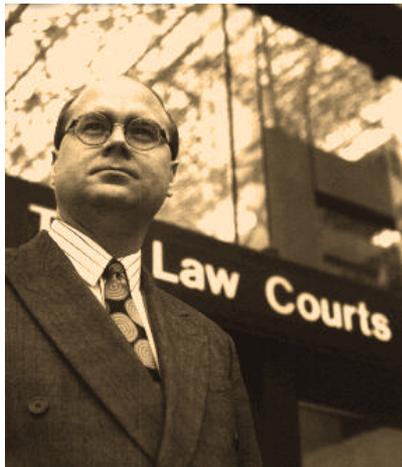
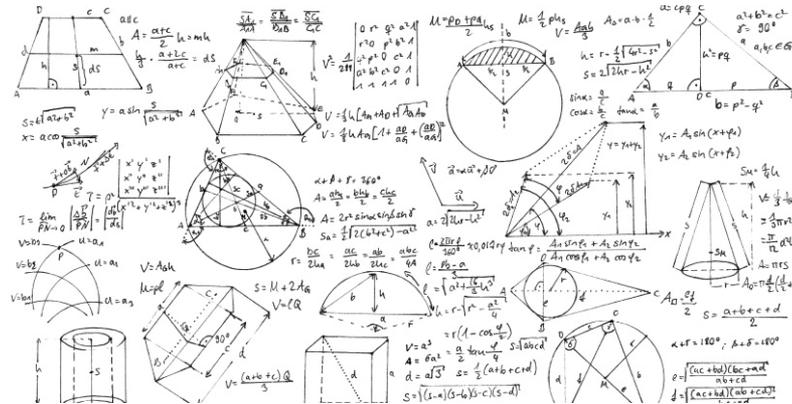


Quantifying *Dunsmuir*: An Empirical Analysis of the Supreme Court's Jurisprudence on Standard of Review



May 27, 2017
CIAJ
Robert Danay



How did the standard of review analysis change after *Dunsmuir*?

Have those changes affected (1) the rate at which a deferential standard was chosen; or (2) the rate at which administrative decisions have been overturned?

What do these results tell us about how “deferential” the *Dunsmuir* framework is?

Where might the jurisprudence be headed next?

Overview



Dunsmuir v. New Brunswick,
[2008] 1 SCR 190

Moved away from the highly contextual four-part balancing test.

Standard is to be determined primarily by the nature of the question under review and precedent.

Dunsmuir v. New Brunswick,
[2008] 1 SCR 190

- (1) Fact, discretion or policy; or
- (2) Interpretation of **home statute.**



Reasonableness

Dunsmuir v. New Brunswick,
[2008] 1 SCR 190

Central importance to legal system as a whole + outside specialized area of expertise

Constitutional questions.

“True” questions of **jurisdiction**

Jurisdictional lines between tribunals



Dunsmuir v. New Brunswick,
[2008] 1 SCR 190

Paul Daly: the pragmatic and functional approach “provided a bulwark against interventionist judges...[T]he barriers between a decision maker and a non-deferential court...have been torn down by *Dunsmuir* and the Court's subsequent decisions.”



[Paul Daly, “The Unfortunate Triumph of Form over Substance in Canadian Administrative Law” (2012) 50:2 Osgoode Hall LJ 317 at 322.]

A Testable Hypothesis?

Examined jurisprudence of the Supreme Court of Canada.

Every relevant case between *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 and *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8.

**Quantifying *Dunsmuir*:
Methodology**

Counted every “vote” of every judge on every application of the standard of review to a decision (or a component of a decision).

930 votes in 88 cases between *Pushpanathan* (1998) and *620 Connaught Ltd. v Canada (Attorney General)* (2008).

920 votes in 89 cases between with *Dunsmuir* (2008) and *Commission scolaire de Laval* (2016).

Quantifying *Dunsmuir*: Methodology

Justices often did not identify any standard of review at all (35% of votes before *Dunsmuir* and 31% thereafter).

Applied to the review of a wide array of decision-makers:

e.g. human rights tribunals, the Immigration and Refugee Board, Ministers, labour boards, Copyright Board, school boards, municipalities, the Commissioner of Official Languages, etc.

Finding #1: The SCC frequently sidesteps the standard of review

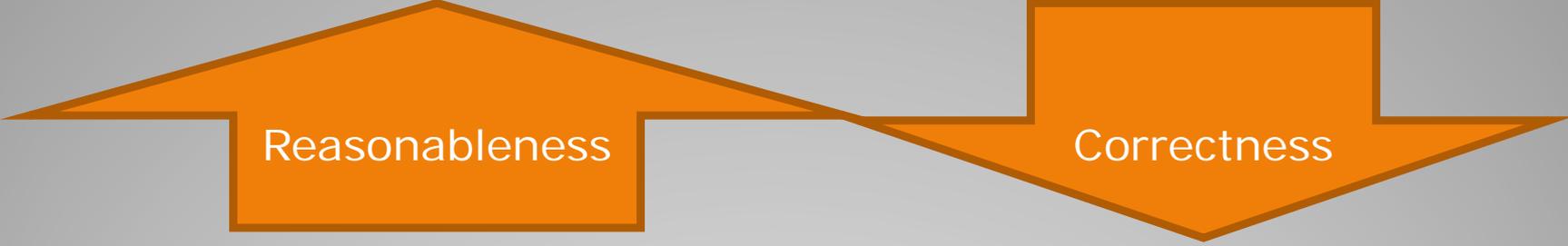
Where Justices didn't identify a standard of review they showed very little deference.

i.e. Before *Dunsmuir*, judges voted to overturn 40% of the time in such cases. After *Dunsmuir*, 41%.

Similar to rates of overturn when correctness standard applied (i.e. 47% before *Dunsmuir* and 46% thereafter).

Suggests that "no standard" = correctness.

Finding #1: The SCC frequently sidesteps the standard of review



Reasonableness

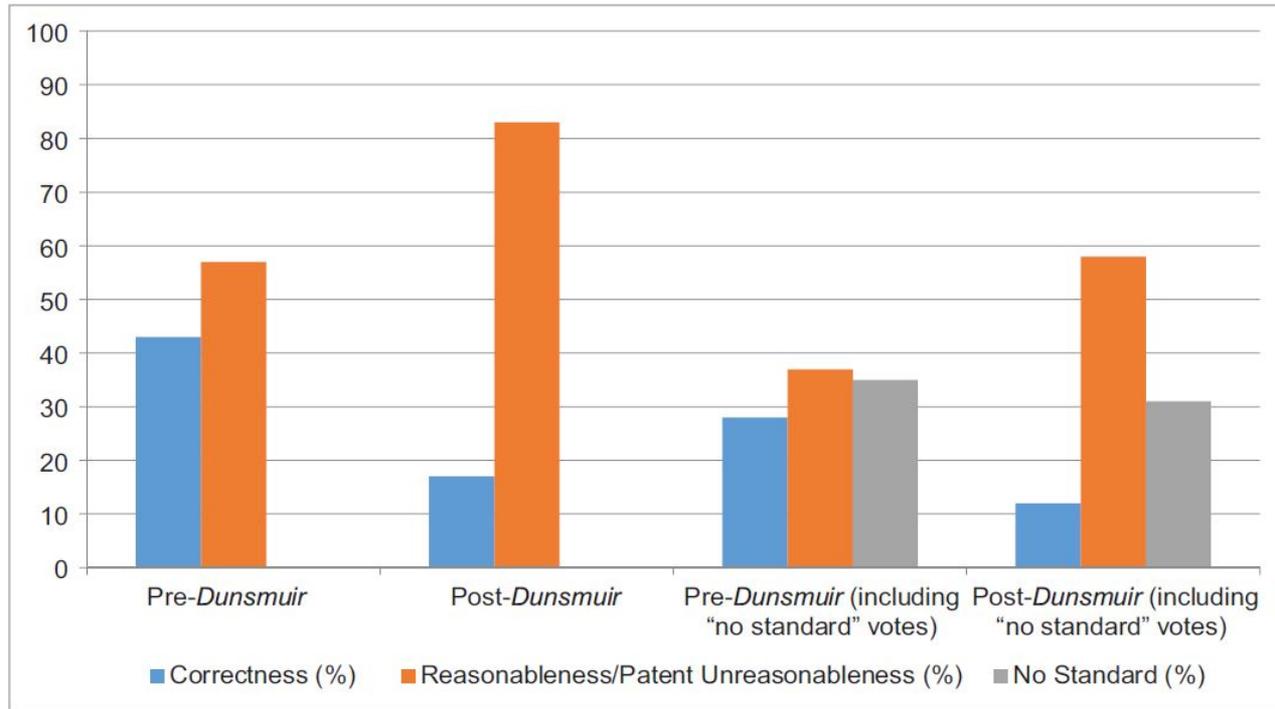
Correctness

Correctness: **43%** of votes under pragmatic and functional approach, **17%** under *Dunsmuir* framework.

Reasonableness: **57%** of votes under pragmatic and functional approach, **83%** under *Dunsmuir* framework.

Finding #2: Selection of standards changed after *Dunsmuir*

Figure 1: Overall selection of standards of review before and after *Dunsmuir* (%)



Finding #2: Selection of standards changed after *Dunsmuir*

By votes:

38% before *Dunsmuir*, 23% after.

By administrative-decision:

46% before *Dunsmuir*, 34% after.

**Finding #3: Rate of overturn
decreased after *Dunsmuir***

Note: No multiple regression analysis to control for potential confounding factors.

But! Two of the most likely factors don't seem to have had a big impact.

Are these results valid?

Table 4: Rate of overturn by political party of appointment (plus McLachlin J/CJ)

Political party of appointing prime minister	Time period	Rate of overturn (with standard) (%)	Overall rate of overturn (%)
Progressive Conservative*	Pre- <i>Dunsmuir</i>	38	39
McLachlin J/CJ	Pre- <i>Dunsmuir</i>	35	38
Liberal†	Pre- <i>Dunsmuir</i>	38	41
	Post- <i>Dunsmuir</i>	23	29
Conservative‡	Post- <i>Dunsmuir</i>	21	27
McLachlin J/CJ	Post- <i>Dunsmuir</i>	26	32

* Lamer CJ, McLachlin, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, and Major JJ.

† McLachlin CJ, Bastarache, Binnie, Arbour, Lebel, Deschamps, Fish, Abella, and Charron JJ.

‡ Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, and Côté JJ.

**Political party of appointing PM
did not have a big impact**

Table 5: Frequency of review by decision maker (partial)

Decision maker	Cases before <i>Dunsmuir</i> (% of total)	Cases after <i>Dunsmuir</i> (% of total)
Adjudicative bodies	61 (69)	62 (70)
Non-adjudicative bodies	27 (31)	27 (30)
Labour adjudicators	17 (19)	21 (24)
Cabinet or departmental officials	14 (16)	20 (22)
Human rights tribunals	8 (9)	7 (8)
Municipalities and school boards	7 (8)	3 (3)
Specialized economic tribunals	5 (6)	5 (6)
Workers' compensation or occupational health and safety tribunals	4 (5)	5 (6)
Copyright, trademarks, or patents boards	4 (5)	7 (8)
Professional/judicial discipline bodies	4 (5)	2 (2)
Immigration and refugee boards	3 (3)	3 (3)
Information and privacy commissioners	1 (1)	5 (6)

Mix of decision-makers under review did not change much

Results consistent with **qualitative** analysis.

e.g. *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*(**2006**)(statutory interpretation of home statutes deemed “jurisdictional”, correctness standard, incorrect).

ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)(**2015**)(statutory interpretation of home statutes, not considered jurisdictional, reasonableness standard, reasonable).

Are these results valid?

Does this mean that the *Dunsmuir* framework is more “deferential” than the pragmatic and functional approach?

Not necessarily.

Several reasons:

Broader significance

- 1) SCC has unique jurisdiction. More study on other jurisdictions necessary;
- 2) Cases during two periods of time were similar, but not identical;
- 3) Most importantly: interpretation and application of *Dunsmuir* has been **constantly shifting**.

Two recent notable trends in the application/interpretation of *Dunsmuir*:

Broader significance

Mouvement laïque québécois (2015)

Tervita Corp. (2015)

Canadian Broadcasting Corp. v. SODRAC (2015)

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. (2016)

Alberta (Information and Privacy Commissioner) v. University of Calgary (2016)

**Recent Trend #1: A Weakened
presumption of reasonableness?**

Wilson v. Atomic Energy of Canada Ltd. (6:2 split)

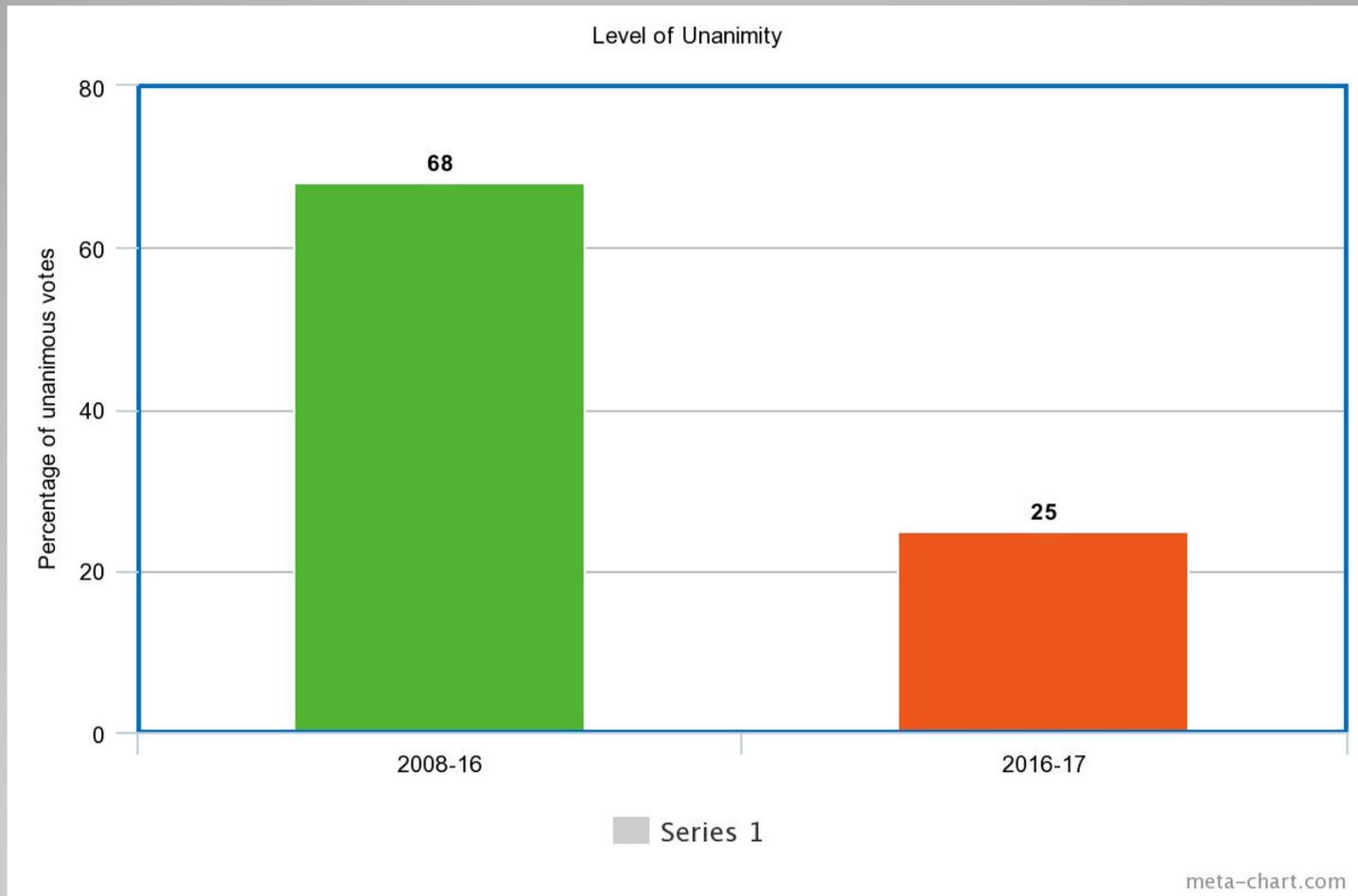
Canada (Attorney General) v. IglooVikski Inc.,
(8:1 split)

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. (5:4 split)

Alberta (Information and Privacy Commissioner) v. University of Calgary
(unanimous)

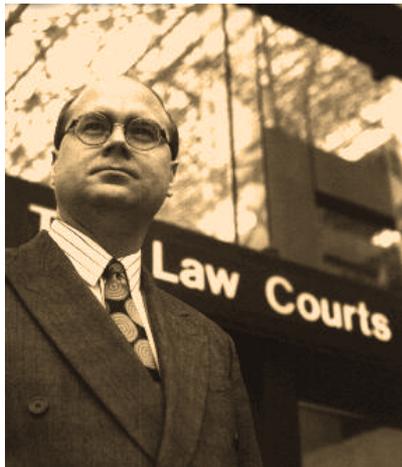
Green v. Law Society of Manitoba (5:2 split)

Recent Trend #2: Less Unanimity



Recent Trend #2: Less Unanimity

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