The Road to *Dunsmuir* : the evolving Canadian approach to substantive review

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Substantive Review - Introduction

- The question:
  - What is the role of a court when it sits on judicial review from a decision of an administrative agency or when it hears an appeal from such a decision?

"Jurisdictional" review

- Dates back to Parliament's delegation of powers to officials and tribunals referred to as "inferior tribunals"
- Judicial review allows superior courts to ensure that these tribunals are not exceeding their statutory mandates

"Jurisdictional" review

- "It is a consequence of all jurisdictions to have their proceedings returned [to the Court of King's Bench] by certiorari to be examined here... Where any court is erected by statute, a certiorari lies to it"
  - Groenwelt v. Burwell (1700), 1 Ld Raym. 467
- Rationale of jurisdictional review:
  - Enforce the legislature's will
  - Uphold the rule of law

Expansion of judicial review

- From a stance of relative non-interference, courts expand the scope of judicial review
- 1940s – 1970s
- E.g.: review for errors of law on the face of the record

Legislative response

- Privative (preclusive) clauses
  - E.g.: labour relations
- Why exclude courts?
  - Avoid delay in resolving labour disputes
  - Avoid litigation in courts
  - Expertise

Privative clauses

New Brunswick *Public Service Labour Relations Act*

- 101(1) Except as provided in this Act, every *order*, *award*, *direction*, *decision*, *declaration*, or *ruling* of the Board, the Arbitration Tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.
- 101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the board, the arbitration tribunal or an adjudicator in any of its or his proceedings.

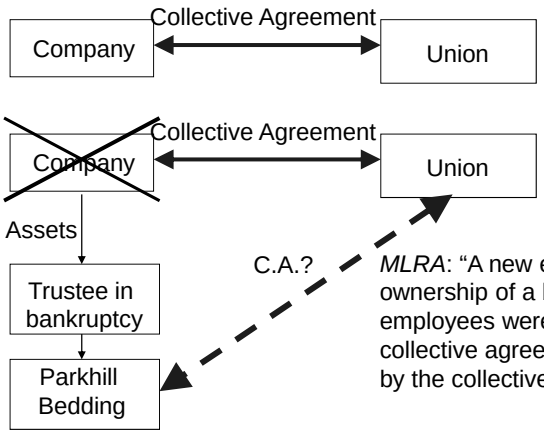
The paradox of privative clauses

- Rule of law: courts must ensure that statutory tribunals don't exceed statutory powers
- Parliamentary supremacy: courts must give effect to privative clauses
- Solution: Privative clauses do not exclude "jurisdictional review"

What is jurisdictional error?

The "preliminary questions" doctrine

- *Parkhill Bedding* v. *Int'l Molders Union* (1961)



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CUPE v. N.B. Liquor

- *Public Service Labour Relations Act*: s. 102(3) defines the rights and duties of employers and employees during a strike:
  - (a) Employer shall not replace the striking employees or fill their position with any other employee
  - (b) No employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer
  - "employee" is defined as excluding management personnel

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The significance of CUPE

- Courts will view jurisdictional questions narrowly (give privative clauses greater effect)
- There may not always be one correct interpretation of a statutory provision
- Courts must pay administrative decision makers an appropriate degree of deference
  - QUESTION: What degree of deference is appropriate?

Towards a pragmatic and functional approach – UES, Local 298 v. Bibeault

- Did the legislature intend that the tribunal have primary or exclusive responsibility to answer the question?
- Reviewing court can face 2 kinds of questions
  - "Jurisdiction-conferring" or "jurisdictional" questions
  - Questions "within jurisdiction"

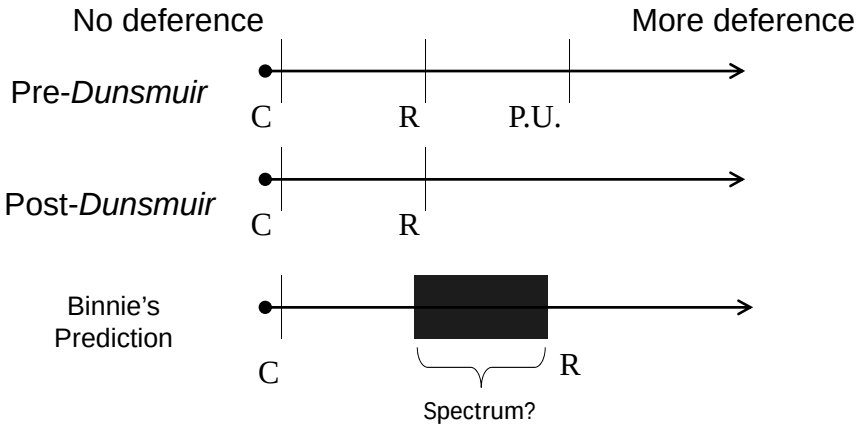
Towards a pragmatic and functional approach – UES, Local 298 v. Bibeault

- To decide if a question is within jurisdiction, look at:
  - Statutory mechanism of review (p. clause, appeal)
  - Area of expertise of tribunal members
  - Purpose of the statute creating the tribunal
  - Nature of the problem before the tribunal (fact, law)
- After *Bibeault*: pragmatic and functional approach remains; language of jurisdiction is abandoned.

Towards a pragmatic and functional approach: an intermediate standard

- Cases post-CUPE were crying out for options other than correctness or p.u. review
- Traditional approach to appellate review:
  - Statutory right of appeal: green light to intervention
- *Southam*: deference is warranted on appeals from specialized tribunals on matters within their expertise
  - Concept of “specialization of duties”

Standard of review analysis



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Standards of review (pre-*Dunsmuir*)

1. Correctness
   - Court undertakes its own analysis of the question
   - If it disagrees with the tribunal, it substitutes its own decision
2. Patent unreasonableness
   - Court doesn't intervene unless decision clearly irrational
   - Irrational aspect is obvious on the face of the decision
3. Reasonableness simpliciter
   - Upheld if, after somewhat probing examination, tribunal's reasons as a whole support the decision

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Standard of review analysis

1. Statutory mechanism of review
   - Broad right of appeal
   - Privative clause
     - Full
     - Weak
   - Silent statute

Standard of review analysis

2. Expertise
   - What is the expertise of the tribunal?
     - Composition
     - Accumulated
     - Policy-making role
     - Other indicia
   - What is the court's expertise relative to the tribunal?
   - Is the matter at issue one that falls within the tribunal's expertise?

Standard of review analysis

3. Purpose of the statute and of the provision
   - What does the statute/provision ask the decision maker to do?
     - Polycentric decision making
     - "Bipolar" / adjudicative / judicial decision making

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Standard of review analysis

4. Nature of the problem
   - Pure determination of law
     - General principle with precedential value
     - Question of "central importance to the legal system" (*Dunsmuir*)
   - Question of mixed law and fact
   - Question of fact

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The Road to Dunsmuir

- Current approach provides no guidance for litigants, counsel, administrative decision makers or judicial review judges
- Patent unreasonableness and reasonableness are difficult to distinguish
- Patent unreasonableness standard raises rule of law concerns

Dunsmuir – what has changed?

1. Name
2. Single reasonableness standard
3. Court emphasizes past precedent
   - No longer necessary for courts to perform a full SOR analysis
   - Can use precedent that has determined "in a satisfactory manner" the degree of deference to be accorded in respect of a "particular category of question"
     - *Proprio*, *Khosa*

Dunsmuir – what has changed?

4. Court formulates guidelines
   a. Deference (reasonableness)
      i. "usually automatic" for questions of fact, discretion, policy
      ii. "must apply" for questions with "intertwined" legal and factual issues
      iii. "usually results" where a tribunal interprets its enabling statute or statutes closely connected to its function
      iv. "may be warranted" if a tribunal has developed expertise in applying a common law/civil law rule in relation to a specific statutory context

Dunsmuir – what has changed?

4. Court formulates guidelines (cont'd)
   b. Correctness
      i. "necessarily applies" for Constitutional questions
      ii. "must be applied" for determinations of true jurisdictional questions
      iii. "must" be applied for a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's expertise
      iv. "has also been applied" to questions regarding jurisdictional lines between specialized tribunals

Dunsmuir – what has changed?

5. True questions of jurisdiction
   a. Court defines this "category"
      - Question where a tribunal must "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter"
   b. Problem: this looks like the definition of a preliminary question
      - Court cautions that the concept of "jurisdictional questions" must be interpreted narrowly
      - See *Hibernia Management* (NLCA), *Watkin* (FCA)

Dunsmuir reasonableness review

- 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.
- "Deference as respect" requires of the courts "a respectful attention to the reasons offered or which could be offered in support of a decision"

Dunsmuir reasonableness review

1. Is there a spectrum of degrees of deference within the reasonableness standard?
   - 2 deferential standards filled a legitimate need
   - Spectrum seemed to be implied:
     - A single standard "does not pave the way for more intrusive review"
     - Courts should follow precedent regarding the applicable degree of deference
   - Rejected by Ontario (*Mills*), Alberta (*Finning*), Federal (*Telfer*) Courts of Appeal

Dunsmuir reasonableness review

- Reasonableness is a "single standard that takes its colour from the context"
- Context still has an impact – but in the application of reasonableness
  - Range of acceptable outcomes will expand and contract
    - E.g.: minister's discretionary decision to issue a licence in the public interest vs. narrower issue of statutory interpretation
    - See *Pharmascience* (FCA)

Dunsmuir reasonableness review

2. Justification, transparency, intelligibility
   - Reasons must: (*Lake*, SCC)
     - Allow the affected individual to understand why the decision is made
     - Allow the court to assess the validity of the decision
     - Show the decision maker considered the applicant's submissions and provide some basis for understanding why these submissions were rejected

Dunsmuir reasonableness review

2. Justification, transparency, intelligibility (cont'd)
   - "Is there a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion?" – *Casino Nova Scotia*, NSCA
   - Minister need not canvass every relevant factor, just those most persuasive to him – *Lake*, SCC
   - Don't scrutinize reasons with scientific precision or hold them to a standard of perfection – *Hills*, NSCA
   - Does the record include evidence that supports the result as a reasonable and defensible outcome? – *Hills*, NSCA

Dunsmuir reasonableness review

2. Justification, transparency, intelligibility (cont'd)
   - Reasons "that could be offered" in support of a decision
   - If a decision maker's reasons fail to consider an important argument, the decision is not necessarily unreasonable
     - Agence nationale (QCCA)
       - Presumes expert tribunal would have been aware of the argument and have dismissed it
     - Telfer (FCA)
       - Failure of applicant to raise an argument before the decision maker is part of the context taken into account in determining reasonableness of reasons

Application of reasonableness to Dunsmuir

Civil Service Act:

- **20** Subject to the provisions of this Act or any other Act, termination of the employment of... an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act:

- **97**(2.1) Where an adjudicator determines that an employee has been discharged... by the employer for cause and the collective agreement... does not contain a specific penalty for the infraction that resulted in... [the discharge]... the adjudicator may substitute such other penalty for the discharge as to the adjudicator seems just and reasonable...
- **100.1**(2), (3) Non-union ees may grieve and refer the grievance to an adjudicator...
- **100.1**(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.