

The Metaphysical Court: *Dunsmuir v. New Brunswick* and the Standard of Review

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Cases Considered:

[*Dunsmuir v. New Brunswick*, 2008 SCC 9](#)

Introduction

The standard used by courts to review administrative decision-making is of central importance to energy and resource development law. Key decisions about regulation of utilities, supervision of energy markets, development of energy projects and facilities, and environmental obligations imposed on resource development, are authorized by legislation, and made and implemented by regulatory authorities. While for the most part, most of the time, the focus of everyone involved is simply on the making and implementing of those regulatory decisions, the courts retain the constitutional power to review and ultimately control this exercise of regulatory authority. Thus, the question of how the courts will exercise that power – the level of deference they will employ and how willing they will be to override regulatory decision-makers – is the fundamental backdrop against which these decisions are made.

The question considered by this blog is whether, given the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick* to “re-examine the foundations of judicial review and the standards of review applicable in various situations,” (*Dunsmuir* at para. 24) that fundamental backdrop has changed. To answer this question I will, first, identify in general terms how the Alberta Court of Appeal has approached the judicial review of decisions by the Alberta Energy and Utilities Board (EUB) – the regulatory agency which, until its recent division in two, was centrally responsible for regulatory decisions related to energy and resource development in Alberta. Second, I will analyze the Supreme Court’s decision in *Dunsmuir* to assess the extent to which it has shifted both the basis for identifying the appropriate standard of review, and how that review is to be conducted in a particular case. Finally, I will make a preliminary assessment as to how those changes, if any, are likely to impact the judicial review of decisions of the successors to the EUB – the Alberta Utilities Commission (AUC) and the Energy Resources and Conservation Board (ERCB).

Ultimately, my position will be that while *Dunsmuir* makes a variety of sweeping pronouncements about judicial review, it is likely to do little to resolve the complexity of the judicial review jurisprudence, and will not change how judicial review is conducted in practice.

Review of Alberta Energy and Utilities Board Decisions at the Court of Appeal

The answer to the question of how the Alberta Court of Appeal has reviewed decisions by the EUB is very straightforward or impossibly complex, but in either case turns on the observation that the Court of Appeal has never applied a single standard to reviewing the decisions of the EUB. It has in each case applied the Supreme Court of Canada's "pragmatic and functional" analysis to determine the level of deference that should be given to the EUB's decision. And in each case numerous factors relevant to that analysis have remained the same, such as the existence of a statutory right of appeal coupled with a limited privative clause, and the EUB's significant expertise with respect to the technicalities, markets and overall policies related to energy and resource development. However, the Court has nonetheless been willing to review EUB decisions based on correctness (*Alberta Energy Co. v. Goodwell Petroleum Corp.* [2004] 8 W.W.R. 116), reasonableness (*ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)* [2004] 11 W.W.R. 220) or patent unreasonableness depending on the nature of the question (fact, law or jurisdiction) and on the particular legislative provisions or common law principles at issue. In general, the more technical and specific the question raised in an appeal – such as “the methodology used by the Board in calculating 2001 Carrying Costs and 2002 Carrying Cost” (*ATCO Electric* at para. 64) – the more deferential the Court has been willing to be, while the more legal and general the question raised by an appeal – such as “the interpretation of case law, contracts and statutes in the context of the oil sands leases to determine whether the *Borys* entitlement to use initial gas-cap gas applies to the AEC's recovery of bitumen” (*Goodwell* at para. 31) - the less deferential the Court has been willing to be.

Dunsmuir

On its face the Supreme Court's decision in *Dunsmuir* claims to make significant changes to the standard of review jurisprudence – to re-examine the foundations of the doctrine, to clarify and simplify how the standard is determined, and to simplify how the standard is applied (how deference is done) in particular cases. On further examination, however, it is not at all apparent that *Dunsmuir* has accomplished what it set out to do – or even that it has made any changes to the law of judicial review other than with respect to the nomenclature to be used by the courts in subsequent cases.

The context of *Dunsmuir* is the termination of Dunsmuir from his public employment. The termination was not said to be for cause, and Dunsmuir was given four months notice. Dunsmuir grieved the termination on the basis of procedural unfairness, and on the basis that, in fact, he had been dismissed for cause, and that that dismissal was wrongful. Although not ultimately making a determination as to whether Dunsmuir had been dismissed for cause, the adjudicator agreed that it was within his legislative authority to determine the true basis for the termination. The adjudicator also agreed that Dunsmuir had not been given sufficient procedural fairness. He ordered Dunsmuir reinstated or, in the alternative, that he be paid eight months salary in lieu of notice.

Both the New Brunswick Court of Queen's Bench and the New Brunswick Court of Appeal held that the adjudicator's decision should not stand. The Court of Queen's Bench applied a correctness standard but also determined that the adjudicator's decision as to his ability to review

the basis for the termination was unreasonable; the Court of Appeal applied a reasonableness standard of review and agreed that the decision was unreasonable. Both courts found that Dunsmuir had not been denied procedural fairness.

In its decision the Supreme Court of Canada dismisses Dunsmuir's appeal on the basis that the adjudicator's decision that he could review the basis for the termination was unreasonable and, as well, on the basis that Dunsmuir was not entitled to procedural fairness. The Court reverses the decision in *Knight v. Indian Head School Division No. 19* [1990] 1 S.C.R. 653 that a public employee whose terms of employment are governed by contract can also claim a separate right to procedural fairness; rather, in that case "the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law" (at para. 81).

To reach this decision, however, each of the three judgments of the Supreme Court undertakes a broad consideration of how the standard of review should be determined, and what that standard should consist of.

For the majority, Justices Bastarache and LeBel JJ. (writing also for Fish, Abella and McLachlin JJ.) hold that the point of judicial review is to ensure the rule of law and respect for legislative supremacy: "the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent" (para. 30). In order to accomplish these objectives, however, the present system of judicial review must be simplified, both with respect to the "number and definitions of the various standards of review" and with respect to the "analytical process employed to determine which standard applies in a given situation" (at para. 34).

With respect to the standards of review themselves, Bastarache and LeBel JJ. hold that the standard of "patent unreasonableness" should be abandoned, and that courts should only apply either a standard of correctness or a standard of reasonableness. The method used for distinguishing between patent unreasonableness and reasonableness – "the magnitude or the immediacy of the defect" (at para. 41) – does not work in practice, and in theory it is unacceptable to assert that an individual should be required to accept an unreasonable decision simply because some effort is required to determine why the decision is unreasonable (at para. 42).

How can a court identify whether a decision is unreasonable? By looking both to how the decision was reached – its "justification, transparency and intelligibility" – and to the nature of the decision itself – whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (at para. 47). Reasonableness is also about incorporating an attitude of deference – of taking seriously the deliberations, process and capacities of the administrative decision-maker with respect to the decision at issue.

Correctness review is different. To review for correctness a court must simply "undertake its own analysis of the question" and, from there, determine whether or not it agrees with the

administrative decision. “[I]f not, the court will substitute its own view and provide the correct answer” (at para. 50).

How should a court determine upon which of these two standards to review? Bastarache and LeBel JJ. make three notable observations on this question. First, they make some general statements about how the determination of the standard should be approached: it should not overly-complicate the problem; in many cases the standard can be largely determined by looking at the nature of the issue or question in the case; privative clauses tend to suggest the application of a reasonableness standard; and, prior jurisprudence can be relied on to answer this question.

Second, they abandon the label “pragmatic and functional” analysis and name the test the “standard of review analysis”.

Finally, and most significantly, they set out a four part, contextual, analytical framework through which these questions are to be answered and which, in substance, entirely replicates the content of the prior pragmatic and functional analysis:

The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case (at para. 64).

The two concurring judgments in *Dunsmuir* were written by Binnie J. (alone) and by Deschamps JJ. (for Charron and Rothstein JJ.).

Binnie J. accepts the majority’s abandonment of a three tier level of deference, and the shift from the pragmatic and functional analysis; however he questions the underlying presumption of the majority that these changes will resolve the complexity of judicial review.

Binnie J. notes that while it may seem opaque, the description of “pragmatic and functional” does provide a helpful explanation for the process of standard identification. It goes to the underlying idea that different agents of government – the courts, administrative decision-makers, the legislatures – have different functions, and much of the point of the analysis is to determine whether a particular decision is one best decided by the administrator or best decided by the courts. And the test is a pragmatic one to emphasize the need to ensure the analysis does not become simply formalistic.

Binnie’s judgment suggests, though, that it is not necessary to go through this type of analysis to determine the appropriate standard of review. Considering the nature of the question relative to the authority of the decision-maker (whether the question is one properly decided by the court or by the administrator) can largely determine whether the standard of review should be reasonableness or correctness.

Binnie J. suggests that the real problem arises when it comes to applying those standards. Because while it makes sense to do away with the artificial distinction between reasonableness and patent unreasonableness, this does not change the fact that ultimately some decision-makers, making some kinds of decisions, are entitled to more deference than other decision-makers, making other types of decisions, even if both decisions/decision-makers are within the “reasonableness” standard. Eliminating patent unreasonableness may simply move the problem from one existing between patent unreasonableness and reasonableness to one existing within reasonableness itself:

In practice, the result of today’s decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense (at para. 140).

To resolve this problem Binnie J. suggests that it is at this point – when it comes time to articulate how reasonableness will be applied – that the factors previously present in the pragmatic and functional analysis come into play. It is when deciding whether a decision was reasonable that a court should consider: “the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing state”, “the existence of a privative clause and the nature of the issue being decided” (at para. 151). The judgment recognizes that applying these many criteria may be difficult but is “not asking too much. In other disciplines, data are routinely plotted simultaneously along both an X axis and a Y axis without traumatizing the participants” (at para. 153).

In her concurring judgment Deschamps J. suggests that the key in judicial review is to focus on the nature of the question at issue – “very little else needs to be done in order to determine whether deference needs to be shown to an administrative body” (at para. 158). It is only if this analysis does not indicate the appropriate standard of review that the other factors in the pragmatic and functional analysis come into play. Deschamps J. acknowledges that deference is difficult – and that whatever is done “any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation” (at para. 167). But this is the function of the appellate court –in administrative law contexts and in civil and criminal contexts as well – and the difficulty of doing so should not be overstated.

What does it mean?

Dunsmuir is unlikely to result in any significant changes to the judicial review of decisions by the Alberta Utilities Commission and the Energy Resources Conservation Board. As before, the standard of review will turn on the nature of the question and of the particular legal provisions and/or common law principles at play. Furthermore, the elimination of the distinction between reasonableness and patent unreasonableness is unlikely to shift the outcome in cases, or lead to more probative review of decisions formerly subject to the patent unreasonableness standard.

This is for four reasons. First, as noted by Binnie J., the Court has not in any way abandoned the pragmatic and functional analysis. They have renamed it, and coupled it with exhortations to

lower courts not to be so rigid in how they apply it, but the same four factors are at issue, and the same emphasis on the context and particulars of each case remain. Those inclined to metaphysics in a law office are unlikely to see any reason to forgo the attractions of philosophy despite the more prosaic title “standard of review analysis” used by the majority.

Further, even the concurring judgments – while suggesting a willingness to move further away from the pragmatic and functional analysis – do not entirely abandon it. Binnie J. moves the placement of the analysis from identifying the standard of deference to how that standard should be applied, and Deschamps J. places increased emphasis on the nature of the question, but ultimately for both judges the four factors and the contextual analysis remain important.

Second, to the extent that there is any change in the approach of the court, it is largely to simply render transparent a trend that had become apparent in the case law of placing the greatest emphasis within the pragmatic and functional analysis on the nature of the question at issue. All three judgments suggest that the nature of the question is the key analytical point – the most common reason for a court being willing to be deferential, or not, as the case may be.

Third, and as clearly noted by Binnie J., removing patent unreasonableness as a standard does not alter the fact that even within those decisions attracting a degree of deference (the reasonableness standard) courts in some cases will be more willing to be deferential than in others. Questions of law involving a high degree of factual specificity, non-legal expertise and discretion, will not be treated in the same way as other questions of law which also arise in contexts other than that addressed by this particular decision-maker and with which the court feels a degree of comfort and familiarity, even if both questions are technically being reviewed for reasonableness.

It is suggested, for example, that in a case similar to that of *ATCO Electric Ltd. v. Alberta (Energy and Utilities Board)* it will still be possible to see varying degrees of deference; just as before the court will apply less deference to the interpretation of a negotiated settlement between a utility and interveners than it will to the selection of “the appropriate methodology for calculating prudent costs of financing” (*ATCO Electric* at para. 63). The former question brings into play some general legal issues, while the latter is an extraordinarily specific question turning on understanding the particulars of financing within the context of utility operations. While one can imagine a court finding an interpretation of a negotiated settlement (which is quasi-contractual) to be unreasonable; it is extraordinarily difficult to imagine the circumstances in which a court would be willing to tell an administrator acting with procedural fairness that it had made a determination of the financing question unreasonably. This is so whether you call review of one reasonableness and call review of the other patent unreasonableness, or whether you call them both review on the basis of reasonableness but approach them differently.

Finally, the *Dunsmuir* Court implicitly rejected the change most likely to affect judicial review in the area of energy and natural resources development – that even in decisions requiring “correctness” some deference should be accorded to the administrative decision-maker. Specifically, the Court left intact the principle that review on the basis of correctness should not

incorporate any deference at all. A correctness analysis is, in the Court's view, simply a substitution of whatever a court believes to have been the proper decision, without analysis of the reasons for the administrative decision-maker's decision, or analysis of whether it fell within the range of possible outcomes. The Court takes this view despite the fact – or at minimum the argument – that even when a question is clearly within the court's expertise (such as a determination of division of powers under the *Constitution Act*, 1867) – it is possible that the proper resolution of that question in the context of the particular case may be something best resolved in light of things which the court does not know more about than the initial decision-maker.

Two examples may clarify this latter point. First, in *Westcoast Energy Inc. v. Canada (National Energy Board)* (1998), 156 D.L.R. (4th) 456, the Supreme Court overturned the National Energy Board's refusal to exercise jurisdiction over Westcoast Energy's processing and gathering facilities. It did so on the basis that the Board had improperly interpreted the division of powers requirements of the *Constitution Act*, 1867. In its decision the majority of the Court largely rejected the relevance of the National Energy Board's analysis of the structure of the industry within which Westcoast was operating, and focused instead on its own assessment of the specifics of Westcoast's operations. It is submitted that this approach was in error. It would have been better – or at minimum desirable – for the Court to do as McLachlin J. (as she then was) did in dissent, and to take seriously the National Energy Board's analysis of the structure and function of the industry in question. Had it done so the majority may have reached a decision of general application rather than one later described by the Federal Court of Appeal as applicable largely to the “exceptional” facts related to Westcoast's particular operations within that industry (*Canadian Hunter Exploration Ltd. v. Canada (National Energy Board)* [1999] F.C.J. No. 460 at para. 7). This is not to say that the Court was wrong to grant only a low level of deference to a constitutional question – it is proper to see such questions as within the “function” of the Court rather than the National Energy Board – but is rather to say that even at the highest level of deference some accounting for the reasons and approach of the administrative decision-maker is desirable.

Second, and similarly, in the more recent decision of the Court in *ATCO Gas and Pipelines Ltd.*, the Court reviewed the EUB's decision to allocate the distribution of proceeds on sale of a utility asset in part to ratepayers. As I have discussed elsewhere, in overturning the EUB's decision it is arguable that the majority of the Court made significant errors in its understanding and characterization of the operation of utility rate regulation. Had it taken better account for the reasons given by the EUB it might not have done so.

Conclusion

In sum, then, little is likely to change in the judicial review of administrative action related to energy and natural resources development. The same factors will be used to determine how deferential a decision-maker should be, the nature of the question will remain the single most important variable, varying levels of deference will be used, and the court will retain its position that deference is something to be done sometimes, rather than something to be done all the time but in different ways.

To be fair to the Court, it may be that any radical change in direction in this area is impossible, that the major flaw in *Dunsmuir* is the judgment's delusion that it can fix the problem, not that it does not do so. Why? Because the questions posed by substantive judicial review are impossible to answer. No generic formula can decide when a specific question is better answered by an administrative decision-maker and when it is better answered by the court. No test can tell one how to be deferential; since deference is neither capitulation nor substitution of judgment it necessarily requires the drawing of fine lines in particular cases. And finally, respect for legislative supremacy in empowering administrative decision-makers to put public policy into action cannot peacefully co-exist with recognition of the constitutional authority of the courts to decide when administrative action is lawful, and when it is not. They can co-exist – indeed they must co-exist – but they are in tension and any co-existence is likely to be fraught and contentious in hard cases.

Let the metaphysics begin.