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The Great Divide on Standard of Review in Canadian Administrative Law

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Case Commented On: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2018 SCC 31 \(CanLII\)](#).

In an unusual move earlier this year, the Supreme Court of Canada announced it would consider the nature and scope of judicial review in a trilogy of upcoming appeals in [Bell Canada](#), [Vavilov](#), and [National Football League](#), and specifically invited the parties to make submissions on standard of review. This open invitation to revisit the standard of review framework established by *Dunsmuir v New Brunswick*, [2008 SCC 9](#) did not come as a surprise to followers of Canadian administrative law who have observed a divide form amongst the current members of the Supreme Court (only one of whom – Justice Abella – was sitting when *Dunsmuir* was argued) on how to select the standard of review. This division is fully apparent in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, [2018 SCC 31](#) and is the subject of this post. Elysa Darling and Drew Lafond have recently analyzed the substance of the merits in *Canadian Human Rights Commission* on ABlawg [here](#), and my post will focus only on the standard of review analysis by the Court in the case.

Generally speaking, the judicial review of an administrative decision is concerned with ensuring the decision accords with the principle of legality – either in the process followed or in the substance of the decision itself. Standard of review analysis is only relevant to judicial review on the substance of the decision (as opposed to the process followed which is governed by the framework set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999 CanLII 699 \(SCC\)](#)). The concept of an “administrative decision” encompasses a wide spectrum ranging from the exercise of Ministerial discretion to an adjudication of legal rights by a statutory tribunal to recommendations made by a board of inquiry. In many ways, this wide spectrum is what necessitates a contextual approach to judicial review – something which is currently at the heart of the dispute within the Court over standard of review (as discussed below). The common thread in all administrative decisions is they are made pursuant to the exercise of power granted in legislation.

The first step in judicial review of the substance of an administrative decision (for example, a decision to grant a regulatory approval or a decision to grant an exemption from regulatory requirements) is to identify the standard of review that will be applied by the court to review the alleged legal errors in the decision. *Dunsmuir* established that the standard of review is either correctness or reasonableness. The essential point in selecting the standard of review is to determine the measure of deference owed by the reviewing court to the administrative decision-maker.

Under the correctness standard the reviewing court affords no deference to the administrative decision-maker and effectively conducts a *de novo* analysis of the legal question(s) for which an error is alleged. If the court agrees with the legal analysis set out in the administrative decision the application for judicial review will typically fail and the administrative outcome is upheld. If the court disagrees with the legal analysis, then the impugned decision is typically set aside or varied to correct the error made by the administrative decision-maker (*Dunsmuir* at para 50).

Under the reasonableness standard the reviewing court defers to the administrative 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). In comparison with an application of the correctness standard, the application of reasonableness is far less conceptually pure, and it is often difficult to grasp how a reviewing court is being deferential in a reasonableness review. At a minimum, the need for the decision to be intelligible, transparent and justified has generally focused a reasonableness review on the reasons provided by the administrative decision-maker. However, Canadian courts have struggled with the notion that there can be a range of lawful outcomes to a dispute, particularly with questions of statutory interpretation that could have wide reaching implications beyond the parties before the court. It is inherently difficult for a reviewing court to remain hands off in cases where the administrative decision-maker arrived at a conclusion different from where the court would have landed.

In *Dunsmuir* the Supreme Court attempted to simplify the standard of review selection process by making a series of declarations on particular categories of question and which standard applies to them (*Dunsmuir* at paras 51-61). *Dunsmuir* stated that 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 administrative 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. *Dunsmuir* stated the reasonableness standard will usually apply to 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. *Dunsmuir* also clarified that the doctrine of precedent applies to selecting the standard of review, such that where the standard of review had previously been determined for a particular type of question decided by a decision-maker there is no need to once again engage in the analysis (*Dunsmuir* at para 62). So if correctness was selected in a previous case involving the same decision-maker and type of decision, correctness is the standard of review.

However, *Dunsmuir*’s attempt to simplify the standard of review analysis was muddled - necessarily so in my opinion because of the wide range of administrative decisions and decision-makers to which judicial review may be applied - by its reference to the need to also consider the four contextual factors which prior to *Dunsmuir* were applied in each and every case to select the standard, under what was known then as the ‘pragmatic and functional approach’. The four contextual factors are (1) the presence or absence of a privative clause or statutory appeal; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue; (4) the expertise of the tribunal (*Dunsmuir* at para 64). In my view, the most thorough yet concise summary of how to apply these factors to select the standard of

review remains paragraphs 26 to 34 in *Dr. Q v College of Physicians and Surgeons of British Columbia*, [2003 SCC 19](#). *Dunsmuir* emphasized that it is not necessary to consider each of these standard of review factors in every case, and that in some cases the nature of the question would be decisive. This was perhaps the only real change implemented by *Dunsmuir* to the standard of review analysis (as I suggested in [Dunsmuir: Much Ado About Nothing](#)), along with reducing the available standards to just correctness and reasonableness. In a recent [comment](#) looking back at *Dunsmuir* the Honourable Michel Bastarache, who co-authored the majority opinion, remarked that *Dunsmuir* was really just trying to simplify the contextual approach to the standard of review analysis in substantive judicial review, not overhaul the framework.

The presumption of reasonableness (or deference) – the overhaul for which *Dunsmuir* is now known – is actually nowhere to be seen in the majority opinion of the case. The notion of employing a presumption of reasonableness to simplify the standard of review determination was suggested by Justice Binnie in his concurring opinion in *Dunsmuir* at para 146. The presumption first surfaced in a majority opinion in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011 SCC 61](#). In *Alberta Teachers'* Justice Rothstein 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 an administrative 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). The Supreme Court doubled down on the presumption of deference in cases that followed such as *McLean v British Columbia (Securities Commission)*, [2013 SCC 67 \(CanLII\)](#) at para 21, *Mouvement laïque québécois v Saguenay (City)*, [2015 SCC 16](#) at para 46, and *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016 SCC 47 \(CanLII\)](#) at para 22. In *Capilano* the Supreme Court explicitly linked the presumption of reasonableness to review statutory interpretation by administrative decision-makers with the need to respect legislative choices to empower these decision-makers:

The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: “. . . in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir*, at para. 49, quoting D. J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Citizenship and Immigration) v Khosa*, [2009 SCC 12](#), [2009] 1 SCR 339, at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: “. . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives

them their mandate, as well as related legislation that they might often encounter in the course of their functions” (*Dunsmuir*, at para. 68). As this Court has often remarked, courts “may not be as well qualified as a given agency to provide interpretations of that agency’s constitutive statute that make sense given the broad policy context within which that agency must work” (*McLean*, at para. 31, quoting *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324, at p. 1336, per Wilson J.) (*Capilano* at para 33).

This presumption, however, has never enjoyed unanimous support by the Supreme Court. Justice Deschamps wrote concurring opinions in both *Alberta Teachers’* and *Alliance Pipeline*. Her divergence from the majority in both decisions rested on the view that judicial deference should be based upon actual expertise or experience of the administrative decision-maker in their particular area, and not simply be an institutional presumption based on statutory design. And this is most problematic in cases where there is room to doubt or question the actual expertise of the administrative decision-maker in making legal determinations such as engaging in statutory interpretation (see e.g., *Alliance Pipeline* at para 80).

By the time of *Capilano* in 2016 a clear divide had formed at the Supreme Court on this point of expertise. In their *Capilano* dissent, Justices Côté and Brown accuse the majority of ignoring the expertise factor in the case. They warn that grounding tribunal expertise merely in its institutional setting (or statutory design) risks making the presumption of deference irrefutable. A reviewing court should not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law (*Capilano* at para 85). Their dissent reads very much like the ‘pragmatic and functional approach, but they are careful to distance themselves from a full return to the old ways by stating that a full contextual standard of review analysis need not be conducted in every single case.

Turning to the case at hand, the Great Divide on standard of review is on full display in *Canadian Human Rights Commission*. Writing for the majority, Justice Gascon restates the presumption for a standard of reasonableness (deference) when an administrative decision-maker is interpreting its home statute (at para 27), and that this presumption is rebuttable only in the face of clear legislative direction that correctness should apply or when the question in issue (1) relates to the constitutional division of powers; (2) is a true question of jurisdiction; (3) involves competing jurisdiction between tribunals; or (4) is of central importance to the legal system and outside the expertise of the administrative decision-maker (at para 28). The majority concludes the presumption applies here because the question at issue involves the interpretation of a home statute by the Human Rights Tribunal (at para 30). However, the majority then goes on to question the existence of a jurisdictional error (at paras 31 – 41) and dismiss any application of a contextual approach to select the standard of review except in truly exceptional circumstances (at paras 45 and 46).

These additional comments by the majority on jurisdiction and a contextual approach seem to spark some animosity within the Court. In their concurring opinion, Justices Côté and Rowe determine that a contextual approach should be used in this case and that an application of the contextual factors leads to the standard of correctness: (1) absence of a privative clause (at paras 82 and 83); (2) the Tribunal is neither a relative expert at interpreting and applying federal

human rights legislation nor does it have exclusive jurisdiction to do so and thus there is a need for judicial oversight to ensure consistent readings across administrative regimes (at paras 84 – 88); (3) the nature of the question before the Tribunal is in essence a challenge to the validity of a legislative act (at para 89). They also explicitly take issue with the notion that a contextual approach is now subordinate to the application of a presumption in selecting the standard of review, and they assert the guidance from *Dunsmuir* is ‘manifestly contextual’ and also reference a portion of the recent [comment](#) by the Honourable Michel Bastarache (who co-authored the majority judgment in *Dunsmuir*) in support of their reading of *Dunsmuir* (at para 78).

The tone of discussion between the majority and Justices Côté and Rowe on the role of a contextual approach is noteworthy (something which my colleagues have also noted with recent Supreme Court decisions, see [here](#) and [here](#)). The majority accuses Justices Côté and Rowe as undermining the jurisprudence with their insistence on a contextual approach and bluntly dismisses their analysis as being without merit (at paras 47 – 53). In response, Justices Côté and Rowe ‘strongly distance’ themselves from what they refer to as merely obiter comments by Justice Gascon (personal references throughout – as opposed to referring to them as majority reasons) on questions of jurisdiction and the contextual approach (at paras 77 - 80).

Justice Brown provides another short concurring opinion at the end of *Canadian Human Rights Commission*, primarily in response to what the majority writes on questions of jurisdiction. The majority describes the category of a jurisdictional question as being on life support and on the verge of being euthanized (at para 41) – a position which first appeared in *Alberta Teachers* at paragraph 34. For the majority, the jurisdictional question is a legal notion with a troubled past, whose time is up and needs to be put to rest with dignity. Justice Brown takes issue with this and observes that while the category of jurisdiction can be laid to rest, the principle of jurisdiction is alive and well, being fundamental to our legal system and the whole enterprise of judicial review (at paras 110 and 111). The principle of legality requires that the exercise of public power must be sourced in law, and accordingly this principle presupposes a limit or boundary on scope of power for every administrative decision-maker. True questions of jurisdiction are found on these boundaries; they may be difficult to recognize, but exist nonetheless. Justice Brown (writing with Justice Rowe) provided a somewhat longer dissertation on the continued presence of jurisdictional questions in *Quebec (Attorney General) v Guérin*, [2017 SCC 42](#) at paras 65 – 80 (Justice Côté also concurs on the jurisdiction point in her opinion in *Guérin* at para 83).

The concern with jurisdiction in administrative law goes back to days of the preliminary question doctrine. This line of authority enabled reviewing courts to look past privative clauses which purport to protect a decision from judicial review, and quash an administrative decision by first questioning the authority of the decision-maker to engage in the matter. In this way, a reviewing court would look beyond the merits of the decision – which might otherwise be entitled to deference – and simply focus on the enabling statutory provisions to decide whether the decision maker exceeded its jurisdiction in making the decision. If so, the decision would be quashed.

While his reasons writing for the majority in *CUPE v New Brunswick Liquor Corporation*, [1979] 2 SCR 227, [1979 CanLII 23 \(SCC\)](#) are those cited in support of narrowing this doctrine of jurisdiction or preliminary question, Justice Dickson provided a more concise statement on

this problem in his earlier dissenting opinion in *Jacmain v. Attorney General (Canada)*, [1978] 2 SCR 15, [1977 CanLII 200 \(SCC\)](#):

The intractable difficulty is this. It is hard to conceive that a legislature would create a tribunal with a limited jurisdiction and yet bestow on such tribunal an unlimited power to determine the extent of its jurisdiction. On the other hand, if the correctness of every detail upon which the jurisdiction of the tribunal depends is to be subject to re-trial in the Courts and the opinion of a judge substituted for that of the tribunal, then the special experience and knowledge of the members of such a tribunal and the advantage they have of hearing and seeing the witnesses may be lost. The power to review jurisdictional questions provides the Courts with a useful tool to ensure that tribunals deal with the type of issues which the Legislature intended. It enables the Courts to check unlawful attempts at usurpation of power. But the Courts, in my opinion, should exercise restraint in declaring a tribunal to be without jurisdiction when it has reached its decision honestly and fairly and with due regard to the material before it. The Court should allow some latitude in its surveillance of jurisdictional findings. It should ask whether there is substantial evidence for decisions of fact and a rational basis for decisions of law, or mixed decisions of fact and law. The error must be manifest. The role of the Court is one of review, not trial *de novo* (at page 29).

Justice Dickson does not completely dismiss the prospect of a jurisdictional question. He does, however, put his finger on the crux of the matter. True questions of jurisdiction will be difficult to identify correctly in an administrative decision because in form they appear like most other questions of law: The interpretation and application of legislative provisions. Being over-inclusive in identifying questions of jurisdiction risks defeating the role and purpose of an administrative entity with expertise in its field.

But how real is this risk of usurping administrative expertise? The role and function of administrative tribunals within our legal system is far more advanced than it was back in 1979 and has never been more fully endorsed by both the judicial and legislative branches of government than it is today. So why does the Supreme Court continue to warn us that the so-called dark ages in administrative law are still lingering just around the corner, as the majority does in *Canadian Human Rights Commission* when it goes on to discuss jurisdictional questions after ruling there isn't one in this case? I don't see much risk here, and it seems odd to me that jurisdictional issues would not have an explicit place in administrative law.

On the topic of a contextual approach, I think it is accurate to say the presumption of reasonableness has simplified (or at least shortened) the analysis for selecting the standard of review in written briefs and oral argument for judicial review cases. Even parties seeking to have an administrative decision quashed will typically concede reasonableness is the standard of review without a long dissertation on the various factors that could support correctness. But the simplification ends there. What amounts to a reasonable decision is as complicated as it has ever been, and identifying what reasonableness looks like can be as difficult as identifying a true question of jurisdiction. The characteristics of intelligible, justified, and transparent are useful principles, but hardly serve as concrete signposts to review a decision. The range of possible

outcomes varies significantly from one case to the next. Really, under the presumption, lengthy argument by the parties has simply shifted away from the contextual factors and over to these criteria on what amounts to a reasonable decision. The reviewing court is still left to sort out a messy set of arguments at the end of the judicial review hearing.

The contextual factors remain essential in substantive judicial review because they help to make some sense of this. Is it a Ministerial decision? A discretionary one? Is the dispute largely based on evidence or legal argument? Who are the actual decision-maker(s), how are they appointed, and what is their experience resolving the dispute at hand? Will the resolution of this dispute have implications beyond the parties? How strong is the need for consistency in outcomes by this decision-maker? These and other factors provide a basis for a reviewing court to explain what constitutes an intelligible and justified outcome, and how broad the range of outcomes can be. Seen as such, it is difficult to comprehend how the standard of review factors can be swept out of the analysis as readily as the majority in *Canadian Human Rights Commission* and other recent Supreme Court decisions suggest.

The Great Divide on standard of review has formed over how to select the standard – correctness or reasonableness – and whether true questions of jurisdiction exist. But I think this is a red herring. The crux of what bothers administrative law in Canada today remains what it has been for decades – how to conduct a deferential review employing a methodology that can be generalized across the wide spectrum of administrative decisions that engage with law; Formulating a methodology of judicial deference towards legal determinations made by administrative decision-makers that co-exists with the need for scrutinizing attention by the superior courts on matters such as political independence, jurisdiction, *Charter* rights and freedoms, and stare decisis. The Supreme Court is divided over standard of review precisely because of strong and divergent views on how to accomplish this

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