2008

Developments in Administrative Law: The 2007-2008 Term - The Impact of Dunsmuir

Laverne Jacobs
University of Windsor, Faculty of Law

Developments in Administrative Law: The 2007-2008 Term -- The Impact of Dunsmuir

Laverne Jacobs*

(2008), 43 SCLR (2d) 1 - 34

I.INTRODUCTION

1 The 2007-2008 term was a landmark year in Canadian administrative law. The Supreme Court of Canada decision in Dunsmuir v. New Brunswick affected dramatically the approach to determining the applicable standard of review. The Dunsmuir decision caused a fervour of discussion among practitioners, judges, academics and all those involved in the administrative justice community.2 It essentially eclipsed all other cases decided this term.3

2 What exactly is the new methodological approach that Dunsmuir directs courts to adopt? More importantly, what is the true impact that Dunsmuir has had on judicial review in Canada? This article does two things. First, after providing a brief history of the standard of review jurisprudence in Canada, it outlines the change in methodology and the new guidance that the Supreme Court of Canada has developed through Dunsmuir, paying particular attention to the different approaches and concerns of the authors of the separate concurring judgments. The second part of this article discusses findings from an examination of cases that have been decided by lower courts in the first three months since the decision in Dunsmuir (the period of time between the date of the decision and the end of the 2007-2008 Supreme Court term). In this second part, the themes that have started to develop relating to the way that the courts are interpreting Dunsmuir and the difficulties in applying the Dunsmuir standard of review analysis are brought to the surface. In so doing, this article attempts to measure the impact of Dunsmuir by identifying the major challenges that have emerged from a reading across Supreme Court and lower court decisions.

3 The Supreme Court of Canada decided six administrative law decisions in the 2007-2008 term. This article focuses primarily on the Supreme Court's decision in Dunsmuir. To the extent that it examines other administrative law decisions rendered by the Supreme Court this term, these decisions are discussed as illustrations of emerging themes and challenges that have arisen as a result of the Dunsmuir decision.4

II.A BRIEF HISTORY OF THE STANDARD OF REVIEW JURISPRUDENCE IN CANADA

4 Judicial review of administrative action has always been characterized by a discrete exercise of reconciling several considerations.5 These considerations point to what one hopes is an appropriate balance between two ideals: deference to legislative intent and to the expertise of administrative decision-makers, on the one hand, and, on the other, court intervention designed to ensure that administrative action remains within the limits of legislative and constitutional legitimacy. In other words, judicial review has sought to maintain a balance between administrative action and the rule of law on both procedural and substantive grounds.6

5 Before the advent of the pragmatic and functional approach to determining standard of review, concerns about balancing judicial intervention and restraint in the administrative state existed but in a much different form.7 Two standards of review were dominant at this time: correctness and, later, patent unreasonableness. Prior to C.U.P.E., Local 963 v. New Brunswick Liquor Corp.,8 the courts focused on whether there was a "preliminary" (or "jurisdictional" or "collateral") question to be decided. The preliminary question doctrine maintained that when an administrative actor had to decide if it possessed the jurisdiction to embark on an inquiry into the substantive matter at hand, its decision was subject to judicial review on a correctness standard. In this way, an administrative actor's determination of its authority to decide a matter under an enabling statute had to be legally correct. In the event that an administrative body made an incorrect decision on this preliminary question, the reviewing court could substitute its own decision on judicial review.

6 Privative clauses also figured centrally in pre-C.U.P.E. v. N.B. Liquor Corp. analyses over the degree of deference to be owed to administrative decision-making. Through a privative or ouster clause, the legislature aimed to limit the amount of court intervention by reducing it to no interference at all through the writ of certiorari or any of the other prerogative writs.9 However, the courts became prone to circumventing legislative intent. They did so by creating additional actions which were deemed to bring administrative decision-makers outside of their jurisdiction. This led to more instances of review than envisaged by the legislature. Moreover, by characterizing the error that an administrative tribunal had made as a jurisdictional error, the most intrusive level of judicial scrutiny could be exercised -- the tribunal decision had to be correct or the court's own decision would be substituted for it.

7 Underpinning the reasoning of the courts of this era was the idea that if a tribunal acted outside of the scope of power that had been granted to it by the legislature, it certainly could not have been the intent of the legislature to protect it by a privative clause. Consequently, any such actions of tribunals were held to be null. Some of the well-known formulations of exercises constituting "error leading to loss of jurisdiction" at that time included finding that the administrative decision-maker had: acted in bad faith in the course of the decision-making process, failed to comply with the requirements of natural justice, dealt with questions other than the question remitted to it, refused to take into account essential factors or taken account of irrelevant factors.10

8 C.U.P.E. v. N.B. Liquor Corp. was a landmark decision for introducing the idea of deference and the standard of patent unreasonableness. While it did not eradicate the concept of jurisdictional error, it was the first Supreme Court case to assert forcefully a countervailing policy of curial deference. The Supreme Court of Canada had suggested on earlier occasions that judicial restraint should be preferred to overzealous review on formalistic, jurisdictional grounds,11 however, C.U.P.E. v. N.B. Liquor Corp. marked the first instance in which the Supreme Court articulated this preference explicitly. In the now famous words of Dickson J.:

The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.12

9 In C.U.P.E. v. N.B. Liquor Corp., one saw a new approach to judicial review -- an approach that perceived differently the allocation of roles between the judiciary and the legislature. Justice Dickson's analysis laid emphasis on the importance of recognizing the legislator's choice to use an administrative agency to render decisions within a particular area of specialization. His discussion in C.U.P.E. v. N.B. Liquor Corp. sought to validate such choices when they were made. Justice Dickson thus highlighted the "[c] onsiderable sensitivity and unique expertise"13 of board members and the importance of promptness and finality, which the legislature sought to achieve by confiding decision-making in certain areas of socio-economic regulation to specialized agencies. He stressed that unlike courts, administrative decision-making calls upon an administrative agency not only to find facts and decide questions of law but also to "exercise its understanding of the body of jurisprudence" that it has developed over time in a particular market or industry.14 As a result, more than one outcome may be reasonable within a context of administrative agency decision-making.15 Administrative tribunals do not have to provide reasons that are "correct" in the view of the courts16 as the courts are not necessarily in the best position to designate one outcome as the most appropriate. Justice Dickson went so far as to assert that with respect to matters lying within the heart of the jurisdiction confided to a board, a board should be entitled to err and that any such errors should be protected by any existing privative clause.17

10 Finally, Dickson J. introduced the concept of patent unreasonableness as a standard of review, broadening the spectrum which had included until then only correctness. He asserted that questions falling squarely within the specialized jurisdiction entrusted to administrative decision-makers could not be collateral or jurisdictional. In Dickson J.'s opinion, when analyzing intra-jurisdictional matters, the true test of whether judicial intervention is justifiable is whether a board's interpretation is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation".18

11 As for the evolution of the standard of review analysis in Canadian administrative law, C.U.P.E. v. N.B. Liquor Corp. served to promote a policy of judicial restraint at a time when judicial interventionism was prevalent. Although it did not eradicate the concept of jurisdictional error, the Court's assertion of judicial deference, the warning against overzealous curial review on "jurisdictional" grounds and the introduction of a standard of patent unreasonableness for matters within jurisdiction, were the first steps toward a more tempered and pluralistic approach to judicial review of administrative action.

12 The jurisprudence up to C.U.P.E. v. N.B. Liquor Corp. did not place much emphasis on delineating the situations in which deference should be owed to administrative decision-makers. What was left was for the jurisprudence to develop these situations and the methodology for determining them. The 1988 Supreme Court of Canada decision in Bibeault19 marked another turning point in the evolution of the substantive review jurisprudence. The importance of Bibeault was that it was the first case to articulate the phrase "pragmatic and functional" and to use a pragmatic and functional approach in one aspect of judicial review. In Bibeault, Beetz J. for a unanimous Court held that a pragmatic and functional

approach should be used to identify a question as truly jurisdictional in nature. This approach would focus on the intention of the legislature. More specifically, the pragmatic and functional approach to jurisdictional issues would seek to determine if the legislator intended that the question that the administrative tribunal has answered should be subjected to judicial review.

13 Despite these early harbingers of a new paradigm for curial review, it was not until the 1990s that the pragmatic and functional approach blossomed fully into a context-driven methodology for determining the degree of deference that a court should accord to an administrative decision-making body. The factors to be considered to establish the appropriate standard and how they should be weighed emerged. The approach put forward four determinative factors. First, the presence or absence of a privative clause was to be considered, with the presence of a privative clause indicating that a higher level of deference should be owed to the original decision-maker. Second, the court should have regard to the expertise of the tribunal relative to that of the court. A greater degree of deference should be accorded to the administrative body if it has a particular expertise in the subject matter or a manner of dealing with issues under the statute that the courts, as generalists, do not possess. Expertise was held to be the most significant factor in determining the appropriate standard of review.20 The purpose of the statute as a whole and of the provision in particular is the third factor in the list of those to be considered by a court in determining standard of review. Administrative regimes that call upon decision-makers to deal with polycentric issues (i.e., questions that involve the simultaneous balancing of several interlocking interests and considerations) invite more judicial restraint. By contrast, the more classic judicial adjudication, in which there are opposing interests, claims of right or entitlement, factual discovery and the application of facts to law in singular situations, militates towards less deference.21 Finally, the nature of the problem -- whether the question is one of fact, law or mixed fact and law -- should be taken into consideration. Although the nature of the question in and of itself will not indicate how much deference, if any, should be given to an administrative decision-maker, when taken into account with the other factors it may favour a particular posture of deference. In particular, it was pointed out in Pushpanathan that where the other three factors leave the legislator's intention ambiguous regarding deference, courts should be less deferential of decisions that are pure determinations of law.22 The Supreme Court also noted that the less that the question of law draws upon the specific expertise of the administrative decision-maker, the harder it will be to justify curial deference. However, the Court in Pushpanathan was also quick to acknowledge that despite this general principle, there are situations in which the legislative scheme, the expertise of the administrative decision-maker and the existence of a strong privative clause may preclude strict judicial intervention.23 The Court also noted the difficulties in identifying "pure" questions of law given that they may be inextricably linked to questions of fact.24

14 Weighing of these four factors led to three possible standards of review: patent unreasonableness, correctness and reasonableness simpliciter. While the first two of these standards were long established, it was only in the 1997 decision of Southam that the standard of reasonableness simpliciter was introduced. Here, Iacobucci J. identified the need for a standard which falls at a fixed point on the spectrum between patent unreasonableness and correctness. He described reasonableness simpliciter as a standard that tests how well an administrative decision can be supported:

An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.25

15 Almost since the inception of the pragmatic and functional approach, the legal community has bemoaned its problems. Criticism has been sounded by judges, lawyers and academics alike. The problems identified with the pragmatic and functional approach have crystallized into forces leading to the change adopted by the Supreme Court of Canada in Dunsmuir. The challenges with the approach are of two main types. Practical problems dealing with the nature and application of the three standards have been identified as well as theoretical questions relating to the appropriate relationship between courts and delegated decision-makers.

16 The most stringent critique of the challenges involved in defining and applying the standards is found in the cri de coeur expressed by LeBel J. in Toronto (City) v. C.U.P.E., Local 79.26 In City of Toronto, LeBel J. reviewed the interplay between the standards of correctness and patent unreasonableness, outlining the conflicted relationship between them. He also discussed the nebulous distinction between patent unreasonableness and reasonableness simpliciter. For both sets of distinctions, Lebel J. noted the challenges that have arisen from the way that they have been conceptualized and the resulting difficulties that exist in their application.27

17 The conceptual problems identified by LeBel J. run deeper, as suggested by Sossin and Flood. They argue that determining the appropriate standard of review in any given situation requires a necessary embrace of the complex nature of the administrative state. While this engagement with complexity was instigated by Iacobucci J.'s creation of the reasonableness simpliciter standard, the Supreme Court has shown reluctance to extend this approach to its natural conclusion. The unfortunate consequence of this hesitancy is that the method of applying one of three fixed standards has replaced a rigorous analysis over whether or not to grant deference in any given circumstance with an increasingly formalistic approach. Sossin and Flood propose that a broader methodology such as the one used for determining procedural fairness be adopted. This more flexible methodology should incorporate the impact on the affected party as a factor. It may also incorporate other factors but establishing which factors are relevant should be developed on a case-by-case basis.28

18 Many additional practical and conceptual challenges have been identified by commentators. These include: the applicability of the pragmatic and functional approach to administrative contexts other than adjudicative tribunal decision-making (such as municipal councils and the making of municipal by-laws);29 the seemingly unpredictable results of the pragmatic and functional test;30 the unworkable flexibility of the test as evidenced by the fact that different judges may select different standards in similar situations or apply the same standard to get different results;31 that the nature of certain factors

of the pragmatic and functional test, like expertise, is not conceptually clear32 and that the reviewing court's characterization of the question brought before it on judicial review can significantly affect the outcome.33

19 In City of Toronto, LeBel J. concluded his eloquent decision with the summation of some possible means of resolving the difficulties nascent in standard of review methodology:

Administrative law has developed considerably over the last 25 years since CUPE. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.34

20 Dunsmuir picked up on LeBel J.'s critique of the current state of the law and was used as a platform for improving the methodology for substantive review of administrative action. Leading the way in this change was LeBel J. himself, who co-authored the majority decision with Bastarache J. They were joined in their decision by McLachlin C.J.C., Fish and Abella JJ. Minority concurring reasons that proposed different views on how the standard of review analysis should be conducted were presented respectively by Binnie J. and by Deschamps, Charron and Rothstein JJ. Although Dunsmuir purports to make a significant change to the way that the standard of review analysis is undertaken, many of the modifications simply codify what has already been done. Moreover, while in some respects, Dunsmuir clarifies the standard of review methodology, the new approach has some significant ambiguities which are being experienced by lower courts as well by the Supreme Court of Canada itself. As discussed below, these challenges include how to deal with situations to which the patent unreasonableness standard formerly applied, incorporating legislated standards of review and how to determine whether a particular category of question has already been addressed. Finally, on a theoretical level, Dunsmuir may provide just as little transparency as the prior pragmatic and functional approach. It also fails to engage with the complex nature of the various forms of decision-making and decision-making bodies that exist in the contemporary administrative state. In short, although Dunsmuir has taken the standard of review jurisprudence to a certain point, there are definitely still many questions to be answered.

III. DUNSMUIR V. NEW BRUNSWICK

1.Facts and Procedural History

21 David Dunsmuir worked for the New Brunswick Department of Justice. He held an Order-in-Council, at-pleasure appointment in the clerk's office for various courts in the Judicial District of Fredericton.

Because of many contretemps in the relationship between Mr. Dunsmuir and his employer, he received several reprimands and was eventually terminated. No cause for termination was alleged by the government and in lieu of providing notice, Mr. Dunsmuir was terminated with four months' pay.

22 Mr. Dunsmuir brought a grievance under the Public Service Labour Relations Act.35 Although he was not a unionized employee, the PSLRA provides non-unionized employees of the provincial public service the right to file a grievance with respect to a discharge, suspension or financial penalty.36 The grievance was denied and the matter referred to an adjudicator who was selected by agreement of the parties and appointed by the Labour and Employment Board. At issue was whether an adjudicator had jurisdiction to determine that an employee had been discharged for disciplinary cause, even when the non-unionized employee was dismissed with notice or pay in lieu thereof. The adjudicator held that he had jurisdiction to make this determination. He found further that the termination was not disciplinary but was based on the employer's concerns about the appellant's work performance and his suitability for the job. The adjudicator next considered Mr. Dunsmuir's claim that he had been dismissed without procedural fairness because the employer did not inform him of the reasons for dismissal or give him an opportunity to respond. Relying on Knight v. Indian Head School Division No. 19,37 the adjudicator determined that Mr. Dunsmuir's position in his hybrid capacity as both an officeholder at pleasure and a legal officer under the provincial Civil Service Act,38 entitled him to procedural fairness.

23 As the case wound its way through the courts on judicial review, two principal issues emerged. The first and most crucial one from the standpoint of contemporary Canadian administrative law theory concerned substantive judicial review. In response to many of the criticisms of the pragmatic and functional approach, the Supreme Court of Canada reduced the number of standards from three to two and attempted to delineate a simpler methodological approach for lower courts in their task of determining appropriate standards of review. The second issue dealt with procedural fairness for officeholders. In this regard, the long-standing decision in Knight,39 which holds that at -- pleasure civil servants have the right to procedural fairness upon termination, was reversed.

2.The Reform of the Standard of Review Analysis -- Majority and Minority Opinions

(a) The Majority -- Bastarache and LeBel JJ.

24 Chief Justice McLachlin, Bastarache, LeBel, Fish and Abella JJ. represented the majority opinion in Dunsmuir. Their decision was penned by Bastarache and LeBel JJ. Justices Bastarache and LeBel asserted that the time had come for a reassessment of the approach to be taken in judicial review of administrative tribunals. They noted the proliferation of confusing tests and general lack of guidance that the current standard of review analysis provided. In the majority's view, it was time to "re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable".40

25 The majority judges sought to rectify the approach taken on judicial review applications -- both with respect to substantive review and on procedural grounds. Their reform also attempted to be holistic in the sense of addressing not only the problems of judicial review associated with adjudicative tribunals but, more globally, "the structure and characteristics of the system of judicial review as a whole".41 However, the majority's attempts to deal holistically with all administrative actors without regard to the specificities of any type of administrative body attracted considerable criticism by Binnie J. in his concurring minority decision. This debate is discussed in more detail below.

26 Justices Bastarache and LeBel began their analysis with an overview of the familiar tension underlying judicial review. This is the tension that exists between the rule of law and legislative supremacy. The challenge can be succinctly described as a need to reconcile the inherent supervisory role of the courts (which is used to ensure that administrative bodies do not act without legal authority) with the democratic principle which maintains that courts are to interpret and follow the intention of the law as enacted by elected officials through legislation. Justices Bastarache and LeBel recognized the standard of review analysis as the yoke by which these two tenets are balanced. In their words:

... when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers.42

27 Despite the central place that judicial review occupies in maintaining a stable constitutional framework, current approaches to judicial review have proven difficult to implement. Justices Bastarache and LeBel therefore proposed a solution to this conundrum: the reduction of the number of standards of review from three to two by eliminating the standard of patent unreasonableness.

28 From a reading of the majority decision, one can discern that the reasons for doing away with patent unreasonableness centre around two poles. First, patent unreasonableness has had difficulty in operation. Justices Bastarache and LeBel observed that judges face a challenge in choosing the right standard of review in part because of the obscure conceptual distinction between the patent unreasonableness and reasonableness simpliciter standards.43 Second, as regards the result of applying the patent unreasonableness standard, the majority noted that the current definition of patently unreasonable may have the effect of allowing some, though not all, irrational decisions to stand. Emphasis has been placed on the magnitude or immediacy of the defect as a signal that a decision is patently unreasonable. These tests seem to permit of "shades of irrationality"44 -- an irrational decision may therefore survive depending on how "clearly irrational" the decision appears to be. Reiterating what LeBel J. had held in City of Toronto, the majority pointed out that allowing any irrational decision to stand is not only unpalatable but also contrary to the rule of law.45

29 The majority therefore left two standards to survive: reasonableness and correctness. Reasonableness was kept in recognition of the reason that it had been created. The development of the reasonableness standard by Iacobucci J. in Southam had been an attempt to circumvent the "all- or-nothing" approach to deference that had previously existed. Reasonableness simpliciter allowed for a more calibrated approach to judicial review by providing a more sophisticated assessment of the degree of deference owed. In the majority's opinion, "it would be a step backwards to simply remove the reasonableness simpliciter standard and revert to pre-Southam law".46 Correctness was seen as a standard that must unquestionably be kept in order to avoid unauthorized applications of law. Correctness review safeguards an appropriate supervisory stance in the many situations where deference is rarely owed: jurisdictional errors, constitutional issues and at least some questions of general law.47

30 Conceptually, the new standard of reasonableness aims to capture both the patent unreasonableness and reasonableness simpliciter strands48 of curial review. It is animated by the principle that underpinned both patent unreasonableness and reasonableness simpliciter. Specifically, this is the idea that a tribunal may legitimately come up with more than one possible outcome and that a court is not necessarily in the best position to label one as the correct decision.

31 Finally, Bastarache and LeBel JJ. provided guidance on how courts are to recognize an unreasonable decision. Central to the inquiry is the goal of ensuring that the administrative decision-making process has demonstrated the existence of justification, transparency and intelligibility. Coupled with this is the need to ensure that outcomes fall within an acceptable range:

Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.49

32 But, the majority argued that the move towards a single reasonableness standard would not mean paving the way for more intrusive review by the courts. They agreed with David Dyzenhaus' theory of deference as respect, which maintains that deference should be showed by the courts to the reasons offered in support of an administrative actor's decision.50

33 The majority went on to outline a concrete methodology for selecting the appropriate standard in individual cases.51 This new methodology has essentially two crucial elements. First, a shorter two-step test for determining the applicable standard of review is offered. This two-step approach begins the analysis with a survey of the jurisprudence to determine if the degree of deference owed has already been satisfactorily established for a particular "category of question". If this is the case, the established

standard can be applied. However, if the standard has not already been satisfactorily determined in past jurisprudence, courts are to embark on a "standard of review" analysis. The second crucial element of the majority's methodology is a renaming of the "pragmatic and functional" approach to the "standard of review" analysis. However, despite the change in nomenclature, the "standard of review" analysis bears significant resemblance to the pragmatic and functional approach. The main difference is that the factor dealing with the nature of the statute has been mysteriously modified. Whereas this factor initially dealt with the purpose of the statute as a whole and of the provision at issue in particular, with particular emphasis on polycentric-city (i.e., the more polycentric the work of the tribunal, the more deference it should attract), this factor has now been replaced with "the purpose of the tribunal as determined by interpretation of the enabling legislation".52 This unfortunate substitution can have a significant impact on the amount of deference that a court chooses to grant a tribunal as there is no evidence that the modified factor directs the court to pay attention to the ways in which the tribunal's decision-making incorporates knowledge beyond adjudication. As well, the emphasis on expertise as the single most important factor has also been dropped.53

34 In addition to these two crucial elements, Bastarache and LeBel JJ. also provide a list of factors that should help courts to determine if the reasonableness or correctness standard should be applied. It is not quite clear that these factors have a fixed place in the two-step methodology. Instead, they seem to be contextual factors that courts can take into account while assessing holistically the question of standard of review. Justices Bastarache and LeBel identified certain factors as pointing to a need for deference and therefore the standard of reasonableness. These factors include the existence of a privative clause, which is said to be a strong indicator of the need for deference; that the question is one of fact, discretion or policy, which will usually indicate that deference applies automatically. Moreover, if the question is one of law and, in particular a question of law that is of central importance to the specialized area of expertise of the tribunal, reasonableness will apply. Finally, if the administrative regime itself is one in which the decision- maker has special expertise, such as labour relations, deference will also be owed and the standard of reasonableness generally required.54

35 Correctness applies, by contrast, to "true questions of jurisdiction or vires". In using the term "jurisdiction", the majority explained that it wished to distance itself from the pre-C.U.P.E v. New Brunswick concept of a jurisdictional error which, as discussed above, was essentially a series of situations that were used by courts to open the door to close scrutiny of administrative decision-making.55 In the Dunsmuir context, true jurisdictional questions relate only to cases "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter".56 The correctness standard also applies generally to constitutional questions regarding the division of powers57 and to general questions of law, meaning those that do not fall within the specialized expertise of the adjudicator and that are of central importance to the legal system as a whole.58

36 In applying the new methodology, Bastarache and LeBel JJ. concluded that the appropriate standard of review was one of reasonableness and that the adjudicator in Dunsmuir had not made a reasonable decision.

(b)Minority Concurring Decision -- Binnie J.

37 In his minority concurring reasons, Binnie J. offered a thoughtful analysis of some implications of having only one undifferentiated reasonableness standard.59 Justice Binnie's central concern was that a single, homogeneous standard of reasonableness would not be flexible enough to determine when and how deference should be accorded to the range of administrative actors that extend beyond administrative tribunals. In his opinion, although the majority had stated an intention to revamp the standard of review methodology in a holistic manner, its end result may only deal with adjudicative tribunal decision-making.

38 Justice Binnie emphasized that the distinction between reasonableness simpliciter and patent unreasonableness centred not only on the magnitude or immediacy of the defect, but "also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what".60 Furthermore, the degree of deference required will also depend on the nature and content of the question at issue before the administrative decision-maker.61 Justice Binnie suggested that in order to preserve properly calibrated degrees of deference for various decision-makers in their decision-making contexts (e.g., ministers, other political actors, mid-level bureaucrats and arm's length administrative bodies that do not use adjudicative processes), a sliding scale of deference may well be needed within the standard of reasonableness itself. This is the crux of the debate between the majority and Binnie J. In Binnie J.'s words:

The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing between two standards of reasonableness that each represent a different level of deference to a debate within a single standard of reasonableness to determine the appropriate level of deference.62

Justice Binnie recognized that the court has resisted applying the reasonableness standard with varying degrees of deference in the past but argued that collapsing the distinction between patent unreasonableness and reasonableness will require exactly that.63

39 However, if contextualizing in order to address adequately the complexity of the administrative state is one of his main concerns, Binnie J. is also interested in simplifying the litigation process so that less time is spent arguing about what the tests mean and more time is devoted to the substantive merits of any case. In this regard, Binnie J. suggested that certain presumptions should be established. First, whenever an administrative outcome is challenged on substantive grounds, there should be a presumption that the standard of review is reasonableness:

The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is no single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review is reasonable until the applicant shows otherwise.64

40 Similarly, Binnie J. urged that when the correctness standard is argued by an applicant, the applicant should be required to demonstrate that the decision under review rests on an error in the determination of a legal issue and one that is not within the administrative decision-maker's ambit of authority.65

41 Finally, Binnie J. disagreed with the majority's understanding of the test for reasonableness. In his opinion, a test of reasonableness as rationality such as the one put forth by the majority is untenable. As an example of a case in which a decision was held to be both coldly rational and also patently unreasonable, he referred to the Court's decision in C.U.P.E. v. Ontario (Minister of Labour).66 Binnie J. suggested that the test for reasonableness should maintain the two core dimensions of the reasonableness standard. These two dimensions are the degree of deference reflected in each of the patent unreasonableness and reasonableness simpliciter standards, and an assessment of the range of options open to the decision-maker in light of the reasons given for the decision.67 In Binnie J.'s opinion, the test designed by the majority which centres on justification, transparency, intelligibility and a range of possible and acceptable outcomes falls short. It would be strengthened by including a framework through which the court and litigants could consider the relevant administrative decision-making context.

42 In sum, Binnie J.'s analysis emphasizes that it is important for reviewing courts to appreciate the contextual factors that will explain the perspective within which an administrative regime was intended to operate. Key among these contextual factors are the precise nature and function of the decision-maker (including its expertise), the terms and objectives of its governing statute or the common law which confers the power to decide and the nature of the issue being decided. With an understanding of factors such as these, the extent of the discretion conferred upon the initiative decision-maker can be better understood. Moreover, the notion of a fixed standard, inflexible in the degree of deference it shows to various administrative decision-making contexts, may suggest more intrusive judicial intervention.

43 In the end, Binnie J. agreed with the majority that the standard of reasonableness applied in the case at bar and that it had not been met by the labour adjudicator.

(c)Minority Concurring Decision -- Deschamps J.

44 Justice Deschamps penned the second and final minority concurring decision. She was joined by Charron and Rothstein JJ. In her reasons, Deschamps J. articulated three main points. First, she argued that judicial review of administrative action should focus primarily on the nature of the question before the administrative actor. Justice Deschamps urged that the nature of the question should be the first and foremost factor considered among the four factors of the standard of review analysis. She further suggested that by focusing on the nature of the question, it would become apparent that all four factors need not be considered in every case.68

45 Justice Deschamps proposed that classifying the work of the tribunal under review according to the traditional categories of question at issue -- that is, whether the administrative actor is dealing with a question of fact, law or mixed fact and law -- would greatly aid in the analysis of how much deference to show.69 More specifically, Deschamps J. theorized that questions of fact always attract deference.70 Questions of law require more scrutiny to evaluate the deference owed, although a privative clause is usually an indicator that deference is owed while the fact that the tribunal is deciding questions of law outside of its area of expertise generally reduces the deference owed.71 Exercises of discretion also usually attract deference unless the administrative body has exceeded its mandate.72 Finally, as for questions of mixed fact and law, Deschamps J. held that "a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court".73

46 The second major aspect of Deschamps J.'s analysis is a more explicit attempt to align, conceptually, judicial review of administrative action with regular appellate review. In this regard, Deschamps J. emphasized that judicial review of administrative action is often indistinguishable from appellate review of court decisions. She pointed out that courts have had extensive experience reviewing questions of fact, law, and mixed fact and law and should not need a special set of tools to address decisions in the administrative law context. In Deschamps J.'s words:

The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.74

47 Similarly, she held that the process of looking at a decision "to determine whether there is an error justifying intervention should not be more complex in the administrative law context than in the criminal and civil law contexts".75

48 Finally, Deschamps J. commented very briefly on the doing away of the distinction between patent unreasonableness and reasonableness simpliciter by her colleagues. She agreed with them that the distinction between patent unreasonableness and reasonableness simpliciter is untenable. In doing so, she referred to LeBel J.'s cri de coeur in City of Toronto, a minority decision which she had co-authored.

Justice Deschamps offered insight into why the definitions of patent unreasonableness and reasonableness simpliciter have been problematic. Sounding surprisingly more similar to Binnie J. than to LeBel J., with whom she had sided in both City of Toronto and Voice Construction,76 Deschamps J. held:

The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality.77

49 Furthermore, Deschamps J. offered a useful way to differentiate the concept of "deference" from that of "reasonableness". She held that "deference" refers to the contours of reasonableness because it describes the attitude adopted towards the decision-maker. By contrast, "reasonableness" concerns the decision itself.78 However, although Deschamps J. acknowledged thoughtfully the diverse context of the administrative state, its inability to fit neatly under the label of reasonableness and the need to somehow recognize more clearly the idea of a posture of deference, she did not provide a solution to this problem. At most, her resolution is to capitalize on the similarities between appellate and judicial review.

50 Unlike their colleagues, the minority led by Deschamps J. determined the applicable standard of review to be correctness, not reasonableness. Because the adjudicator was dealing with general common law principles, he was owed no deference. In this case, the adjudicator's decision was far from correct. The minority therefore would have dismissed the appeal.

3.Commentary on the Reform of the Standard of Review Analysis

(a) General Commentary on the Impact of Dunsmuir

51 In considering the Court's reform of the standard of review analysis, a natural question is whether the approach in Dunsmuir has provided an appropriate solution. In Dunsmuir, the Supreme Court of Canada has definitely invested much thoughtful analysis into how to improve the standard of review methodology. However, Dunsmuir can only be the beginning. The outcome of Dunsmuir deals primarily with definitional issues. Its analysis certainly addresses the conceptual difficulties that existed in understanding the distinction between the three standards of review. What is still required, however, is a more nuanced and detailed discussion of how any chosen standard of review can be applied appropriately. This issue speaks to making room for a fluid relationship between courts and administrative decision-makers -- one that fosters deference when appropriate and shows a flexible understanding of how deference can be shown to the varied actors and processes that make up the Canadian administrative state. In this vein, Dunsmuir still leaves much room for future discussion.

52 This gap in Dunsmuir forms the heart of the debate between Binnie J. and the majority. Justice Binnie perceives this gap as a question of whether the standard of reasonableness should have flexible, differentiated points of deference. In arguing that it should, Binnie J. presents an understanding of the administrative state that places primary emphasis on its polycentricity and multimodal nature. In this respect, the majority's reduced emphasis on the nature of the statute (the factor relating to polycentricity) in articulating the newly revised standard of review analysis has resulted in a greater impact than one may have initially thought.79 Interestingly, Binnie J.'s attempt to bring a more sophisticated and modulated approach to substantive review within the revised reasonableness standard, though rejected by his majority colleagues in Dunsmuir, seems to have garnered some favour in Lake, a case decided unanimously by the Supreme Court two months later. Lake dealt with the review of an extradition order made by the federal Justice Minister. While the Court in Lake does not apply a sliding scale, one sees a significant amount of discussion relating to the polycentric nature of the Minister's task.

53 Justice Deschamps' analysis, by contrast, seems to reject, rather than embrace the nuanced complexities of judicial review of administrative action. In Deschamps J.'s view, streamlining the judicial review process with elements of general appellate review would make the process much simpler. While Deschamps J.'s ideas are interesting, one sees once again, similar to the position of the majority, an approach that largely stops at the definitional threshold. Organizing issues according to the categories of fact, law and mixed fact and law may make it easier to determine which standard to choose but does not go very far in setting out a framework for understanding the way(s) of applying any particular standard in our complex and varied administrative state.

54 Finally, some commentators have also expressed a merited concern with the Court's reintroduction of the notion of "true jurisdictional questions". The concern is that questions central to an administrative body's work may be hived off as "jurisdictional".80

55 Overall, in light of all of these concerns and those addressed in the next section, it is extremely likely that the standard of review will be addressed again soon by the Supreme Court of Canada.

(b)Emerging Themes from Lower Court Decisions that have Considered Dunsmuir

56 By the end of the 2007-2008 Supreme Court term,81 103 decisions had already been rendered following Dunsmuir, 289 cases mentioned Dunsmuir and 36 cases had been decided explaining Dunsmuir's reasoning.82 In terms of sheer quantity of cases, it is clear that the impact of Dunsmuir had certainly already been felt by the end of the first three months of the decision's existence.

57 Yet, what is the qualitative impact of the decision in Dunsmuir? In what ways has Dunsmuir affected the standard of review analysis? This section discusses some of the themes that can be pulled from a

reading of these lower court cases. The cases examined are those following Dunsmuir, with closest focus on those which offer an explanation of the Supreme Court of Canada's reasons in Dunsmuir. I conclude that during the first three months of Dunsmuir's existence, courts have shown wide acceptance of the shortened two-step analysis but struggle with situations in which patent unreasonableness was clearly the dominant standard applied in the past. Some courts have also applied interesting mixtures of the majority and minority decisions in Dunsmuir in attempts to address some of the ambiguities of the Dunsmuir decision and the challenges that the Supreme Court decision has yet to clarify.83

58 There is no doubt that the Supreme Court of Canada's invitation to look first to the jurisprudence in deciding on the appropriate standard of review has been welcomed. The vast majority of cases following Dunsmuir have adopted the two-step approach to determining the applicable standard of review. In general, courts have also read Dunsmuir to indicate that wherever the standard of patent unreasonableness would have formerly existed, the court is simply to substitute the new standard of reasonableness. The idea is illustrated well in United Brotherhood of Carpenters and Joiners of America, Local 1985 v. Graham Construction and Engineering Ltd.,84 a decision of the Saskatchewan Court of Appeal. In this case, the majority held:

... the Supreme Court of Canada released Dunsmuir v. New Brunswick. Again, the parties were permitted to file additional argument. Before Dunsmuir was issued, I had found, notwithstanding the exacting nature of the standard, that the Board's decision was patently unreasonable.

Since Dunsmuir, I have reviewed the matter in light of that decision and the parties' submissions. I remain of the view that the Board's decision finding abandonment is not sustainable. The standard of review is, of course, now one of reasonableness ...85

59 Particularly interesting, however, is how the reasonableness standard has been understood to apply in these contexts. In situations where patent unreasonableness has traditionally been appropriate, such as the review of administrative decisions in relation to findings of fact and credibility, the courts seem to follow one of three options. The first, as indicated above is simply to apply Dunsmuir's revised standard of reasonableness in place of the standard of patent unreasonableness. In this way, the Court examines the decision of the administrative body in order to test the decision's justification, transparency and intelligibility. But, one sees immediately the downfall of this approach, as it allows for a much more searching review of an administrator's decision than the patent unreasonableness standard.86 In situations such as findings of fact or credibility, the revised standard of reasonableness does not acknowledge or make any room for the advantage that an original administrative decision-maker has in seeing testimony given firsthand. This acknowledgment is part of the very reason why the patent unreasonableness standard was created. In his reasons, Binnie J. alluded to this idea; indeed, it is the underlying pulse of his decision. He observed this gap most astutely when he held:

The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration,

but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts.87

60 This very danger and its effect can be seen in lower court decisions in which judges embark on an intrusive review vis-à-vis an administrative tribunal's findings of fact or credibility. The conceptual challenges of substantive review with respect to findings of fact or credibility epitomize the concerns that Binnie J. laid out in his minority decision.

61 Averting the danger of over-intrusive review has led to the second and third approaches that one sees in the recent jurisprudence emanating from the lower courts in which Dunsmuir is interpreted. The second approach to recalibrating former areas of patent unreasonableness review is to incorporate differentiated levels of deference in the application of Dunsmuir's revised reasonableness standard. An example of this approach is found in the Federal Court decision of Elmi v. Canada (Minister of Citizenship and Immigration).88 In Elmi, an immigration case dealing with credibility, the Federal Court was clear in indicating that significant deference would continue to be shown to first level credibility analyses despite the Dunsmuir test. The Court held:

Prior to the Supreme Court of Canada's recent decision in Dunsmuir v. New Brunswick, ..., it was trite law that facts and credibility findings were reviewable on the now defunct patent unreasonableness standard ...

In light of the Supreme Court's decision in Dunsmuir, it is clear that the standard of patent unreasonableness has now been abandoned and that courts conducting a standard of review analysis must now focus on two standards, those of correctness and reasonableness.

The jurisprudence is clear in stating that the Board's credibility analysis is central to its role as trier of fact and that, accordingly, its findings in this regard should be given significant deference. This grant of deference supports a reasonableness standard of review and implies, as the Court held at paragraph 49 of Dunsmuir, that courts will give "due consideration to the determinations of decision makers" when reaching a conclusion. Accordingly, the Board's decision will be reviewed on the standard of reasonableness with considerable deference being afforded to the Board's factual findings and credibility determinations. To put it simply, this application for judicial review will be granted only if the Board's conclusion was not open to it as a matter of fact or law.89

62 The notion of the sliding scale of reasonableness that Binnie J. suggested in his minority decision seems to have emerged as a reality. Cases like Elmi show courts pulling together a creative mix of the majority and minority decisions in Dunsmuir in order to reach a result they perceive to be fair. The problem that they are facing is an underlying tension in the majority's approach in Dunsmuir. This tension lies in the majority's assertion that applying the revised single standard of reasonableness (which counsels inquiring into the decision-making process for its ability to show justification, transparency and intelligibility) ought not to "pave the way for more intrusive review by courts".90 In order to reconcile the tension between these two aspects of the Dunsmuir majority decision, cases such as Elmi, understandably, suggest that it is necessary to have differentiated standards of reasonableness.

63 However, there is a third approach to dealing with former instances of patent unreasonableness review that is emerging in the jurisprudence. The third approach also involves incorporating a posture of deference within the new reasonableness standard but does so through the avenue of legislated standards of review. In this line of cases, statutes such as the British Columbia Administrative Tribunals Act91 and the Federal Courts Act,92 which incorporate the standard of patent unreasonableness either implicitly or explicitly, have been held to persist despite the Dunsmuir decision. An illustrative case is Glandon v. British Columbia (Residential Tenancy Act, Dispute Resolution Officers).93 In Glandon, the applicant sought judicial review in order to set aside the decision of a dispute resolution officer appointed under the provincial residential tenancies regime. As a result of section 58 of the Administrative Tribunals Act and a strong privative clause in the Residential Tenancy Act,94 courts can only interfere with residential tenancy decisions if they are patently unreasonable. The British Columbia Supreme Court applied the patent unreasonableness standard that had been established through the statutory provisions. In doing so, Rice J. indicated that he was not disregarding Dunsmuir but that Dunsmuir was not clear in indicating that a statutory provision such as the standard created under the Administrative Tribunals Act, should be set aside.

64 With respect to the Federal Courts Act and, in particular, section 18.1(4)(d), Sahil v. Canada (Minister of Citizenship and Immigration)95 is a case that illustrates a similar position held by some judges of the Federal Court. In Sahil, the applicants applied for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board denying refugee status. The Board had noted a number of implausibilities in the applicants' testimonies and had denied refugee status because the applicants lacked a well-founded fear of persecution.

65 On judicial review, Teitelbaum J. noted that credibility was the determinative issue of the claim. Subsection 18.1(4)(d) of the Federal Courts Act provides that the Federal Court may grant relief on a judicial review application if a federal board, commission or other tribunal has "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it". In essence, this legislative provision embodies the notion of patent unreasonableness. Faced with the issue of whether to follow the Court's own jurisprudence which evaluates the findings of fact and credibility of administrative decision-makers on the capriciousness standard of section 18.1(4)(d) or whether to adopt the dicta of the majority in Dunsmuir, the Court chose to follow its previous jurisprudence. In Teitelbaum J.'s opinion, the direction of the Supreme Court of Canada was ambiguous as it had not addressed the situation of what to do when the standard of review to follow has been clearly enacted in legislation. The Court held:

The Supreme Court of Canada's decision in Dunsmuir v. New Brunswick, [...] established that correctness and reasonableness are the two standards to be applied on judicial review, collapsing reasonableness simpliciter and patent unreasonableness into one standard, that being reasonableness. However,

Dunsmuir did not address the question of the application of paragraph 18.1(4)(d) of the Federal Courts Act, R.S.C., 1985, c. F-7, as it did not arise in that case.

There has been general consensus that this Court may provide relief on judicial review if it finds that the Board's findings of fact with regard to credibility or plausibility were made in a perverse or capricious manner, or without regard to the material before it. ... In particular, findings of fact related to an objective or subjective basis of fear of persecution or serious harm due to a lack of credibility in pivotal areas of an applicant's testimony along with a lack of credible documentary evidence, are issues that ought to be examined against a standard such as that of paragraph 18.1(4)(d) of the Federal Courts Act, above, since it turns entirely on a review of the Board's weighing of the evidence before it, in which the Board has considerable expertise

...

Therefore this Court will not interfere with the Board's findings of fact unless they were found to be made in a perverse or capricious manner without regard to the evidence.96

66 The idea that specific legislation should supersede common law principles is not a new or unfamiliar one in administrative law. The approach taken by Teitelbaum J. in Sahil has also been favoured in several decisions by other members of the Federal Court.97 The attempt to preserve patent unreasonableness review as it exists in section 18.1(4)(d) of the Federal Courts Act seems also to have been accepted by the Federal Court of Appeal.98 It is an approach that has certainly garnered support in the Federal Court and is legally sound.

67 The Supreme Court of Canada may soon answer the question of whether legislated standards of review should be integrated into the Dunsmuir analysis and, if so, how such an integration should be done. Shortly after Dunsmuir, the Supreme Court of Canada heard Canada (Minister of Citizenship and Immigration) v. Khosa99 in which the litigants asked whether it is necessary to conduct a standard of review analysis if a standard has already been provided by legislation. A definitive answer to this question will be useful since there are a number of administrative regimes, such as the human rights regime in Ontario which provide for judicial intervention only if the decision under review is patently unreasonable.100

68 Finally, another issue that has emerged from the lower court jurisprudence deals with how to define "a particular category of question". Recall that in Dunsmuir, the first part of the majority's two-step approach asks courts to determine whether past jurisprudence has established an appropriate standard of review for the particular category of question at issue before them. However, there is divergence in the jurisprudence regarding how narrowly the concept of a particular category of question should be defined. In the jurisprudence, the concept ranges from the very narrowly defined issue before the court in that instance to the large, classic labels of "question of law" or "mixed question of fact and law" under a particular statutory regime.101 If interpreted too narrowly, there may be no jurisprudence determining the standard of review for the very specific question chosen. By contrast, if defined too

broadly, the detrimental risk of sweeping a wide variety of issues into a single standard, without analysis of the expertise of the decision-maker and the administrative decision-making context becomes even more pronounced.

4.Procedural Fairness and Public Officeholders

69 As mentioned above,102 Mr. Dunsmuir's position with the government had a hybrid nature. He was both a public officeholder at pleasure as a result of his Order-in-Council appointment as Clerk of the courts, and a Legal Officer employed in the Court Service Branch of the Department of Justice under the provincial Civil Service Act.103 However, Mr. Dunsmuir had a rocky employment relationship at the New Brunswick Department of Justice and received formal reprimands on more than one occasion. In the end, his employment was terminated by the Deputy Minister. Notice of termination came to him unexpectedly on the eve of a performance review meeting scheduled for the next day. Cause for his termination was not alleged.

70 Mr. Dunsmuir argued that there had been a breach of procedural fairness in the process of his dismissal. This breach stemmed from the fact that reasons for his employer's dissatisfaction had never been specified and that he had not had a reasonable opportunity to respond to the employer's concerns. Prior to the Supreme Court of Canada, Mr. Dunsmuir's argument regarding procedural fairness had been addressed only briefly by the New Brunswick Court of Appeal. There, it had been held that the employer did not owe a duty of fairness since Mr. Dunsmuir had been terminated with notice and had exercised his right to grieve.104

71 The Supreme Court of Canada devoted a significant amount of time to analyzing this issue. The Court was unanimous on the issue of procedural fairness and all concurred with the majority reasons, which were written by Bastarache and LeBel JJ. Justices Bastarache and LeBel pointed out that by virtue of section 20 of the Civil Service Act, ordinary rules of contract govern the dismissal of public employees in New Brunswick. The Government of New Brunswick therefore did not owe a duty of procedural fairness in dismissing Mr. Dunsmuir. Its offer of payment in lieu of notice was legally valid. The Court indicated that using the long-standing distinction between public officeholders and contractual employees for the purposes of determining when a duty of fairness is owed was problematic. As a consequence, it overturned this distinction which had been reinforced in Knight. By contrast, the Court asserted that the essential element in determining whether a public law duty of fairness is owed is whether the public sector employment relationship is rooted in a contract between the parties. If so, contractual principles will always apply and these principles will allow for termination on notice or payment in lieu thereof.

72 The Court held that there are three traditional reasons for distinguishing between public officeholders and contractual employees and for extending procedural fairness protection only to public officeholders. These reasons are: an historical understanding of public office holding as a form of

property which the officeholder could recover upon termination; a means of controlling the exercise of delegated statutory power that underlies the act of dismissal, and to circumvent a common gap in statutory language which seems to authorize dismissal without notice. In the Court's opinion, all three reasons had become untenable.

73 At the same time, the Court was insistent that its narrowing of the duty of procedural fairness with respect to the dismissal of public officeholders did not detract from the general duty of fairness owed by administrative decision-makers that had expanded since the time of Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners.105

5.Commentary on Dunsmuir's Reform of the Procedural Fairness Doctrine

74 The reversal of Knight was an unexpected development. It seems to be prompted largely by the Court's perception that there has been a change in the nature of employment relationships between individuals and government. As the Court notes, most employment relationships of public officeholders are now grounded in contract.106 The reversal of Knight was also prompted by the difficulty in distinguishing between public officeholders and contractual employees.

75 The Court has stated a preference for viewing the dismissal of public employees through the lens of contract law rather than that of public law. However, it has left unaddressed the situation of Order-in-Council employees who are not judges, ministers or others who fulfil "constitutionally defined state roles"107 and who do not have a duty of fairness that flows naturally from the statutory power governing the employment relationship. More specifically, the Court does not address whether its holding will have any impact on the dismissal of Order-in-Council appointees to many administrative boards, agencies and tribunals at all levels of government. While jurisprudence exists dealing with the compensation of Order-in-Council appointees removed before their term is over,108 one will have to wait to see whether the principles of Knight will continue to apply in order to allow rights to procedural fairness in this context.

76 The 2007-2008 term required the Court to address another case in which the right to procedural fairness in dismissal rested on the distinction between public office and contractual relationship. In Société de l'assurance automobile du Québec v. Cyr,109 the Court held that a mechanic who lost his accreditation from the provincial regulatory body was not in a contractual relationship with the regulator. However, the dissent shows how difficult it can be to establish when contractual rights and obligations exist within a particular matrix of relationships. On the procedural fairness front, we may see more shortly from the Supreme Court regarding when various types of public officeholders should be afforded procedural fairness, including notice and the right to respond. In particular, leave to appeal has been sought in at least one case dealing with procedural fairness requirements in the removal of municipal board members.110

IV.CONCLUSION

77 In conclusion, Dunsmuir was a landmark decision with respect to the standard of review analysis in Canadian administrative law. In this case, the Supreme Court of Canada reviewed and revised the methodological approach to determining applicable standards of review. In doing so, it eliminated the standard of patent unreasonableness, leaving only two standards, correctness and reasonableness, to survive. The Court also reversed a long-standing principle of Canadian administrative law which held that public officeholders were owed a duty of fairness on their dismissal.

78 Both of these developments are of significant import. However, in each case, and especially with respect to the standard of review analysis, many pressing questions remain to be answered. One looks forward to seeing the Supreme Court of Canada's future developments in administrative law as the Court continues to work out the appropriate relationship between courts, administrative actors and the individual citizen.

*

Faculty of Law, University of Windsor. I am grateful for the generous support of the Law Foundation of Ontario as well as for the excellent research assistance of Lauri Daitchman. I am also grateful to Eddie Clark, Gerald Heckman, Jeff King, Thomas Kuttner and Lorne Sossin for helpful conversations and comments during my completion of an earlier draft. Any errors are, of course, my own.

1. [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.) [hereinafter "Dunsmuir"].

2

For example, a roundtable on Dunsmuir was held by the University of Toronto, Faculty of Law on June 4, 2008 approximately three months after the decision was rendered. Papers from this roundtable and a synopsis of the day are available online: <www.law.utoronto.ca/visitors_content.asp?itemPa th=5/7/0/0/0&contentId =1743>.

3

A total of six administrative law decisions were rendered during the 2007-2008 Supreme Court term, which ran from July 1, 2007 to June 30, 2008. Chronologically, these decisions are: Canada v. Addison & Leyen Ltd., [2007] S.C.J. No. 33, 2007 SCC 33 (S.C.C.) (July 12, 2007); Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.) (March 7, 2008); Société de l'assurance automobile du Québec v. Cyr, [2008] S.C.J. No. 13, 2008 SCC 13 (S.C.C.) (March 28, 2008) [hereinafter "Cyr"]; Lake v. Canada (Minister of Justice), [2008] S.C.J. No. 23, 2008 SCC 23 (S.C.C.) (May 8, 2008) [hereinafter "Lake"]; Assoc. des courtiers et agents immobiliers du Québec v. Proprio Direct inc., [2008] S.C.J. No. 32, 2008 SCC 32

(S.C.C.) (May 30, 2008) [hereinafter "Proprio Direct"]; Charkaoui v. Canada (Citizenship and Immigration), [2008] S.C.J. No. 39, 2008 SCC 38 (S.C.C.) (June 26, 2008).

4

In this way, four of the six administrative decisions from the 2007-2008 term are mentioned in this article: Dunsmuir, id.; Assoc. des courtiers et agents immobiliers du Québec v. Proprio Direct inc., id.; Lake v. Canada (Minister of Justice), id.; Société de l'assurance automobile du Québec v. Cyr, id. The two cases that are not addressed at all are: Canada v. Addison & Leyen Ltd., id. and Charkaoui v. Canada (Citizenship and Immigration), id.

5

There are several excellent reviews of the evolution of the standard of review jurisprudence in Canada. See, for example, David J. Mullan, Administrative Law: Cases, Text, and Materials, 5th ed. (Toronto: Emond Montgomery, 2003), at 697-823; Audrey Macklin, "Standard of Review: The Pragmatic and Functional Test" and Sheila Wildeman, "A Fine Romance? The Modern Standards of Review in Theory and Practice", both in Colleen M. Flood & Lorne Sossin, eds., Administrative Law in Context (Toronto: Emond Montgomery, 2008), 197 and 229; David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can. J. Admin. L. & Prac. 59 [hereinafter "Mullan, The Struggle for Complexity?'"]; and David Phillip Jones, "Standards of Review in Administrative Law" in Laverne A. Jacobs & Justice Anne L. Mactavish, eds., Dialogue between Courts and Tribunals: Essays in Administrative Law and Justice, 2001-2007 (Montréal: Thémis, 2008) 213 [hereinafter "Jones, Standard of Review'"].

6

My use of the expression "rule of law" is not meant to assert a Diceyan conception in which the "ordinary" law of the courts and judiciary ought to supplant administrative decision-making whenever they are at odds. Instead, I use this term primarily to indicate that democratically agreed-upon norms of legality should govern. These norms of legality may find their manifestation in the decisions rendered by both the judiciary and the administration.

7

For discussion of the length of time that the concept of deference has occupied a central role in the process of judicial review, see David Mullan, "The Supreme Court of Canada and Tribunals -- Deference to the Administrative Process: A Recent Phenomenon or Return to Basics?" (2001) 80 Can. Bar Rev. 399. Mullan argues that deference has been present in the Canadian jurisprudence relating to judicial review since the early days of Supreme Court of Canada decisions.

8

[1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.) [hereinafter "C.U.P.E. v. N.B. Liquor Corp."].

9

Later, lesser restrictive privative clauses, limiting judicial review to questions of law or mixed fact and law were introduced. See, e.g., the Special Import Measures Act, R.S.C. 1985, c. S-15, s. 61, which allows for appeal to the Federal Court only on questions of law.

10

The classic case which sets out all of the ways in which jurisdiction may have been lost by tribunal is the House of Lords decision in Anisminic v. Foreign Compensation Commission, [1969] 2 A.C. 147, [1969] 1 All E.R. 208 (H.L.) [hereinafter "Anisminic"].

11

See Service Employees, International Union, Local 333 v. Nipawin District Staff Nurses' Assn., [1973] S.C.J. No. 148, [1975] 1 S.C.R. 382 (S.C.C.) and Jacmain v. Canada (Attorney General), [1977] S.C.J. No. 111, [1978] 2 S.C.R. 15 (S.C.C.) (Dickson J. in dissent).

12

C.U.P.E. v. N.B. Liquor Corp., supra, note 8, at 233.

13

Id., at 236.

14

Id., at 235.

15

Indeed, this was the fact situation in C.U.P.E. v. N.B. Liquor Corp., where more than one possible interpretation of a poorly drafted labour statute gave rise to the dispute. The Supreme Court of Canada held that the Court of Appeal's interpretation of the statute was "no more or less" reasonable than the interpretation given by the Public Service Labour Relations Board of New Brunswick. Id., at 238.

16

Id., at 236.

17

Id.

18

Id., at 237.

19

Union des employés de service, local 298 v. Bibeault, [1988] S.C.J. No. 101, [1988] 2 S.C.R. 1048 (S.C.C.) [hereinafter "Bibeault"].

20

See United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] S.C.J. No. 56, [1993] 2 S.C.R. 316 (S.C.C.); Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.) [hereinafter "Southam"].

21

See Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1999] S.C.J. No. 46, [1998] 1 S.C.R. 982, at para. 36 (S.C.C.) [hereinafter "Pushpanathan"].

22

Id., at para. 37.

23

Id., at paras. 37-38.

24

Id., at para. 37.

25

Southam, supra, note 20, at para. 56.

26

[2003] S.C.J. No. 64, [2003] 3 S.C.R. 77 (S.C.C.) [hereinafter "City of Toronto"]. For discussion of this important case see Lorne Sossin, "Developments in Administrative Law: The 2003-2004 Term" (2004) 26 S.C.L.R. (2d) 31.

27

With respect to patent unreasonableness, LeBel J. illustrated that the parameters of patent unreasonableness are unclear due to the two ways that the standard has been defined in the jurisprudence. In LeBel J.'s opinion, the two formulations of the test for patent unreasonableness -- namely, defining patent unreasonableness by the magnitude of the defect found in the decision and by the immediacy or obviousness of the decision's defect -- has contributed to difficulties in applying the standard. Justice LeBel also noted that the distinction between patent unreasonableness and correctness is not always readily discernible in practice. He attributed this difficulty to a lack of clarity in the theoretical definition of patent unreasonableness. In its early stages of development, patent unreasonableness was linked to both a highly deferential standard (a choice among a reasonable range of alternatives as seen in C.U.P.E. v. N.B. Liquor Corp., supra, note 8) and a historically interventionist standard (the choice of nullifying errors of jurisdiction as outlined in Anisminic, supra, note 10).

28

See Lorne Sossin & Colleen M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 U.T.L.J. 581. See also Lorne Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003) 27 Advocates' Q. 478.

29

See, e.g., Philip Bryden, "Judicial Review of Administrative Legislation in a Pragmatic and Functional Framework" (2007) 20 Can. J. Admin. L. & Prac. 217. See also Chamberlain v. Surrey School District No. 36, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

30

See, e.g., Deborah K. Lovett, "That Enigmatic Curial Deference and the Continuing and Most Curious Search for Legislative Intent -- What to Do, What to Do?" (2004) 17 Can. J. Admin. L. & Prac. 207.

31

See Jones, "Standard of Review", supra, note 5, at 266-68. David Jones has created a list of several conceptual and practical challenges associated with the use of the pragmatic and functional approach.

32

See Mullan, "The Struggle for Complexity?", supra, note 5.

33

Id.

34

City of Toronto, supra, note 26, at para. 134.

35

R.S.N.B. 1973, c. P-25 [hereinafter "PSLRA"].

36

PSLRA, s. 100.1(2).

37

[1990] S.C.J. No. 26, [1990] 1 S.C.R. 653 (S.C.C.) [hereinafter "Knight"].

38

S.N.B. 1984, c. C-5.1.

39

Supra, note 37.

40

Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 32 (S.C.C.).

41

Id., at para. 33.

42

Id., at para. 29. The majority's view on preserving the rule of law and legislative supremacy are also seen in the following comment: "In essence, 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." Id., at para. 30.

43

Id., at para. 39.

44

See David J. Mullan, "Recent Developments in Standard of Review", in Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners, Canadian Bar Association (Ontario) (October 20, 2000), at 25.

45

Dunsmuir, supra, note 40, at para. 42.

46

Id., at para. 44.

47

Id., at para. 50.

48

Id., at para. 45.

49

Id., at para. 47.

50

See "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997), at 279, as endorsed by the majority in Dunsmuir, supra, note 40, at para. 48.

51

Id., at para. 51ff.

52

Id., at para. 64.

53

For the list of factors, see id., at paras. 63-64.

54

Id., at paras. 51-56.

55

Id., at para. 59.

56

Id. The majority also points out specifically at para. 61 that questions regarding the jurisdictional boundaries between two or more competing tribunals have also generally attracted correctness review.

57

Id., at para. 58.

58

Id., at para. 60.

59

Id., at para. 134.

60

Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 135 (S.C.C.).

61

Id., at para. 137.

62

Id., at para. 139.

63

Id., at para. 152, where Binnie J. makes this point and refers to the Court's past resistance to a variegated standard in Law Society of New Brunswick v. Ryan, [2003] S.C.J. No. 17, [2003] 1 S.C.R. 247 (S.C.C.).

64

See Dunsmuir, id., at para. 146 (emphasis in original).

65

Id., at para. 147.

66

[2003] S.C.J. No. 28, [2003] 1 S.C.R. 539 (S.C.C.).

67

See Dunsmuir, supra, note 60, at para. 149.

68

Id., at para. 160.

69

Id., at para. 158.

70

Id., at para. 161.

71

Id., at paras. 162-63. Justice Deschamps also highlighted a right of review as having the same effect.

72

Id., at para. 165.

73

Id., at para. 164.

74

Id., at para. 172.

75

Id., at para. 167.

76

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] S.C.J. No. 2, [2004] 1 S.C.R. 609 (S.C.C.).

77

Dunsmuir, supra, note 60, at para. 167.

78

Id.

79

As noted above, the "purpose of the act as a whole and of the provision in particular" seems to have been dropped from the list of factors that the majority considered. See Dunsmuir, id., at para. 64 as well as supra, note 52 and accompanying text.

80

See, for example, David Mullan, "Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21 Can. J. Admin. L. & Prac. 117.

81

The 2007-2008 Supreme Court of Canada term finished on June 30, 2008.

82

As reported by Quicklaw.

83

The Supreme Court of Canada may soon deal once again with the standard of review analysis and may have a chance to clarify further the standard of review jurisprudence post-Dunsmuir. See Khosa v. Canada (Minister of Citzenship amd Immigration), [2007] F.C.J. No. 139, 2007 FCA 24 (F.C.A.), a decision from the Federal Court of Appeal which was heard by the Supreme Court of Canada on March 20, 2008 [hereinafter "Khosa"]. Khosa addresses directly the question of whether it is necessary to conduct an analysis to determine the applicable standard of review if one has already been provided in legislation. See also Compagnie Wal-Mart du Canada c. Desbiens, [2008] J.Q. no. 673, 2008 QCCA 236 (Que. C.A.), leave to appeal to the Supreme Court granted September 4, 2008, [2008] C.S.C.R. no 115 (S.C.C.) [hereinafter "Desbiens"]. Desbiens deals with whether the Québec Commission des relations du travail rendered a decision that was unreasonable within the meaning of Dunsmuir.

84

[2008] S.J. No. 319, 2008 SKCA 67 (Sask. C.A.).

85

Id., at paras. 3-4, per Jackson J.A. for the majority (citation omitted). Also representative are: Atia v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 820, 2008 FC 662 (F.C.); Li v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 825, 2008 FC 640 (F.C.); Rodrigue c. Commission des lésions professionnelles, [2008] J.Q. no. 5704, 2008 QCCS 2737 (Que. C.S.).

86

For example, see Li v. Canada (Minister of Citizenship and Immigration), id.

87

See Dunsmuir v. New Brunswick, [2008] S.C.J. No. 9, 2008 SCC 9, at para. 141 (S.C.C.).

88

[2008] F.C.J. No. 977, 2008 FC 773 (F.C.) [hereinafter "Elmi"].

89

Id., at para. 19-21 (citations omitted).

90

See Dunsmuir, supra, note 87, at para. 48.

91

S.B.C. 2004, c. 45.

92

R.S.C. 1985, c. F-7.

93

[2008] B.C.J. No. 1042, 2008 BCSC 727 (B.C.S.C.) [hereinafter "Glandon"].

94

S.B.C. 2002, c. 78, s. 58(3).

95

[2008] F.C.J. No. 976, 2008 FC 772 (F.C.) [hereinafter "Sahil"].

96

Id., at para. 9-11 (citations omitted; emphasis in last para. added).

97

See, for example, Da Mota v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 509, 2008 FC 386 (F.C.); Obeid v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 633, 2008 FC 503 (F.C.); Naumets v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 655, 2008 FC 522 (F.C.).

98

See Mendez v. Canada (Minister of Citizenship and Immigration), [2008] F.C.J. No. 771, 2008 FC 584 (F.C.).

99

See the discussion of Khosa, supra, note 83 and accompanying text.

100

See Human Rights Code, R.S.O. 1990, c. H.19, s. 45.8.

101

Contrast, for example, the narrower approach of Northern College of Applied Arts and Technology v. Ontario Public Service Employees Union, [2008] O.J. No. 1159 (Ont. Div. Ct.) with the much wider approach of the Federal Court in Bateman v. Canada (Attorney General), [2008] F.C.J. No. 510, 2008 FC 393 (F.C.) which was followed by J. (A.) v. Canada (Attorney General), [2008] F.C.J. No. 741, 2008 FC 591 (F.C.). See also the characterization of the issues by the majority and dissent in Proprio Direct, [2008] S.C.J. No. 32, 2008 SCC 32 (S.C.C.), a case which was decided by the Supreme Court of Canada shortly after Dunsmuir.

102

See section 1., Facts and Procedural History, above.

103

S.N.B. 1984, c. C-5.1 [hereinafter "Civil Service Act"].

104

New Brunswick (Board of Management) v. Dunsmuir, [2006] N.B.J. No. 118, 2006 NBCA, at para. 34 (N.B.C.A.).

105

[1978] S.C.J. No. 88, [1979] 1 S.C.R. 311 (S.C.C.).

106

See Dunsmuir, supra, note 87, at para. 95.

107

Id., at para. 115.

108

In this regard see, e.g., Wells v. Newfoundland, [1999] S.C.J. No. 50, [1999] 3 S.C.R. 199 (S.C.C.); Hewat v. Ontario, ([1997] O.J. No. 439, 32 O.R. (3d) 622 (Ont. Div. Ct.), vard [1998] O.J. No. 802, 37 O.R. (3d) 161 (Ont. C.A.); Dewar v. Ontario, [1996] O.J. No. 2746, 30 O.R. (3d) 334 (Ont. Div. Ct.), affd [1998] O.J. No. 853, 37 O.R. (3d) 170 (Ont. C.A.) and see also related in principle: McKenzie v. British Columbia (Minister of Public Safety and Solicitor General), [2006] B.C.J. No. 2061, 61 B.C.L.R. (4th) 57 (B.C.S.C.), abated [2007] B.C.J. No. 2270, 2007 BCCA 507 (B.C.C.A.), leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 601 (S.C.C.) (application for leave to appeal to the Supreme Court of Canada dismissed without reasons, April 24, 2008).

109

[2008] S.C.J. No. 13, 2008 SCC 13 (S.C.C.).

110

See Martin v. Vancouver (City), [2008] B.C.J. No. 823, 2008 BCCA 197 (B.C.C.A.), leave to appeal to the Supreme Court of Canada filed on September 15, 2008 [2008] S.C.C.A. No. 321 (S.C.C.).