

## RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

### Introduction

Over the years, applications for judicial review and the hearing of statutory appeals from energy regulators have been bedeviled by issues about choice of the appropriate standard of review and the application of the chosen standard. The prime exhibit is clearly the judgment of the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*.<sup>1</sup> In a world where there were three possible standards of review, the Supreme Court split on the appropriate choice. According to the majority, the appropriate standard was the most intrusive, that of correctness. In contrast, the minority were of the view that the issues in question demanded the highest level of deference, that of patent unreasonableness (or, at the very least, unreasonableness). That choice as between the two extremes in effect determined the outcome.

As I understand it, *ATCO* was the subject of a lively debate at last year's conference. In my presentation on recent developments in administrative law at the annual CAMPUT conference in Kingston, I was sharply critical of the majority position as far too anxious to intervene in the home territory of the regulator. Since then, in energy regulation cases in various jurisdictions, lower courts have attempted to come to terms with how to apply *ATCO*.<sup>2</sup>

This struggle to discern the appropriate standard of review (and how to apply the chosen standard) has by no means been confined to the domain of judicial review and statutory appeals in an energy regulation context. It has been a distracting feature of Canadian judicial review law for over fifty years but more intensely so since the advent of the "pragmatic and functional" analysis as the touchstone for identifying the appropriate standard of judicial review.<sup>3</sup> Binnie J., in characteristically blunt language, has described the process as "unduly subtle, unproductive [and] esoteric".<sup>4</sup> As such, it contributes to "lengthy and arcane" discussions in both factums and on the hearing of applications and appeals<sup>5</sup> and, often, on further appeal. This inevitably involves "undue cost and delay".<sup>6</sup>

As a consequence, it came as welcome news that the Supreme Court of Canada had seemingly selected a particular case as a vehicle for reassessing its approach to conducting judicial review of and statutory appeals from administrative decisions with particular reference to the problems created by its standard of review jurisprudence. That case was *Dunsmuir v. New Brunswick*,<sup>7</sup> judgment in which was delivered on March 7, 2008. The majority<sup>8</sup> proclaimed a decision that provided "a principled framework that is

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<sup>1</sup> [2006] 1 S.C.R. 140.

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<sup>3</sup> In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at 1088 (*per* Beetz J.).

<sup>4</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 133.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra*, note 4.

<sup>8</sup> Bastarache and LeBel JJ. (McLachlin C.J., Fish and Abella JJ. concurring).

more coherent and workable”<sup>9</sup> on both substantive and procedural grounds. In two separate judgments (including one delivered by Binnie J.),<sup>10</sup> the other four judges seemed to accept that a solution had been found to an important procedural fairness issue – the right to a hearing of those employed by the state under a contract of employment.<sup>11</sup> However, they were by no means convinced that the majority had produced a satisfactory reconceptualization of the bases of review on substantive grounds.

This paper is an attempt to assess this very ambitious initiative on the part of the Supreme Court of Canada.

### **Dunsmuir v. New Brunswick - Overview**

It is almost nine years since the Supreme Court of Canada delivered its judgment in *Baker v. Canada (Minister of Citizenship and Immigration)*,<sup>12</sup> a case that had a profound effect on many critical issues in Canadian judicial review of administrative action on both substantive and procedural grounds. In *Dunsmuir v. New Brunswick*, the majority judgment (delivered by Bastarache and LeBel JJ.) proclaimed similar ambitions:

The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when dealing with fundamental principles.<sup>13</sup>

The reality is that *Dunsmuir* does very little violence to the holding and principles articulated in *Baker*.<sup>14</sup> Nonetheless, it is a decision that alters the typography of Canadian judicial review principles in significant ways.

It reduces the number of review standards in Canadian common law judicial review law from three to two with “patent unreasonableness” disappearing from the lexicon. It renames the test deployed to establish a standard of review from the “pragmatic and functional analysis” to “standard of review analysis”. In so doing, it explicitly resurrects or, perhaps more accurately, recognizes a category of “true questions of jurisdiction or *vires*.”

In the domain of procedural fairness review, it establishes that most forms of public employment are best viewed through the lens of private employment law principles irrespective of whether the affected person may be categorized as a public office holder.

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<sup>9</sup> *Supra*, note 4, at para. 32.

<sup>10</sup> Binnie J. was alone, and Deschamps J. was joined by Charron and Rothstein JJ.

<sup>11</sup> *Supra*, note 4, at para. 119 (Binnie J.) and 173 (Deschamps J.).

<sup>12</sup> [1999] 2 S.C.R. 817.

<sup>13</sup> *Supra*, note 4, at para. 26.

<sup>14</sup> To the extent that *Baker* accepted that three standards of review and the continuation of the pragmatic and functional analysis (even in the case of discretionary powers), there has been a change. However, it was a case in which the Court accepted that unreasonableness was the appropriate standard of review and that clearly survives *Dunsmuir*, as presumably do the Court’s pronouncements on procedural fairness.

As a consequence, there will be few categories of public employee to which the principles of procedural fairness will apply as a precondition of proper dismissal. As a further consequence, reinstatement, through the vehicle of a declaration of invalidity or a setting aside, will be an even more infrequent occurrence.

The changes in the domain of standard of review were not surprising. In two previous judgments,<sup>15</sup> LeBel J. (on each occasion supported by Deschamps J.) had advocated a reduction in the number of standards of review from three to two. While that point of view did not garner the support of a majority in either of those judgments, there continued to be considerable confusion in the application of the existing tests for standard of review.<sup>16</sup> There was frequently contestation as to the precise meaning and content of the four components of the pragmatic and functional analysis. Providing a satisfactory articulation of the difference between an unreasonable and a patently unreasonable decision continued to elude the judges. Indeed, the Supreme Court itself contributed to this state of confusion by seemingly inconsistent description and balancing of the various elements of the pragmatic and functional analysis.<sup>17</sup> Counsel and lower courts were frustrated and often what seemed to be inordinate amounts of time were spent in factums and oral argument on the identification of the appropriate standard of review. LeBel J.'s position aside, there was much rumbling in the ranks.

Perhaps because the issue was not litigated all that frequently, the due process rights of non-unionized statutory employees were not up front and centre among the domains that seemed ripe for clarification or reformation. In *Knight v. v. Indian Head School Division No. 19*,<sup>18</sup> the Court had extended the protection of procedural fairness to a statutory employee who served at the pleasure of the School Division. That seemed to be a logical extension or at least unsurprising evolution of the seminal judgment of Laskin C.J.C. in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*<sup>19</sup> and also judgments such as *Kane v. Board of Governors of the University of British Columbia*,<sup>20</sup> in which the Court had placed a high premium on the entitlement to procedural fairness when a statutory form of employment was in jeopardy, in that instance, continued tenure as a university professor.

Nonetheless, there were many questions that the case law did not satisfactorily resolve. For example, whose positions under statute, to use the language of *Knight*, had a "sufficient statutory flavour"<sup>21</sup> to qualify for this benefit of procedural fairness? To what extent, if at all, were these entitlements liable to be excluded in the affected person's

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<sup>15</sup> In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 and *Voice Construction Ltd. v. Construction and General Workers' Union, Local 92*, [2004] 1 S.C.R. 609.

<sup>16</sup> For an example of Justice LeBel's extra-judicial advocacy, see "Some Properly Deferential Thoughts on Deference" (2008), 21 *C.J.A.L.P.* 1.

<sup>17</sup> Aside from *ATCO*, *supra*, note 1, the most obvious example rested in the seemingly stark contrast between *Lévis v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 and *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, delivered on the same day.

<sup>18</sup> [1990] 1 S.C.R. 653.

<sup>19</sup> [1979] 1 S.C.R. 311.

<sup>20</sup> [1980] 1 S.C.R. 1105.

<sup>21</sup> *Supra*, note 19, at 672.

contract of employment? And, was reinstatement and an entitlement to all arrears of salary an automatic or near automatic consequence of a finding that there had been a violation of the principles of procedural fairness in the way in which the employer dismissed the employee?

As a consequence, if the judgment in *Dunsmuir* has brought both clarity and an appropriate balance of interests to these two areas of judicial review of administrative action, it will have performed a singular service. But has it?

## Facts

Dunsmuir was a New Brunswick public servant and legally a statutory office holder serving at pleasure. He was dismissed and given four and a half months salary in lieu of notice. In dismissing him by way of order of the Lieutenant Governor of the province, the government relied on section 20 of the *Civil Service Act*.<sup>22</sup> It provided that “[s]ubject to the provisions of this Act and any other Act” termination of any employee “shall be governed by the ordinary rules of contract”. According to the government, this meant it could dismiss Dunsmuir simply by providing him with reasonable notice or salary in lieu thereof. It did not have to establish cause or give him a hearing before dismissing him.

However, section 100.1 of the *Public Service Relations Act*<sup>23</sup> extended grievance rights to non-unionized employees such as Dunsmuir. Section 97(2.1), a provision expressed in section 100.1 to apply *mutatis mutandis* to grievances by non-unionized employees, stated:

Where an adjudicator determines that an employee has been discharged or otherwise disciplined **for cause** and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or the discipline as to the adjudicator seems just and reasonable in all the circumstances [emphasis added].

Dunsmuir, a court official with the Department of Justice, had been reprimanded on three occasions. However, the official reason provided for his dismissal on notice was that he was not suitable for the position he was occupying. In exercising his grievance rights under section 100.1, Dunsmuir did not confine himself to contesting the length of the notice period (as a common law contractual matter) but asserted that the government had in reality dismissed him for cause and that, if he established that and also that the government did not have cause, he was entitled to seek reinstatement.

The government challenged the right of the adjudicator to go behind the dismissal on notice to ascertain whether it was in reality for cause. In a preliminary ruling, the adjudicator rejected the government’s challenge holding not only that he could go behind the basis for the dismissal but also that he could, where appropriate, order reinstatement.

<sup>22</sup> S.N.B. 1984, c. C-5.1.

<sup>23</sup> R.S.N.B. 1973, c. P-25 (as amended).

Subsequently, having determined that Dunsmuir's dismissal was related to his work performance though not disciplinary, the adjudicator ordered that the government reinstate Dunsmuir as of the date of dismissal because it had dismissed him without a hearing.

On an application for judicial review,<sup>24</sup> the motions court judge determined that the appropriate standard of review was correctness and set aside the adjudicator's decision on the preliminary motion as incorrect in law. Rideout J. also held that there had been no violation of the principles of procedural fairness. Once the adjudicator had determined that the dismissal was not for disciplinary reasons, the adjudicator had in effect determined that this was not an instance of dismissal for cause. As a consequence, Dunsmuir, as an office holder at pleasure, had no entitlement to procedural fairness.

The Court of Appeal sustained that decision but on the basis of unreasonableness as the appropriate standard of review.<sup>25</sup> The Court of Appeal also held that Dunsmuir was precluded from asserting a failure of procedural fairness once he exercised his right to grieve under the Act.

The Supreme Court of Canada gave leave to appeal. On the appeal, the Court unanimously upheld the lower courts' decision. A majority of the Court, by reference to the standard of unreasonableness, held that the adjudicator's decision on the preliminary motion was unreasonable as a matter of law. Three of the judges (Deschamps J., Charron and Rothstein JJ. concurring) reached the same conclusion on the basis of correctness review. All nine members of the Court also held that persons in Dunsmuir's position have no entitlement to procedural fairness as a precondition of effective dismissal.

## **Analysis**

### Standard of Review

#### *Recasting the Methodology*

Any assessment of the new world of standard of review depends on understanding what precisely the majority judgment has in fact done. As Binnie J.'s concurring judgment makes clear, full comprehension may not be all that easy.<sup>26</sup>

In terms of the initial choice of an appropriate standard of review, the majority takes three steps with a view to simplifying the process. First, as described above, the majority reduces the number of standards of review from three to two by eliminating what they regarded as the most problematic of the three previous standards, patent unreasonableness. Indeed, the two other judgments seem to give at least qualified support

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<sup>24</sup> (2005), 293 N.B.R. (2d) 5 (Q.B.).

<sup>25</sup> (2006), 297 N.B.R. (2d) 151 (C.A.).

<sup>26</sup> *Supra*, note 4, at paras. 120-22.

to the project of reconceiving the methodology of standard of review and moving away from the existing regime requiring a choice from among three standards.<sup>27</sup>

Obviously, any reduction in the number of standards has a tendency to make this initial inquiry as to which standard of review applies less complex. However, as I will suggest below, it may actually simply postpone the complexity to a second stage, that of identifying where, on a spectrum of reasonableness, the reviewing court should locate itself in assessing the decision under attack.

Secondly, the majority jettisons the term “pragmatic and functional”, asserting that it may have misguided courts in the past.<sup>28</sup> Nevertheless, Bastarache and LeBel JJ. also accept that, in the overall scheme of things, the name is “unimportant”<sup>29</sup> and that it is the substance of the test that counts. In this context, the majority does not propose any new elements. The four relevant factors are the same as the four elements that made up the pragmatic and functional factors or considerations. However, it is notable that expertise is no longer described as the single most important factor.<sup>30</sup>

### *The Domain of Reasonableness*

More importantly, in line with the objective of simplification, the Court states that a full analysis is not necessary in every case.<sup>31</sup> Precedents may have addressed the issue of the appropriate standard of review. “[S]ome of them may be determinative in the application of the reasonableness standard in a specific case.”<sup>32</sup>

In elaboration of this, the majority had earlier emphasised the presence of a privative clause<sup>33</sup> or a question that was “one of fact, discretion or policy”<sup>34</sup> or one “where the legal and factual issues are intertwined and cannot be readily separated”<sup>35</sup> as situations where deference was to be expected. In the case of a privative clause, this was a “strong indication”<sup>36</sup> of a requirement of deference, and, in the instance of questions of fact, discretion or policy or inextricably intertwined issues of law and fact, “deference will usually apply automatically”.<sup>37</sup>

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<sup>27</sup> *Id.*, at para. 134 (Binnie J.) and para. 167 (Deschamps J.).

<sup>28</sup> *id.*, at para. 63.

<sup>29</sup> *Ibid.*

<sup>30</sup> Iacobucci J. has characterized it in these terms in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, relying on the judgment of Sopinka J. in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at 335.

<sup>31</sup> *Supra*, note 4, at para. 57.

<sup>32</sup> *Id.*, at para. 64.

<sup>33</sup> *Id.*, at para. 52.

<sup>34</sup> *Id.*, at para. 53.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.*, at para. 52.

<sup>37</sup> *Id.*, at para. 53.

Even though Binnie J. (in his concurring judgment) would have gone even further in making deference the norm in such situations,<sup>38</sup> this does constitute valuable signposting that not all factors in the test for establishing a standard of review rank equally and that some may confidently be treated as very commonly, if not invariably leading unreasonableness review. In those situations, counsel seeking to convince a reviewing court otherwise will have a heavy burden.

*Where Correctness Reigns (and the Resurrection of “True” Jurisdictional Error)*

The majority also identifies a range of situations where correctness review is required. They are resolution of constitutional questions, “determinations of true questions of jurisdiction or *vires*”,<sup>39</sup> and resolving issues of “general law” that are

... both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise.<sup>40</sup>

They also list “[q]uestions regarding the jurisdictional lines between two or more specialized tribunals” as ones where, in the past, correctness review has been applied.<sup>41</sup>

This too is useful even though once again Binnie J.<sup>42</sup> and also Deschamps J.<sup>43</sup> would have formulated the circumstances requiring correctness review somewhat differently. Indeed, in terms of the Court’s recent conflicting jurisprudence, there is the explicit recognition that there is nothing constitutionally unprincipled in courts deferring to decision-makers on pure questions of law on which they have special expertise.<sup>44</sup>

However, there is no doubt that the explicit re-insinuation of the concepts of jurisdiction and *vires* into the lexicon of judicial review will be both controversial and, I suspect, generate yet another search for a test or series of tests to identify the badges of what kinds of decision come within their range.

It is useful to recapitulate the history very briefly. For a long time, the Supreme Court of Canada deployed an expansive version of jurisdictional error using the concept of preliminary and collateral errors as a basis for avoiding or minimizing the impact of privative clauses.<sup>45</sup> As the majority point out in *Dunsmuir*,<sup>46</sup> in 1979, Dickson J.,

<sup>38</sup> For Binnie J., the final word on questions of general law should always rest with the courts (*id.*, at para. 128) and deference should be exceptional in situations where what is at stake is “an administrator’s conclusion of law *outside* his or her home statute, or a statute “intimately” connected thereto” (*id.*, at para. 128).

<sup>39</sup> *Id.*, at para. 59.

<sup>40</sup> *Id.*, at para. 60, citing the judgment of LeBel J. in *Toronto (City) v. C.U.P.E., Local 79*, *supra*, note 15, at para. 62.

<sup>41</sup> *Id.*, at para. 61.

<sup>42</sup> *Supra*, note 38.

<sup>43</sup> *Supra*, note 4, at para. 166: “A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.”

<sup>44</sup> *Id.*, at para. 56.

<sup>45</sup> See, for example, *Jarvis v. Associated Medical Services Inc.*, [1964] S.C.R. 497.

<sup>46</sup> *Supra*, note 4, at para. 35.

delivering the judgment of the Court in *New Brunswick Liquor Corporation v. Canadian Union of Public Employees, Local 963*,<sup>47</sup> deplored the Court's previous attitude and, while not jettisoning the concept of preliminary and collateral error entirely, cautioned courts against branding issues as coming within those categories too readily. The ultimate point in this evolution came when Bastarache J., in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,<sup>48</sup> stated, in a passage not cited in his judgment in *Dunsmuir*, that a jurisdictional question was now simply a way of describing issues for which the pragmatic and functional analysis demanded a correctness answer.

Nonetheless, the Court, without acknowledging it, did, from time to time, treat issues as jurisdictional or demanding of correctness review without a pragmatic and functional analysis and seemingly on an *a priori* basis. One of these examples was *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*,<sup>49</sup> a 2004 judgment of the Supreme Court also delivered by Bastarache J. The case involved the validity of a by-law restricting the number of taxi licences in the City.

There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy making function is being exercised.<sup>50</sup>

At one level, this might amount to no more than a statement to the effect that correctness is always the standard of review when a court is considering the validity of subordinate legislation. Legislative functions attract a correctness standard automatically without any standard of review analysis. However, in terms of *Dunsmuir*, what exactly are the badges of other forms of *vires* review and true jurisdictional questions? It also raises questions as to why the conferral of discretion in the form of a power to pass subordinate legislation should be treated differently from other policy-making discretions where, on the Court's own terms in *Dunsmuir*, deference and the reasonableness standard are now presumptively required.

Even more problematic is the terminology that the majority uses to describe true jurisdictional questions;

In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction.<sup>51</sup>

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<sup>47</sup> [1979] 2 S.C.R. 227.

<sup>48</sup> [1998] 1 S.C.R. 982, at para.

<sup>49</sup> [2004] 1 S.C.R. 485.

<sup>50</sup> *Id.*, at para. 5.

<sup>51</sup> *Supra*, note 4, at para. 59.

This follows a statement in which the majority purports not to be in any way reverting to the old concept of jurisdiction as a preliminary or collateral matter.<sup>52</sup> Yet, in this context, it is worth reflecting back to the 1971 judgment of the Court in *Bell v. Ontario Human Rights Commission*,<sup>53</sup> decided just a year after *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*<sup>54</sup> considered by most commentators to be the high water mark of judicial interventionism.<sup>55</sup> The preliminary question in *Bell*, which the Court treated as jurisdictional to justify correctness review by way an application for relief in the nature of prohibition, was whether the property with respect to which rental discrimination was alleged was a self-contained dwelling unit. Commentators such as Hogg<sup>56</sup> and Weiler<sup>57</sup> excoriated the Court for that decision and the classification of the question as jurisdictional. However, it must be asked whether the test articulated by the majority in *Dunsmuir* resurrects that possibility. Does not the issue whether rental accommodation is a self-contained dwelling unit involve a situation where

...the tribunal must explicitly determine whether its statutory grant of power gives it authority to determine a particular matter[?]

This is not meant to suggest that today's Court would take the same view of *Bell* as its predecessor that decided that case. Nonetheless, the re-introduction of language or a test that can be made so readily to fit the critical question in *Bell* should ring alarm bells in terms of the capacity of this judgment to give new life in the lower courts to the thinking and philosophies of the period between 1950 and 1979. That aside, it also raises serious questions of how well the majority has achieved its professed objective of simplifying and bringing greater clarity to the law.

### *Statutory Rights of Appeal*

While the majority was insistent that there were categories of "true" jurisdictional error that either as a matter of constitutional imperative or statutory interpretation were resistant to deferential review, they did not address specifically the situation where there was an express statutory right of appeal to the courts. What this suggests is that the majority wanted to leave open the possibility of deferential or unreasonableness review even in the face of a statutory right of appeal. In other words, the combination of an expert tribunal and a question of law coming within that tribunal's expected range of expertise could result in deference even in the face of a statutory right of appeal. This was the contribution of *Canada (Director of Investigation and Research) v. Southam Inc.*<sup>58</sup> to Canadian judicial review law.

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<sup>52</sup> *Ibid.*

<sup>53</sup> [1971] S.C.R. 756.

<sup>54</sup> [1970] S.C.R. 425.

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<sup>58</sup> *Supra*, note 30, building on his earlier judgment in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

While the majority repudiated *Southam* to the extent that it introduced a third standard of review,<sup>59</sup> it did not otherwise seem to call that judgment into question. First, in reducing the number of standards of review from three to two, it preserved the *Southam* standard of reasonableness, even if somewhat recast.<sup>60</sup> Secondly, while stressing the importance of the presence of a privative clause as an indicator of deference, the majority did not preclude the possibility of deference even where there was no privative clause. Only where there was a question of “general law” that is “both of general importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” was correctness a **necessary** standard of review.<sup>61</sup>

In stark contrast, Deschamps J. stated:

Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.<sup>62</sup>

There is a certain irony in the fact that the majority were so insistent on the need to respect statutory intention as a critical factor where there was a privative clause but failed to consider the statutory intention behind statutory rights of appeal to the courts from administrative tribunals and agencies.

#### *The Ambit of the New Regime*

In his concurring judgment,<sup>63</sup> Binnie J. is critical of the majority for not living up to their billing of the judgment as one that would develop a “principled framework” that addressed the “structure and characteristics of the system as a whole”. In this context, he deplored the “focus on administrative tribunals.”<sup>64</sup> In particular, he questioned whether a single undifferentiated deferential standard of unreasonableness was appropriate across the whole range of statutory decision-making. His particular concern was that this would lead to inappropriate intervention or too great a scrutiny of decision-making by Cabinet, Ministers of the Crown, and indeed other officials (including “major administrative tribunals”)

... who make broad decisions of public policy.<sup>65</sup>

This led him to the conclusion that there had to be a sliding scale of deference or unreasonableness to adequately encompass the whole of the administrative process.<sup>66</sup>

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<sup>59</sup> *Supra*, note 4, at paras. 37-41.

<sup>60</sup> *Id.*, at paras. 47-48.

<sup>61</sup> *Id.*, at para. 60.

<sup>62</sup> *Id.*, at para. 163.

<sup>63</sup> *Id.*, at para. 120.

<sup>64</sup> *Id.*, at para. 121.

<sup>65</sup> *Id.*, at para. 136.

<sup>66</sup> *Id.*, at paras 144-52. He is particularly pointed at para. 152 when he characterizes the majority’s approach as necessarily rejecting the position taken by the Court (Iacobucci J.) in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 43, that there was no room for variations within the standard of reasonableness.

Deschamps J. was even more guarded. She saw the judgment as best confined to the “adjudicative context”<sup>67</sup>:

Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its jurisdiction.<sup>68</sup>

Are these concerns justified? Ironically, *Dunsmuir* itself seems to prove the point that “Holistic” or apparently comprehensive statements about the scope and methodology of judicial review can be dangerous and transitory. After all, it was as recently as 2003 and *Dr. Q. v. College of Physicians and Surgeons of British Columbia*,<sup>69</sup> that the Chief Justice purported to lay down an overarching theory of judicial review applicable to all statutory and prerogative decision-makers and based on both the pragmatic and functional analysis and three standards of review.

It is also the case that Binnie J. is correct in his criticism of the majority when he faults them for concentrating on adjudicative tribunals. Thus, for example, the discussion of how unreasonableness is assessed is located exclusively in precedents involving adjudicative tribunals and in testing for unreasonableness in the context of the reasons of adjudicative tribunals that the common law or statute obliges to provide reasons for their decisions. How does all of this relate to the world of highly discretionary, policy decision-making by statutory and prerogative authorities that do not act in an adjudicative fashion?

This constitutes an important gap in the majority’s articulation of the new theory and certainly lends credence to Binnie J.’s argument that, if the majority position is to prevail across the entire spectrum of statutory decision-making, there will have to be at the least an understanding that reasonableness is a variable standard. (More of this below!). It is also clear that there are other ways in which the judgment is not comprehensive. To the extent that the British Columbia *Administrative Tribunals Act*,<sup>70</sup> has statutorily recognized “patent unreasonableness” as a standard of review in that jurisdiction, it will continue to have a life. There is also the question, left over by *Mugesera v. Canada (Minister of Citizenship and Immigration)*,<sup>71</sup> whether the statutory codification of the grounds of judicial review in the *Federal Court Act*<sup>72</sup> leaves any room for standard of review analysis in the conduct of review by reference to those grounds. This is an issue that the Court may be facing in its determination of the appeal in *Khosa v. Canada (Minister of Citizenship and Immigration)*,<sup>73</sup> heard on March 20, 2008.

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<sup>67</sup> *Id.*, at para. 166.

<sup>68</sup> *Id.*, at para. 165.

<sup>69</sup> [2003] 1 S.C.R. 226.

<sup>70</sup> S.B.C. 2004, c. 45, sections 58-59.

<sup>71</sup> [2005] 2 S.C.R. 100, at para. .

<sup>72</sup> R.S.C. 1985, c. F-7, section 18.1 (4).

<sup>73</sup> 2007 FCA 24.

*The Content of Unreasonableness Review*

At first blush, the elimination of patent unreasonableness as a standard of review suggests that the Court has accepted that such a degree of deference is inappropriate in any situation. Agencies and tribunals must at the very least be able to withstand scrutiny by reference to the apparently rather more intrusive, less deferential test of reasonableness. However, it seems clear that that was not the intention of the majority.

First, the majority states that a single reasonableness standard “does not pave the way for more intrusive review by the courts.”<sup>74</sup> They also go on to state that the change does not necessarily require a revisiting of the standards of review established in the pre-*Dunsmuir* jurisprudence. The judgment acknowledges that “[a]n exhaustive review is not required in every case to determine the standard of review.”<sup>75</sup> That analysis may have already taken place. As a matter of methodology, courts should first

...ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to particular category of question.<sup>76</sup>

When this statement is coupled with the acknowledgment that it is not the intention in reforming the test to bring about more intrusive review, there seems to be an implication that, even within the new unreasonableness standard, there should be great hesitation or caution in setting aside a decision that was previously subject to the patent unreasonableness standard. In other words, reasonableness is a standard that admits of varying levels on intensity of review depending on the context.

The majority never says this explicitly. However, it is certainly the interpretation that Binnie J., in his concurring judgment, places on the majority’s elaboration of reasonableness review.<sup>77</sup> In one of the first lower court judgments to consider *Dunsmuir*, Smith J., of the British Columbia Supreme Court, in *Canadian Union of Public Employees v. Canada Post Corporation*,<sup>78</sup> also reads the majority the same way when she refers to the Court as having accepted that “there may be different degrees of deference within the reasonableness standard”.<sup>79</sup> Similarly, in an early web-based comment on the judgment, Professor Lorne Sossin commends it for adopting a “spectrum of deference approach” as opposed to one involving three supposedly clearly differentiated species of review.<sup>80</sup>

Indeed, I suppose one might also read the majority’s statement above as lending support to this assertion. When the majority talks of first ascertaining whether the previous

<sup>74</sup> *Supra*, note 4, at para. 48.

<sup>75</sup> *Id.*, at para. 57.

<sup>76</sup> *Id.*, at para. 62.

<sup>77</sup> *Id.*, at para. 150, particularly.

<sup>78</sup> 2008 BCSC 338.

<sup>79</sup> *Id.*, at para. 25.

<sup>80</sup> “*Dunsmuir – Plus ça change*”, The Court, March 17, 2008,

<http://www.thecourt.ca/2008/03/17/dunsmuir>

jurisprudence has established “the degree of deference”, is that statement to be read as including by necessary implication the words “if any”? Correctness after all is a non-deferential standard. If not, then the appropriate inference may well be that the majority is accepting that the methodology has changed. Reviewing courts should first determine whether the appropriate standard is correctness or unreasonableness. If the latter, the next step is to determine where along the spectrum of deference engaged by the concept of unreasonableness, the Court’s approach to its task should come to rest.

If that indeed is the new world of standard of review, then the determination of how to approach review of any particular decision has not necessarily become any easier or, for that matter, any less likely to minimize the extent to which counsel and lower courts have to concern themselves with identifying the appropriate posture of the courts. Certainly, the initial choice from between two standards (as opposed to among three) may make life simpler. Should there be no deference or some deference? However, if the next stage is to identify how intense within a single standard of deference the court’s scrutiny should be, the court is going to have to engage in the same or a similar kind of balancing exercise that preoccupied the courts at the initial stage of the former three, discrete standards test. Moreover, the range of possibilities has become more nuanced and variegated than previously.

Perhaps, as Professor Sossin has suggested, this is more realistic than the previous methodology and reflects the kind of approach that the Court has already imposed on the determination whether the common law requires any level of procedural fairness and, if so, how much. However, that does not mean that it has become any easier. Indeed, it is on its face less of a bright line drawing exercise than previously, and, as such, more susceptible to judicial difference of opinion. It also might demand an even more problematic and extensive vocabulary than that which grew up around the difference between unreasonable and patently unreasonable.

It may be even more problematic in terms of the majority’s articulation of what review by reference to a newly defined unreasonableness standard actually involves. The majority states:

A court conducting review for <sup>81</sup>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.

It looks as though what the majority is saying is that the reviewing court should look initially at the reasons of the tribunal to see whether they are coherent in the sense of presenting a reasoned and reasonable articulation of the conclusion reached. However, it is not clear whether an affirmative answer to that inquiry ends the conversation or

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<sup>81</sup> *Supra*, note 4, at para. 47.

whether the court nonetheless must go on and ask the further question whether, in isolation from the reasons provided, the outcome can be justified as reasonable in the sense of coming within what the reviewing court regards as an acceptable range of results by reference to its own assessment of the matter.

What does seem to be made clear in the next paragraph is that a negative answer to the inquiry as to the reasonableness of the tribunal's articulation of its reasons for decision does not end the exercise. This emerges from the majority's approving citation<sup>82</sup> of David Dyzenhaus's theory of deference as respect. It requires

...not submission but a respectful attention to the reasons offered or **which could be offered** in support of a decision [emphasis added].<sup>83</sup>

In other words, even if the reasons provided are not adequate to meet the reasonableness standard, the reviewing court must consider any other arguments (either advanced by counsel or, perhaps also, developed by the court) that might justify the decision by reference to a reasonableness standard.

### ***Dunsmuir* as an Example of Unreasonableness Review**

One of the fears of those who support very restrained judicial review is that the removal of the patent unreasonableness standard will increase the willingness of courts to intervene on what might, the statements of the majority notwithstanding, become in practice a much softer unreasonableness standard. Indeed, there is a sense in which *Dunsmuir* itself lends support to this contention. This is exemplified by the unwillingness of the Court to attribute any degree of plausibility to the adjudicator's finding that he was entitled to look behind the dismissal on notice to ascertain whether in reality it was a grievable dismissal for cause.

In their application of the unreasonableness standard to the critical finding of the adjudicator, Bastarache and LeBel JJ. state that the

...decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee.<sup>84</sup>

They continue to the effect the adjudicator's interpretation "creates a requirement that the employer show cause before dismissal."<sup>85</sup>

That does not appear to be accurate. The adjudicator's ruling does not go that far. It clearly leaves open the right of the employer to dismiss a non-unionized employee simply by the giving of adequate notice. However, it does add a rider or qualification. The

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<sup>82</sup> *Id.*, at para. 48.

<sup>83</sup> "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart, 1997), 279, at 286.

<sup>84</sup> *Supra*, note 4, at para. 75.

<sup>85</sup> *Ibid.*

employer's exercise of that authority is subject to scrutiny by way of grievance if it amounts to a disguised dismissal for cause. Why? Because non-unionized employees dismissed for cause, whether explicitly or in reality, are entitled to have an adjudicator consider not only whether there was cause but also, if there was no cause, whether to order their reinstatement.

Under this interpretation, the ordinary rules of contract govern in that the employer still possesses the right to dismiss without cause on the giving of reasonable notice, something that the employer does not presumably have the right to do under most collective agreements. However, the employer cannot use that power without exposing itself to a grievance when the reality is that the dismissal is for cause.

In my view, there is certainly an argument that such a conclusion is "within the range of acceptable outcomes that are defensible in respect of the facts and the law." It preserves an important common law right of the employer thereby leaving section 20 with content when it states that termination of non-unionized employees "shall be governed by the ordinary rules of contract". However, as required by section 20 itself, it also gives effect to the provisions of another Act conferring grievance rights on non-unionized employees.

In effect, the difference between the interpretation that the Court finds acceptable and the interpretation that the Court finds unreasonable is as follows:

Acceptable: The employer can use the power to terminate on notice even when the reality is that the employer is terminating for cause. In such an instance, the only ground of grievance is that the period of notice is too short. However, if the employer purports to dismiss for cause, the employee can contest the cause and, if successful, seek reinstatement.

Unreasonable: The employer can use the power to terminate on notice but not as a disguised manner of dismissing for cause. Where the dismissal is truly on notice, the only ground of grievance is that the period of notice is too short. However, if the employer either explicitly or under the guise of dismissing on notice is dismissing for cause, the employee can contest the cause (whether explicit or disguised) and, if successful, seek reinstatement.

I want to suggest that, if seen in this way, the difference between the two interpretations is simply as to the **degree to which** the terms of the *Public Service Relations Act* modify the common law rights of employers created by section 20 of the *Civil Service Act*. They both leave the common law right of the employer with content. The interpretation found by the Court to be unreasonable does not require the employer to show cause in every case. Rather, it calls upon the adjudicator to respond to a contention that a dismissal that, on its face, purported to be on the basis of reasonable notice was in reality for cause.

If that is so, then does this undercut an essential premise in the Court's argument that the adjudicator's interpretation is unreasonable in the sense that it is "fundamentally

inconsistent with the employment contract and, thus, fatally flawed”<sup>86</sup> Certainly, it is plausible to assert that the common law right to dismiss on notice always allows an employer to choose to go that route even when the employer believes that it could dismiss for cause, and that this has not been altered by the conferring of grievance rights on non-unionized employees in the other statute. In other words, the employer, under this interpretation, can avoid a grievance by simply giving notice or salary in lieu, and thereby not have to justify the existence of cause. At the same time, this interpretation does not undercut entirely the conferral of grievance rights on non-unionized employees. They can still contest the extent of the notice that the employer has provided. Moreover, when the employer relies explicitly on cause, they have full grievance rights and the possibility of reinstatement. That seems a plausible interpretation of the balance between the two regimes. It is certainly not unreasonable in the sense identified by the Court.

However, is it unreasonable to reach a conclusion that extends the employee’s rights to grievance and potential reinstatement to situations where a dismissal on notice may be a disguise for what in reality is a dismissal for cause? The common law of employment contracts still applies to dismissals that are not for cause. In other situations, the non-unionized employee has the right to grieve. Is it not possible to see this simply as an interpretation that is more expansive in its protection of the rights of non-unionized employees, but one which is also consistent with a statutory objective of trying to achieve a satisfactory balance between the common law rights of employers and protecting the employment interests of non-unionized employees in a largely unionized workforce?

In short, I can understand the decision to set aside the adjudicator’s determination from the perspective of correctness review but I find it very difficult to see how that determination is unreasonable in the sense of an approach to judicial review that accords

...a margin of appreciation with the range of acceptable and rational solutions.<sup>87</sup>

Certainly, the adjudicator may have paid little or no attention to section 20 and its preservation of the common law of employment and, in that sense, have offended the Court’s sense of what is necessary to satisfy the requirements of reasonableness in “the process of articulating the reasons.” However, reasonableness review also focuses on outcomes and, if the Court’s approving citation of David Dyzenhaus is to be taken at face value, requires

...a respectful attention to the reasons offered **or which could be offered in support of a decision** [emphasis added].<sup>88</sup>

Under a statutory regime that has shown increasing solicitude for the situation of non-unionized public servants, is not a reasonable outcome and one that is permissible in terms of the statutory language a finding to the effect that the employer cannot avoid an inquiry into the possible award of reinstatement by disguising a dismissal for cause as a

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<sup>86</sup> *Id.*, at para. 74.

<sup>87</sup> *Id.*, at para. 47.

<sup>88</sup> *Supra*, note 83.

simple dismissal on the giving of reasonable notice?<sup>89</sup> Was the failure of the Court to at least advert to this the result of an overarching objective of ensuring that non-unionized public sector employees were equated for all purposes with employees in the private sector? This possibility is, of course, given greater credence by the Court's subsequent holding that, with few, if any, exceptions, non-unionized public sector employees, regardless of whether they might previously have been categorized as office holders, have no procedural fairness entitlements at common law if they can be dismissed on the giving of notice.

### **Non-unionized Public Servants and Office Holders and Procedural Fairness**

On this issue, all nine members of the Court were in accord. While the adjudicator was perfectly within his rights ("jurisdiction"<sup>90</sup>) in determining whether the government owed Dunsmuir a duty of procedural fairness, the duty of procedural fairness was not triggered in this case.

Why? Although the Court concluded that Dunsmuir was a public office holder, he was also a contractual employee of the government. This meant that his relationship with the government was regulated by contract, not public law.

The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.<sup>91</sup>

In reaching this conclusion, the Court made it clear<sup>92</sup> that it was changing the law as laid down in *Knight v. Indian Head School Division No. 19*.<sup>93</sup>

In order to understand what the Court was doing in repudiating *Knight*, it is important to understand how *Knight* itself changed the law. *Knight* established the principle that public office holders (or those whose employment with a public authority had a sufficient "statutory flavour"<sup>94</sup>) were entitled to the benefit of the principles of procedural fairness before they were dismissed from their position. This was so even where they were also performing their functions under a contract of employment, including one that permitted

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<sup>89</sup> Section 20 itself is part of that to the extent that its original objective was to provide non-unionized public sector employees with the right to reasonable notice on dismissal. This contrasts with the previous position where that category of employee, under the common law, served at pleasure and could be dismissed without notice at any time.

<sup>90</sup> *Supra*, note 4, at para. 84, headed "The Preliminary Issue of Jurisdiction". As a consequence, determining capacity to decide issues of procedure and law, including constitutional and *Charter* questions is reaffirmed as a "true" jurisdictional question for which the standard of review is correctness.

<sup>91</sup> *Id.*, at para. 117.

<sup>92</sup> *Id.*, at para. 114.

<sup>93</sup> *Supra*, note 18.

<sup>94</sup> *Id.*, at 672.

discharge on the giving of notice. Unless the contract specifically provided otherwise (and L'Heureux-Dubé J., delivering the judgment of the majority, seemed to explicitly acknowledge this possibility<sup>95</sup>), the right to terminate on notice was implicitly subject to the public law principles of procedural fairness, now extended to office holders at pleasure. In other words, the obligations arose out of a blending of public and private law principles.

As the majority in *Dunsmuir* makes clear,<sup>96</sup> there were application problems with the position taken by the majority in *Knight*. In particular, as mentioned already, sorting out public office holders or those whose position had a sufficient statutory flavour from other non-unionized public employees with no procedural entitlements prior to dismissal was a problematic exercise and productive of inconsistency on the part of first instance courts. As the judgment at first instance in *Dunsmuir* also exemplifies, there was a further application problem. Did the duty of procedural fairness only apply to dismissal from offices held at pleasure for cause or did it also extend to all situations, irrespective of whether cause was being alleged? *Knight* on its face seemed to be proposing the latter but that was not how Rideout J. interpreted it in *Dunsmuir*.<sup>97</sup>

Looking at the Supreme Court's judgment in *Dunsmuir* from this perspective, what has it done to *Knight*?

The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges and interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.<sup>98</sup>

Obviously, as far as the Court was concerned, *Dunsmuir* was protected by the law of contract and therefore had no claims to the public law principles of procedural fairness. It is noteworthy that, in this instance, *Dunsmuir* rights in contract were not based in a specific contract of employment that he had with the government.<sup>99</sup> They were a statutory creation of section 20 of the Act that in effect conferred on those employed at pleasure the benefits (and disadvantages!) of the common law of employment contracts.

What are those benefits? Obviously, they include the right to reasonable notice or salary in lieu thereof unless the employer has cause for dismissal. Implicit in this is the right to sue for damages where the notice period is inadequate or where the employer dismisses someone for cause without justification. They also include the right to enhanced notice

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<sup>95</sup> *Id.*, at

<sup>96</sup> *Supra*, note 4, at paras. 92-98.

<sup>97</sup> *Supra*, note 24, at para. 78.

<sup>98</sup> *Supra*, note 4, at para. 114.

<sup>99</sup> See the judgment of Rideout J. at first instance: *supra*, note 24, at para. 43.

rights or damages by reference to *Wallace v. United Grain Growers Ltd.*,<sup>100</sup> and possibly punitive damages where the manner of dismissal passes the threshold of tolerable behaviour.<sup>101</sup> However, reinstatement is not an option at common law. At private law, there is also no right to procedural fairness before dismissal though a failure to give the employee a chance to meet allegations on which the dismissal is based may trigger *Wallace* enhanced notice period damages or punitive damages.

The Court does, however, identify situations where the private law of employment contracts may not govern or not govern completely:

1. Where a public employee is not protected by a contract of employment as in the case of judges, Minister of the Crown, and other officials who “fulfill constitutionally defined state roles.”<sup>102</sup>
2. Where a public office holder truly serves at pleasure in the sense of being subject to summary dismissal;<sup>103</sup> and
3. Where a duty of fairness “flows by necessary implication from a statutory power governing the employment relationship”.<sup>104</sup>

Dunsmuir was none of these and, as a consequence, had no procedural fairness entitlements.

Has this led to a more certain world? Maybe. But, there are still substantial areas of uncertainty. On the Court’s own terms, distinguishing between a public officer holder or one whose position had a “sufficient statutory flavour”, and those who were mere contractual employees of the state was at the margins a very imprecise exercise. Indeed, the Court explicitly states that

..the distinction between office holder and contractual employees for the purposes of a public law duty of fairness is problematic and should be done away with.<sup>105</sup>

Yet, the Court’s second exception still seems to rest on that distinction. I am also somewhat sceptical as to whether the category of “constitutionally defined state roles” is self-defining.

However, it is surely the third category when read in the light of *Dunsmuir* itself that is going to be the most problematic. The example given<sup>106</sup> of a statutory provision that triggers the duty of fairness “by necessary implication” is *Malloch v. Aberdeen*

<sup>100</sup> [1997] 3 S.C.R. 701.

<sup>101</sup> See e.g. *Keays v. Honda Canada Inc.* (2006), 274 D.L.R. (4<sup>th</sup>) 107 (Ont. C.A.), presently under reserve in the Supreme Court of Canada.

<sup>102</sup> *Supra*, note 4, at para. 115.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Id.*, at para. 116.

<sup>105</sup> *Id.*, at para. 112

<sup>106</sup> *Id.*, at para. 116.

*Corporation*.<sup>107</sup> There, the statutory provision called for three weeks' notice of a motion to dismiss. Why provide for three weeks' notice of the motion to dismiss if not to enable it to be contested?

That is fine but what about the situation of a statutory provision that permits dismissal from statutory office or employment but only for cause? Does that carry with it the necessary implication that there is an entitlement to public law procedural fairness and not just contractual rights? If the answer to that question is a negative, then the Supreme Court has by a side swipe repudiated the authority in Canada of the exalted judgment of the House of Lords in *Ridge v. Baldwin*<sup>108</sup> and the proposition accepted in that case that office holders who could be dismissed only for cause had a right to what in 1963 was the full panoply of natural justice entitlements.<sup>109</sup>

Surprisingly, the Court does not deal explicitly with the continued authority of *Ridge v. Baldwin* in Canada,<sup>110</sup> despite the fact that it formed an integral part of the Court's judgment in the foundational procedural fairness decision in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioner of Police*.<sup>111</sup> That is most regrettable particularly since there is one way in which it can be contended that the Court has set *Ridge v. Baldwin* aside inferentially.

Recollect that the Court seems to hold that someone in Dunsmuir's position has no rights to procedural fairness. It is also important to note that the Court, in introducing the issue of procedural fairness, describes it as

... as discrete and isolated from the statutory interpretation issues, and it raises very different considerations.<sup>112</sup>

Thereafter, in applying the law to the facts and immediately after identifying the necessary implication exception, the Court goes on to state:

In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness.<sup>113</sup>

<sup>107</sup> [1971] 2 All E.R. 1278 (H.L., Sc.).

<sup>108</sup> [1964] A.C. 40 (H.L., Eng.).

<sup>109</sup> *Ridge* was decided at a time when the English and Canadian courts still required applicants for relief to establish that the function at issue was judicial or *quasi*-judicial in nature in order to trigger an entitlement to the benefit of the rule of natural justice.

<sup>110</sup> It is however very much part of the Court's account of the evolution of the law in this domain: *supra*, note 4, at paras 85-87, 91, 101, and 108.

<sup>111</sup> *Supra*, note 19.

<sup>112</sup> *Supra*, note 4, at para. 76.

<sup>113</sup> *Id.*, at para. 117.

Does all of this add up to the proposition that, even if the government in this case was exercising its contractual right to dismiss for cause, it was not obliged, save indirectly through the grievance or litigation processes, to provide an opportunity for a hearing before doing that? If so, unless that implicit holding is related to the particular wording of section 20, the Supreme Court may well have repudiated *Ridge v. Baldwin* and gone even further than the first instance judge who predicated his procedural fairness finding on his holding that the dismissal was not for disciplinary reasons.

Aside from that particular and potentially very significant uncertainty, the judgment's failure to resolve definitely the dilemmas inherent in this overlapping world of public and private principles emerged dramatically just three weeks later in *Société de l'assurance automobile du Québec v. Cyr*.<sup>114</sup>

Cyr was an "accredited mechanic" for the purposes of conducting inspections and issuing certificates and stickers of compliance under the Quebec automobile insurance scheme. The Société ("SAAQ") withdrew his accreditation for failure to apply appropriate standards. It did so without a hearing.

Cyr was an employee of a company to which the SAAQ had by way of contract lawfully delegated its statutory responsibility for conducting inspections. Under the contract, the company was restricted to using for inspections employees designated as an "accredited mechanic" in a schedule to that contract with the province. Accreditation required meeting SAAQ standards by way of examination and training. The contract with the company also held "accredited mechanics" to regulatory standards and required their signature. Accreditation was coextensive with the term or duration of the contract between the company and the SAAQ.

Cyr challenged the revocation of his accreditation on the grounds of procedural unfairness and, in particular, that the SAAQ had violated his right to a hearing in the Quebec *Administrative Justice Act*.<sup>115</sup> In the Supreme Court of Canada, the critical issue was whether the suspension or revocation of a mechanic's accreditation engaged the provisions of the *Administrative Justice Act*.

According to the majority,<sup>116</sup> Bastarache J. delivering the judgment, Cyr was not a party to the contract between SAAQ and his employer. It was also a situation in terms of section 5 of the *Administrative Justice Act* where Cyr was a citizen who had been subjected to a "decision concerning a permit or licence or other authorization of like nature". As a consequence, his right to a hearing was triggered.

In the course of his decision, Bastarache J. made it clear that the finding that Cyr was entitled to procedural fairness was in no way dependent on any finding that he was a public office holder but rather was a product of the language of the statute.<sup>117</sup> It was a

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<sup>114</sup> 2008 SCC 13.

<sup>115</sup> R.S.Q., c. J-3.

<sup>116</sup> *Supra*, note 114, at para. 126.

<sup>117</sup> *Id.*, at para. 44. However, *cf* the dissenting judgment of Deschamps J. at para. 69.

situation in which the Court was concerned not about the state's role in relation to its employees but rather the "holders of permits and licences."<sup>118</sup> *Dunsmuir* is not mentioned.

In contrast, Deschamps J. in dissent (Abella and Charron JJ. concurring) relies heavily on *Dunsmuir*<sup>119</sup> as well as a more restricted reading of the reach of section 5 of the *Administrative Justice Act*. In particular, she finds reassurance in her holding that Cyr is not protected by section 5 in the holding of *Dunsmuir* that private law should, where appropriate, be left to deal with issues of this kind arising out of an employment relationship as well as the conclusion that Cyr had adequate contractual rights in the event that he is terminated without just cause before the end of the contract between the SAAQ and his employer.

Obviously, an assessment of the majority and the minority positions in *Cyr* depends on issues of interpretation surrounding section 5 of the *Administrative Justice Act* as well as an appreciation of the contractual rights of persons in Cyr's position under the *Civil Code of Quebec*. Now is not the place for a detailed consideration of those two aspects of the decision.

However, in an era of increasing use of the private sector to deliver public services on a delegated basis, this case raises questions as to whether the result would have been the same by reference to common law principles of procedural fairness as it was under section 5 of the *Administrative Justice Act*. And, indeed, there are indications in the majority judgment that it would in that the majority approves a characterization of the Act as in general being "a codification of the principles of administrative law."<sup>120</sup> And, if that is so, what are the policy justifications for treating a private sector employee as entitled to greater procedural rights when her or his employment is terminated within the framework of a statutory scheme than a public sector employee such as *Dunsmuir*? Do employment licences to perform work for the state and that do not have an existence independent of the contract of which they are part have a greater claim to procedural protection than those whose claims emerge out of direct employment by the state? There is no obvious reason to hold that they do unless Deschamps J. and the minority are incorrect in ascribing to the licensee contractual rights against the state.

I do not pretend to know the answer to that question. However, irrespective of that, this situation provides yet another example of the uncertainty left over by *Dunsmuir*. When precisely do private law employment contract remedial rights trump public law procedural entitlements?

## Conclusions

This has been a largely critical assessment of *Dunsmuir v. New Brunswick*. However, in concluding, I should make it clear that there is a very real sense in which the judgment

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<sup>118</sup> *Id.*, at para. 47.

<sup>119</sup> *Id.*, at paras. 78 and 90.

<sup>120</sup> *Id.*, at para. 30.

makes a significant contribution. In its urging that lower courts should be attentive to precedents that have already established a standard of review for the particular species of decision that is before them, the majority has tried to encourage lower courts not to respond to every invitation to reinvent the wheel on the intensity of scrutiny. The same concern for eliminating unproductive and time-consuming argument is also present in the majority's admonition that some cases are simpler than others and not demanding of a full standard of review analysis. Rather, one or two of the standard of review factors will be determinative. There has also been a lessening of the emphasis on expertise as a free-standing and the most important of the factors. What the majority is now emphasising is an analysis that concentrates on asking whether there is a match between the decision-maker's expected area of competence (or its home turf) and the question that is the focus of the judicial review application or statutory appeal. Finally, the listing of situations that will normally attract correctness or unreasonableness review provides valuable guidance to lower courts with the exception of the category of "true" jurisdictional question.

Nonetheless, the majority's best efforts notwithstanding, the issues of standard of review and how to apply the chosen standard will not always be simple or easily resolved. That is almost inevitable no matter what methodology is chosen. However, the terms of the majority judgment will also contribute to this. Indeed, the Binnie and Deschamps judgment are on the mark when it comes to identifying the problem areas in the judgment. Is unreasonableness a single, undifferentiated standard or is there a sliding scale within reasonableness? If the latter, will this lead to a potentially even more time-consuming or, as Sossin has suggested, is this simply a more realistic way of dealing with issues of deference – no clearly punctuated or delineated boundaries but a recognition of the multi-faceted nature of the inquiry about the standard of review? How are reviewing courts to respond to statutory rights of appeal to the courts? Why was this not the subject of explicit consideration by the majority given their general recognition of the relevance of legislative sign-posting? How precisely does a court apply an unreasonableness standard that focuses on both the justifications provided by the decision-maker and the actual outcome of the case? How readily does the new methodology apply outside the domain of adjudicative tribunals, and, in particular, to the exercise of broad policy making functions? To those problems identified in the minority judgments, I voice my own concerns with the Court's failure to provide sufficient guidance as to the indicia of a "true" jurisdictional question. That, coupled with the Court's failure to find any warrant at all for the adjudicator's actual finding on the preliminary motion in *Dunsmuir* raise for me fears about the extent to which some of the terms of the judgment expose statutory decision-making to overly expansive intervention.

I also want to suggest that not only in this respect but also in its rejection of the argument for procedural fairness, the Court showed little sympathy for the position of non-unionize public employees. In particular, there is in effect a repudiation of any sense that the state as employer might have special obligations in the exercise of public authority implicating the employment rights of its servants. That factor that seemed to feature so prominently in *Knight* has disappeared from the calculus as may have the holding in *Ridge v. Baldwin* that those who are statutory officer holders who can be dismissed only for cause may no longer have any procedural fairness entitlements.

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