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Supreme Court of Canada Issues Landmark Judicial Review Decision

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On March 7th, the Supreme Court of Canada issued a very significant administrative law decision, *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), in which it has addressed the thorny issue of how to determine the standard of review in a judicial review application. The decision also significantly reforms the law relating to the dismissal of public officials.

Judicial review is the manner by which the decisions of a wide range of administrative bodies can be reviewed by the courts. Decisions that are subject to judicial review include the decisions of labour arbitrators, the Labour Relations Board, the Human Rights Tribunal of Ontario, the Workplace Safety and Insurance Appeals Tribunal, the Pay Equity Hearings Tribunal, the Financial Services Tribunal and the Information and Privacy Commissioner/Ontario.

The choice of the standard of review is important because it determines the level of deference that a reviewing court will show to the original decision. The greater the level of deference shown by the reviewing court, the less likely that the initial decision will be overturned. Therefore having some idea ahead of time of the standard of review will inform strategic decisions not only about challenging decisions of arbitrators and other tribunals, but also about whether and how to proceed with the initial administrative hearing itself.

FACTS

The Appellant, Mr. Dunsmuir, was hired by the Province of New Brunswick as a Legal Officer in the Fredericton Court Services Branch, subject to a six-month probationary period. Less than one month later, he was appointed by Order-in-Council as a Court Clerk and Court Administrator. The employment relationship was not ideal. Mr. Dunsmuir's probationary period was twice extended, up to the maximum allowable twelve months. The Appellant became permanent, but was reprimanded on several occasions over the next couple of years. Eventually, the Appellant's employment was terminated, not for cause, but by providing advance notice of termination (in doing so, the Province cancelled a performance review, and gave Mr. Dunsmuir no opportunity to respond to the termination notice).

The Appellant brought a grievance under the governing statute (the *Public Service Labour Relations Act* or "PSLRA") as he was permitted to do. One issue that arose was the jurisdiction of the adjudicator hearing the grievance. Despite a provision in the governing statute that said that the

termination of an individual in Mr. Dunsmuir's position would be "governed by the ordinary rules of contract", the adjudicator found that he could look into the reasons for the termination. Not surprisingly, he found that the Province did not have cause, though he did not overturn the termination on this basis. The Appellant was actually reinstated on the basis that the Province had not accorded him procedural fairness, which the adjudicator found was his due as an appointee. The adjudicator also found that the amount of notice given (four months) was too short, and would have awarded eight months instead had the termination been upheld.

STANDARD OF REVIEW

This decision was overturned on judicial review by all three levels of the courts. Essentially, the courts found that the adjudicator had misconstrued the PSLRA, which gave the Province the ability to terminate the employment of Mr. Dunsmuir by providing reasonable notice. Once that right had been invoked, the adjudicator could only review the quantum of notice, and not whether the Province had cause to terminate the employment relationship.

Over the last ten or more years, the question of determining the appropriate standard of review has become quite complex, and is litigated on a frequent basis. There have been calls from many quarters, including from some justices of the Supreme Court, to review and simplify the law. The Supreme Court in its earlier decision in *Council of Concerned Canadians with Disabilities v. Via Rail Canada Inc.* [2007] 1 S.C.R. 650 gave a strong indication that it was considering revamping this area of the law. The Court finally took the opportunity to do so in *Dunsmuir*, though it was ultimately divided both on the proper analysis to apply, and on the result that should be reached in this case.

THE MAJORITY JUDGEMENT

Six of the judges agreed that there should now be only two standards of review – correctness and reasonableness, effectively doing away with the more stringent "patent unreasonable" standard that represented the highest level of deference that the courts previously would grant to an administrative decision maker. Of the six, five justices signed onto the majority judgement written by The Honourable Mr. Justice Bastarache and the The Honourable Mr. Justice LeBel. Ordinarily, one will expect that the majority judgement will bind and be followed by lower level courts.

As noted above, the majority judgement has found that there will now be two standards of review – correctness and reasonableness. Correctness means that the reviewing court is free to substitute its view of what the correct answer should be, without necessarily having regard to the underlying reasoning and decision making process of the initial decision maker. The correctness standard will apply to several types of questions:

- constitutional law issues;
- jurisdictional issues (i.e. the basic determination that the tribunal has the statutory authority

to decide a particular matter), including questions of the jurisdiction of other tribunals; and
- questions of general (i.e. common) law, but this is qualified by the limit that such questions be “both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise”.

All other decisions of administrative tribunals are now subject to the standard of reasonableness. This is a “deferential standard” that recognizes that some questions that are addressed by administrative tribunals can have more than one defensible answer:

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. [para. 47]

It would appear that the notion of deference means that the reviewing court must give “a respectful attention to the reasons offered or which could be offered in support of a decision” [para. 48]. While the Court does not flesh this out in great detail, it appears that the review should focus on whether the reasons given by the tribunal support the result achieved in light of the facts and law. If they do, the decision will not be disturbed, even if the reviewing court might have reached a different conclusion.

In terms of process, the Court established a two-step process for determining the appropriate standard of review. First, the reviewing court looks at decided cases and whether they determine “in a satisfactory manner” the appropriate degree of deference to be applied. If that does not assist, one then conducts a “standard of review analysis”. Despite the Supreme Court’s efforts to distance themselves from the established “pragmatic and functional test”, this new standard of review analysis appears to be essentially the same as the former test, which focuses on four factors:

(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. [para. 64]

In the case at bar, the majority applied a reasonableness standard, and found that the adjudicator’s decision was unreasonable because he had required the Province to have reasons for the termination when the statute made it clear that ordinary contract principles applied, and the common law does not require reasons in a non-cause termination.

THE FIRST CONCURRING JUDGEMENT

The Honourable Mr. Justice Binnie wrote reasons for himself. While he essentially agreed with the majority including the results reached on both substantive issues, he felt that it did not go far

enough in its review of the law. He was clearly concerned with the focus on tribunals (as opposed to the great many types of decisions that can be subject to judicial review), and he intimated that the majority had not really grappled with what led the Court to adopt the patent unreasonableness standard of review in the first place. In this latter regard, he would allow for degrees of deference within the reasonableness standard to account for the wide variety of types of decisions to which it will apply. He also took issue with the majority's qualification on the review of general questions of law, and would apply a correctness standard to any questions concerning "the Constitution, the common law, and the interpretation of a statute other than the [home statute (or closely related ones)]" [para. 124].

THE SECOND CONCURRING JUDGEMENT

The Honourable Madam Justice Deschamps wrote a concurring judgement on behalf of three justices. This group of justices took an entirely different approach to the whole question, and would have done away with the developed approach altogether. Deschamps J. would apply a review process essentially the same as that applied by appellate courts to the decisions of lower courts in civil and criminal matters.

Thus, the first step would be to determine whether the questions at issue were questions of law, fact or mixed fact and law. Questions of fact would clearly attract deference, as would most questions of mixed fact and law. Deference would also be shown to most exercises of discretion. Finally, most questions of law would be subject to a correctness standard, but would attract deference if they were limited to interpreting the enabling statute and "provided that there is no right of review".

In the result, this group of justices applied a correctness standard to the decision of the adjudicator on the basis that the adjudicator was deciding a question of the general law of contract, but came to the same result as the majority (i.e. the adjudicator's decision was incorrect and could not stand).

CONCLUDING THOUGHTS ON STANDARD OF REVIEW

It remains to be seen how much this decision will change the law in practice. Some comments of the majority suggest that the correctness standard would be used less frequently, especially with the limitations placed on the review of questions of general law. However, on this issue, the Court split 5-4, so there may yet be further refinements as the lower courts grapple with applying the new principles in actual cases. As far as dispensing with the patent unreasonableness standard, it remains to be seen whether this will lead to a greater willingness on the part of reviewing courts to overturn decisions with which they simple do not agree, despite the repeated warnings contained in the *Dunsmuir* decision that dispensing with that more stringent standard is not to be considered an invitation for greater judicial intervention in administrative decision making.

PUBLIC OFFICIALS AND PROCEDURAL FAIRNESS

As noted at the outset, the adjudicator ultimately decided the case on the basis that Mr. Dunsmuir, as a public office holder, was owed procedural fairness, but was not accorded it in the termination process. All justices of the Supreme Court agreed that the law in this area should also be clarified and reformed. In doing so, it has departed from the majority decision of *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653. In *Knight*, the majority of the Court found that office holders were owed procedural fairness when being dismissed.

The Court has overturned this aspect of *Knight* in recognition that most holders of public office are essentially employed on the basis of an employment contract. That being the case, these office holders should be subject to the ordinary rules of the law of employment contracts, which does not provide "procedural fairness" protections to employees (though it does, of course, require employers to act in good faith in the termination process). The substance of the Court's reasoning can be found in the following passages:

[112] In our view, the distinction between office holder and contractual employee for the purposes of a duty of a public law duty of fairness is problematic and should be done away with…What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

[113] The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following Wells, it is assumed that most public employment relationships are contractual…

The Court gave a few examples where the ordinary rules of contract would not apply. First, it would not apply where there is no contract of employment, as is the case with judges, ministers of the Crown or others who "fulfill constitutionally defined state roles". The Court allowed that the rules might also not apply where a contract permitted summary dismissal or was silent on the issues. Finally, the Court also acknowledged that some statutes may create termination procedures that will give rise to the implication that a duty of fairness must have been intended.

On the facts of this case, Mr. Dunsmuir was subject to an employment contract, and as such, had no right to procedural fairness. Thus, the adjudicator's reinstatement was overturned, and the alternative award of eight months' notice was upheld.

If you have any questions about the *Dunsmuir* decision, and how it might affect your organization, please feel free to contact any Hicks Morley lawyer, who would be happy to assist you.