57, at para. 207.

<sup>74</sup> *Id.*, at para. 214.

about trade unions — over a careful reading of the text of the Charter. He alludes specifically to the danger inherent in this approach in his reference to freedom of religion, reminding his colleagues that the language of the enactment that they are interpreting does not permit the Court to make substantive determinations of worth as between potential rights claimants. This, he concludes, is what the Court did in *Health Services* and what it did again in *Fraser*.

Justice Rothstein's fourth and fifth reasons for rejecting the *Health Services* approach to section 2(d) in *Fraser* reflect less his interpretive approach than his careful attention to institutional roles.

**Fourth**, Justice Rothstein observed that the *Health Services* and *Fraser* majorities ultimately “granted constitutional protection to ... collective agreements on the basis that they were the fruits of that process.”<sup>75</sup> This, he charged, elevates contractual terms above statutes, such that certain private contracts are constitutionally insulated from legislative interference. This criticism reflects Justice Rothstein's concern with protecting the fine balance on which the rule of law depends, between courts, legislatures and private actors.

**Fifth**, and finally, Justice Rothstein discussed the Court's own history, prior to *Health Services*, of deferring to the legislature on questions of labour relations, and for good reason:

[T]he principle of judicial deference in the field of labour relations is rooted in two underlying concerns. The first of these is that the Court is ill-equipped to carry out the requisite balancing of interests in the labour relations context.... While the courts are responsible for safeguarding the ability of individuals to do collectively that which they have the right to do as individuals, the judiciary is ill-equipped to engage in fine adjustments to the balance of power between labour and management....<sup>76</sup>

The second underlying concern justifying judicial deference in the area of labour relations is that courts should avoid extending constitutional protection to a particular statutory model of labour relations.... [T]he courts should avoid defining as a matter of constitutional law the particular framework according to which all Canadian labour relations must be structured for the indefinite future.<sup>77</sup>

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<sup>75</sup> *Id.*, at para. 216.

<sup>76</sup> *Id.*, at para. 223.

<sup>77</sup> *Id.*, at para. 225.

Calls for deference are often considered a hallmark of small-“c” conservative judging, yet Justice Rothstein’s discussion of the legislative frontier sounded a progressive note. Why should the Court constitutionalize the particular model of labour relations that is presently dominant in North America, when other, better, perhaps fairer techniques may emerge in the future? Why tie the legislature’s hands to the bench’s understanding of the status quo when better may yet be possible? By defending legislative running room, Justice Rothstein preserved both the role of the courts and the role of the legislature in the constitutional order.

In statutory interpretation, contractual interpretation and constitutional interpretation, Justice Rothstein espoused and adhered to a consistent judicial philosophy, one centred on text and context and cognizant of the roles of the different actors involved in the creation and enforcement of legal rules. His judgments speak to the unity of his approach — and, above all, to his training and experience as a skilled civil litigator.

That training and experience also found expression in the second major component of Justice Rothstein’s approach to judging: his insistence on an adequate evidentiary basis for decision, backed by a keen awareness of what was and was not before the court in a particular case.

### III. AN APPRECIATION OF THE NEED FOR EVIDENCE

It should be obvious to any civil litigator that an evidentiary basis is required to ground a cause of action. Surprisingly, lawyers and judges all too frequently concentrate on other aspects of their legal argument at the expense of this fundamental requirement. Indeed, the failure to produce an evidentiary basis is not exclusively a beginner’s error. This issue may not have the surface glitter of other matters, but it is fundamental to procedural fairness and the rule of law.

The evolution of the common law depends upon cases being decided on the basis of a full factual record. That evidentiary basis is essential not only to do justice between the parties, but also to set common law judgments in the context of concrete cases. That, indeed, is the genius of the common law.

As we noted at the outset, Justice Rothstein was one of Canada’s top counsel prior to his appointment to the bench, and he was insistent after his appointment that the litigants before him establish a proper evidentiary basis for their case.

Appellate courts frequently stress the importance of establishing a sufficient evidentiary basis for determinations of law with potentially broad implications. For example, In *Northern Telecom Ltd. v. Communications Workers of Canada*,<sup>78</sup> the issue before the Supreme Court of Canada was the limits of the Canada Labour Relations Board's jurisdiction in light of the constitutional division of powers.<sup>79</sup> Writing for the Court, Justice Dickson (as he then was), determined that:

On the evidence in the record, this Court is simply not in a position to resolve the important question of constitutional jurisdiction over the labour relations of the employees involved in the installation department of Telecom....<sup>80</sup>

The Court considered returning the matter to the Board to create the necessary evidentiary record to adjudicate the constitutional issue, but ultimately rejected this possibility because, “[t]o refer the whole affair back to the Board for a re-hearing would start the matter all over again...”<sup>81</sup> It decided, instead, to dismiss the appeal with costs to the respondent union.<sup>82</sup>

## 1. Regulatory Cases

Justice Rothstein's regulatory judgments displayed a similar lack of enthusiasm for evidentiary deficiencies, and nowhere more so than in cases involving the Competition Bureau. Here, Justice Rothstein's concern with “jurisdiction creep” by administrative boards and tribunals and his litigator's appreciation for the art of case-building were each in full view. At every level of court, he refused to permit the Bureau to obtain a remedy without a proper evidentiary basis.

For example, the *Superior Propane* cases turned on section 100 of the *Competition Act*,<sup>83</sup> which authorizes the Tribunal to issue an interim order barring a merger where the Tribunal is satisfied that the proposed merger is “reasonably likely to prevent or lessen competition substantially”.<sup>84</sup> In applying section 100, Justice Rothstein emphasized

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<sup>78</sup> [1979] S.C.J. No. 98, [1980] 1 S.C.R. 115, 28 NR 707 (S.C.C.), affg [1977] F.C.J. No. 51 (F.C.A.) [hereinafter “*Northern Telecom*”].

<sup>79</sup> *Northern Telecom*, *supra*, note 78, at 127-30.

<sup>80</sup> *Id.*, at 139.

<sup>81</sup> *Id.*, at 140.

<sup>82</sup> *Id.*, at 141.

<sup>83</sup> R.S.C. 1985, c. C-34 [hereinafter “*Competition Act*”].

<sup>84</sup> *Id.*, s. 100.

the requirement that the Director present an evidentiary case to justify the interim relief sought:

...generally I think some evidence of significant concentration or market share must ... be present to support a finding that a proposed merger is reasonably likely to prevent or lessen competition substantially.<sup>85</sup>

Justice Rothstein observed that, according to the evidence of the Director, which the respondents had not substantially challenged, “the merged operation would have a Canadian market share of over 70 percent”, including a market share of over 90 per cent in certain markets.<sup>86</sup> This was not a complete answer, however, since it failed to account for “[t]he fundamental test for determining the boundaries of the relevant market”, namely “substitutability”.<sup>87</sup>

In his analysis of the evidence before him on substitutability, Justice Rothstein found the evidentiary basis of the Director’s application wanting:

[T]he Director has provided no evidence as to whether propane pricing is or is not observed to be disciplined by other fuel prices. One would expect that if the relevant market was limited to propane, that there would be some evidence that propane pricing was independent of the pricing of other fuel sources. There is no such evidence. On the contrary, there is evidence from the respondents that pricing practices are governed by alternative fuel cost comparisons....<sup>88</sup>

The Director submits that certain uses are essentially unique to propane. He refers to agricultural and other drying uses in areas where natural gas is not easily available, heating in remote confined areas such as construction sites, mines, oil wells and forestry operations, portable home use, and non polluting fleet automotive use. He also says that the market is stable or declining.

.....

With respect to the use of propane at construction sites, mines, oil wells and forestry operations, the Director’s evidence provides no information....  
There is virtually no evidence about these locations. On the basis of the

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<sup>85</sup> *Canada (Director of Investigation & Research) v. Superior Propane Inc.*, [1998] C.C.T.D. No. 20, 85 C.P.R. (3d) 194, at para. 21 (Competition Tribunal) [hereinafter “*Superior Propane* (Competition Tribunal)”].

<sup>86</sup> *Id.*, at para. 22.

<sup>87</sup> *Id.*, at para. 28.

<sup>88</sup> *Id.*, at para. 35.

record before me, I do not have sufficient information about these locations to accord them any significant weight in making a determination of market definition in this application under section 100.<sup>89</sup>

Ultimately, he concluded that: “The Director has the obligation to satisfy the Tribunal that the proposed merger is reasonably likely to prevent or lessen competition substantially. On the basis of the record before me he has not done so.”<sup>90</sup>

Competition cases, like the cases involving the extent of the CRTC’s regulatory jurisdiction discussed above, are often framed as policy problems and litigated as such. To the skilled civil litigator, this may be strategically advantageous, at least if one’s client is the regulator. Yet, it undervalues a significant aspect of the advocate’s training: assembling an evidentiary record that supports a legal argument. Justice Rothstein’s precedent-setting decision in *Superior Propane* indicated his readiness, as a judge, to hold counsel before him to the same standard of diligence to which he held himself in practice. The result was an exacting standard of judicial scrutiny of the exercise of regulatory authority — on which the rule of law depends.

Several years later, when *Superior Propane* had been (twice) decided on the merits and was (for the second time) on appeal to the Federal Court of Appeal,<sup>91</sup> it came once again before Justice Rothstein, who had by then been elevated to that court. The issue in the case on appeal was the Tribunal’s interpretation of the “efficiencies defence”, set out in section 96 of the *Competition Act*. That section directs the Tribunal not to make an order to halt or unwind a merger that is found to prevent or lessen competition substantially,<sup>92</sup> where the Tribunal finds that “the merger ... has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.”<sup>93</sup>

Writing for a majority of the court on the second *Superior Propane* appeal, Justice Rothstein’s reasons focused on the key issue in dispute: the Tribunal’s treatment of the gains to Superior’s post-merger

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<sup>89</sup> *Id.*, at paras. 38-40.

<sup>90</sup> *Id.*, at para. 57.

<sup>91</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] F.C.J. No. 455, 2001 FCA 104, [2001] 3 F.C. 185 (F.C.A.) [hereinafter “*Superior Propane I*”]; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] F.C.J. No. 151, 2003 FCA 53, [2003] 3 F.C. 529 (F.C.A.) [hereinafter “*Superior Propane II*”].

<sup>92</sup> See *Competition Act*, *supra*, note 83, at s. 92.

<sup>93</sup> *Id.*, s. 96.

shareholders arising from the transaction and the corresponding loss to consumers.<sup>94</sup> Under the test applied by the Tribunal, this redistribution of wealth was considered to be neutral and so was not taken into consideration when weighing the efficiency gains from a merger against its anti-competitive effects.<sup>95</sup> The Tribunal determined that it should include only the portion of the wealth transfer to shareholders that could be described as “socially adverse” in its weighing of efficiency gains.<sup>96</sup> Justice Rothstein agreed, not on the basis of policy, but rather because of the evidentiary record before the Tribunal:

... For purposes of the subsection 96(1) inquiry, the Tribunal was not prepared to assume that the entirety of the wealth transfer should necessarily be considered a socially adverse effect of the merger. ...

The only socially adverse effects of the merger that the Tribunal was able to find were the effects on low-income households that used propane for essential purposes and had no good alternatives. The Tribunal calculated this socially adverse portion of the wealth transfer to be approximately \$2.6 million per year.<sup>97</sup>

The Court [of Appeal] left it open to the Tribunal to adopt the socially adverse effects approach to the wealth transfer. The Tribunal based its analysis on this approach, but found that there was a dearth of evidence presented by the Commissioner respecting the adverse effects of the merger...<sup>98</sup>

The Commissioner’s argument, both before the Tribunal and on appeal, was that the transfer of wealth from consumers to shareholders was almost *ipso facto* a loss to be weighed against the transaction’s efficiency gains. Justice Rothstein declined to agree in the absence of an evidentiary basis for that conclusion. Inherent in Justice Rothstein’s reasons was his regard for the prerogatives of the fact-finder.

If Justice Rothstein’s respect for institutional role was implicit in his discussion of the proper weighing of the wealth transfer from consumers to shareholders, then it was explicit in his analysis of the Tribunal’s treatment of the alleged effects of the merger on small- and medium-sized enterprises.

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<sup>94</sup> *Superior Propane II*, *supra*, note 91, at para. 22.

<sup>95</sup> *Id.*, at para. 14.

<sup>96</sup> *Id.*, at para. 23.

<sup>97</sup> *Id.*, at paras. 23-25.

<sup>98</sup> *Id.*, at para. 58.

There, he noted, “[t]he sufficiency of evidence is a matter for the Tribunal to consider and determine.”<sup>99</sup>

Justice Rothstein’s *Superior Propane* decisions exemplify his insistence on the need for evidence, as a member of the Federal Court and the Federal Court of Appeal. The same can be said of his tenure on the Supreme Court of Canada.

Most recently in *Tervita*,<sup>100</sup> which was the second competition case (after *Superior Propane*) to be contested on the basis of the section 96 efficiencies defence, the Commissioner had neglected to quantify the anti-competitive effects arising from the impugned merger. Justice Rothstein stated:

The Commissioner’s burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed....<sup>101</sup>

.....

In this case, the Commissioner failed to meet her burden to quantify the quantifiable anti-competitive effects. As a result, the Tribunal should have assigned zero weight to the quantifiable anti-competitive effects.<sup>102</sup>

Justice Rothstein’s concern with the need for evidence extended beyond competition law to class action certifications. In *Microsoft*,<sup>103</sup> Justice Rothstein, speaking for a unanimous Supreme Court of Canada, certified a class of indirect purchasers seeking damages from Microsoft on the basis of passing-on of alleged over-charges. In the course of doing so, when considering the use of expert evidence at the certification stage, he wrote:

In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement.

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<sup>99</sup> *Id.*, at para. 39.

<sup>100</sup> *Tervita Corp. v. Canada (Commissioner of Competition)*, [2015] S.C.J. No. 3, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.), revg [2013] F.C.J. No. 557 (F.C.A.) [hereinafter “*Tervita*”].

<sup>101</sup> *Tervita*, *supra*, note 100, at para. 125 (emphasis added).

<sup>102</sup> *Id.*, at para. 137 (emphasis added).

<sup>103</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57, [2013] 3 S.C.R. 477 (S.C.C.), revg [2011] B.C.J. No. 688 (B.C.C.A.) [hereinafter “*Microsoft*”].

This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (*i.e.*, that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.<sup>104</sup>

## 2. Civil Cases

Justice Rothstein also had occasion to apply the need for an evidentiary basis in the civil context while on the Supreme Court. This is apparent from the class action certification decision in *Sun-Rype*,<sup>105</sup> heard together with the other indirect purchaser class action case of *Microsoft*.

In *Sun-Rype*, the defendants were alleged to have engaged in an illegal price-fixing conspiracy involving high-fructose corn syrup. The plaintiffs included both direct and indirect purchasers. In the Supreme Court of Canada, the defendants argued that the class could not be certified because there was no way for indirect purchasers to determine whether they had, in fact, purchased products containing high-fructose corn syrup.<sup>106</sup> Therefore, the certification requirement for an “identifiable class” in the class proceedings legislation could not be met.

Justice Rothstein agreed that the plaintiffs had failed to establish the requisite evidentiary basis for the relief sought, even at the certification stage:

Here, there is no basis in fact to demonstrate that the information necessary to determine class membership is possessed by any of the putative class members. The appellants have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified. Here, they have not met even this relatively low evidentiary standard....<sup>107</sup>

.....

A key component in any class action is that two or more persons fit within the class definition. If, as in this case, there is no basis in fact to

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<sup>104</sup> *Id.*, at para. 118 (emphasis added).

<sup>105</sup> *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2013] S.C.J. No. 58, 2013 SCC 58, [2013] 3 S.C.R. 545 (S.C.C.), varg [2011] B.C.J. No. 689 (B.C.C.A.) [hereinafter “*Sun-Rype*”].

<sup>106</sup> *Id.*, at para. 55.

<sup>107</sup> *Id.*, at para. 61 (emphasis added).

show that at least someone can prove they fit within the class definition, the class cannot be certified because the criteria of “an identifiable class of 2 or more persons” is not met. No amount of expert evidence establishing that the defendants have harmed the class as a whole does away with this requirement.<sup>108</sup>

*Microsoft* and *Sun-Rype* illustrate the consistency of Justice Rothstein’s rigour with respect to evidence across different areas of law. Both cases also illustrate the breadth of Justice Rothstein’s impact. *Microsoft* and *Sun-Rype* have since been applied in class certification proceedings to ensure that a proper evidentiary basis exists for the assessment of damages and for determining class membership.<sup>109</sup> Justice Rothstein’s jurisprudence reflected a firm belief that the integrity of process is instrumental to the achievement of just outcomes and to maintaining the rule of law.

#### IV. REASONABLE DEFERENCE TO ADMINISTRATIVE DECISION-MAKERS

Justice Rothstein’s administrative law jurisprudence provides the third and final vantage point from which to assess his judicial philosophy — and, specifically, his view of the institutional role of the courts in the Canadian constitutional structure. While Justice Rothstein authored numerous administrative law judgments during his time at the Federal Court, Federal Court of Appeal and Supreme Court of Canada, three Supreme Court judgments demonstrate his belief in the importance of rigorous judicial review and respect for precedent: *Khosa*,<sup>110</sup> *Alberta Teachers*<sup>111</sup> and *SOCAN*.<sup>112</sup>

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<sup>108</sup> *Id.*, at para. 72 (emphasis added).

<sup>109</sup> See *Miller v. Merck Frosst Canada Ltd.*, [2015] B.C.J. No. 1683, 2015 BCCA 353, 375 B.C.A.C. 224, at paras. 27-38 (B.C.C.A.), affg [2013] B.C.J. No. 613 (B.C.S.C.), leave to appeal refused [2015] S.C.C.A. No. 431 (S.C.C.); *Charlton v. Abbott Laboratories Ltd.*, [2015] B.C.J. No. 41, 2015 BCCA 16, 381 D.L.R. (4th) 575, at paras. 81-83, 110-113 (B.C.C.A.), revg [2014] B.C.J. No. 1963 (B.C.S.C.), revg [2014] B.C.J. No. 1292 (B.C.S.C.).

<sup>110</sup> *Canada (Citizenship and Immigration) v. Khosa*, [2009] S.C.J. No. 12, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), revg [2007] F.C.J. No. 139 (F.C.A.) [hereinafter “*Khosa*”].

<sup>111</sup> *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011] S.C.J. No. 61, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), revg [2010] A.J. No. 51 (Alta. C.A.) [hereinafter “*Alberta Teachers*”].

<sup>112</sup> *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] S.C.J. No. 35, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) [hereinafter “*SOCAN*”].

*Khosa* probably best reflects Justice Rothstein's true view of the appropriate standard of judicial review; while he recognized the importance of deference to administrative tribunals, he argued against deference on pure questions of law. In his concurrence in *Khosa*, he expounded on this view that legal determinations are matters best left to the courts, while factual and policy matters lie within tribunals' expertise and are matters on which significant deference should be accorded. In short, Justice Rothstein believed in deference, but not deference without limit. Rather, deference should be determined in light of the particular expertise of courts, the Canadian constitutional structure and the intent of Parliament.

*Khosa* concerned a removal order against Mr. Khosa issued pursuant to the *Immigration and Refugee Protection Act* after he was convicted of an offence. Mr. Khosa appealed the decision to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board. The IAD rejected his appeal and concluded that there were insufficient humanitarian and compassionate considerations to overturn the removal order.<sup>113</sup>

The decision was ultimately appealed to the Supreme Court. The majority of the Supreme Court concluded that the IAD was entitled to deference,<sup>114</sup> and therefore granted the appeal.<sup>115</sup> Justice Rothstein concurred in the result, but wrote separate reasons in which he grappled with principled questions of administrative law.

Consistent with his previous practice, Justice Rothstein began not with abstract principles, but with the words of the relevant statute itself, in this case section 18.1(4) of the *Federal Courts Act*:

The language of s. 18.1(4)(d) makes clear that findings of fact are to be reviewed on a highly deferential standard. Courts are only to interfere with a decision based on erroneous findings of fact where the federal board, commission or other tribunal's factual finding was "made in a perverse or capricious manner or without regard for the material before it". By contrast with para. (d), there is no suggestion that courts should defer in reviewing a question that raises any of the other criteria in s. 18.1(4). Where Parliament intended a deferential standard of review in s. 18.1(4), it used clear and unambiguous language. The necessary implication is that where Parliament did not provide for a deferential standard, its intent was that no deference be shown. As I will explain, the language and context of s. 18.1(4), and in particular the absence of

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<sup>113</sup> *Khosa*, *supra*, note 110, at para. 2.

<sup>114</sup> *Id.*, at paras. 53-59.

<sup>115</sup> *Id.*, at paras. 60 and 67.

deferential wording, demonstrates that a correctness standard is to be applied to questions of jurisdiction, natural justice, law and fraud. The language of s. 18.1(4)(d) indicates that deference is only to be applied to questions of fact.<sup>116</sup>

Justice Rothstein began with the principle that Parliament had explicitly turned its mind to the question of the standard of review and, in doing so, had provided for a difference between the deference to be accorded on factual matters and questions of law or jurisdiction.

Justice Rothstein criticized the majority for treating administrative law decisions as *automatically* producing a tension between the judiciary and Parliament.<sup>117</sup> Justice Rothstein did not disagree that there were cases when this tension arose, particularly when the legislature enacted privative clauses intended to immunize statutory decision-makers from review, such as in the labour relations context:

In attempting to preclude judicial review, privative clauses gave rise to a tension between the two core pillars of the public law system: legislative supremacy and the judicial enforcement of law.... Strong privative clauses reflected the legislature's intent to make administrative decisions final and thereby beyond the purview of judicial scrutiny. This conflicts with the rule of law principle of accountability, for which access to courts is necessary....

Faced with these competing "supremacies", courts were forced to develop a juridical approach that would reconcile, or at least alleviate, this tension. In Canada, courts opted for the deference approach.<sup>118</sup>

However, for Justice Rothstein, this approach did not necessarily apply in the *absence* of a privative clause. The standard of review jurisprudence was a response to a very particular problem: an attempt by the legislature to remove from judicial review that which (sometimes) could not be removed. However, where that particular problem did not arise it was more appropriate to treat the question of review more like conventional questions of statutory interpretation:

I do not dispute that reviewing courts, whether in the appellate or judicial review contexts, should show deference to lower courts and administrative decision-makers on questions of fact....

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<sup>116</sup> *Id.*, at paras. 71-72 (emphasis added).

<sup>117</sup> *Id.*, at para. 78.

<sup>118</sup> *Id.*, at para. 81.

However, where a legal question can be extricated from a factual or policy inquiry, it is inappropriate to presume deference where Parliament has not indicated this via a privative clause. ... The reasons for this are twofold. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations... Divergent applications of legal rules undermine the integrity of the rule of law... Second, appellate and reviewing courts have greater law-making expertise relative to trial judges and administrative decision-makers....

In the administrative context, unlike the appellate context, the legislature may decide that an administrative decision-maker has superior expertise relative to a reviewing court, including on legal questions. It signals this recognition by enacting a strong privative clause. It is in these cases that the court must undertake a standard of review analysis to determine the appropriate level of deference that is owed to the tribunal. It is not for the court to impute tribunal expertise on legal questions, absent a privative clause and, in doing so, assume the role of the legislature to determine when deference is or is not owed.<sup>119</sup>

Significantly, in *Khosa*, Justice Rothstein brought together the two threads that run throughout the analysis of his jurisprudence in this article.

The first is Justice Rothstein's deep respect for the rule of law. It was essential to him to maintain a principle of universality because it is inherent to the rule of law that laws be applied equally and consistently. The rule of law is significantly undermined if courts, performing their reviewing function, are not able to ensure consistency on those questions. It will mean that on any given day, a citizen may not know how even *general legal principles* will be applied to him or her.

The second aspect of Justice Rothstein's jurisprudence on display in *Khosa* was his resistance to dogmatism. Notwithstanding the importance of universality, Justice Rothstein recognized that there were times when the legislature may have intended to immunize a tribunal from judicial review even on questions of law. In such cases, the two key rule of law principles he had described as the "core pillars" of the public law system, legislative supremacy and judicial enforcement of law, really were in conflict. Under such circumstances, it was indeed appropriate to engage in the careful balancing of the standard of review analysis.

Justice Rothstein did not dispute the careful compromise between those core pillars that had been created through the standard of review

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<sup>119</sup> *Id.*, at paras. 89-91 (emphasis added; internal citations and quotation marks omitted).

administrative law jurisprudence. Rather, he simply confined that balancing exercise to its proper place: when there is a genuine conflict. He recognized that this approach better respected the division of powers between the legislative and judicial branches because it respected the *legislature's own assessment* of a particular tribunal's expertise on questions of law, as expressed through a privative clause.<sup>120</sup> While his approach would often have led to *more onerous* judicial review of questions of law, it would have actually accorded *greater* deference to the intent of the legislature. Justice Rothstein's view of administrative law deference was based on the constitutional imperative of *legislative supremacy* rather than its offspring, the notion of deference to statutory decision-makers that had become unmoored from that original guidepost.

However, even as he expounded his theory of the judicial role in reviewing administrative decisions in *Khosa*, Justice Rothstein limited his reasons to a concurrence. As he expressly acknowledged in his dissent in *Fraser*,<sup>121</sup> he strongly believed that the standard to depart from precedent was high. Despite his strong and principled disagreement with the majority in *Khosa*, Justice Rothstein recognized that respect for precedent overrode his personal view of the correct approach to the standard of review.

While it is easy to recognize as a matter of principle that a judge should be reticent to depart from precedent, it is harder to put that principle into practice. In *Alberta Teachers*, Justice Rothstein did just that and followed the majority's approach from *Khosa*, his personal views notwithstanding.

In *Alberta Teachers*, the Information and Privacy Commissioner complained that the Alberta Teachers' Association had disclosed private information contrary to the Alberta *Personal Information Protection Act*. The Commissioner took 22 months to complete an inquiry, notwithstanding a 90-day limit under the Act. Ultimately, an adjudicator concluded that the Association had breached the Act. The decision was ultimately appealed to the Supreme Court.

Despite his concurring judgment in *Khosa*, two years earlier, Justice Rothstein described the standard of review as follows:

... There is authority that deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity.... This principle applies unless the interpretation of the home statute falls into one of the

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<sup>120</sup> *Id.*, at paras. 95-96.

<sup>121</sup> *Fraser, supra*, note 57, at paras. 129-139.

categories of questions to which the correctness standard continues to apply, i.e., constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or vires.<sup>122</sup>

Justice Rothstein recognized that deference *was* accorded on questions of law unless they were of central importance to the legal system as a whole and outside the adjudicator's expertise. The other category of questions that he had suggested in *Khosa* did not attract deference (absent a privative clause) were questions of jurisdiction.

Justice Rothstein was careful to define questions of jurisdiction in a manner that did not swallow up the entire judgment:

The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, 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....<sup>123</sup>

Justice Rothstein again tried to strike a balance that respected both the role of the legislature and the judiciary. He recognized that labelling a question as “jurisdictional” could not be used as the basis to defeat the standard of review analysis. At the same time, he refused to *exclude* the possibility that such questions may arise in subsequent cases:

As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with

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<sup>122</sup> *Alberta Teachers, supra*, note 111, at para. 30 (citations and internal quotation marks omitted).

<sup>123</sup> *Id.*, at para. 34 (emphasis added).

maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary.<sup>124</sup>

In the context of *Alberta Teachers*, Justice Rothstein concluded that the correct standard of review was reasonableness and deferred to the statutory decision-maker. In essence, Justice Rothstein's approach was that, if it was necessary to defer to administrative decision-makers on legal questions, then it made sense to do so in a clear, coherent way.

Justice Rothstein's subsequent decision in *SOCAN* also demonstrated how, notwithstanding the majority judgment in *Khosa*, standard of review jurisprudence can be applied in favour of a correctness standard of review. In *SOCAN*, the Copyright Board had established a tariff for the communication of musical works over the Internet. Rogers sought judicial review of the decision to the Federal Court of Appeal, which dismissed the application.

Justice Rothstein concluded that the appropriate standard of review of the Board's decision was correctness. The statutory scheme surrounding the *Copyright Act* was unusual because it was not solely interpreted directly by the Copyright Board, but could also be brought before the courts directly, at first instance, in proceedings for copyright infringement.<sup>125</sup> Justice Rothstein reasoned that it would be incoherent for appellate courts to defer to the decisions of the Board on legal matters, when it would owe no such deference to the decisions of trial judges:

Because of the unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions. This concurrent jurisdiction of the Board and the court at first instance in interpreting the *Copyright Act*

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<sup>124</sup> *Id.*, at paras. 42-43 (emphasis added; citations omitted).

<sup>125</sup> *SOCAN*, *supra*, note 112, at para. 13.

rebutts the presumption of reasonableness review of the Board's decisions on questions of law under its home statute. This is consistent with *Dunsmuir*...<sup>126</sup>

Even working within the framework established by *Khosa*, Justice Rothstein followed an approach that allowed him to emphasize legislative intent and the two core pillars of the public law system he recognized in his concurrence in *Khosa*.

Justice Rothstein emphasized the “pillar” of *legislative supremacy*. While there are practical reasons not to apply different standards of review to the decisions of lower courts and tribunals, under the same statute, Justice Rothstein's guidepost was legislative intent, *as inferred from the scheme*.

Further, he applied the principle of *universality* by ensuring consistent treatment, regardless of whether the Copyright Board or lower courts had jurisdiction over disputes at first instance. The importance of that principle is redoubled in light of the fact that not only could deference on legal questions lead to inconsistent decisions under the particular statute, it could also result in different legal determinations depending on the particular statutory mechanism chosen.

Justice Rothstein's administrative law decisions are a microcosm of the principles discussed in this article that run through his jurisprudence and judicial philosophy. His approach centred on his respect for the proper role of the court in the constitutional structure, as a zealous guardian of the functions that are delegated to it (the enforcement of the law) but a cautious interloper on questions of policy (legislative supremacy). In the context of administrative law, this approach manifested itself through Justice Rothstein's deference to the intent of the legislature, on both matters of substance and matters of procedure and review, combined with a more interventionist approach on questions of law.

Perhaps most significantly, Justice Rothstein implemented this strategy within the constraints of precedent: pushing the law gently in the direction of this balance while respecting that there were times when this view was not the view of the Court. This only confirms our assessment of Justice Rothstein as the lawyer's judge, one who understood that consistency and predictability in judging were essential to upholding the rule of law.

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<sup>126</sup> *Id.*, at para. 15 (emphasis added).

## V. CONCLUSION

Justice Rothstein applied a consistent legal and evidence-based approach to adjudication. As a lawyer, he achieved professional success and the admiration of his peers through his mastery of technique and technicality. As a judge, he translated his experience as an advocate into a deliberate, consistent approach to resolving complex disputes. He will be remembered for a style of judging that, in our view, is consistent with ensuring the rule of law in a highly bureaucratized democracy — one which began always with the text and context, which valued facts and the evidentiary necessities of sound decision-making, and which scrupulously adhered to the limits of institutional role, and policed them when others failed to do so.

Justice Rothstein's approach to statutory, contractual and constitutional interpretation, his requirement of an evidentiary basis for decision, and his approach to administrative law will have a lasting impact on the way Canadian courts, administrative decision-makers, and contracting parties operate. His jurisprudence will remain an indispensable resource for jurists who are deeply concerned with justly performing their role in our constitutional order. In that respect, at least, the lawyer's judge is also the judge's.

