POSTSCRIPT
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Back to the Future: *Dunsmuir v. New Brunswick*

In Dunsmuir, the Court heeded the disgruntlement percolating up from lawyers and commentators: The Court unanimously reverted from three back to two standards of review (correctness and reasonableness), and attempted to provide clearer guidance on the determination and application of the appropriate standard of review. However, this clarion call for clarity was somewhat muffled by the split in the Court on methodology (one majority, two concurrences).

Dunsmuir concerned the discharge of a non-unionized employee of the New Brunswick Department of Justice. The issue relevant to standard of review was whether the adjudicator under the Public Service Labour Relations Act was authorized under the statute to determine whether the employee had in fact been discharged for cause, even though the employer did not assert cause, but rather relied on its contractual entitlement to terminate with reasonable notice.

Writing for the majority, Bastarache and Lebel JJ. (McLachlin, Fish and Abella JJ concurring), concede that the current state of the law "provides great flexibility but little on-the-ground guidance, and offers too many standards of review".[1] They insist, however, that a return to two standards of review is not merely a return to pre-Southam law. The "pragmatic and functional approach", with its emphasis on the balancing of factors, is revised (or perhaps jettisoned) in favour of the "standard of review analysis" that distills the test to three categorical bases for deference: the presence of a privative clause; a discrete and specialized regime; and a question of law that is not of central importance to the legal system or beyond the specialized expertise of the tribunal.

The majority then provides a non-exhaustive list of situations where a reasonableness standard is presumptively appropriate, and a few examples where the correctness standard would be suitable. , Most notably, the correctness standard will apply where 'true' jurisdiction or constitutionality are at stake, or where the legal issue is both of central importance to the legal system as a whole and outside the adjudicators' specialized area of expertise. Consistent with this renewed respect for privative clauses, the majority revives the concept of jurisdictional question, long submersed under the language of deference. However, the majority also invokes Dickson J's caution that reviewing judges "must not brand as jurisdictional issues that are doubtfully so" in order to subject tribunal decisions to more exacting review. In so doing, the majority links jurisdiction back to vires, and appears to confine jurisdictional questions to the statutory authority to make the inquiry and decide a particular matter.

The concurring judgment by Binnie J. considers it a "distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is of central importance to the legal system as a whole". He prefers to adopt a simpler rule that provisions of the home statute and closely related statutes attract a reasonableness standard of review. The concurring judgment of Deschamps J. (joined by Charron and Rothstein JJ) advances the most formalist analysis. Deschamps J. proposes that questions of fact, mixed fact and law, discretion, and questions of law protected by a

[1] Dunsmuir v. New Brunswick, 2008 SCC 9 at para. 43

privative clause, attract the deferential standard of reasonableness. By implication, other questions of law warrant stricter scrutiny for correctness.

With the reduction from three to two standards of review, the Court must articulate the criteria for identifying what is (or is not) reasonable. The majority rejects the utility of the negative approach that examines the immediacy and magnitude of the alleged defect. Rather, the majority advocates a positive inquiry centred on the ideal of rationality, and directs the assessment toward "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes". Thus, indicia of reasonableness include the process-oriented factors of intelligibility, justification and transparency of the reasoning, as well as an outcome that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". *Quaere* the relationship between the majority's explicit attention to the quality of reasoning as a component of substantive review and the common law duty to give reasons recently established by Baker.

Binnie J.'s concurring judgment endorses the move to two standards, but he is preoccupied with the methodological implications of the collapse of reasonableness simpliciter and patent unreasonableness into a single standard. Most significantly, he maintains that the reclamation of a single standard for deference will necessarily introduce precisely what the Court rejected in *Ryan*, namely, a sliding scale of scrutiny under the general rubric of reasonableness. Rather than resolve the myriad challenges that arose under the 'pragmatic and functional' approach, the majority's 'standard of review' approach will simply "shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference". Many of the factors formerly reserved to the determination of the appropriate standard of review will be displaced onto an assessment of the degree of deference owed to the decision maker. For instance, Binnie J does not regard a privative clause as signaling a standard of review of reasonableness over correctness, but rather as demanding a more rigorous application of reasonableness review.

In many ways Dunsmuir signals a seismic shift in the jurisprudence on substantive judicial review. Only by monitoring the reverberations over time will it be possible to judge whether it is a shift on the scale of Nicholson, CUPE, and Baker.