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## Now We Are Two (Again): Standards of Review Post-*Dunsmuir*

British Columbia Council of Administrative Tribunals  
Annual Education Seminar  
20 October 2008  
Angus M. Gunn, Jr.

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## Agenda

1. **Key Standards of Review Judgments 1979-2008**
2. ***Dunsmuir v. New Brunswick***
  - Key Facts
  - Judgments Below
  - Synopsis of Judgments in SCC
    - ◆ *Bastarache and Le Bel JJ.*
    - ◆ *Binnie J.*
    - ◆ *Deschamps J.*
3. **Summary of Current Law**
4. **Unresolved Practical Issues**

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## Key Standards of Review Judgments 1979-2008

- 1979: *CUPE*
- 1988: *Bibeault*
- 1997: *Southam*
- 1998: *Pushpanathan*
- 2003: *Dr. Q., Ryan*
- 2002-2004: *Chamberlain v. Surrey School District, Toronto v. CUPE, Voice Construction v. CGWU*

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### Dunsmuir v. New Brunswick: The Key Facts

- Termination of non-unionized employee of Department of Justice for New Brunswick
- Employee grieved termination
- Interpretive issue: did adjudicator have jurisdiction to determine whether termination (purportedly with notice or pay in lieu) in fact for cause
- Adjudicator's decision
  - Interpretive issue: yes
  - Merits: employee's termination void, reinstatement ordered

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### Dunsmuir v. New Brunswick: The Lower Judgments

- NBQB: correctness standard applied to interpretive issue, adjudicator's decision incorrect, order of reinstatement set aside and grievor restricted to pay in lieu of notice
- NBCA: reasonableness *simpliciter* standard applied to interpretive issue, adjudicator's decision unreasonable, grievor's appeal dismissed

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### Dunsmuir v. New Brunswick: Summary of SCC's Disposition

- SCC unanimously dismissed grievor's further appeal
- Majority (*per* Bastarache and Le Bel JJ.) and Binnie J. (concurring): reasonableness standard applied to interpretive issue, adjudicator's decision unreasonable, further appeal dismissed
- Deschamps J. (Charron and Rothstein JJ. concurring): correctness standard applied to interpretive issue, adjudicator's decision incorrect, further appeal dismissed

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## Dunsmuir v. New Brunswick: The SCC Majority

- Recent history of judicial review in Canada marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance (¶1)
- Majority seeks to develop a principled, coherent, and workable framework that simplifies the present system and offers guidance (¶¶32-33, 43)
- Necessary to consider both the number and definitions of the various standards of review and the analytical process employed to determine which standard applies (¶¶34)

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## Dunsmuir v. New Brunswick: The SCC Majority

- **Number and Definition of Standards**
  - Tension between highly formalistic, artificial “jurisdiction” test that could easily be manipulated and highly contextual, “functional” test that provided flexibility but little guidance (¶43)
  - Three-standard model too difficult to apply to justify its retention, but it would be a step backwards to revert to pre-*Southam* (¶44)
  - Collapse the two variants of reasonableness review into a single “reasonableness” standard – reasonableness *singularis*? (¶45)

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## Dunsmuir v. New Brunswick: The SCC Majority

- **Number and Definition of Standards**
  - The single “reasonableness” standard concerned mostly with justification, transparency, and intelligibility and with whether decision falls within range of acceptable outcomes (¶47)
  - Inquiry into reasonableness refers both to process of articulating reasons and to outcomes (¶47)
  - Deference accords respect to legislative choices different constitutional roles (¶49)
  - Correctness review maintained “in respect of jurisdictional and some other questions of law (¶50)

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## Dunsmuir v. New Brunswick: The SCC Majority

### ■ Determining Applicable Standard

- Reasonableness generally applies to questions of fact, discretion, policy, questions where legal issues cannot easily be separated from factual ones, and to some legal issues (¶¶51, 53)
- Deference usually results where a tribunal interprets its own statute or statutes closely connected to its function, or where administrative tribunal has developed expertise in applying general law in a specific statutory context (¶54)
- Exhaustive review unnecessary in every case, if existing jurisprudence may already be deemed to have performed that analysis (¶57)

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## Dunsmuir v. New Brunswick: The SCC Majority

### ■ Determining Applicable Standard

- Correctness standard applies to
  - ◆ constitutional questions regarding division of powers
  - ◆ "true questions of jurisdiction or vires"
  - ◆ questions of general law of central importance to the legal system as a whole and outside the adjudicator's area of expertise, and
  - ◆ jurisdictional lines between two or more competing specialized tribunals (¶¶58-59, 60-61)
- "Jurisdiction" is intended in narrow sense of authority to decide a particular matter (¶59)

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## Dunsmuir v. New Brunswick: The SCC Majority

### ■ Determining Applicable Standard

- Name of approach unimportant
  - ◆ Previous phrase "pragmatic and functional approach" may have misguided courts in past (¶63)
  - ◆ "Standard of review analysis" to be used in future (¶63)
- Analysis remains contextual and depends on the application of relevant factors including:
  - ◆ Presence or absence of a privative clause
  - ◆ Purpose of the tribunal as determined by interpreting its enabling legislation
  - ◆ Nature of question at issue
  - ◆ Expertise of tribunal (¶64)

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## *Dunsmuir v. New Brunswick:* The SCC Majority

- **Determining Applicable Standard**
  - May not be necessary to consider all factors if some are determinative of reasonableness (and correctness?) (¶64)

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## *Dunsmuir v. New Brunswick:* Binnie J. (Concurring)

- **Majority's reappraisal too narrow to address "system as a whole", not just "adjudicative functions" (¶121)**
- **Correctness standard should be applied in respect of questions concerning**
  - The Constitution
  - The common law
  - The interpretation of a statute other than the decision-maker's enabling statute ("home statute") or a rule or statute closely connected with it (¶124)

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## *Dunsmuir v. New Brunswick:* Binnie J. (Concurring)

- **Rather than debate whether particular question of law is "of central importance to the legal system as a whole", leave last word on questions of general law to judges except home statute and closely related statutes**
- **Reasonableness standard will generally govern challenges to the substantive outcome of an administrative decision absent "full statutory right of appeal" (¶¶130-31)**

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### Dunsmuir v. New Brunswick: Binnie J. (Concurring)

- **Agrees with reduction of three standards of review to two, but implications go well beyond administrative tribunals (¶134)**
- **Notes problems of single “reasonableness” standard**
  - “Contextualizing’ a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference.” (¶139)

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### Dunsmuir v. New Brunswick: Binnie J. (Concurring)

- **Notes problems of single “reasonableness” standard**
  - “In *Law Society of New Brunswick v. Ryan*, ... the Court *rejected* the argument that “it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances” ... . It seems to me that collapsing everything beyond “correctness” into a single “reasonableness” standard will require a reviewing court to do exactly that.” (¶152)
  - ‘Reasonableness’ is a big tent (¶144)
  - Presumption is that the standard of review applicable to reviewing any administrative outcome on grounds of substance is reasonableness, and that the decision is reasonable until shown otherwise (¶146)

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### Dunsmuir v. New Brunswick: Deschamps J. (Concurring)

- **Primacy of Questions at Issue to Determine Applicable Standard**
  - Very little needs to be done other than identifying the questions at issue as ones of law, fact, or mixed fact and law in order to determine whether deference needs to be shown to an administrative body (¶158)
  - Not all four traditional factors need to be considered in every case, and judicial review often indistinguishable from appellate review (¶158)

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## Dunsmuir v. New Brunswick: Deschamps J. (Concurring)

### ■ Primacy of Questions at Issue to Determine Applicable Standard

- Questions of fact always entitled to deference, and unreasonableness should be indistinguishable from "palpable and overriding error" test in appellate context (§161)
- Interpretations of laws of general application reviewable on correctness standard, as are questions of law on which the legislature has provided for a statutory right of review (§163)
- Questions of mixed fact and law limited to those situations where legal issue inextricably intertwined with factual issue (§164)

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## Summary of Current Law on Standards of Review

### ■ Obituaries (Lawyers Weekly, 28 March 2008)

- "Reasonableness *simpliciter*" we hardly knew you. The former central star of the judicial review spectrum was swept away along with longtime partner "patently unreasonable" in a landmark decision by the Supreme Court of Canada on March 3, replaced by a new standard of "reasonableness" in *Dunsmuir v. New Brunswick*. Their former colleague "correctness" offered no condolences or comment. "Reasonableness *simpliciter*" made its debut a little over decade ago in March 1997 in *Canada (Director of Investigation and Research) v. Southam*, which created three standards of judicial review. The trio went on to appear in over 2,000 appeal decisions according to QuickLaw. Critics, however, scoffed that the standards for judicial review were needlessly convoluted, and that "reasonableness *simpliciter*" should be canned. You will be forgotten, but not missed."

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## Summary of Current Law on Standards of Review

### ■ Two step process

1. Ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question
2. If not, proceed to an analysis of the factors making it possible to identify the proper standard of review
  - ◆ Two standards: correctness and reasonableness
  - ◆ New "reasonableness" standard concerned mostly with justification, transparency, and intelligibility and whether decision falls within range of acceptable outcomes, referring both to reasons and to outcomes

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## Unresolved Practical Issues

- **Will consolidating two deferential standards into one invite greater judicial intervention?**
  - Majority says no (¶48), as does Binnie J. (¶155)
  - May depend on whether correctness review has been expanded, and on whether elimination of patent unreasonableness has shifted the spectrum
  - If not, does this mean that decisions formerly reviewable on the patent unreasonableness standard will now be reviewed on a less deferential standard?
- **Is there a spectrum of deference within the new reasonableness standard?**
  - See *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436

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## Unresolved Practical Issues

- **Implications of revival of “jurisdictional questions”**
  - How do you know whether a matter is jurisdictional rather than having been left to the decision-maker?
  - Is an unreasonable decision necessarily one made in excess of jurisdiction?
  - Implications for tribunal standing on judicial review?

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## Unresolved Practical Issues

- **Impact of *Dunsmuir* on statutorily mandated “patent unreasonableness” review?**
  - ATA sections 58 and 59 both impose patent unreasonableness review, but define it only in respect of discretionary decisions
  - Other statutes also refer to patent unreasonableness
- **Impact of *Dunsmuir* on statutory grounds of review established by *Federal Courts Act*?**
  - *Khosa v. Canada (Minister of Citizenship and Immigration)* (heard and reserved 20 March 2008) (SCC File No. 31952)

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## Unresolved Practical Issues

- Where no precedents exist, how does “standard of review analysis” differ from “pragmatic and functional test” other than terminologically?
- Implications of new reasonableness test for duty to give reasons?
- Can a single, compendious approach be identified to determine the applicable standard of review across the great breadth of administrative decision-making?

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## Unresolved Practical Issues

- Implications of *Dunsmuir* for statutory appeals from administrative decision-makers?
  - Majority described itself as re-examining standards of review in “various situations” and as bringing a “holistic” and “comprehensive” review of the system (¶¶ 24, 26)

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## Thank You!

agunn@blgcanada.com

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