A View From the Top: The Supreme Court of Canada's Redirections of Administrative Standards of Review and Standards of Proof in Civil Cases

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I. INTRODUCTION

This past year has proven to be a busy and important one in the development of the principles of administrative law and standards of proof in civil cases.

The Supreme Court of Canada has attempted to simplify these two areas of the law by rendering the much anticipated decisions in Dunsmuir and McDougall. Whether the Court has accomplished its goals remains to be seen.

This paper will review these two significant cases, and subsequent cases which consider them, and comment on the practical implications of them.¹

II. STANDARDS OF REVIEW: NEW BRUNSWICK (BOARD OF MANAGEMENT) V. DUNSMUIR

Few areas of the law have been as confusing and tortuous as the standards of review analysis in judicial review and administrative appeal cases. The last three decades have seen a plethora of cases from courts of all levels trying to dissect, decide, and clarify the issue of to what degree a court can scrutinize a decision of an administrative board or statutory delegate, either on judicial review or on an appeal. To put it another way, to what extent will the court defer to the decision of the statutory delegate, even if the court itself might have decided a matter differently?

In 2008, the Supreme Court of Canada issued a landmark decision revisiting—and significantly altering—the standards of review analysis: New Brunswick (Board of Management) v. Dunsmuir.²

Background

Mr. Dunsmuir was a non-unionized lawyer in the New Brunswick Department of Justice. He held a position under the Civil Service Act which provides that the termination of employment shall be governed by the ordinary rules of contract (subject to any other applicable statutory provisions, such as those which would govern a unionized employee). He also held the clerk's office “at pleasure”. The department became dissatisfied with his performance, and ultimately terminated his employment with payment of four months’ salary in lieu of notice. The department did not allege cause.

¹ This paper draws significantly from an article prepared by David Phillip Jones, Q.C. which was published in the Administrative Law Reports at (2008), 69 Admin. L.R. (4th) 11 and from chapter 12 of Jones and de Villars, Principles of Administrative Law, 5th edition to be released in 2009 (and previous editions). Also, I wish to thank Dawn Knowles of de Villars Jones for her assistance in the preparation of this paper.

² 2008 SCC 9.
Dunsmuir grieved using the grievance process under section 100.1 of the Public Service Labour Relations Act, alleging that he was not given reasons for the department's dissatisfaction or the opportunity to respond to it, and that the length of the notice period was insufficient. The grievance was denied, and the matter was referred to adjudication.

At adjudication, a preliminary issue (the “interpretation issue”) arose about whether, under the applicable legislation, the adjudicator was entitled to determine the reasons for the decision to terminate Dunsmuir's employment, and, if the termination was for cause, whether the adjudicator had jurisdiction to reinstate Dunsmuir (which would have been the case for a unionized employee). Although the adjudicator asserted that he had this jurisdiction, he ultimately did not make a finding about whether there was or was not cause (which the department was not alleging).

Applying the decision in Knight v. Indian Head School Division No. 19, the adjudicator held that the principles of procedural fairness applied because Dunsmuir was an office holder; the principles of procedural fairness had been breached; and Dunsmuir was entitled to be reinstated to his position with no loss of pay. In the alternative, the adjudicator would have increased the notice period from four to eight months, with a corresponding increase in the amount of pay in lieu of notice.

The Government applied for judicial review. The Court of Queen's Bench applied the correctness standard with respect to the interpretation issue; and held that the adjudicator's decision was incorrect; with the result that there was no reinstatement, but eight months' pay in lieu of notice. In dismissing Dunsmuir's appeal, the Court of Appeal determined that reasonableness simpliciter was the applicable standard of review, and held that the adjudicator's interpretation of the statute was unreasonable, with no change in the result.

The Supreme Court of Canada unanimously dismissed Dunsmuir's further appeal, and seized this case as the opportunity to attempt to rationalize the law relating to standards of review.

The decision in Dunsmuir is very important for at least four reasons:

**Two standards of review, not three**

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4. The procedural fairness aspect of Dunsmuir and its effect on Knight v. Indian Head School Division is discussed briefly below.

5. Although all of the judges concurred in merging the two deferential standards of review into one unified standard of reasonableness, and were unanimous in the result, the Court was not unanimous in its reasoning, or the description of “reasonableness”, or in the standard of review. For example, Justice Binnie was concerned that the majority decision (written by Bastarache J. and LeBel J.) was restricted to adjudicative decisions instead of the administrative “system as a whole”. Binnie J. also saw a greater role for the courts in correcting errors of law. Deschamps J. took a completely different approach in arriving at the result by focussing on “the nature of the decision”.