

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

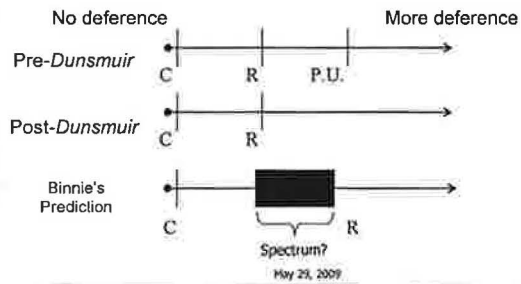
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Standard of review analysis



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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
- Silent statute

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Standard of review analysis

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?

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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

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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

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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

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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?
 - CNR v. CTA

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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

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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

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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)

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Dunsmuir – what has changed?

5. Deference re: decisions on questions of law in presence of a statutory appeal?

- Appeared to be in question
- Khosa reaffirms Southam

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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

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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)

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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"

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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

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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)

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Dunsmuir reasonableness review

2. Justification, transparency, intelligibility

- Relationship with "outcomes requirement"
- 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

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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

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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

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Statutory standards of review: *Khosa*

Federal Courts Act

18.1 (3) On an application for judicial review, the Federal Court may

- 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
- 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.
- The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal ...
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

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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)

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Statutory standards of review: *Khosa*

- *Federal Courts Act:*
 - 18.1(4)(a)-(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

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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

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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"?

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