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Don't you forget about me: Remembering the rest of administrative law after Dunsmuir

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Cases Considered:

Bear Hills Charitable Foundation v. Alberta Gaming and Liquor Commission 2008 ABQB 766;
East Prairie Métis Settlement v. Alberta (Métis Settlements Ombudsman) 2009 ABQB 31.

In March 2008 the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, in which it rearticulated the appropriate approach to identifying and applying the standard for judicial review of administrative decisions. The significance (or not) of this re-articulation has been discussed elsewhere on ABlawg (see here and here). What perhaps needs to be better understood, however, is that in rearticulating the standard of review, the Supreme Court did not change other principles of administrative law. Two recent decisions of the Alberta Court of Queen's Bench indicate that there may be some confusion on this point. In one case, the *Dunsmuir* analysis was used by the Court to consider a question of administrative procedure, even though procedural questions are not properly subject to standard of review analysis. In another case, the *Dunsmuir* analysis was used by the Court to review a decision properly characterized either as procedural or non-dispositive which, again, makes the use of a *Dunsmuir* analysis inapt.

Bear Hills

In *Bear Hills Charitable Foundation v. Alberta Gaming and Liquor Commission*, the Court considered a challenge brought to the decision of the Commission to grant an extension of time to the Samson Cree Nation's application for a casino facility license. The Louis Bull Tribe and the Montana Tribe challenged the extension because their own applications for casino facility licenses had been placed on hold while the Commission considered the application of the Samson Cree. Specifically, the Louis Bull and Montana Tribes were not given access to the hearing to which they were entitled in the event of a denial of their own applications, because their own applications were on hold, and not technically 'denied', so long as the Commission was in the process of considering the application of the Samson Cree. The procedural extension granted to the Samson Cree delayed access to process for the Louis Bull and Montana Tribes.

In her reasons Madam Justice June Ross first considered whether the application was premature, because the decision in question was interlocutory. She held that it was not premature. The granting of a series of extensions to the Samson Cree Nation had resulted in an unjust delay to the procedural rights of the Louis Bull and Montana Tribes, and constituted an "exceptional circumstance" justifying immediate judicial review:

It would be manifestly unjust to simply allow the delay to continue until some unspecified date in the future before allowing the Applicants' judicial review application to proceed. The time that has passed, 3 ½ years from the beginning of the Step 7 process…has had a direct impact on the Applicants' right to a hearing (at para. 41).

Justice Ross then went on to consider the merits of the decision. She reviewed the *Dunsmuir* decision and, as well, the standard of review used by the Court with respect to decisions "granting, suspending or canceling liquor licenses" (at para. 44). She noted that those decisions do "not address directly the issue of a Board decision that extends a timeline" (at para. 45) and thus went on to perform the standard of review analysis - what was formerly known as the "pragmatic and functional" test - to determine that the standard of review for the Board's decision was "reasonableness".

Justice Ross held that the decision was not reasonable. The delay was excessive and prejudicial and was not justified by reasons. Ultimately, she concluded that "there is no obviously justifiable or acceptable reason for the Board's November 22, 2007 decision to further extend the time" (at para. 55).

While this decision appears justifiable and correct, it is an unfortunate misapplication of *Dunsmuir*. The decision being reviewed by Justice Ross was *not* a substantive consideration of the merits (or not) of the Samson Cree application for a Casino license, despite the claim of the Respondent (the Alberta Gaming and Liquor Commission) that it is a "substantive discretionary decision" (at para. 34). Justice Ross notes the Respondent's position on this point, but not whether the Appellant took a position nor why she is adopting the Respondent's position as correct. It is not clear why the decision, which has no bearing on the actual issue of the granting of a casino facility license, could be characterized as substantive. Yes, it is discretionary, but it is about *how* the decision is to made, not about *what* decision is to be made. There is no exercise of the substantive statutory powers granted to the Commission here. It was rather a decision about the process by which that application would be considered - the time lines through which the actual substantive decision (i.e., whether to grant a casino facility license) would be made. As such, it was a decision that Justice Ross was simply required to review for fairness relative to any parties who had, in respect of that decision, an entitlement to fairness.

Dunsmuir itself evidences this distinction. In that case there were two issues, one related to the jurisdiction of the arbitrator of the grievance, and one related to whether Dunsmuir was entitled to procedural fairness in the decision to terminate his employment. In considering the question of whether he was entitled to procedural fairness the Court did not consider the question of standard of review; they simply determined whether he was entitled to procedural fairness, or not.

Similarly, here, the focus of the inquiry should have been: 1) who is entitled to fairness relative to the process by which the Commission considers the Samson Cree application? and 2) has fairness been granted to those parties in the Commission's decision to grant an extension of time? The decision does not need to be reasonable or correct, it needs to be fair, and that is where the focus of the inquiry should have been directed.

In the end, this may not have had any substantive impact on Justice Ross's decision - a process that "fails to ensure justification, transparency and intelligibility in the decision-making… process" (at para. 56) - is almost certainly unfair. However, the misdirection of the inquiry does leave certain important questions unconsidered, most notably whether and why the Louis Bull and Montana Tribes are entitled to fairness relative to the Samson Cree application. Given the effect of the application on the substantive interests of those Tribes it is almost certain that they would, but that question was not analyzed by the Court, and it should have been. Further, it may be that in another case the application of a standard of reasonableness to a procedural decision could result in a decision being upheld as 'reasonable' when it should not, because not meeting the more absolute requirement of fairness.

East Prairie Métis Settlement

In *East Prairie* Justice M.G. Crighton was asked to review the decision of the Métis Settlements Ombudsman to conduct an investigation into whether Councillors on the Settlement Council were legally ineligible to sit because indebted to the Settlement for amounts in excess of $250.00 without having a written repayment agreement or while in default of such written repayment agreement. Justice Crighton was asked to consider, first, whether the Ombudsman had the jurisdiction to order such an investigation and, second, whether it was appropriate for him to have done so. The parties "agreed" that the standard of review applicable to the first decision was correctness and that "the standard of review on the appropriateness of the Ombudsman's decision to appoint an investigator is reasonableness" (at para. 23). Justice Crighton agreed that these standards were the appropriate ones. He held that the Ombudsman's decision that it had jurisdiction to order an investigation was correct, and that the decision to order the investigation was reasonable and should be upheld.

Again, while this judgment also appears meritorious from a results perspective, it is analytically off the mark with respect to the review of the Ombudsman's actual decision to order an investigation. The review of whether the Ombudsman had *jurisdiction* to order an investigation is a review of the extent of the Ombudsman's statutory mandate, and is properly determined by the Court in the manner employed by Justice Crighton - i.e., at the outset on the basis of correctness. Once the Ombudsman was found to have that power, however, his decision to exercise it is one which was not properly subject to review by the Court for reasonableness as if it were a straightforward substantive exercise of a statutory power. This is because a decision to investigate, while undoubtedly an administrative decision, is not a dispositive substantive decision. It is either a procedural decision - a decision about the process through which the Ombudsman will determine whether the Settlement Councillors are in violation of the legal rules - or it is a non-dispositive substantive decision - a recommendation or gathering of information

through which the actual substantive decision will be reached. Either way, the approach for reviewing that decision (and, again, this is review of the decision itself, not whether the Ombudsman has the jurisdiction to make it) should not be judicial review through the methodology of *Dunsmuir*. Based on other administrative law cases it should either be review for procedural fairness (as discussed above) or, if the decision is non-dispositive, then there should be no review at all pending the actual substantive decision (see, e.g., *Guay v. Lafleur*, [1965] S.C.R. 12 with respect to the approach to non-dispositive decisions).

In sum, a decision to investigate is either purely procedural or substantively non-dispositive. Given that, once Justice Crighton determined that the Ombudsman had the jurisdiction to conduct the investigation, the application for judicial review should have been at an end immediately, or should have concluded after a brief consideration of the fairness of the Ombudsman's approach. That that is the case is not affected by the analysis of the Supreme Court of Canada in *Dunsmuir*.

Conclusion

The point of this commentary is straightforward: while *Dunsmuir* may affect the standard of review analysis to be used by a court, it does not unseat the remainder of administrative law. Courts conducting judicial review of administrative decisions should use *Dunsmuir* for what it does, not for what it does not: i.e., to determine the standard for reviewing dispositive, substantive decisions, not to review procedural or non-dispositive decisions in a different way than was done before.