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The Continued Complexity of Administrative Law post-Dunsmuir

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Cases Considered:

Mitzel v. Alberta (Law Enforcement Review Board), 2010 ABCA 336; *Calgary (City) v. Alberta (Municipal Government Board)*, 2010 ABQB 719

The Supreme Court's judgment in *Dunsmuir v. New Brunswick*, 2008 SCC 9, purported to identify a "more coherent and workable" approach to substantive judicial review (*Dunsmuir* at para. 32). Whether, as a general matter, *Dunsmuir* has achieved this ambition is uncertain. It does seem to have liberated courts from the formalistic analysis that was previously *de rigueur* in the standard of review analysis. On the other hand, it has left some significant questions unanswered, and in some respects has created new issues that did not exist formerly.

One of the more notable of these issues is with respect to the identification of "true questions of jurisdiction" (*Dunsmuir* at para. 59). In *Dunsmuir* the Court stated that it was not seeking to resurrect the use of jurisdictional questions to justify intrusive judicial review of administrative decisions. It did suggest, however, that it was possible to distinguish true questions of jurisdiction from other questions of law that might come before a decision-maker. It stated that true questions of jurisdiction "arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir* at para. 59).

In at least one judgment subsequent to *Dunsmuir*, *Public Service Alliance of Canada v. Canadian Federal Pilots Association*, 2009 FCA 223 (*PSAC*), a judge has questioned the ability to make coherent distinctions between questions of jurisdiction and other questions of law. Evans J.A. noted the "analytical emptiness of the concept of a 'jurisdictional issue'" (*PSAC* at para. 40). He suggested that the phrases used by the Court in *Dunsmuir* to identify a question of jurisdiction were vague (*PSAC* at para. 45), and that in any case where an administrative decision-maker was interpreting its enabling statute, a court must identify the appropriate standard of review based on the standard of review analysis (formerly the pragmatic and functional test) rather than by attempting to determine whether the matter was jurisdictional based only on the nature of the provision being interpreted (*PSAC* at para. 52).

Another question that has troubled the courts post-*Dunsmuir*, is with respect to the relationship between review of reasons for procedural adequacy (i.e., do the reasons conform with the requirements of procedural fairness) and review of reasons for substantive adequacy (i.e., are the reasons justified, transparent and intelligible such that they can be considered to be "reasonable"). In two appellate court judgments, one from Ontario (*Clifford v. Ontario (Attorney General)*, 2009 ONCA 670), and one from Newfoundland (*Newfoundland and Labrador (Treasury Board) v. Newfoundland and Labrador Nurses Union*, 2010 NLCA 13; leave granted [2010] S.C.C.A. No. 317), the courts have taken opposing views on how to approach review of

reasons. In *Clifford*, the Ontario Court of Appeal held that reasons must be reviewed first for procedural adequacy, with no deference being given and, if they are found to be procedurally adequate, they must be reviewed again for substantive adequacy. In *Newfoundland and Labrador (Treasury Board)*, the Newfoundland Court of Appeal disagreed, holding that "since reasons, including adequacy thereof, constitute a component of reasonableness, a separate examination of procedural fairness [in relation to those reasons] is an unnecessary and unhelpful complication" (*Newfoundland and Labrador (Treasury Board)* at para. 12).

Two recent Alberta judgments, one from the Court of Appeal and one from the Court of Queen's Bench, raise these issues. They suggest that, in Alberta, the approach to the problem of jurisdictional questions is to allow for the possibility that jurisdictional questions can be distinguished from other questions of law, but to identify questions as jurisdictional only rarely. In addition, they suggest that the Alberta courts are concerned with the problem of how to review reasons procedurally and substantively, and are looking to the Supreme Court to provide guidance on this issue.

After summarizing the relevant aspects of the two decisions, I will offer some thoughts on these two questions, suggesting that it is in fact not possible to articulate a coherent basis for distinguishing true questions of jurisdiction from other questions of law, and that the approach in Alberta of rarely identifying questions as jurisdictional is as it should be. I will also suggest that while it may be theoretically possible to conduct an independent analysis of reasons for procedural fairness and for substantive adequacy, doing so is a waste of time, and creates the possibility of introducing non-deferential review where deference is appropriate.

This problem of reviewing reasons for procedural and substantive adequacy was discussed yesterday in a post by Shaun Fluker, also on the *Calgary (City)* case; my comments here can be viewed as a somewhat different route to a substantially similar conclusion on the proper resolution of this problem.

The Cases

A. Mitzel v. Law Enforcement Review Board

The Law Enforcement Review Board directed charges against Constable Horon, an officer with the Edmonton Police Service. The charges were based on Constable Horon's alleged failure to make notes of a strip search of an accused. The original complaint brought to the Law Enforcement Review Board did note an issue with respect to the "failure to provide any investigative record" (*Mitzel*, para. 4), but Horon was not named, and the complaint focused on events that occurred at the time of the arrest, not at the time of detention. Nonetheless, the Board "directed the Chief of Police to lay a charge of neglect of duty against Horon" (para. 16). The Board did not make an express finding about whether a complaint had properly been made against Horon, "although it is logical to assume it concluded Horon's failure to make notes about the strip search was part of the complaint" (para. 17).

Horon sought judicial review of this decision, arguing that since no complaint had been brought against him, the Board was acting "without jurisdiction" (para. 18). The complainant countered

this position by suggesting that the Board was simply making a finding of fact that the complaint included Horon, a finding with respect to which they were entitled to deference. For its part, the Board "acknowledged that the Board's reasons offer no explanation for its apparent conclusion that the complaint included Horon" (para. 20).

In its decision allowing Horon's application for judicial review, and remitting the issue to a new panel for reconsideration, a majority of the Court of Appeal (Justices Constance Hunt and Clifton O'Brien) held that this was "not a matter of true jurisdiction" (para. 23). A complaint had been made, clearly giving the Board jurisdiction over that complaint; the only question was whether the complaint as filed included Horon. If no complaint had been made there would be a jurisdictional question, because the legislation gives the Board power once a "public complaint has been made"; that was not the case here (para. 22, citing *SC v. Calgary Police Commission*, 2001 ABCA 122).

The majority noted the purpose of the legislation which requires "balancing the need for public confidence [in the police] with the employment rights of the officer in the context of the safe, efficient and effective operation of the police service" (para. 24, citing *Plimmer v. Calgary (City) Police Service,* 2004 ABCA 175). It noted that the legislation contains no privative clause, which indicates the Court should not defer, but that interpreting the scope of a complaint was a matter which "was not outside the Board's expertise" (para. 25), and that there "are many reasons why a court ought to defer to the Board on such a question" (para. 25). As a consequence, the appropriate standard of review was reasonableness.

The majority noted, however, the complication of how to analyze the adequacy of reasons, and in particular the conflicting jurisprudence on whether to analyze reasons for procedural adequacy or substantive sufficiency. The majority held that the Board's acknowledgement that its reasons "were inadequate on the critical point" was sufficient to make resolution of that controversy unnecessary in this case. This was "one of the rare cases referred to in *Clifford* at para. 26 where essentially nothing was offered by the tribunal to support its decision on the critical issue" (para. 29), and the decision consequently could not stand.

In dissenting reasons Justice Paul Belzil found the Board's decision to be *prima facie* unreasonable. When an individual is not included in a complaint then, "on a plain meaning or purposive approach" to interpreting that complaint, the decision to nonetheless proceed against that person cannot stand (para. 48). "The standard of review of reasonableness is deferential and broadly defined but this does not equate with a standard of review which is without limits and completely open ended" (para. 48). That there was no way to include Horon within the complaint meant that there was no point in remitting the matter to the Board. In essence, since no reasons could be offered to justify the inclusion of Horon in the complaint, there was no point in giving the Board the opportunity to offer such reasons.

B. Calgary (City) v. Alberta (Municipal Government Board)

In this case the City of Calgary sought judicial review of a decision of the Municipal Government Board with respect to whether BTC Properties II Ltd. was properly assessed for tax with respect to its parking facilities. Justice Barbara Romaine dismissed the City's application in extensive reasons, most of which will not be discussed here. However, one argument made by the City led Romaine J. to address the question of the proper approach to review of reasons. In particular, the City challenged the adequacy of the reasons offered by the Municipal Government Board for its decision. Romaine J. held that pending resolution by the Supreme Court of the

issue, it was necessary to consider the adequacy of the reasons separately in terms of procedural fairness and substantively, but found that the reasons were adequate.

With respect to this way of reviewing reasons she stated that:

> In my view, the requirement in *Baker* [[1999] 2 SCR 817] to give reasons does not occupy precisely the same ground as the Supreme Court of Canada's framework for analyzing the sufficiency of reasons in *Dunsmuir*. However, there is some crossover since both involve an evaluation of the justification, transparency and intelligibility of the reasons. As this issue is not settled in Alberta, I will conduct two separate reviews, although I agree with the view of the majority of the Newfoundland Court of Appeal which is consistent with the D*unsmuir* goal of clarity and simplicity (*Calgary (City)* at para. 42).

She also noted that:

> This description of reasonableness [from the Supreme Court's judgment in *Law Society of New Brunswick v. Ryan,* 2003 SCC 20] can be taken as a description of the process for determining whether the reasons given by the tribunal are sufficient, whether the basis for the decision is intelligible and thus whether the process was fair, the first step in the two-step analysis adopted by *Clifford*. To isolate the first step and characterize it as being subject to some standard of "correctness" rather than "reasonableness" is to bring "correctness" in through the backdoor in an analysis that does not require such a standard, as reasons that do not meet such a test would surely, as Welsh J. has put it … be unreasonable (para. 44).

Romaine J. found that, here, given past precedent and review of the factors set out in the standard of review analysis, the correct standard was reasonableness. The Board interpreted the *Municipal Government Act*, RSA 2000, c M-26, Bylaws and made findings of fact. There was no jurisdictional question, despite the City's argument that the reduction of tax assessment to zero was equivalent to granting a tax exemption, and that the Board's ability to do that was a question of jurisdiction. Romaine J. said that the "issue was whether the City had properly assessed BTC for business tax under the MGA and the Bylaws. This was an issue which was clearly within the jurisdiction of the MGB" (para. 62). Romaine J. then reviewed each aspect of the Board's decision, concluding that in each case the decision was reasonable and that, as well, the reasons were procedurally adequate: "The reasons are based upon the issues, the evidence and the submissions presented to the MGB and are thus adequate for the purposes of conducting an effective judicial review" (para. 159).

Analysis

A. Jurisdictional Questions

In *Calgary (City)* and in *Mitzel* the courts declined the invitation of the party seeking review of the administrative decision to characterize the issue as jurisdictional, holding instead that the decision was within the jurisdiction of the decision-maker, and amounted only to an interpretation or application of legislation to the facts raised. In *Mitzel* they distinguished the

earlier decision, *SC v. Calgary Police Commission*, 2001 ABCA 122, in which the Board proceeded without having a public complaint before it, suggesting that while *SC* raises a question of jurisdiction, *Mitzel* does not.

This all seems fair enough in terms of the outcome reached, and in terms of the courts' appropriate willingness to defer to the administrative decision-makers in these cases. However, at an analytical level, it is not easy to see, or to predict, when a question will be reasonably characterized as jurisdictional. Take the jurisdictional question raised in *SC*. In that case, the legislation gave the Board authority to proceed if there was a public complaint. On the facts of *SC* all the Board had to do was determine what constitutes a "public" complaint, because an individual had raised an issue of police misconduct with the police, she had just not formally filed a complaint. If that is so, then the Board was determining its authority, but it was also simply construing the meaning of a term used in its home statute, a matter on which it might be entitled to deference given the position taken by the Court in *Dunsmuir* (i.e. that interpretation of a decision-maker's home statute should be given deference).

Similarly, in *Mitzel*, the question could have been characterized as being whether there can be a public complaint under the legislation against an officer when that officer is not named in any complaint documents. That is – whether the Board has the authority to proceed against an officer about whom there is no express public complaint. That question, like the question in *SC*, arguably does go to the authority of the Board – to the Board's jurisdiction to hear cases or make decisions about individuals in light of the statute that grants it authority. The dissenting opinion at the Court of Appeal, although agreeing that the matter was not jurisdictional, does hint at the extent to which the question is one that a court could legitimately want the administrative decision-maker to decide correctly, and that a failure by the decision-maker to do so will create at least the appearance that the decision-maker is extending its authority beyond where it may legitimately go. That is, that the question is one about the nature and extent of the decision-maker's jurisdiction.

In my view, as set out by Evans J.A. in the *PSAC* case discussed earlier, many questions of statutory interpretation can be characterized as jurisdictional on the test in *Dunsmuir*, and there is no categorical way to distinguish between those questions and other matters of law. On any number of issues it may be that the statutory interpretation goes to the decision-maker's authority to decide, yet the heart of the issue nonetheless remains one of statutory interpretation, and there is no particular reason to suspect that the decision-maker is less (or better) suited to make the decision than in any other statutory interpretation case. The real issue, for determination of standard of review, is the relative expertise of the court and of the tribunal to make the particular decision in question.

With respect to *Mitzel* and *SC*, whether the facts are that a complaint was not made through the proper formal channels, or that a complaint did not reference a particular individual, the Law Enforcement Review Board must interpret its legislation in light of the facts, and if it makes the wrong (incorrect or unreasonable) decision it may exceed its authority. It is the bad decision – the incorrect or unreasonable decision – that creates a question of jurisdiction, not the nature of the question *per se*.

This makes sense in light of the overall function of judicial review. Judicial review exists to protect the rule of law, to prevent administrative decision-makers from being incorrect on matters they were required to decide correctly, and from being unreasonable on matters they were required to decide reasonably. An error of jurisdiction arises when an administrative decision-maker makes a mistake of this kind, whether the court was being deferential or not. The

prior analysis of whether a question is "jurisdictional" is to a great extent not relevant, and is not helpful in determining whether deference is required. Indeed, all it may mean is, simply, "this is a matter that the decision-maker should not get wrong" or "this is a matter on which I think the decision was unreasonable". But the first point can simply be resolved by determining, through the ordinary standard of review analysis, that a correctness standard was required, and the second point can simply be resolved by explaining why the decision-maker's decision was unreasonable. There is no need to try and pigeon hole the issue into a jurisdictional category.

B. Reasons

In *Calgary (City)*, Romaine J. found that the reasons passed the tests for both procedural and substantive adequacy. In *Mitzel*, the Court of Appeal held that the entire absence of reasons on the central issue meant that it was not necessary to consider how the reasons fared on the two different bases; the matter would be sent back to the Board for reconsideration in any event.

The decisions, and particularly the judgment of Romaine J., do indicate that the problem of dual review of reasons needs to be resolved by the Supreme Court. And, as Romaine J. suggests, they indicate that the Court should eliminate dual review of the adequacy of reasons. On procedural grounds, the only question should be whether or not reasons were required, and whether or not the decision-maker purported to give reasons. If the decision-maker claims that it gave reasons, then the content of those reasons should only be reviewed for substantive adequacy, on either a correctness or reasonableness standard. Prior review for procedural adequacy should not occur.

This is not because review for procedural adequacy is impossible. As suggested by *Clifford*, review for procedural adequacy simply focuses on whether the reasons show how the decision-maker got from point A to B. It is possible to do that without considering whether the path taken from point A to B is sensible – i.e., whether it is correct or reasonable.

Consider these examples of reasons one might give to deny an applicant admission to law school:

1. You are not admitted to law school.
2. You are not admitted to law school because your last name begins with the letter "G".
3. You are not admitted to law school because your GPA was too low.

The first set of reasons is procedurally inadequate. It does not show how the decision-maker reached the conclusion she did. The second set of reasons is procedurally adequate – it shows how the decision-maker reached the conclusion she did. Of course the reasons are substantively inadequate – they suggest that the decision was made on a basis outside the criteria for assessing a candidate for law school admission – based, in fact, on a criterion that is spurious and silly. The third set of reasons is both procedurally and substantively adequate; it shows why the applicant was denied admission, and offers a criterion which is sensible – i.e., reasonable or correct – given the normal criteria for law school admission.

That review for procedural adequacy is possible, though, does not demonstrate that it is useful. Once it has been shown that reasons were given, and once the substantive adequacy of those reasons has been called into question, why would it be useful for a decision-maker to assess whether those reasons were sufficient to satisfy a procedural obligation? What purpose would it serve, since substantive adequacy should suggest procedural adequacy, and since procedural inadequacy almost certainly suggests substantive inadequacy? Moreover, reasons are now so closely tied to substantive judicial review, that it seems difficult to see how a reviewing court

could in practice distinguish between adequacy review on the two bases. And, given that procedural requirements are reviewed for correctness, while substantive grounds will often be reviewed only for reasonableness, reviewing reasons twice does create the very real risk that correctness review will slip into the substantive analysis. Theoretically it shouldn't – the court in a procedural review should not be looking at anything more than whether there is a discernable path to the conclusion in the reasons offered. That, though, simply leaves two possibilities: either the review for procedural adequacy will add nothing of value, or it will add something of value, but in doing so undermine the deferential review for substantive adequacy. Neither possibility is desirable.