Dunsmuir and Substantive Review – Implications and Impact: A Preliminary Assessment

Gerald P. Heckman
Faculty of Law, University of Manitoba

2009 National Roundtable on Administrative law
Canadian Institute for the Administration of Justice
Halifax, Nova Scotia

May 29, 2009

Standard of review analysis

No deference       More deference

Pre-Dunsmuir

Post-Dunsmuir

Binnie's Prediction

Spectrum?

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

May 29, 2009
Standard of review analysis

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

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

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
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

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
   - "pragmatic and functional approach" is replaced by "standard of review analysis"
2. Single reasonableness standard
   - Patent unreasonableness and reasonableness *simpliciter* are merged into reasonableness
Dunsmuir – what has changed?

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"
   - Precedent becoming most important determinant of the SOR
   - Where a full analysis is conducted, the nature of the question predominates

May 26, 2009

Dunsmuir – what has changed?

3. Court emphasizes past precedent (cont'd)
   a) What is "a particular category of question"? How loosely is precedent defined?
      • Proprio, Khosa
   b) Will precedent-based arguments really save time and energy?
   c) Will Dunsmuir perpetuate questionable precedent?
      • CIR v. CTA

May 26, 2009

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

May 26, 2009
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

May 20, 2009

Dunsmuir - what has changed?

4. Court formulates guidelines (cont’d)
   • How are the guidelines used?
     ▪ They establish a presumption of what the appropriate standard should be
     ▪ The presumption is rebuttable
       ▪ Idahosa (FCA)
Dunsmuir – what has changed?
6. 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 viewed
   narrowly

May 29, 2009

Dunsmuir – what has changed?
6. True questions of jurisdiction (cont’d)
c. Depending on the inclinations of the
reviewing court, Dunsmuir may either deter
or enable the characterization of questions
as jurisdictional
   - Hibernia Management (NLCA)
   - Watkin (FCA)

May 29, 2009

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”

May 29, 2009
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 that sets the applicable degree of deference
   - Rejected by Ontario (Mills), Alberta (Finning), Federal (Telfer') Courts of Appeal

2. Justification, transparency, intelligibility
   - 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 (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

Statutory standards of review: Khosa

Federal Courts Act
18.1 (3) On an application for judicial review, the Federal Court may
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.
(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal ...
(b) based its decision or order on an erroneous finding of fact that it made in a perjured or capricious manner or without regard for the material before it;
Statutory standards of review: *Khosa*

- **Bottom line**
  - Legislatures have the power to specify standards of review
  - Courts will interpret such statutes restrictively
    - They will interpret these statutes against the backdrop of the common law (i.e. the *Dunsmuir* framework)

May 29, 2009

---

Statutory standards of review: *Khosa*

- **Federal Courts Act:**
  - 19.1(4)(e)-(f) are "grounds" not "standards" of review
  - They authorize court intervention
  - Whether the court will intervene is discretionary and depends, among other things, on the standard of review

May 29, 2009

---

Statutory standards of review: *Khosa*

- **B.C. Administrative Tribunals Act:**
  - Patent unreasonableness "lives on" in BC
  - Its content and "the precise degree of deference it commands... will necessarily continue to be calibrated according to the general principles of administrative law"
  - Troubling?
    - Rothstein J.
    - Statutory patent unreasonableness was surely a single standard

May 29, 2009
Dunsmuir's impact – final observations

- Growing impact of the nature of the question
- Requirement of justification, transparency, intelligibility
- Overall, does Dunsmuir "force judges to address the relevant questions"?