

January 12, 2015

Some Thoughts on the Presumption of Deference under the *Dunsmuir* Framework in Substantive Judicial Review

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Case Commented On: *Alberta Treasury Branches v Alberta Union of Provincial Employees*, [2014 ABQB 737](#)

This is a run-of-the-mill judicial review decision by Justice Don Manderscheid in early December. The decision reviews statutory interpretation conducted by the FOIP Commissioner acting under the *Freedom of Information and Protection of Privacy Act*, [RSA 2000 c F-25](#) (*FOIP Act*) to settle a dispute between Alberta Treasury Branches (ATB) and the Alberta Union of Provincial Employees (AUPE) over the obligation of ATB to disclose certain bargaining unit information to AUPE. While there is nothing particularly unusual about this case, it does provide a good platform from which to revisit some of the fundamentals in judicial review as we enter 2015. This post first describes the legal issues in this case, and then summarizes how Manderscheid J. resolves them. I conclude with some thoughts on the developing presumption of deference in substantive judicial review post-*Dunsmuir*.

The Dispute between ATB and AUPE and the Commissioner's Ruling

In March 2010 the AUPE requested information from ATB on employees who were excluded from the bargaining unit. ATB refused to disclose the information on the view that such records were exempt from disclosure under section 4 of the *FOIP Act*. The relevant portion of section 4(1)(r) states: "This Act applies to all records in the custody or under the control of a public body . . . but does not apply to a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party." The *Freedom of Information and Protection of Privacy Regulation*, [Alta Reg 186/2008](#) designates ATB as a public body subject to the *FOIP Act* disclosure obligations. However ATB's position was that the bargaining unit information requested by AUPE is in the custody or control of a treasury branch, and thus exempt from disclosure under section 4(1)(r) of the Act. The AUPE subsequently asked the FOIP Commissioner to rule on the issue.

As all first year students learn in our legislation fundamentals course, the first step in statutory interpretation is to isolate the interpretation problem(s) in the case. Which word(s) or phrase requires interpretation? The goal of the statutory interpretation exercise is to decipher the intention of the legislature as to the meaning and effect of the words in question. Consideration is given to the literal reading of the words, their context, and the overall purpose of objective of the legislation.

The crux of this dispute involves interpreting the meaning of ‘treasury branch’ in section 4(1)(r) of the *FOIP Act*. In particular, does this phrase include all aspects of the ATB operations, including the corporate and administrative functions relevant here? If it does, then presumably the clause provides a full exemption to ATB from the disclosure requirements in the *FOIP Act*. If it does not, then the operations of ATB outside of a treasury branch are subject to the disclosure obligations as a designated public body.

One wrinkle in the interpretation issue is that ‘treasury branch’ is defined in several enactments. Under section 1(k) of the *Alberta Treasury Branches Act*, [RSA 2000, c A-37](#) ‘treasury branch’ means “a treasury branch established under section 10, whether the branch carries on business with the public directly or serves as an administrative or head office.” Section 10 further states that Alberta Treasury Branches may establish and operate treasury branches at any location within Alberta. The most important provision for interpreting the term in the *FOIP Act* would be section 28(1)(ddd) of the *Interpretation Act*, [RSA 2000, c I-8](#) which states that in any enactment ‘treasury branch’ means a treasury branch as defined in the *Alberta Treasury Branches Act*.

The definition in section 28 of the *Interpretation Act* applies to all other Alberta legislation. However, ATB argued that another legislated definition of ‘treasury branch’ is in force, and it is in a transitional provision of the *Alberta Treasury Branches Act*, SA 1997, A-37.9 which states in section 36(3) that a reference in any enactment to “treasury branch” shall be read as a reference to “Alberta Treasury Branches”.

The question of law for the FOIP Commissioner was to interpret and reconcile these various provisions in order to establish the scope of the disclosure exemption in section 4(1)(r) of the *FOIP Act*. In Decision [F2012-09](#) the Commissioner considered the relevant provisions of the *Alberta Treasury Branches Act* and concluded the legislation expressly makes a distinction between a treasury branch and the corporate entity of Alberta Treasury Branches. The two terms are not synonymous – the corporate entity establishes treasury branches and is not a branch itself (F2012-09 at paras 16-25). In Supplemental Decision [F2013-D-01](#) the Commissioner considered the transitional provision in the 1997 legislation. A literal reading of that section would suggest ‘Alberta Treasury Branches’ is synonymous with ‘treasury branch’ in any enactment. However the Commissioner favored a purposive and contextual reading to conclude the 1997 transitional provision was not intended to apply to the current ATB regime, but rather the legislature intended this transitional section to apply to references to the former branch of the Treasury Department known as the Government of Alberta Treasury Branches to ensure legal interests transitioned from this prior structure to the new corporate ATB entity established at that time. The Commissioner cited Alberta court decisions that support this reading and further noted that if section 36(3) of the 1997 legislation applied literally today, it would be in conflict with the definition of ‘treasury branch’ in the *Interpretation Act*; accordingly if the literal reading was intended, the legislature would have seen fit to address this conflict.

The Commissioner also had to address previous Orders under the *FOIP Act* that had confronted the same interpretive problem but had ruled that the reference to ‘treasury branch’ in section 4 of the *FOIP Act* did include both the corporate offices of ATB as well as the treasury branches established by ATB, and which had also cited the 1997 transitional provision as support for this conclusion. The Commissioner essentially just disagrees with earlier Orders, but also notes these earlier Orders do not run through the same interpretive analysis of the various legislated definitions of ‘treasury branch’ (Decision F2012-09 at paras 30-33).

Judicial Review Application Dismissed

Justice Manderscheid decides three issues in his judicial review decision: (1) what is the applicable standard of review? (2) Did the Commissioner err by ruling the 1997 transitional provision does not apply to the interpretation of section 4(1)(r) of the *FOIP Act*? (3) Did the Commissioner err by ruling that section 4(1)(r) of the *FOIP Act* does not provide ATB with an exemption from disclosure obligations on the AUPE request? In short, he concludes the standard of reasonableness applies to the Commissioner's decisions in (2) and (3) above and that both decisions are reasonable. ATB's judicial review application is dismissed.

As I noted at the outset, there is nothing particularly unusual with this result. But the decision does provide an opportunity to revisit some fundamentals in substantive judicial review.

The Applicable Standard of Review

The first step in substantive judicial review under Canadian administrative law is to identify the standard of review applicable to the question or questions in the impugned statutory decision. Since the Supreme Court of Canada's 2008 decision *Dunsmuir v New Brunswick*, [2008 SCC 9](#), the choice of standard is either correctness or reasonableness.

Under the correctness standard the reviewing court affords no deference to the statutory decision-maker and effectively conducts a *de novo* assessment by answering the issue or issues itself (*Dunsmuir* at para 50). If the court agrees with the findings of the statutory decision-maker the impugned decision survives judicial review, but if the court disagrees with the findings then the impugned decision is set aside or varied to correct the error.

Under the reasonableness standard the reviewing court defers to the statutory decision-maker and limits its review to an inquiry as to whether the impugned decision is intelligible, transparent, and justified, as well as within the range of possible outcomes given the applicable facts and law in question (*Dunsmuir* at para 47). The application of this standard is less straightforward than correctness: the determination of whether an administrative decision intelligible, transparent and justified is a necessarily a subjective exercise. One characteristic of a reasonableness review that does seem more concrete however is that the court should limit its review to assessing the adequacy of the reasons provided by the statutory decision-maker.

In *Dunsmuir* the Supreme Court of Canada attempted to simplify the standard of review selection process by making a series of declarations on which standard usually applies to a particular category of question (*Dunsmuir* at paras 51-61). We were told the correctness standard will apply to questions involving constitutional law, questions of law important to the legal system generally and outside the specialization or expertise of the statutory decision-maker, questions of law that engage the jurisdiction of more than one statutory regime, and 'true' questions of jurisdiction whereby the statutory decision-maker must ask whether it has the authority to pursue the line of inquiry. And we are told the reasonableness standard will apply to questions of fact, questions that engage primarily with policy, questions laden with discretion, and questions of law within the 'home' statute(s) and expertise of the decision-maker.

The identification of the applicable standard of review thus requires a good understanding of how to differentiate between questions of law, questions of fact, and all related iterations between and surrounding these extremes. *Dunsmuir* also confirmed that precedent is established

on the applicable standard of review for a particular decision-maker in relation to a particular type of decision or question (*Dunsmuir* at para 62).

An applicant in judicial review who seeks to have the statutory decision set aside or otherwise varied will usually assert that correctness be applied as the standard of review. And in this case ATB argued for correctness on the basis that the Commissioner's decision engages in the interpretation of statutory provisions which are outside of her specialization, and also that the interpretation of the scope of the disclosure exemption is a true question of jurisdiction.

The respondent in judicial review who seeks to defend the statutory decision will usually assert that reasonableness be applied as the standard of review, such that the reviewing court affords deference to the decision and making it less likely the court will interfere with the decision. And in this case the AUPE argued for reasonableness on the basis that the statutory interpretation in the Commissioner's decision is conducted within the overall FOIP regime. Even though the *Alberta Treasury Branches Act* is not expressly within the 'home' turf of the Commissioner, the interpretation here is connected to the question of disclosure.

Justice Manderscheid canvasses *Dunsmuir* and earlier Alberta cases concerning the standard of review applicable to FOIP decisions, and based on this jurisprudence he rules the standard of review applicable to the Commissioner's decisions is the deferential reasonableness standard (at paras 26 – 40). In particular, he agrees with the AUPE that the Commissioner is entitled to deference on the interpretation of home legislation as well as legislation that is encountered in the course of FOIP issues. He also rejects the ATB argument that the application of the section 4 exemption is a jurisdictional issue, noting that 'true' questions of jurisdiction are rare concerning the interpretation by a statutory decision-maker of its home statute (at para 39).

These findings on standard of review are not only consistent with the overall trend in existing jurisprudence concerning the judicial review of FOIP decisions, but are also consistent with the trend towards reasonableness as the standard of review generally in substantive judicial review of statutory interpretation by administrative decision-makers. Some post-*Dunsmuir* Supreme Court of Canada decisions have asserted there is now a presumption that the standard of review is reasonableness concerning the interpretation by a statutory decision-maker of its home statute and related legislation.

The Presumption of Deference

The notion of employing a presumption of reasonableness to simplify the standard of review determination was first suggested by Binnie J. in *Dunsmuir* at para 146, however the majority of the Supreme Court did not concur with him. Then in 2011 Justice Rothstein, this time writing for the majority in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011 SCC 61](#), wrote that the principle of judicial deference asserted in *Dunsmuir* had evolved to the point where there is a presumption the standard of review is reasonableness where a statutory decision-maker applies and interprets its home statute (at para 39). In another 2011 Supreme Court of Canada decision Justice Fish, writing for the majority in *Smith v Alliance Pipeline*, [2011 SCC 7](#), agreed that *Dunsmuir* had established that the reasonableness standard will usually apply when a statutory decision-maker is interpreting and applying its home statute (at para 28).

Madam Justice Deschamps wrote concurring opinions in both *Alberta Teachers' Association* and *Alliance Pipeline*. Her divergence from the majority in both decisions rested on the view that

judicial deference is based upon the principle of relative expertise or experience in a particular area, and thus this bare assertion of a presumption of deference simply because a statutory decision-maker is interpreting its home statute pays too little attention to whether the statutory decision-maker actually has sufficient expertise or experience to justify deference to its determination of a legal question (See *Alliance Pipeline* at para 80 and *Alberta Teachers' Association* at paras 82 – 89).

More recent Supreme Court of Canada jurisprudence continues to use the language of a presumption of reasonableness. In *McLean v British Columbia (Securities Commission)*, [2013 SCC 67](#), Justice Moldaver restated the presumption that a statutory decision-maker's interpretation of its home statute will attract the reasonableness standard (at paras 20 – 24). And it is apparently a very strong presumption, demonstrated by how the Court described the onus on an applicant seeking to challenge the statutory interpretation given by a decision-maker to its home statute (at paras 40, 41):

The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with “administer[ing] and apply[ing]” its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

And finally for present purposes, Justice Rothstein wrote for the majority in *Canadian National Railway v Canada (Attorney General)*, [2014 SCC 40](#), and he again asserts that there is a presumption of reasonableness that applies to the interpretation of home statutes and other legislation related to the function of a statutory decision-maker (at para 55).

While these more recent decisions confirm that a presumption of reasonableness applies, they suggest the presumption rests on the need to demonstrate some expertise or familiarity on the part of the statutory decision-maker. However it remains to be seen just how rigorous the Court will be on what it takes to establish such expertise. It seems most likely to me that the threshold to establish expertise will not be a high one, and thus the fact a decision-maker is interpreting its home statute or related legislation will be enough to invoke the presumption of reasonableness as the standard of review.

Some Concluding Thoughts

This decision by the FOIP Commissioner was a paradigm candidate for the presumption of judicial deference. The interpretive problems were located outside of the *FOIP Act*, but nonetheless strongly connected to the application of the FOIP regime. Moreover, there are several judicial review decisions which also indicate reasonableness is the standard to review statutory interpretation by the FOIP Commissioner. Despite this, it appears both ATB and the AUPE expended significant time and energy arguing over what the applicable standard of review would be in their case. Unfortunately, I think a similar observation can be made in most judicial review proceedings today. Most would likely agree that the *Dunsmuir* decision itself did little to simplify matters in substantive judicial review.

Perhaps it is folly to expect substantive judicial review to be a simple exercise, since at its core the review must both acknowledge and respect the exercise of legal authority by statutory officials while at the same time ensure such authority is legitimate under the rule of law. It may be that employing a presumption of deference risks overlooking important context or the subtle wrinkles that may arise in the exercise of public power by statutory officials.

In this case for example, one might suggest Justice Manderscheid ought to have been more intrusive in his review and given stronger consideration to ATB's argument that the Commissioner erred in law by failing to follow the earlier interpretations set out by a previous FOIP Commissioner. Justice Manderscheid touches on this argument only at the very end of his judgment by (1) simply declaring that the Commissioner's decision not to follow these earlier interpretations was reasonable (at para 83); and (2) stating that in any event the doctrine of *stare decisis* does not apply to administrative tribunals such that the Commission is entitled to completely depart from an earlier interpretation (at para 84).

It is here where Manderscheid J.'s analysis might raise some eyebrows. Can we so readily abandon consistency in legal decision-making and still purport to be functioning under the rule of law? Stating that administrative decision-makers such as the FOIP Commissioner are entitled to alter precedents or completely depart from an earlier interpretation of legislation – as Justice Manderscheid states here (at para 84) – was perhaps tenable in a legal system that did not employ a strong presumption of deference to substantive legal findings made by these persons. It seems more problematic in a legal system that gives administrative decision-makers the power to make final and binding determinations of law when they interpret and apply their home legislation. But the application of judicial deference and the reasonableness standard of review should – and did – constrain the extent to which Justice Manderscheid explores this issue.

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