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The Standard of Patent Unreasonableness Lives On

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Case Commented On: : *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 (CanLII)

In its recent *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25 decision, the Supreme Court of Canada engages in a review of a tribunal decision which emanates from British Columbia. From the perspective of administrative law jurisprudence, what is noteworthy about this decision is that the Supreme Court applies the standard of patent unreasonableness in its review. Yes that's right – this is the same standard of review which was shown the door by the Supremes in *Dunsmuir*. This decision reminds us that the standard of patent unreasonableness lives on in judicial review where a legislature has preserved it under a statute, as is the case in British Columbia with sections 58 and 59 of the *Administrative Tribunals Act*, SBC 2004 c 45, but offers nothing explicit on how this fits into general principles of administrative law.

The appellants in this case are technicians employed at a hospital laboratory who were diagnosed with breast cancer and sought benefits under the *Workers Compensation Act*, RSBC 1996 c 492 on the basis that the cancer is an occupational disease. Their claim was denied at the first instance by the Workers' Compensation Board which found there was insufficient evidence to conclude their employment as a lab technician had a causal role in the development of breast cancer (at para 13). The appellants successfully appealed this Board ruling to the Workers Compensation Appeal Tribunal which found the breast cancer is an occupational disease on the basis of the evidence before it and the application of policy that requires the evidence to establish a 'causative significance' between the employment activity and the illness (at paras 14, 15). The Fraser Health Authority then successfully obtained judicial review of this Tribunal decision at both the British Columbia Supreme Court and the British Columbia Court of Appeal. Both levels of the British Columbia courts essentially held the Tribunal erred by ignoring or disregarding the expert evidence concluding there is no scientific basis to causally link the incidence of breast cancer to the appellants' employment in the laboratory (at paras 19 – 24).

The majority decision (the court split 6 – 1) at the Supreme Court of Canada is written by Justice Russell Brown. Justice Brown begins the analysis by characterizing the causation issue as a question of fact, upon which the Tribunal's finding of causation should not be overturned unless it is patently unreasonable. This standard of patent unreasonableness is prescribed in this case by the combination of sections 254 and 255 of the *Workers Compensation Act* which amount to a strong privative clause by stating (1) the Tribunal has exclusive jurisdiction to hear and determine all questions of fact, law and discretion arising in an appeal under the Act and (2) that the Tribunal's decision is final and not subject to review by any court, as well as section 58 of the *Administrative Tribunals Act* (in particular subsection (2)(a)) which provides as follows:

> 58(1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

British Columbia's umbrella-style *Administrative Tribunals Act* is similar to Alberta's *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3, however the legislation in British Columbia has much more depth in terms of its provisions relating to practice and procedure of administrative tribunals as well as prescribing the standard applicable in a judicial review of a tribunal decision.

So patent unreasonableness as a standard of review lives on where it is designated by statute, despite the Supreme Court's *Dunsmuir v New Brunswick*, 2008 SCC 9 decision which proclaimed only correctness and reasonableness as available standards in judicial review. This anomaly was directly at issue before the Supreme Court early after *Dunsmuir* in its *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 decision. The majority of the Court in *Khosa* upheld the standard of patent unreasonableness in that case, but stated this standard must be read in the context of general administrative law principles developed in the common law:

> In cases where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business. Our Court had earlier affirmed that, within constitutional limits, Parliament may by legislation specify a particular standard of review: see *R. v. Owen*, 2003 SCC 33 (CanLII), [2003] 1 S.C.R. 779. Nevertheless, the intended scope of judicial review legislation is to be interpreted in accordance with the usual rule that the terms of a statute are to be read purposefully in light of its text, context and objectives.

> Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(a) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s. 58(3). Despite Dunsmuir, "patent unreasonableness" will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention. (*Khosa* at paras 18, 19)

Justice Rothstein wrote a spirited dissent on this point in *Khosa* (at paras 69 – 137), disagreeing that the common law should always be read into the application of a legislated standard of review.

There is no sign of this debate over standard of review in *Fraser Health Authority*, as both Justice Brown for the majority and Madame Justice Suzanne Côté in dissent agree on the test for patent unreasonableness in this case by referring to pre-*Dunsmuir* jurisprudence: the Tribunal's decision on causation will be patently unreasonable if it is based on no evidence or the evidence before it, viewed reasonably, is incapable of supporting the Tribunal's findings in question (at paras 30, 48).

The divide between the majority and the dissent in *Fraser Health Authority* is essentially over whether there was evidence to support the Tribunal's finding on causation, and the majority judgment seems much more deferential to the Tribunal in this regard than the dissent. Justice Brown observes how the Tribunal dealt with the expert evidence before it, and its finding that such evidence demonstrates the appellants were exposed to carcinogens in the workplace and have a statistically elevated incidence for breast cancer (at paras 31 – 35). Justice Brown concludes this evidence provides adequate support for the Tribunal ruling that cancer is an occupational disease here, and accordingly the Tribunal's decision is not patently unreasonable even in the face of expert opinion that the evidence is insufficient to establish scientific conclusions to support an association between the workplace and cancer (at paras 37 – 39). Justice Côté, in dissent, held there was no evidence capable of supporting the Tribunal's finding on causation and she was troubled by the Tribunal's apparent disregard for the uncontested evidence that no scientific causal link exists between the workplace and the development of cancer (at paras 50 – 75). For Justice Côté, the Tribunal's decision strayed into the 'wilderness' of mere speculation (at para 79). So while there is no disagreement on the test for patent unreasonableness there is significant divergence between the majority and dissent over the application of the standard in this case, with Justice Brown implementing a much more deferential sense of the standard than did Madame Justice Côté or the lower courts in British Columbia.

My final word on this decision goes back to the legislated standard of review. I find it strange that a legislature can lawfully prescribe the applicable standard for judicial review, when that standard is supposed to be the mechanism developed and employed by the Court to reconcile the fundamental tension in judicial review between policing the exercise of administrative power to ensure it respects the Rule of Law and, at the same time, ensuring such review is respectful of the legislative intention to grant such administrative power to a tribunal in the first instance. How is it that there can be any such reconciliation if the legislature dictates the level of review? The discussion that this fundamental incongruence should attract seems to have ended with *Khosa* – there is nothing written here in *Fraser Health Authority* and the Supreme Court passed on another opportunity back in 2011 with *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52. Yet the majority here in *Fraser Health Authority* seems to be sending a relatively strong message on judicial deference, without getting into the details of how this is 'calibrated' into the general principles of administrative law (to borrow from the majority in *Khosa*) which have developed under *Dunsmuir*. This is surely one of those fissures in the jurisprudence of administrative law worthy of deeper investigation.