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Dunsmuir Update

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Introduction

In the course of addressing David Dunsmuir's appeal from a decision of the New Brunswick Court of Appeal,[1] the majority of the Supreme Court set out to clarify and simplify a body of judicial review jurisprudence that was politely described as "difficult to implement."[2]

The primary issues in *Dunsmuir* were whether a public office holder was entitled to enhanced procedural fairness when his employment was terminated, and whether an adjudicator's decision regarding the validity of the process by which he was terminated was reasonable. Mr. Dunsmuir was employed by the Court Services Division of the New Brunswick Department of Justice. He was appointed by virtue of an Order-in-Council to the position of Court Clerk for a number of different New Brunswick courts. After he was dismissed without cause due to perceived performance issues, Mr. Dunsmuir grieved his dismissal under provisions of New Brunswick's *Public Service Labour Relations Act* (*PSLRA*).[3] In his grievance Mr. Dunsmuir alleged, among other things, that his dismissal was lacking in procedural fairness because he was not advised as to the specifics of his employer's dissatisfaction with his work performance, and also because he was not given an opportunity to respond to those specifics, and finally because he was given insufficient notice.[4]

Arbitral Award

Mr. Dunsmuir's grievance went to arbitration. The adjudicator held, following his interpretation of the relevant statutes and the decision in *Knight v. Indian Head School District No. 19*,[5] that because Mr. Dunsmuir was, at least with respect to his Court Clerk appointment, a public office holder 'at pleasure,' he was therefore owed a duty of procedural fairness regarding his

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[1] *Dunsmuir v. New Brunswick (Board of Management)*, 2006 NBCA 27, 44 Admin. L.R. (4th) 92 [*Dunsmuir* C.A.].
[2] *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9, 69 Admin. L.R. (4th) 1 at para. 32 [*Dunsmuir* (S.C.C.)].
[3] R.S.N.B. 1973, c. P-25.
[4] *Dunsmuir* (S.C.C.), *supra* note 2 at para. 9.
[5] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, 43 Admin. L.R. 157.

dismissal.[6] The adjudicator held that the *PSLRA* empowered him, in this case, to look behind the reasons for the dismissal and to determine if there was just cause. Since, in the adjudicator's opinion, the duty of procedural fairness was not discharged on the facts of this case, an order was made for Mr. Dunsmuir's reinstatement. The adjudicator also noted that had he not reinstated Mr. Dunsmuir, he would have increased his notice period to eight months.

Judicial Review at the Court of Queen's Bench

The Province was not satisfied with this result and accordingly made an application to have the adjudicator's decision reviewed by the Court of Queen's Bench. The reviewing Judge applied the pragmatic and functional analysis to the arbitration scheme established under the auspices of the *PSLRA*, and to the specific issues raised by this case, in order to determine the applicable standards of review.[7] Ultimately, it was held that the adjudicator was incorrect in his preliminary statutory interpretation decision regarding the *PSLRA*, and that his subsequent reasons did not stand up to a somewhat probing examination on the reasonableness standard. In the result, the reinstatement order was quashed, but the adjudicator's alternate remedy of eight months' pay in lieu of notice was upheld.[8]

Court of Appeal of New Brunswick

Mr. Dunsmuir appealed the Queen's Bench decision to the Court of Appeal of New Brunswick. The panel undertook its own pragmatic and functional analysis, ultimately concluding that the lower Court erred in requiring that the adjudicator be correct in his assessment of the statutory interpretation question; the adjudicator's decision on that score ought to have been reviewed on the more deferential reasonableness standard. The Appeals Court, however, found that the adjudicator's assessment of the statutory interpretation question was unreasonable in any event, and so agreed with the lower Court in the result.[9] Ultimately, the Court of Appeal held that

[6] *Dunsmuir* (S.C.C.), *supra* note 2 at para. 15.
[7] *Ibid.* at para. 18.
[8] *Ibid.* at para. 20.
[9] *Dunsmuir* (C.A.), *supra* note 1 at para. 9.

despite the fact that Mr. Dunsmuir was a public office holder at pleasure, the Province retained its common law right to dismiss employees without cause, as long as reasonable notice is provided.[10] It was unreasonable to interpret the *PSLRA* in such a fashion as to extend public law procedural entitlements to employees who were hired by the Provincial Government in its capacity as a private employer. The Court held that there was no enhanced duty of procedural fairness owed to Mr. Dunsmuir.

Supreme Court of Canada

Mr. Dunsmuir appealed again, this time to the Supreme Court. Before addressing the substance of the appeal that was before them, Bastarache and LeBel J.J. endeavoured to overhaul the system of judicial review that had, since the late 1980s, revolved around the so-called "pragmatic and functional" approach. They were joined in their majority decision by McLachlin C.J. and Fish and Abella JJ. Although the Court was unanimous in holding that the patent unreasonableness standard should be eliminated, the practical benefits of this simplification were fleeting. In a classic example of the ironies inherent in the judicial review field, two concurring judgments were also released: one which arrived at a completely different standard of review from the majority, and one which implicitly questioned the entire standard of review exercise.

At least two big changes came out of the majority decision. The first was the elimination of the most deferential standard of review, "patent unreasonableness." There is now only one deferential standard of review and it is simply called "reasonableness."[11] The non-deferential standard remains "correctness." The other major change that came out of the majority judgment is that the "pragmatic and functional test" has been eliminated, or at least, renamed. The newly dubbed "standard of review analysis" still looks at many of the same factors, but increased emphasis has been placed on its contextual nature. Not every one of the factors under the old pragmatic and functional analysis will be relevant in any given case. This is evident from the way in which the Court actually applied the analysis to the administrative decision-maker in this case.

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[10] *Ibid.* at paras. 26 & 33.
[11] *Dunsmuir* (S.C.C.), *supra* note 2 at para. 45.

On the issue of whether the adjudicator needed to be correct in his interpretation of the *PSLRA*, the Court examined the privative clause, the relative experience of the adjudicator, the legislative purpose, and the nature of the question. However, the most detailed analysis was done with respect to the nature of the entire labour relations regime at issue. The overarching context for this dispute was a labour relations system that was purposely designed to deal with public service employees and their grievances.[12] Interpreting one of the constituent statutes for this system was a task to which the adjudcator was well-suited by virtue of his expertise. The majority also found that the interpretation question was not one of general importance for the legal system. All of this militated toward review on the reasonableness standard.[13] In the result, the decision of the adjudicator was found to be unreasonable because it ignored the fact that the employment relationship in this case was governed by private law.[14] On the question of natural justice the majority found that there was no enhanced right to procedural fairness, again, because Mr. Dunsmuir's employment was governed by private law.

Justice Binnie wrote a concurring decision in which he departed from the approach taken by the majority with respect to the development of a new standard of review analysis. For the most part Binnie J. agreed that the tripartite test was unworkable, but he suggested that collapsing two unworkable standards (reasonableness and patent unreasonableness) into one would leave us in much the same predicament. There still could be substantial argument with respect to what the 'reasonableness' standard would actually mean in a given case, and there was a possibility that a 'spectrum' of reasonableness could develop over time.[15] Justice Binnie proposed instead that we de-emphasize the entire standard of review issue, and instead get back to arguing the substantive merits of the case and the actual reasons supporting an administrative decision-maker's conclusion on discrete issues.[16]

Justices Deschamps, Charron, and Rothstein, in their concurring reasons, argued that the statutory interpretation question before the adjudicator was a question of law that was outside his

[12] *Ibid.* at para. 68.
[13] *Ibid.* at para. 70.
[14] *Ibid.* at para. 117.
[15] *Ibid.* at para. 139.
[16] *Ibid.* at para. 129.

expertise. Based largely on this, they held that the appropriate standard of review should have been correctness. In the context of the case before him, the adjudicator was called upon to interpret the common law relating to employment contracts. This was outside the expertise of the administrative decision-maker and as such the decision that was made should have attracted no deference.

Subsequent Developments

It is relatively clear that *Dunsmuir* has been received by the administrative law community as representing a significant development in the law of judicial review. Eliminating one out of the three previously well established standards of review is a major symbolic gesture towards increased simplification and streamlining in judicial review analysis. Since it was released on March 7, 2008 *Dunsmuir* has been cited in hundreds of decisions across Canada. This paper focuses on Ontario where the Superior Court, the Divisional Court, and the Court of Appeal have applied or considered *Dunsmuir* in at least 67 decisions. We have reviewed all of these decisions in preparation for this summary.

The remainder of this paper is divided into two sections, each with an associated chart. The first section catalogues those decisions where we thought the release of *Dunsmuir* had an appreciable impact on the outcome of the case. The second section catalogues those decisions where it seemed that although *Dunsmuir* was cited, the pattern of reasoning with respect to the standard of review was largely dictated by previously established jurisprudence.

Substantive Standard of Review Analyses Post-*Dunsmuir*

In the cases surveyed below some form of in-depth *Dunsmuir* standard of review analysis was conducted, or *Dunsmuir* was seen to have some effect in the outcome. In other words, these cases are ones where *Dunsmuir* has had an appreciable impact. Depending on the case, the nature of the impact in question may vary. In some of these decisions the influence of *Dunsmuir* is clear because the court was deciding a novel question regarding the standard of review. In these decisions, either the particular type of issue had not been reviewed before, or there was simply scant jurisprudence regarding the deference to be owed to a particular administrative

decision-maker. Courts entering these untested waters have performed more fulsome "standard of review" analyses.[17] In a subset of these cases the parties disagreed on the standard of review to be applied given the release of the Supreme Court's reasons in *Dunsmuir*. In these cases the courts also often engaged in a substantive standard of review analysis in order to settle the disagreement.[18]

In some of these cases, particular aspects of the standard of review analysis that were emphasized in *Dunsmuir* played an important role in the decision. One such example is the clarification that was offered in *Dunsmuir* with respect to 'true' questions of jurisdiction, and the similar clarification given with respect to questions of law that have some relevance for the legal system as a whole.[19] It appears that one potential emerging trend in these cases is that the correctness standard is being applied less often, but more consistently. In some cases, such as *Mills v. WSIB*, decided shortly after *Dunsmuir*, the courts have contended with the elimination of the patent unreasonableness standard and the question of what to do with all of the existing patent unreasonableness jurisprudence.[20] Though *Dunsmuir* figured prominently in the early decisions, its long-term impact on judicial deference appears to be limited.

Summary of Cases

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Li v. College of Physicians and Surgeons of Ontario, 2008 CanLII 37613 (ON S.C.D.C.)	College of Physicians and Surgeons	Standard of review applicable to penalty decision. Penalty involved 'permanent' restriction of practice to male patients. Penalty jurisdiction under *Health Professions Procedural Code*. Also raised issue of severity.	Court commented that normally penalty decisions are reviewed on reasonableness standard, but that because penalty jurisdiction here is set out specifically in statute, and because this is a statutory appeal, College must be correct in terms of the nature of the penalty. Does not appear to rely on past jurisprudence. With respect to the complained of harshness of the penalty (alternative ground of appeal), College need only be reasonable.

[17] See, for example, *Whitely v. Shuniah*, [2008] O.J. No. 2823; *Taub v. Investment Dealers Association of Canada*, 2008 CanLII 35707 (ON S.C.D.C.); *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 2460.

[18] See, for example, *Darragh v. Normar Developments, Inc.*, [2008] O.J. No. 2586; *Jacobs Catalytic v. International Brotherhood of Electrical Workers*, 2008 CanLII 26686 (ON S.C.D.C.); *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 2460.

[19] See, for example, *Toronto Police Association v. Toronto Police Services Board*, 2008 CanLII 56714 (ON S.C.D.C.); *Whitely v. Shuniah*, [2008] O.J. No. 2823 at para. 16;

[20] *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 (CanLII).

Toronto Police Association v. Toronto Police Services Board, 2008 CanLII 56714 (ON S.C.D.C.)	Labour Arbitrator	Relates to the interpretation of privacy legislation with respect to the disclosure of mental health records.	The standard of review is correctness since the issue involves a matter of interpretation of general law not within the particular expertise, knowledge or experience of an arbitrator appointed under the *Police Services Act.*
Whitely v. Shuniah, [2008] O.J. No. 2823	Municipality of Shuniah, Chief Building Inspector	Appeal pursuant to s. 25 of the *Building Code Act*, 1992. Decision with respect to statutory definition of 'ground level.' Factual decision on ground level in this case. Definition of 'single storey' in context of dispute.	Whitely argued that standard should be correctness, municipality argued for reasonableness. Conflicting pre-*Dunsmuir* jurisprudence: *Craft-Bilt Materials Ltd. v. Toronto (City)*, [2006] O.J. No. 4710, 2006 CarswellOnt 7451 **and** *Runnymede Development Corp. v. 1201262 Ontario Inc.*, [2000] O.J. No 981 *De novo* analysis: Considers absence of privative clause, expertise of building inspector, nature of question not relevant to legal system as a whole. Mixed fact and law. Reasonableness is appropriate standard. Holds that *Dunsmuir* signals move toward enhanced deference unless question touches on issue of law outside expertise, jurisdiction, or constitutional issues.
Taub v. Investment Dealers Association of Canada, 2008 CanLII 35707 (ON S.C.D.C.)	Investment Dealers Association of Canada **and** Ontario Securities Commission	Review of discipline imposed on former member. Question of statutory interpretation and contract interpretation. Applicant argued for correctness, respondent for reasonableness.	Court noted that previous jurisprudence would still apply, but none was cited. The implication being that there was no established jurisprudence to rely on. Majority undertook full standard of review analysis, looking at all former "pragmatic and functional factors." Noted statutory right of appeal, interpretation of home statute, expertise, not question of general legal significance = standard of reasonableness. In dissent, Carnwath J. agreed with standard but differed in result.
Flora v. Ontario (Health Insurance Plan, General Manager), 2008 ONCA 538 (CanLII)	OHIP (Health Services Appeal Review Board) Divisional Court	Issue was whether treatment received by Appellant was an "insured service" under a Regulation s. 28.4(2) made under the *Health Insurance Act*. Mixed fact and law. No privative clause, statutory appeal. Board experienced, question within field of experience.	This decision relies to some extent on existing standard of review jurisprudence with respect to reviewing Health Services Board decisions, but also undertakes a fulsome standard of review analysis on its own. Comes to the same conclusion that the Divisional Court reached by applying the *Pushpanathan* pragmatic and functional factors. Standard of review here is reasonableness, some deference is owed.

Darragh v. Normar Developments, Inc., [2008] O.J. No. 2586	Landlord and Tenant Board	Statutory appeal from decision of Landlord and Tenant Board. Pure question of law regarding interpretation of *Residential Tenancies Act*, and *Landlord and Tenant Act*. Parties originally agreed that the standard of review would be correctness.	Majority raised point that *Dunsmuir* did not specifically refer to statutory appeals, but applied the new standard of review analysis given the scope of the majority judgment in *Dunsmuir*. Ultimately found that standard on this issue should be correctness, relied to some extent on older jurisprudence, but also considered expertise, nature of question, and other factors.
Toronto (City) v. Wolf, 2008 CanLII 39430 (ON S.C.D.C.)	Ontario Assessment Review Board	What is the standard of review for the Board's decision that the City did not comply with notice requirements under the *Assessment Act*?	"This appeal raises a question of law or specifically, an issue of statutory interpretation that does not engage the Board's expertise. The Board is not protected by a privative clause and there is a right to appeal, with leave, on a question of law, pursuant to s. 43.1(1) of the Act. The standard of review in these circumstances is correctness."
Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal), [2008] O.J. No. 2460.	Environmental Review Tribunal	Tribunal granted leave to a group of concerned citizens and advocacy groups to appeal decisions of Ministry regarding Certificates of Approval granted to Lafarge for use of alternative fuels in its facility. Applicant argued that Tribunal committed jurisdictional error with respect to leave test and that standard should be correctness. Respondent submitted reasonableness.	Did not rely on previous jurisprudence. There was a weak privative clause. Tribunal is a specialized body, with expertise in environmental law and policy. Tribunal was interpreting the leave provision and applying it to the facts of the case. The statute was an environmental statute with which the Tribunal has familiarity. There were questions of mixed fact and law. Therefore, the Tribunal's leave decision is entitled to some deference. This was not a question of true jurisdiction; it was a question of law. Also, not a question of law relevant to legal system as a whole. Standard should be reasonableness.
Jacobs Catalytic v. International Brotherhood of Electrical Workers, 2008 CanLII 26686 (ON S.C.D.C.)	Ontario Labour Relations Board	Dispute with respect to Board's interpretation of collective agreement. Issue related to assignment of fire restoration work to outside contractor. Nature of work at issue, jurisdiction at issue, application of doctrine of estoppel at issue. Counsel for one party submitted that standard should be correctness on estoppel issue because it is an issue of law with general application.	Standard of review analysis performed here does not rely on previous jurisprudence. The Court examined two privative clauses, nature of question mixed fact and law. Board had experience in applying estoppel doctrine, also this was not a pure question of law of general application, but a mixed question. Labour Board has significant experience interpreting collective agreements and relevant statutes = reasonableness standard. Ultimately Board's decision found to be reasonable.

Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal), 2008 ONCA 436 (CanLII)	WSIB Appeals Tribunal	Issue involved determination of whether back injury linked to workplace incident.	This was a significant early decision interpreting *Dunsmuir* because it suggested that well-established pre-*Dunsmuir* patent unreasonableness standards would now be simply re-termed "reasonableness." It also confirmed that *Ryan v. Law Society of New Brunswick* was still good law and that there was to be no sliding scale of deference within the reasonableness standard. Did not address how single reasonableness standard could encompass old "patently unreasonable" jurisprudence alongside old "reasonableness simpliciter" jurisprudence, without spectrum of deference.
University of Windsor Faculty Association v. University of Windsor, 2008 CanLII 23711 (ON S.C.D.C.)	Labour Arbitrator	Issue involving the University's posting of student evaluations of teacher performance on web. Union claimed collective agreement and *FIPPA* violated. Arbitrator disagreed.	Both parties agreed that standard was reasonableness for interpretations of collective agreement. Court cites para. 57 in *Dunsmuir* for relying on old jurisprudence. Says that level of deference has not changed from old jurisprudence. Labour arbitrators have experience in interpreting collective agreements. With respect to *FIPPA*, however, the Court noted that this was a question of law of general significance. But the Court also noted the strong privative clause. The Court did not decide the standard of review question, but rather concluded that the Arbitrator was correct in any event. The Court here did do a fulsome standard of review analysis however. Some impact may be seen here from dicta in *Dunsmuir* relating to true jurisdiction and pure questions of law with general significance for legal system as a whole. "[46] However, we conclude it is unnecessary for us to resolve this matter based on the unusual facts of this case. Our conclusion on the correctness of the Arbitrator's decision persuades us to review her decision by the standard of correctness."

The Persistence of Established Jurisprudence

Dunsmuir may still prove to be a watershed moment in the development of our standard of review jurisprudence, however two of the passages which have attracted a great deal of interest in the decisions we surveyed for this paper suggest that we may be looking instead at a repackaging of conventional wisdom regarding judicial deference. In the context of discussing how the new standard of review analysis would operate, the majority in *Dunsmuir* wrote that, "[g]uidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law."[21] A few paragraphs later the majority continued in the same vein:

> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.[22]

Our survey of Ontario decisions reveals that these passages have been extensively relied upon. There appears to be a significant tendency to adhere to the pre-existing standard of review analysis with respect to administrative regimes that have long track records and on issues or questions where the applicable standards of review are well established. In particular, there seems to be little indication that *Dunsmuir* has had any impact on the standards applicable to questions of natural justice (sometimes referred to as the duty of fairness, or procedural fairness), or on the level of deference afforded to administrative bodies whose decisions are routinely reviewed (Labour Boards, Municipal Boards, etc.). Just as the Supreme Court directed, lower courts are not reopening the standard of review can of worms where it seems that the existing jurisprudence has adequately addressed the issue.

The cases surveyed below are ones that cite *Dunsmuir* but which do not, for a variety of reasons, engage in a detailed standard of review analysis. We argue that these decisions tend to fall into three categories:

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[21] *Ibid.* at para. 54.
[22] *Ibid.* at para. 57.

(1) In the first category are those cases where the question of standard of review arises in the post-*Dunsmuir* context, and the question is dealt with expeditiously by referring to a body of existing jurisprudence, and by then applying a previously established standard of review.[23]

(2) In another group of cases, the established body of jurisprudence is not as helpful because it indicates that the standard of review should be patent unreasonableness. In these cases the approach has often been simply to retain the existing jurisprudence, but to cut the standard of review down to reasonableness without engaging in a fresh standard of review analysis. For the most part, courts are no less deferential in these cases than they would have been in the past.[24]

(3) In cases of the third type the approach has been to consider the substance of the administrative decision-maker's reasons. If it appears that the decision was both reasonable **and** correct, then there is no need to consider what standard of review would be appropriate. We suggest that this approach reflects to some extent the view expressed in Binnie J.'s minority judgment. Less time is spent on the exercise of determining the standard of review, and more time is spent on carefully scrutinizing the actual issues that the administrative decision raises, and in assessing the overall legitimacy of the final decision within the range of all acceptable outcomes.[25]

These three categories of decisions are reflected in the right-most column of the chart below, labelled, *Dunsmuir* Treatment. Not every case fits neatly into this division, however we have found that these categories summarize the recurring themes in these decisions.

Summary of Cases

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
1673233 Ontario Inc. (c.o.b. Eurohaven Spa) v. Brampton (City), 2008 CanLII 64379 (ON S.C.D.C.)	City of Brampton	Procedural Fairness, Natural Justice, or Duty of Fairness – what is the standard of review?	*Dunsmuir* does not alter the pre-existing jurisprudence which has established that a denial of procedural fairness or natural justice does not require a standard of review analysis. The standard is always correctness.

[23] See, for example, *Conway v. Darby*, 2008 CanLII 54773 (ON S.C.); [2008] O.J. No. 1353; *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, [2008] O.J. No. 3904; *Igbinosun v. Law Society of Upper Canada*, 2008 CanLII 36158 (ON S.C.D.C.).

[24] See, for example, *Limestone District School Board v. O.S.S.T.F.*, 2008 CanLII 63992 (ON S.C.D.C.); *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*; *Jeremiah v. Ontario (Human Rights Commission)*, 2008 CanLII 46915 (ON S.C.).

[25] See, for example, *Gore Mutual Insurance Co. v. Co-Operators General Insurance Co.*, 2008 CanLII 46914 (ON S.C.); *University of Windsor Faculty Association v. University of Windsor*, 2008 CanLII 23711 (ON S.C.D.C.).

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Limestone District School Board v. O.S.S.T.F., 2008 CanLII 63992 (ON S.C.D.C.)	Labour Arbitrator	Parties did not contest standard of review. Both agreed that it would be reasonableness.	Prior to *Dunsmuir* the standard of review for labour arbitration decisions was patent unreasonableness. Now this is cut down to reasonableness. No difference in amount of deference.
Smyth v. Perth and Smiths Falls District Hospital, 2008 ONCA 794 (CanLII)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Whether correctness standard applied by Applications judge appropriate for question of true jurisdiction with respect to the Arbitrator's power under an Arbitration agreement.	Quotes *Dunsmuir*: "[a]n exhaustive review is not required in every case to determine the proper standard of review." This was a question of true jurisdiction = correctness standard.
Inforica Inc. v. CGI Information Systems and Management Consultants Inc., 2008 CanLII 60706 (ON S.C.)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Is this a true jurisdictional question? What is the standard of review for private arbitration decisions?	*Dunsmuir* does not alter the usual approach to true jurisdictional questions: correctness. In any event private arbitration decisions of this nature are reviewed on the correctness standard – depends on contractual context.
Ontario Public Service Employees Union v. Ontario (Ministry of Labour), 2008 CanLII 59106 (ON S.C.D.C.)	Labour Arbitrator	Parties agreed that standard would be reasonableness on review of penalty.	Arbitrators have broad discretion with respect to penalty, and are owed great deference. *Dunsmuir* has not changed this.
Hamilton (City) v. United Carpenters and Joiners of America, Local 18, [2008] O.J. No. 4806	Ontario Labour Relations Board	Is the Board's practice of deeming management to accept content of application where employer doesn't respond reasonable? Is the Board's practice with respect to delay a natural justice issue?	Board's decision with respect to matters within its expertise is reviewable on reasonableness standard. No decline in deference from pre-*Dunsmuir* jurisprudence. Decision with respect to delay is reviewed on correctness standard as a natural justice issue.
Lombard Canada v. Kent & Essex Mutual Insurance Co.,	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Interpretation of insurance policy and related regulation.	Standard of review was reasonableness.
Horochowski v. Ontario English Catholic Teachers' Association, 2008 CanLII 55139 (ON S.C.D.C.)	Ontario Labour Relations Board	What is the standard of review for the board's decision? What is standard of review on procedural fairness.	Cuts down patent unreasonableness standard to reasonableness on substantive questions. Procedural fairness not subjected to standard of review analysis – must be correct.
Ontario Nurses' Association v. Rouge Valley Health System, [2008] O.J. No. 4566	Board of Directors of Rouge Valley Health System	Administrative exercise of statutory discretion re: consolidation of mental health program.	Decision is one within the discretion or policy role of the board = reasonableness standard.
Hamilton Street Railway Co. v. Amalgamated Transit Union, 2008 CanLII 56007 (ON S.C.D.C.)	Labour Arbitrator	Arbitrator performing "core function" – interpreting Collective Agreement.	Decision within Arbitrator's expertise, not jurisdictional, older jurisprudence = patent unreasonableness standard. Now, standard cut down to reasonableness. Same deference.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Conway v. Darby, 2008 CanLII 54773 (ON S.C.)	Consent and Capacity Board	Statutory appeal from a decision of Consent and Capacity Board on a determination of capacity	Pre-*Dunsmuir* standards set out in *Starson v. Swayze*, 2003 SCC 32, still apply, standard = reasonableness.
Lester v. Ontario Racing Commission, 2008 CanLII 48813 (ON S.C.D.C.)	Ontario Racing Commission	Judicial review of penalty decisions of ORC with respect to cheating. Natural justice raised.	ORC has broad mandate and expertise in regulating racing. Standard of review is reasonableness on penalty decisions – already established. There is no standard of review analysis for natural justice.
TTC Insurance Co. v. Watson, 2008 CanLII 49337 (ON S.C.D.C.)	Director's Delegate of Financial Services Commission of Ontario	What is the standard of review for decisions of the Director's Delegate relating to area of expertise?	Pre-*Dunsmuir* standard of review of decisions of the Director's Delegate was "patent unreasonableness" when the decision was related to the domain of expertise: *Liberty Mutual Insurance Co. v. Young*, [2006] O.J. No. 952. Standard of review post-*Dunsmuir* cut down to reasonableness. No difference in amount of deference given.
Gore Mutual Insurance Co. v. Co-Operators General Insurance Co., 2008 CanLII 46914 (ON S.C.)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Arbitrator's decision interpreting *Statutory Benefits Accident Schedule* and facts of case.	The parties disagreed on the standard of review, one argued correctness, the other argued reasonableness. In the end Perell J. found that the Arbitrator's decision was both correct and reasonable and did not decide which standard of review ought to be applied.
Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board), [2008] O.J. No. 3904.	Ontario Energy Board	Issue in this case was decided to not be a matter of discretion or fact, but rather of jurisdiction and law outside area of expertise.	Pre-*Dunsmuir* jurisprudence held that a board's decisions with respect to the extent of its powers do not attract deference. Here: "no reason to depart from the standard of correctness, nor does the decision in *Dunsmuir* lead to a different conclusion."
Thunder Bay Regional Health Sciences Centre v. Ontario Public Service Employees Union, 2008 CanLII 48154 (ON S.C.D.C.)	Labour Arbitrator	Standard of review for decision of an arbitrator awarding specific work under a collective agreement. Interpretation of agreement and statutory interpretation. Mixed fact and law.	Standard, as in pre-*Dunsmuir* jurisprudence, is deferential, but no longer 'patent unreasonableness.' Deference now contained within 'reasonableness' standard. But Arbitrator's decision ultimately found to be unreasonable. Parties agreed that standard should be reasonableness.
ADGA Group Consultants v. Lane, 2008 CanLII 39605 (ON S.C.D.C.)	Human Rights Commission	Standard of review for questions of fact, mixed law and fact, and law.	Pre-*Dunsmuir* jurisprudence applied. Questions of fact and mixed fact and law are reviewed on reasonableness standard. Questions of law outside area of expertise on correctness standard.
Bajor v. Ontario (Labour Relations Board), 2008 CanLII 37608 (ON S.C.D.C.).	Ontario Labour Relations Board	Primary issues in the case were findings of pure fact, and interpretations of the *Employment Standards Act*. Dr. Bajor wanted correctness standard applied.	Pre-*Dunsmuir* deference to labour arbitrators and labour boards, referenced here to para. 54 of *Dunsmuir*, was adopted. The standard should be reasonableness.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Igbinosun v. Law Society of Upper Canada, 2008 CanLII 36158 (ON S.C.D.C.)	Law Society Discipline Committee and Appeal Panel	Committee interpreting provisions of its home statute, imposing a penalty, making findings of fact, mixed fact and law. Appellant raised issues of procedural justice and natural fairness.	As established in *Evans*, *Dunsmuir* does not change standard of deference to Law Society Discipline Committees. Reasonableness is the deferential standard. Questions of law outside area of expertise (i.e. home statute) are reviewable on the correctness standard. Procedural justice and natural fairness do not attract standard of review analysis.
Jeremiah v. Ontario (Human Rights Commission), 2008 CanLII 46915 (ON S.C.)	Human Rights Commission	Review of Commission's decision not to deal with complaint due to delay.	*Dunsmuir* does not change older jurisprudence which mandates a high level of deference to the OHRC (patent unreasonableness). Standard will now be reasonableness, but high deference remains. Only *true* jurisdictional questions under. s. 34(c) of the *Human Rights Code* will be reviewed on correctness standard. The decision not to deal with a particular part of the complaint may have been a jurisdictional decision, but the OHRC was correct in any event.
Law Society of Upper Canada v. Evans, 2008 CanLII 34276 (ON S.C.D.C.)	Law Society Discipline Committee and Appeal Panel	Involved a decision of first impression: whether to restore membership to former judge found guilty of serious misconduct.	"I do not see *Dunsmuir* as having any impact on the well-established standards for review of decisions from the Society's Appeal Panel. The Appeal Panel is entitled to deference on its findings of mixed fact and law and on its interpretation of the Act and this Court should only intervene if the Appeal Panel's decision is unreasonable. However, on questions of law outside that area of expertise, the Appeal Panel is required to be correct."
Watt v. Classic Leisure Wear, 2008 CanLII 32818 (ON S.C.D.C.)	Ontario Municipal Board (Review Board)	Question involved whether Board has jurisdiction to determine right of way, access and egress issue. Statutory appeal with leave.	On a narrow jurisdictional issue like this the Board is required to be correct. In this case the Board correctly asserted jurisdiction over the issue.
Greater Essex County District School Board v. Ontario Secondary School Teachers' Federation, District 9, 2008 CanLII 32805 (ON S.C.D.C.)	Labour Arbitrator	Primarily interpretation of collective agreement. Mixed law and fact. Arbitrator references other collective agreements as interpretive aid regarding collective agreement at issue.	Parties agreed that standard would be reasonableness. Not much analysis in majority judgment. In dissent, Swinton J. also accepted that standard was reasonableness, but reached conclusion that Arbitrator's decision was ultimately not within "range of acceptable outcomes."

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Walsh v. Hamilton (City) Chief Building Official, 2008 CanLII 32325 (ON S.C.)	Chief Building Inspector	Mixed question of law and fact regarding interpretation of building code definition, and nature of contested structure.	"*Dunsmuir* also held that an exhaustive analysis to determine the proper standard is not required where the jurisprudence has already determined in a satisfactory manner the applicable standard. In this case, the appropriate standard has been previously discussed in *Runnymede*, *1218897* and *Rotstein*, *supra*. These cases held that a standard of reasonableness is applicable when deciding questions of mixed law and fact..."
Mulligan v. Laurentian University, 2008 ONCA 523 (CanLII)	Laurentian University, Oversight Committee and Dean	Decision whether to admit students to program who did not meet funding requirements, but who met academic standards.	Adopted longstanding, pre-*Dunsmuir* jurisprudence indicating high level of deference to discretionary decisions going to the core of university administration. Decision was reasonable and no denial of natural justice occurred.
Venneri v. College of Chiropractors of Ontario, 2008 CanLII 27824 (ON S.C.D.C.)	Discipline Committee of College of Chiropractors	Questions of mixed fact and law relating primarily to professional misconduct with respect to patient consent. Appellant also raised natural justice with respect to notice and adequacy of reasons.	Parties agreed on reasonableness, court cited pre-*Dunsmuir* jurisprudence such as *Dr. Q.* for reasonableness standard for professional conduct decisions. Already well established that standard of review analysis does not apply to natural justice – decision-maker must be correct.
Lonergan v. Ontario (License Appeals Tribunal), 2008 CanLII 27477 (ON S.C.D.C.)	License Appeals Tribunal	Exercise of discretion, and findings of fact and credibility.	This was a very brief endorsement. Court cited *Dunsmuir* but relied on previous jurisprudence: "*Cecillo v. Tarion Warranty Corp.* [2007] O.J. No. 1692 (Div. Ct.), dictates that the applicable standard of review is correctness on questions of law and, on questions of fact or mixed fact and law, reasonableness simpliciter.
Cotton v. College of Nurses of Ontario, 2008 CanLII 26674 (ON S.C.D.C.)	College of Nurses, Board of Inquiry	Decision of Board to compel Applicant to submit to medical examination regarding fitness to practice. No reasons given, question of natural justice.	The parties agreed that for non-procedural questions the appropriate standard of review was reasonableness. No further analysis done. On questions of natural justice, a standard of review analysis is not performed, decision must be correct.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Clifford v. Ontario (Attorney General), 2008 CanLII 26256 (ON S.C.D.C.)	OMERS Appeal Subcommittee	Issue involved pension entitlement of wife and alleged co-habiting partner of deceased firefighter. Mixed question of law and fact regarding spousal status. Also raised issues of natural justice, reasonableness apprehension of bias.	*Dunsmuir* has "no impact" on standard of review for questions of fact or mixed fact and law. Pre-existing jurisprudence cited, parties also agreed that standard should be reasonableness. Natural justice demands that decision-maker be correct with respect to procedure. Reasonableness of decision could not be assessed due to inadequacy of reasons. Decision quashed and sent back. Dissent relied on previous jurisprudence as well in setting standard of review at reasonableness. Came to different conclusion on procedural fairness.
Shooters Sports Bar Inc. v. Ontario (AGCO), 2008 CanLII 25052 (ON S.C.D.C.)	Alcohol and Gaming Commission, Registrar	Statutory appeal only permitted on question of law.	Pre-*Dunsmuir* jurisprudence consistently held this board to standard of correctness. No privative clause, only questions of law may be appealed. *Dunsmuir* has no impact on standard of review.
Canadian General-Tower Ltd. v. United Steel, Paper and Forestry, Rubber, etc. Intl. Union, Local 862, 2008 ONCA 404 (CanLII)	Labour Arbitrator	Question relating to definition of "temporary layoff" under collective agreement for purposes of supplementary unemployment benefit. Employer argued for a correctness standard because it said that Arbitrator was interpreting the *EI Regulation* – statutory interpretation of general significance.	This case was on appeal from a decision of the Divisional Court which had been rendered pre-*Dunsmuir* and which had applied the patent unreasonable standard. Pre-existing jurisprudence indicates that standard of review is patent unreasonableness. Court here finds that standard should be reasonableness, citing older jurisprudence, and citing some of the P & F factors. This case involved interpreting a collective agreement, not a question of general legal significance. Court does not address "spectrum of deference" issue within single reasonableness standard.
Wolfe v. Ontario (Provincial Police), 2008 CanLII 23503 (ON S.C.D.C.)	Ontario Civilian Commission on Police Services	Finding of discreditable conduct and imposition of penalty.	Pre-*Dunsmuir* standard cited. Reasonableness continues to be the applicable standard post-*Dunsmuir*.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Visic v. Ontario (Human Rights Commission), 2008 CanLII 20993 (ON S.C.D.C.)	Human Rights Commission	Commission decision not to refer complaint to tribunal. Complaint involving law school's refusal to remove first year marks from transcript when student withdrew for medical reasons.	"[31] ...That is to say, the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded (see *Dunsmuir*, para. 62). This jurisprudence is sufficient to determine the standard of review – which is that of reasonableness."
Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819, [2008] O.J. No. 1353	Ontario Labour Relations Board	Dispute relating to late filing of employer's response to certification application from Union. Employer sought judicial review of labour board decision.	Appeal dismissed as moot, however Court of Appeal interpreted *Dunsmuir* in the labour relations context for the first time as follows: "[43] In the nomenclature of old, Board decisions were not to be set aside unless they were patently unreasonable or clearly irrational. *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, has simplified the standard of review... However, both the result and the reasoning in *Dunsmuir* affirm a continuing stance of deference in the field of labour relations... The majority in *Dunsmuir* notes that an exhaustive analysis is not required in every case to determine the proper standard of review: if the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded a decision maker with regard to a particular category of question, the search for the appropriate standard is over."

Summary of Conclusions

- At least 30 of the decisions cited above have followed pre-existing jurisprudence in determining the applicable standard of review. Several decisions have explicitly stated that *Dunsmuir* had no impact on the applicable standard of review.[26]
- Where you would expect *Dunsmuir* to have had more impact (i.e. where the pre-existing standard of review was patent unreasonableness), there has not actually been a great deal of new analysis performed. One important decision behind this trend was arguably *Mills* because it reasserted the "no sliding scale" rule from *Ryan v. Law Society of New Brunswick*, and because it suggested that the old patent unreasonableness standard should now migrate into a monolithic reasonableness standard. However, post-*Mills*, reviewing courts have not reopened the question of how a body of older jurisprudence which advocates very high levels of deference under the patent unreasonableness standard can be incorporated into a single reasonableness standard of review which retains a conflicting body of less deferential jurisprudence.
- *Dunsmuir* has had some impact where courts have undertaken more fulsome standard of review analyses. In cases where the standard of review for a particular decision-maker was unclear, *Dunsmuir* has been considered in more detail. Similarly, in cases where the particular question that has arisen was unusual, a more detailed standard of review analysis is sometimes undertaken.
- One potentially significant impact of *Dunsmuir* has been with respect to what is to be reviewed on the correctness standard. Several cases have suggested that the applicability of the correctness standard has been narrowed.[27] *Dunsmuir's* clarifications regarding what are 'true' jurisdictional issues, and regarding what may be considered issues of pure law with general relevance for the legal system as a whole, appear to have made some inroads.[28] It is likely too early to say for certain, but it appears that there is a move

[26] See *Law Society of Upper Canada v. Evans*, 2008 CanLII 34276 (ON S.C.D.C.); *Visic v. Ontario (Human Rights Commission)*, 2008 CanLII 20993 (ON S.C.D.C.); *Shooters Sports Bar Inc. v. Ontario (AGCO)*, 2008 CanLII 25052 (ON S.C.D.C.)

[27] See, for example, *Whitely v. Shuniah*, [2008] O.J. No. 2823.

[28] See, for example, *University of Windsor Faculty Association v. University of Windsor*, 2008 CanLII 23711 (ON S.C.D.C.); *Jacobs Catalytic v. International Brotherhood of Electrical Workers*, 2008 CanLII 26686 (ON S.C.D.C.);

towards greater deference overall. Courts seem to be more reluctant to apply the correctness standard given the narrowing of what can be termed "jurisdictional."

Future Issues

- As discussed above, one unresolved tension remains what to do with previous jurisprudence which indicated that extremely high deference was to be afforded to certain administrative tribunals, such as the Ontario Labour Relations Board, while other bodies that have traditionally been reviewed on the reasonableness standard have arguably been afforded less deference. So far the approach has often been that counsel will either agree that the standard of review is now reasonableness, or the reviewing court will decide that the new standard of review is reasonableness, without engaging in an extended or detailed standard of review analysis. The bulk of the analysis is spent on the underlying merits of the decision being reviewed, on the context in which the decision was made, and on the range of acceptable outcomes (including both correct and reasonable outcomes). In this respect the practical post-*Dunsmuir* approach is not entirely incompatible with the approach advocated by Binnie J. in his concurring reasons. It could be interesting to observe the extent to which the standard of review analysis may become less prominent, or increasingly brief, in future judicial review decisions.
- In that vein, it is possible that we may see a move in the future towards statutorily directed standards of review, bypassing completely the established jurisprudence regarding the contextual standard of review analysis. One example to watch out for is the new human rights regime in Ontario. It is arguable that s. 45.8 of the *Human Rights Code*, R.S.O. 1990, c. H.19, is not a privative clause, but rather a directed standard of review. This section unambiguously states that decisions of the Human Rights Tribunal are not to be interfered with unless patently unreasonable. Comparisons can be made between that section and s. 59 of British Columbia's *Administrative Tribunals Act*, S.B.C. 2004, c.45, which has consistently been interpreted as a statutorily directed standard of review.

Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal), [2008] O.J. No. 2460; *Jeremiah v. Ontario (Human Rights Commission)*, 2008 CanLII 46915 (ON S.C.).

- For the moment, it appears that the shift from the "pragmatic and functional" approach to the "judicial review analysis" has simplified the judicial review exercise at least insofar as there are now only two possible outcomes following the elimination of the patent unreasonableness standard. This development alone goes a long way toward achieving the Supreme Court's stated goal of making the law in this area easier to implement.
- However, at the same time, the judgment in *Dunsmuir* itself indicates that no matter how simple the analysis, the practical application of that analysis will necessarily remain a complex exercise. The fact that three judges of the Court thought that the applicable standard on the legal interpretation issue in this case should have been correctness, while the majority thought that the standard should be reasonableness, indicates that some degree of complexity is unavoidable. Even on a question as fundamental as whether a statutory labour adjudicator has expertise in interpreting the common law of employment, there is still room for disagreement. In the final analysis, it is difficult to overstate the importance of the Supreme Court's repeated admonitions to keep the contextual nature of this analysis at the forefront.