

Canadian Judicial Review Law – Continuing Dilemmas

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A. Introduction – The Legacy of *Dunsmuir*

1. General

- (a) Standard of Review Analysis (on issue by issue, not decision-maker wide basis) to determine which of two standards applies: correctness or unreasonableness
- (b) Required for both judicial review and statutory appeals unless standard already **satisfactorily** established by precedent or legislatively prescribed
- (c) Ascertained by series of rules and presumptions, and, in close cases, by reference to four standard of review criteria.

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190

Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339

A. Introduction (cont.)

2. Legislative Prescription

British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c.45, sections 58-59 (including “discredited” patent unreasonableness standard).

Ontario Human Rights Code, R.S.O. 1990, c. H-19, section 45.8 – also patent unreasonableness, **BUT!**

Toronto (City) Police Service v. Phipps, 2010 ONSC 3884, aff’d 2012 ONCA 155 – should be interpreted as meaning “reasonableness.”

Note: *Federal Courts Act*, section 18.1(4), while codifying grounds of Review, does not exclude standard of review analysis. Not automatic correctness on specified grounds:

Canada (Citizenship and Immigration) v. Khosa, *supra*

However, correctness is standard when FCA responding to a certified question from FC

Kanthisamy v. Canada (Minister of Citizenship and Immigration), 2014 FCA 113

A. Introduction (cont.)

3. Automatic Correctness Review

- (a) Constitutional questions of law, including jurisdiction to deal with constitutional questions and grant *Charter* remedies, but not exercises of discretion implicating *Charter* guarantees and values.

Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504.

R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765.

Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395.

But note legislative restrictions on decision-maker ability to consider constitutional questions in British Columbia *Administrative Tribunals Act*, ss. 44-46.3, and Alberta *Administrative Procedures and Jurisdiction Act*, ss. 10-15.

- (b) True questions of jurisdiction and *vires*, including jurisdictional lines between two or more competing tribunals (but exercise extreme caution in classifying an issue as a true question of jurisdiction!).

Dunsmuir v. New Brunswick, *supra*.

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 33-42.

A. Introduction (cont.)

3. Automatic Correctness Review (cont.)

- (c) Questions of general law of central importance to legal system as a whole **and** outside the authority's specialized area of expertise.

Dunsmuir, supra

- (d) Issues of entitlement to procedural fairness (threshold), though perhaps not decisions re content particularly where express conferral of discretion re procedures and/or field sensitivity.

Infra, B.10

- (e) Bad faith; acting under dictation; wrongful fettering (But what about improper delegation, improper purposes, failure to take account of relevant factors, and taking account of irrelevant factors?)

Kane v. Canada (Attorney General), 2011 FCA 19, 413 N.R. 351 (Not dealt with by SCC on appeal: 2012 SCC 64, [2012] 3 S.C.R. 398.)

Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299, 425 NR 341.

A. Introduction (cont.)

4. Presumptions of Unreasonableness

- (a) Where protected by privative clause
- (b) Questions of fact, discretion and policy, and situations where legal issues cannot easily be separated from factual issues
- (c) Interpretation of authority's home or related statute as well as common and civil law principles encountered frequently, even if pure question of law (though *quaere* whether applies only to adjudicative bodies)

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, *supra*, at para. 34

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559, at paras 46-50.

Canada (Citizenship & Immigration) v. Kandola, 2014 FCA 8

A. Introduction (cont.)

5. Contextual Factors

- (a) Presence or absence of a privative clause or statutory right of appeal, and terms of those provisions. (For abuse of discretion, also consider breadth and terms in which discretion is conferred.)
- (b) Expertise of tribunal, perhaps in comparison to that of reviewing court on relevant issue.
- (c) Purpose of empowering legislation and, especially, relevant provision(s).
- (d) Nature of question: law, fact, mixed law and fact, discretion.

Dunsmuir v. New Brunswick, supra

A. Introduction (cont.)

6. Contributions of *Dunsmuir*

- (a) Marginalization of standard of review analysis where satisfactory precedent
- (b) Reasonableness as almost invariable standard for issues of fact, mixed fact and law (where no readily extricable pure question of law), and exercises of discretionary power
- (c) Presumption of reasonableness review where tribunal interpreting home or closely related statute.
- (d) Elimination of patent unreasonableness standard of review (Was this an unqualified good?)

B. Establishing the Standard

1. What is a “Satisfactory” Precedent or Standard?

- How closely must precedent bear upon decision or action that is subject to judicial review?
- Do all directly relevant precedents establishing a “patent unreasonableness” standard of review default to “reasonableness”?
- How should court respond to arguments that pre-*Dunsmuir* precedent on standard of review is no longer reliable (such as correctness review on basis that “true” jurisdictional question)?
- What if impugned pre-*Dunsmuir* precedent is SCC or CA?

Canada (Attorney General) v. Johnstone, 2014 FCA 110, at para. 52

1. What is a “Satisfactory” Precedent or Standard? (cont.)

- If find relevant precedents on standard of review, they are applied unless
 - ...appear to be inconsistent with recent developments in the common law principles of judicial review.

Agraira, supra, at para. 48

2. Disappearance of Jurisdictional Error?

“True” Questions of Jurisdiction

- What are badges of questions that have **not** been left to tribunal for determination?
- Clearest example remains determination of competing authorities where only one can exercise the authority, and no explicit or implicit legislative conferral of initial responsibility for resolving deadlock on one of competitors
- This aside, does jurisdiction survive in any practical (as opposed to theoretical sense after *Alberta Teachers*?

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, *supra*;; *Newfoundland and Labrador Hydro v. Newfoundland and Labrador (Board of Commissioners of Public Utilities)*, 2012 NLCA 38, 323 Nfld. & P.E.I.R. 127; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 25; *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25.

3. What About Issues of *Vires*?

- Recognized in *Dunsmuir* by reference to earlier precedent.
- Is *vires* equivalent to jurisdiction when dealing with non-adjudicative bodies and authorities exercising legislative power?
- To the extent that SCC assesses the scope of legislative powers (by-laws, regulations, rules, general orders) on a correctness basis, is this a significant exception to presumption of reasonableness review for decision-makers interpreting home statute?

3. What About Issues of *Vires* (cont.)

- Where is line drawn between the scope of authority (or an issue of *vires*) and deferential review of motivations and purposes of decision-maker?

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485 (cited in *Dunsmuir*, *supra*, at para. 59)

Enbridge Gas New Brunswick Limited Partnership v. New Brunswick (Attorney General), 2013 NBCA 34, 404 N.B.R. (2d) 189

Katz Group Canada Inc. v. Ontario (Health and Long-Term Care), 2013 SCC 64, [2013] 3 S.C.R. 810

4. Competing and Overlapping Jurisdictions

- Generally correctness
- May be different if legislative assignment of responsibility on one of competing tribunals for determining question of which has authority
- Where competing or overlapping jurisdictions and no mutual exclusivity, matter will be determined by reference to any statutory indicators (such as tribunal discretion on whether to take case), and doctrines such as abuse of process, *res judicata*, issue estoppel, and general considerations as to more or most appropriate venue.

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125.

5. Continued Relevance and Evaluation of Expertise

- Pre-*Dunsmuir*, most important of four pragmatic and functional factors
- Post-*Dunsmuir*, apparently diminished in importance in that generally assumed in case of tribunals (though perhaps not other decision-makers) even where no qualifications specified let alone any evidence of actual expertise
- Movement away from assessment of comparative expertise of tribunal under review in relation that of courts
- May, however, bolster arguments for deference where actual expertise in form of statutory qualifications or actual expertise

Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 53; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, *supra*, at para. 1

6. Characteristics of Question of Law of Central Importance to the Legal System **and** Outside Expertise of Decision-Maker

- Is question one that transcends tribunal setting, and stands to be decided in same way irrespective of setting?
- Is that sufficient, or must question also be important in other ways – precedent setting; recurring in variety of settings; involving a major rather than trivial matter? Substantive human rights determinations?
- When will such a question nonetheless still be within expertise of decision-maker?
- Does this provide a basis for reviewing for correctness where tribunal has been rendering inconsistent decisions on an important question of law?

Lethbridge Regional Police Service v. Lethbridge Police Association, supra; McLean v. British Columbia (Securities Commission), supra, at paras. 26-33; Canada (Attorney General) v. Johnstone, 2014 FCA 110; Telecommunications Workers Union v. Telus Communications Inc, 2014 ABCA 154, though cf Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC11, [2013] 1 S.C.R. 467, at paras. 166-68 .

7. Presumption of Reasonableness Review in Interpretation of Home Statutes – How Extensive?

Non-tribunal Decision-Making

- To what extent does presumption of reasonableness review when interpreting home statute or frequently encountered question of law extend beyond tribunal setting?
- More particularly, does it extend to government officials (including Cabinet, Ministers) determining pure questions of law in course of exercising power?
- If not, why not?
- If not, will non-tribunals ever be reviewed on reasonableness standard when determining pure questions of law?

Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans), 2012 FCA 40, [2013] 4 F.C.R. 155; *Takeda Canada Inc. v. Canada (Minister of Health)*, 2013 FCA 13, 440 N.R. 346; *Agraira v. Canada (Public Safety and Emergency Preparedness, supra; Canada (Minister of Citizenship and Immigration) v. Kandola, supra; Canada (Attorney General) v. Canadian National Railway Co.*, 2012 FCA 278, 440 N.R. 217, on reserve in SCC, [2012] S.C.C.A. No. 557 (Q.L.).

8. Rebutting the Presumption: Rothstein Exception

- Exceptional circumstance - original jurisdiction over same question of law before both Copyright Board and Federal Court

Rogers Communications Inc. v. Society of Composers, Authors & Music Publishers of Canada, 2012 SCC 35, [2012] 2 S.C.R. 283, at paras. 10-20 (per Rothstein J.)

- Does not apply where courts and tribs do not share first instance jurisdiction over matter or where court first instance authority over question is speculative and remote possibility

McLean v. British Columbia (Securities Commission), *supra*, at paras. 23-24;
Re: Sound v. Fitness Industry of Canada, *supra*, at paras. 45-51

9. Rebutting the Presumption - General

- If presumption applies outside adjudicative setting, is it more easily rebuttable by reference to nature of decision-maker and assumed lack of expertise/capacity on questions of law?
- What role does standard of review list play in rebutting presumption?
- Does presumption weaken where narrow issue of law decided by reference to general principles of statutory interpretation?

See e.g. *Canada (Citizenship and Immigration) v. Kandola*, *supra*, at paras. 36-44; *Takeda Canada Inc. v. Canada (Health)*, *supra*, at para. 33 (*per* Stratas J.A. dissenting); *Qin v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 263, at paras. 34-38.

10. Reconciling Nominated Grounds of Review with Reasonableness Review

- **Bad faith; acting under dictation; and perhaps wrongful fettering:** Seemingly little or no room for deference. Factual inquiry in light of legal test
- **Improper delegation:** Generally same. However, where engages discretion or interpretation of provision of home Act, room for deference in form of reasonableness review.
- **Improper purpose, failure to take account of relevant factors, taking account of irrelevant factors:** Far more likely to involve interpretation of home statute and assessment of evidential weight where deference will generally be appropriate

Kane v. Canada (Attorney General), *supra*; *Stemijon Investments Ltd. v. Canada (Attorney General)*, *supra*; *Canada (Minister of National Revenue – M.N.R.) v. J.P. Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, 450 N.R. 91, at paras. 72-75.

11. Decisions Implicating *Charter* Rights and Freedoms

- Where pure question of law (meaning of relevant provision), correctness review
- Where reviewing exercise of discretion engaging *Charter* rights, freedoms and values[?], reasonableness may be appropriate standard incorporating proportionality dimensions of *Oakes* test (though not formal structure of that test).
- *Quaere* whether reasonableness universal standard irrespective of decision-maker; whether extends to all *Charter*-infused mixed questions of law and fact, where no readily extricable pure question of law
- What are *Charter* values as opposed to rights and freedoms?

Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

12. Reasonableness Review and Procedural Rulings

Generally correctness and no standard of review analysis

Mission Institution v. Khela, 2014 SCC 24, at para. 79

Canada (Citizenship and Immigration) v. Khosa, *supra*, at para. 43

C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539, at paras. 100-03.

Moreau-Bérubé v. New Brunswick Judicial Council, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 74.

However:

(a) Within list of *Baker* factors, tribunal expertise and width of discretion over procedures is a consideration in determining content of procedures

Re: Sound v. Fitness Industry of Canada, 2014 FCA 48, at paras. 34-42

(b) On occasion, a form of deference to tribunal procedural choices may arise out of statutory context, nature of decision, and expertise of decision-maker

Mission Institution v. Khela, *supra*, at 89.

Bibeault v. McCaffrey, [1984] 1 S.C.R. 176.

12. Reasonableness Review and Procedural Rulings (cont.)

(c) However, in some instances, judges have applied conventional reasonableness analysis to procedural content rulings (such as right to counsel, admissibility of evidence, *etc.*)

Au Dragon Forgé, 2013 QCCA 793

Maritime Broadcasting System Ltd. v. Canadian Media Guild, 2014 FCA 59, at paras. 46-66 (*per* Stratas J.A.) (This did not garner majority support but the review of the authorities is extensive.)

C. Applying the Standard

1. When to Segment

- What constitutes a readily extricable question of law?
- Abella: Too ready segregation of questions of law opens door to correctness review!
- However, not necessary corollary of segregation. Presumption of deference will still apply to decision-maker's segregable interpretation of home statute
- Somewhat artificial to refuse to segregate and apply an overall standard of reasonableness where decision-maker has itself segregated and opined on a pure question of law (*cf* where d-m does not unpackage).

See the Abella/Rothstein debate in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, *supra*. See also *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, at paras. 80-82.

2. Links between Reasonableness Review and Reasons

- Adequacy (as opposed to absence) of reasons, no longer to be treated as question of procedural fairness; rather merged into substantive review
- Reasonableness evaluated at least initially against reasons provided by decision-maker
- Where reasons inadequate, normal response will be to quash or reverse decision
- However, where no reasons (especially where not legally required) or even inadequate reasons, permissible on occasion to reconstruct reasons (“which could have been offered”) where possible, and assess reasonableness of outcome on basis of that material

2. Links between Reasonableness Review and Reasons (cont.)

- *Quaere* circumstances under which reconstruction possible and, in contrast, when, e.g. affidavit evidence supplementing reasons, it will run afoul of principle that decision-maker should not be able to bootstrap decision by after the event justifications
- *Quaere* when remission back for provision of better or more extensive reasons is appropriate remedial disposition as opposed to simply quashing decision as unreasonable (as, for example, in a licensing cancellation case) or, exceptionally, stepping into shoes of decision-maker and mandating an outcome.

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, *supra*; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 53, [2012] 1 S.C.R. 364; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, *supra*; *McLean v. British Columbia (Securities Commission)*, *supra*; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95; *Lemus v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114, at paras. 27-39.

3. Inconsistency as a Species of Unreasonableness

- Not a free-standing ground of judicial review
- Varying interpretations by different adjudicators or in differing decision-making settings not sufficient to convert to question of general importance to the legal system as a whole
- No substantive legitimate expectation doctrine such as to prevent change in policy or interpretation – though may generate procedural entitlements

Domtar Inc. v. Québec (Commission d'appel en matière des lésions professionnelles), [1993] 2 S.C.R. 756, 105 D.L.R. (4th) 385; *National Steel Car Ltd. v. United Steelworkers of America, Local 7135* (2006), 278 D.L.R. (4th) 345 (Ont. C.A.); *Smith v. Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 38-39; *McLean v. British Columbia (Securities Commission)*, *supra*, at para. 29.

4. The Malleability of Reasonableness Review

Tests for Unreasonableness

- (a) While no sliding scale of reasonableness, what is tolerable within reasonableness is itself a context-sensitive inquiry
Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, supra, at para. 47.
- (b) Does the conclusion come within the range of possible reasonable conclusions in the sense of being acceptable, rational and defensible in fact and law, having regard to both the reasons provided or that could have been provided, **and** the outcome? Does “the outcome fit comfortably with the principles of justification, transparency and intelligibility”?
Dunsmuir v. New Brunswick, supra, at para. 47.
Canada (Citizenship and Immigration) v. Khosa, supra, at para. 59.
- (c) Reasons that cannot stand up to a somewhat probing analysis; no line of analysis within the given reasons that could reasonably lead to the conclusion reached on the basis of the evidence before the tribunal. Not for courts to reweigh the various factors taken into account.
Law Society of New Brunswick v. Ryan, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 48 and 55.

5. Impact of Nature of Question

- Reasonableness is context-sensitive inquiry
- Does not mean that range of deference within reasonableness
- However, where narrow question of law admitting of choice between only two or limited outcomes, reasonableness will be very different form of assessment than where broad discretionary power or factual finding being reviewed on basis of reasonableness standard. Indeed, it may be hard to distinguish from correctness review – the phenomenon of “disguised” correctness!

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53, [2011] 3 S.C.R. 471; *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2013 FCA 75, at paras. 14-15; *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon’s)*, 2013 ONCA 157; *Qin v. Canada (Citizenship and Immigration)*, *supra*, at para. 33 (in effect no room for reasonableness review where statutory provision admits of only one answer); *McLean v. British Columbia (Securities Commission)*, *supra* (where range of outcomes narrow, question becomes whether decision-maker acted in accordance with accepted principles of statutory interpretation); *Canada (Transport, Infrastructure and Communities) v. Farwaha*, *supra* (includes test for establishing range and limits where broad discretion). 33

5. Impact of Nature of Question (cont.)

- Equally, disguised correctness will be hard to avoid where applying reasonableness review to tribunal decision based on legal test of reasonableness

Antrim Truck Centre Ltd. v. Ontario (Transportation), 2013 SCC 13

- And, also, where dealing with a situation where the decision-maker has not provided reasons for the decision or element of decision under review

E.g. Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, *supra*; *McLean v. British Columbia (Securities Commission)*, *supra*

- Beyond that, a number of reviews of questions of law on a reasonableness basis look no different from ordinary statutory interpretation exercises (*i.e.* correctness review)

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), *supra*; *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25; *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Dionne v. Commission scolaire des Patriotes*, 2014 SCC 33; *John Doe v. Ontario (Finance)*, 2014 SCC 36

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