

Dealing with *Dunsmuir*: Judicial Deference and Reasonableness Review

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Dealing with *Dunsmuir*

- Historical overview of deference and reasonableness review.
- “Reigning In” the categories associated with correctness review.
- The challenge of implementing reasonableness review.



Historical Overview: The Conceptual Period

- Pre-*Nicholson* and pre-*CUPE* period in Canadian administrative law.
 - “all-or-nothing” approach to judicial review, which hinged on abstract characterization of the power or issue at stake.
 - If issue was “jurisdictional” or power was “judicial”, courts could engage in *de novo* review.
 - **But**, if the issue was “non-jurisdictional” or power was “administrative”, no independent judicial scrutiny of administrative decision.



Historical Overview:

The Pragmatic and Functional Period

- Goal is to shift judicial focus away from abstract conceptual categories towards practical consequences of administrative decisions and regulatory context.
- Two problems:
 - The conceptual edifice was never explicitly reformed, so doctrine of deference is “layered” over top of the conceptual approach.
 - The pragmatic and functional approach becomes complex, confusing and conflicted, which is a distraction from more substantive issues.



Overview:

The Dis-Functional Period

- Disenchantment and frustration with the pragmatic and functional approach leads to revival of abstract, *a priori* concepts and categories of issues which attract correctness review.
- *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190.



Dunsmuir's Categories of Correctness Review

- (1) Constitutional questions;
- (2) “True” questions of *vires*;
- (3) General questions of law which are “of central importance to the legal system as a whole and outside the adjudicator’s area of expertise”; and
- (4) Questions regarding the jurisdictional lines between two or more competing specialized tribunals.



“Reigning In” the Conceptual Categories Associated with Correctness Review

- “True” questions of *vires*: *Alberta (Information and Privacy Commissioner) v Alberta Teachers’ Association*, [2011] 3 SCR 654; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10.
- Constitutional questions: *Doré v Barreau du Québec*, 2012 SCC 12.
- General questions of law: *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, [2011] 3 SCR 616.
- Concurrent authority: *British Columbia (Workers’ Compensation Board) v. Figliola* (?)



The Challenge of Implementing Reasonableness Review

- Different definitions of “reasonableness review”:
 - *CUPE v New Brunswick Liquor*: the decision “cannot be rationally supported by the relevant legislation”;
 - *Canada (Attorney General) v PSAC*: the decision is “clearly irrational, that is to say evidently not in accordance with reason”;
 - *Southam*: the decision contains a defect that “is apparent on the face of the tribunal’s reasons”;
 - *Ryan v Law Society of New Brunswick*: the decision is “so flawed that no amount of curial deference can justify letting it stand”.



Baker v Canada

- Reasonableness review is a tool or method, not an abstract philosophical concept.
- Reasonableness review is intimately connected with the purpose of judicial review, which is to ensure that the substance of administrative decisions are consistent with relevant legal values and principles.



Reasonableness Review in *Dunsmuir*

- Agrees with Dyzenhaus that judicial deference requires “not submission by a respectful attention to the reasons offered or which could be offered in support of a decision.”
- “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.”



Reasonableness Review in 2012

- *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association.*

An administrative decision which, on its face, disregards a statutory limitation period and does not explain the oversight is nevertheless reasonable, because the court can repair the oversight by speculating about a possible reasonable justification for the outcome.



Reasonableness Review in 2012

- *British Columbia (Workers' Compensation Board) v Figliola.*
 - administrative decision provides legitimate reasons (i.e. reasons which are consistent with the values and principles of the enabling legislation, as well as common law precedent)
 - the discretionary decision is nevertheless is “unreasonable” because it prioritizes its statutory mandate (broad enforcement of human rights) over unwritten common law principles of finality, avoidance of multiplicity which the court prefers.



Reasonableness Review in 2012

- *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*.
 - administrative award of costs which provides legitimate reasons (i.e. reasons which are consistent with the values and principles of the enabling legislation, as well as common law precedent).
 - decision is nevertheless unreasonable, because the outcome conflicts with the Court's interpretation of the statutory provision (legislative history, *eiusdem generis* canon of statutory construction, etc.).



What is the matter with Reasonableness Review in 2012?

- The law pertaining to reasonableness review is confused and arcane.
- Hangover from the dis-functional period suggests judicial reluctance to follow Binnie J.'s suggestion in *Dunsmuir* that reasonableness review be “contextualized”.



What is the matter with Reasonableness Review in 2012?

- The importance of practiceThe Supreme Court needs to explain why the burden of justification, which requires “transparency, intelligibility and justification”, is more or less onerous depending on the context.
- Focus on practical consequences for the individuals affected by the decision.

