Submissions on

"The Standard of Review Applicable to Tribunal Decisions in British Columbia –

The Implications of *Dunsmuir v. New Brunswick*

A Discussion Paper"

Presented by the British Columbia Council of Administrative Tribunals

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Introduction

The British Columbia Council of Administrative Tribunals ("BCCAT") is comprised primarily of tribunal members, lawyers, and staff of administrative tribunals of British Columbia. BCCAT's mission is to foster improvements in the administrative justice system in the Province.

[1] BCCAT is pleased to be given an opportunity to submit a brief response to the Administrative Justice Office's discussion paper on the impact of *Dunsmuir v. New Brunswick*, 2008 SCC 9, on the *Administrative Tribunals Act*, R.S.B.C. 2004, c. 45 (*ATA*).

Background

[2] In *Dunsmuir*, the Supreme Court took three different approaches to a revision of the common law in regard to judicial review of administrative decisions. The Court also gave three reasons for undertaking that revision.

[3] In the majority decision written by Bastarache and LeBel JJ., and concurred in by McLachlin C.J. and Fish and Abella JJ., the Justices stated:

> ¶ [1] This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. *The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.* [Emphasis added]

[4] The majority goes on to say:

> ¶ [32] … The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

[5] Binnie J. gave his own reasons for revision of the common law. He stated, in part:

> ¶ [122] … Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. …

[6] Binnie J. also sets out how administrative tribunals fulfill a different role than the courts. He states:

> ¶ [123] Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

[7] Deschamps J., (concurred in by Charron and Rothstein JJ.) provides a third reason for a need for a revision:

> ¶ [158] The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the substance of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

[8] There is no mention of the *ATA* in *Dunsmuir*.

Focus of the BCCAT Submission

[9] The focus of this paper reflects the common theme echoed by all three judgments: comprehensibility and simplicity.

[10] Many parties appearing before tribunals are self represented. Pursuing a judicial review of a tribunal decision should be a process that not only is fair, but also is as simple and comprehensible as possible. Litigants, in particular self-represented litigants, should not be confronted with a system that requires them to engage in "law office metaphysics" in order to participate.

[11] The same theme is the underpinning for the Legislature's enactment of sections 58 and 59 of the *ATA*.

[12] The following discussion addresses among other things, the questions raised in the AJO paper. It also addresses the question of how successful the *ATA* and *Dunsmuir* have been in simplifying the standard of review.

Preliminary Matters

[13] There are two preliminary matters that need to be addressed.

(a) No Need to Repeat the Standard of Review Analysis Each Time

[14] First, much to everyone's relief, the Supreme Court of Canada has done away with the requirement set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, para. 21, that a reviewing court must, in every case of judicial review, first determine the appropriate standard of review by conducting a standard of review analysis, even if the parties agreed on the standard, or if the standard had already been determined in another identical or similar case: *Speckling v. British Columbia (Workers' Compensation Board) et al.*, [2005] B.C.J. No. 270 (QL), 2005 BCCA 80, (2005), 46 B.C.L.R. (4th) 77 (C.A.), para. 15.

[15] Many judges, and indeed counsel, saw this as a colossal waste of time and money. In Alberta, the court in several cases had begun to resist the "must do analysis each time" approach: *White v. Alberta (Workers' Compensation Board, Appeals Commission*, [2006] A.J. No. 548, 2006 ABQB 359, 57 Alta. L.R. (4th) 282, paras. 26-31.

[16] However, the Supreme Court of Canada has now indicated that "[a]n exhaustive review may not be required in every case to determine the proper standard of review. … This simply means that the analysis required is already deemed to have been performed and need not be repeated": *Dunsmuir, supra*, at para. 57.

[17] The Supreme Court of Canada explained that the proper process now involves two steps: "[f]irst, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review": *Dunsmuir* para. 62.

[18] Regardless of whether *Dunsmuir* affects the *ATA*, or what is done with the *ATA*, this aspect of *Dunsmuir* should be universally applied and nothing should be done that would jeopardize the principle that one need not repeat the standard of review analysis each time out.

(b) Current Impact: A Developing Trend

[19] The second preliminary matter is an appreciation of the current impact of *Dunsmuir* on the standard of review litigation in British Columbia. The current impact in British Columbia is a plethora of litigation on the very question of what impact if any *Dunsmuir* has or should have on the *ATA*.

[20] In *Howe v. 3770010 Canada Inc.*, 2008 BCSC 330, paras. 18, 19 Madam Justice Gerow appears to have read out the word "patent" from section 58(2)(a) of the *ATA* based on *Dunsmuir* without expressly considering whether the Supreme Court of Canada's decision has or should have any impact when the standard of review is legislated. The Attorney General was not heard from in that case.

[21] In *Carter v. Travelex Canada Limited*, 2008 BCSC 405, para. 14, Mr. Justice Hinkson found otherwise, in relation to section 59 of the *ATA.* He held that "despite the

recent decision of the Supreme Court of Canada in *Dunsmuir*, three standards of review remain applicable on judicial review in British Columbia …"

[22] In *Gogol, supra*, Mr. Justice N. Smith found it unnecessary to decide the issue as the matter was not fully argued and the Petitioner was content to rely on the patent unreasonableness standard (para. 17). A number of other cases have followed "the unnecessary to decide" approach

[23] In *Glandon v. British Columbia (Residential Tenancy Branch*), 2008 BCSC 727, Mr. Justice Rice applied the patent unreasonableness standard legislated by the *ATA*. He noted it was not clear whether *Dunsmuir* applied when patent unreasonableness is prescribed by statute (para. 39).

[24] In *Amacon Property Management Services Inc. v. Dutt*, 2008 BCSC 869, Mr. Justice Slade reviewed these same cases and concluded that "the question of how to apply the patent unreasonableness standard of review mandated by the *ATA* in view of *Dunsmuir* is *unsettled*." (para. 44), (emphasis added)

[25] In *British Columbia Securities Commission* v. *Burke*, 2008 BCSC 1244, paras. 104-112, the Court found that *Dunsmuir*, which collapsed the patently unreasonable and reasonableness standard into one standard of review of "reasonableness", altered the meaning of patent unreasonableness in section 58(2)(a) of the *ATA*, insofar as it relates to a finding of fact or law only, but did not affect the definition of patent unreasonableness with regard to discretionary decisions as the phrase patent unreasonableness is codified in section 58(3) of the *ATA* for such decisions.

[26] This can be contrasted with *Lavigne* v. *British Columbia (Workers Compensation Review Board) et al***,** 2008 BCSC 1107, in which the Court noted that *Dunsmuir, supra*, had collapsed the two common law standards of review of patent unreasonableness and reasonableness simpliciter into one standard of "reasonableness", but added that

> [91] While the court said that the new standard of reasonableness for judicial review would apply even where an administrative tribunal has a strong privative clause, the court did not specifically deal with the situation where the privative clause is backed by a provincial statute such

> as the *ATA* that specifically assigns the standard of patent unreasonableness to tribunals which are making findings of fact or law or exercising discretion in matters where they have exclusive jurisdiction under privative clauses.
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> …
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> [98] Having the luxury of two competing decisions of this court to choose to follow, I choose to follow the *Carter* decision and apply the standard of patent unreasonableness to the October 28, 2003 decision of WCAT here, regardless of the decision in *Dunsmuir*, along with the *ATA* standard of fairness for natural justice and procedural fairness.

[27] In *D. & A. Investments. Inc. v. Hawley*, 2008 BCSC 937, para. 15 the Court concluded that *Dunsmuir* does not modify the *ATA*, stating:

> The recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, dealt with standards of review in a common-law context. The court determined that there are only two standards: correctness and reasonableness. However, the standard of review set out in the *Administrative Tribunals Act* is a statutory one, rather than one at common law, so that, for the purpose of review under that *Act*, the standard of patent unreasonableness still applies.

[28] In *Evans v. University of British Columbia*, 2008 BCSC 1026 (Evans), Mr. Justice Macaulay, considering section 59, came to a similar conclusion:

> [5] This is purely a legal issue of broad application and not dependent on the circumstances of this case so it is sensible to deal with it at the beginning. I conclude that the *Dunsmuir* decision does not modify the clear legislative intent underlying s. 59(3) of the *ATA*.
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> ...
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> [15] The petitioner's argument is also bound to fail because of previous appellate authority interpreting s. 59 and, more recently, post-*Dunsmuir*, a decision of the Supreme Court of British Columbia on the three standards of review set out in the section. In *Carter v. Travelex Canada Ltd.*, 2008 BCSC 405, a recent decision, Hinkson J. concluded that the three standards of review set out in the *ATA* remain despite *Dunsmuir* (para. 14).

[29] Referring to *Evans*, the Court in *Yang* ***v.*** *British Columbia (Human Rights Tribunal)*, 2008 BCSC 1456, stated that "the applicable standard of review is that set out in s. 59(4) of the *ATA*, that this standard is not affected or modified by the decision of the Supreme Court of Canada in *Dunsmuir"*: para. 95.

[30] In *British Columbia Ferry and Marine Workers' Union* v. *British Columbia Ferry Services Inc.*, 2008 BCSC 1464, the Court applied the pre-*Dunsmuir* definition of "patently unreasonable or clearly irrational": para. 74.

[31] In *Redae* v. *Workers' Compensation Appeal Tribunal*, *supra*, although the Court did not determine the impact of *Dunsmuir* on the standard of review of WCAT decisions generally under the *ATA*, the Court did apply the patently unreasonable standard of review from section 58 of the *ATA* to a decision of WCAT.

[32] In *Brown v Residential Tenancy Act* 2008 BCSC 1538, Mr. Justice Hinkson stated, at paras. 26- 37:

> [26] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*], the Supreme Court of Canada stated that, depending on the nature of the issue to be reviewed, there are but two standards of review: correctness for issues of jurisdiction and other questions of law; and reasonableness for issues of fact, discretion or policy.
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> [27] The standard of review of a decision of many administrative tribunals in British Columbia is, however, legislated under the *ATA*…
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> [31] In *Howe v. 3770010 Canada Inc.*, 2008 BCSC 330 [*Howe*], Gerow J. held at para. 17 that because s. 58(3) of the *ATA* defines "patently unreasonable" under s. 58(2)(a) only with respect to discretionary decisions, not findings of fact or law, courts must use the common law definition of "patently unreasonable" for review of findings of fact or law. She went on at para. 18 to follow *Dunsmuir*'s fusion of the former standards of reasonableness *simpliciter* and patent unreasonableness.
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> [32] I also considered the interaction of s. 58 and *Dunsmuir*, but without the benefit of Gerow J.'s decision, in *Carter v. Travelex Canada Limited*, 2008 BCSC 405 [*Carter*]. I concluded that the standard is patent unreasonableness for both discretionary decisions and findings of fact or law.
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> [33] In *Lavigne v. British Columbia (Workers Compensation Review Board)*, 2008 BCSC 1107, Truscott J. considered both *Carter* and

Howe, found them in conflict, and chose to follow *Carter*. Cullen J., however, disagreed with Truscott J. in *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244 [*Burke*], finding that *Carter* and *Howe* were reconcilable. He did so by limiting *Carter* to situations where the decision at issue is a discretionary one under s. 58(2)(a).

[34] The distinction which Cullen J. drew, however, is not one which I drew in *Carter*. Though the Supreme Court of Canada collapsed the standards in *Dunsmuir*, the Court there did not take issue with the definitions of reasonableness *simpliciter* and patent unreasonableness set out by Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 [*Southam*], and instead quoted them at para. 37:

> In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

[35] Where a term of art is judicially defined, courts are bound to use that definition unless it is explicitly replaced by a new definition. *Dunsmuir* does collapse the standards of reasonableness *simpliciter* and patent unreasonableness, and does establish a new definition, for the term "reasonableness". However, it does not establish a new definition of "patent unreasonableness," and so I conclude that the definition in *Southam* continues to apply to that term.

[36] In *Evans v. University of British Columbia*, 2008 BCSC 1026, Macaulay J. dealt with the application of *Dunsmuir* to s. 59 of the *ATA*. Section 59 sets the standards for review of tribunals whose enabling legislation has no privative clause in much the same way as s. 58 does for tribunals whose enabling legislation contains a privative clause. Macaulay J. found at para. 6 that the "clear legislative intent" of s. 59 is "to codify the applicable standard of review for the various types of tribunal decisions amenable to review", and noted at para. 8 that *Dunsmuir* does not address legislated standards of review. He held at para. 11 that importing the new definition of "reasonableness" from *Dunsmuir* into the *ATA* "goes too far and would require me to ignore the clear legislative intent underlying s. 59".

[37] Macaulay J.'s logic applies equally to s. 58. In that section, the legislature expresses a clear intent to establish a standard of patent unreasonableness for review of discretionary decisions and findings of fact or law. In the result, despite *Dunsmuir*, three standards of review continue

> to be applicable on judicial review in British Columbia depending upon the nature of the question or questions raised. Nonetheless, I recognize that some uncertainty in the standard remains, and so I will review Ms. Yuen's decisions on both the reasonableness and the patently unreasonable standards.

[33] This approach is also consistent with two cases from the Federal Court which considered the impact of *Dunsmuir* on the standard of review provisions in the *Federal Courts Act*, SC 2001, c. 27. In *Da Mota v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 509, 2008 FC 386, para. 14 Mr. Justice Gibson said:

> [In *Dunsmuir]* The Court did not address paragraph 18.1(4)(d) of the *Federal Courts Act*. The relevant portions of subsection 18.1(4) reads as follows:
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> > 18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
> >
> > …
> >
> > (d) 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;
>
> I am satisfied that it remains clear that, where this Court is called upon to review a finding of a federal board, commission or other tribunal, the decision of which is under judicial review by this Court, this Court is still entitled, *and indeed obliged,* to grant relief if it determines that the finding is indeed a finding of fact and that it was made in a perverse or capricious manner or without regard for the material before the federal board, commission or other tribunal. This "standard of review" has been interpreted as akin to the now abolished standard of "patent unreasonableness". (para. 14) (emphasis added)

[34] In *Bielecki v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 524, 2008 FC 442, Mr. Justice Gibson repeated his remarks from *Da Mota* at para. 21 and added:

> In the result, I am satisfied that, on the facts of this matter, very little has changed with respect to the issue of standard of review except that the description "patent unreasonableness" is no longer appropriate and in its place reference should be made to review of determinations of fact under the standard of review provided by paragraph 18.1(4)(d) of the *Federal Courts Act*, above. (para. 22)

[35] Oddly, all other judges in the Federal Court simply apply the reasonableness test as enunciated by *Dunsmuir* in place of patent unreasonableness previously used without giving any thought to the actual legislated standard.

[36] Thus, to echo Mr. Justice Slade's remark in *Amacon* that the law on this point is unsettled is to understate the obvious. However, the trend at this point seems to be that *Dunsmuir* does not impact the standards of review as legislated by the *ATA*. Unless the courts settle this matter, then surely the legislature must. One question is how long do we wait and a related question is whether it is prudent to give the court a bit more time to settle the law in BC.

[37] As a final note, there are two cases, one of which is pending before the Court of Appeal, in which a constitutional challenge has been raised to the Legislature's competence to enact a patent unreasonableness standard in view of the Supreme Court's remarks about how the definition of patent unreasonableness, i.e. clearly irrational, offends the rule of law which is constitutionally grounded.

[38] We now turn to the questions posed in the AJO's discussion paper.

Discussion

• Is the new test in Dunsmuir sufficiently simple and clear?

[39] The reasoning in *Dunsmuir* is problematic for a number of reasons. First, the Court has not spoken with a single voice. It is unfortunate that three judgments in pursuit of a common goal have been issued, especially in the face of the common position of the Court that the current jurisprudence is overly complex and needs revision.

[40] Second, the majority's test of reasonableness has not simplified matters sufficiently. In explaining why the Court had adopted the third intermediate test of reasonableness simpliciter, the majority said:

> As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in

> Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 U.T.L.J. 581). However, the analytical problems in trying to apply different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to the pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

[41] The Court did not say that the problem of a more finely calibrated system of judicial review was solved or irrelevant or had magically disappeared. That problem remains and the fine tuning or calibration has to take place within the standard of reasonableness.

[42] The identification of this issue by the majority segues into and explains Mr. Justice Binnie's take on the majority's reasons. At paragraph 134 Mr. Justice Binnie recognizes that the collapsing of two standards into one poses a problem for the issue of fine calibration or nuance in judicial review. He explores that problem in paragraphs 135 and following looking at it from different perspectives. The premise for his thesis is that the difference between the old patent unreasonableness and reasonableness *simpliciter* test was intended to reflect degrees of deference depending on who was deciding what (para. 135). Mr. Justice Binnie recognizes that the problem of calibration to reflect different degrees of deference, that the two original reasonableness standards were designed to reflect, remains (paras. 140, 150).

[43] Accommodating different degrees of deference is nothing more than contextualizing the review process (para. 139). That would now have to be done within the standard of reasonableness (para. 149). The upshot of his discussion is that reasonableness is intended to accommodate the differing degrees of deference but may be wrongly viewed by judges as an invitation to second guessing the substantive issues

rather than conducting the usual inquiry as to whether irrelevant matters were taken into account or relevant matters were not (para. 141).

[44] The result, according to Mr. Justice Binnie, is that "'Reasonableness' is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making" (para. 144).

[45] Unfortunately, because reasonableness now has to accommodate both degrees of deference, the debate may shift to the question of how much deference should be accorded within the standard to a particular tribunal: shifting rush hour congestion from one intersection to another without any overall saving (para. 139).

[46] The majority of the Supreme Court in *Dunsmuir* has signalled a closer scrutiny of the articulation of the reasoning process focusing on justification, transparency and intelligibility. The majority said that 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." (para. 47)

[47] The question arises whether courts will now closely parse the written reasons and seize on any miscue or misstatement as a basis on which to intervene.

[48] The starting point for all judicial reviews, we suggest, is the quality and scope of a tribunal's decisions. It is important that the principles applied in a judicial review are ones that can be readily identified by tribunal decision makers and incorporated into their work. These considerations go to the structure of a decision. The reasons for decision must be sufficient, include a coherent and economical recital of the facts, a clear statement as to the core and peripheral statutory enactments that are relevant, and a comprehensible statement as to the application of the law (codified or common) to the facts as found.

[49] In *Kovach v. Workers' Compensation Board of British Columbia* (2000) 184 D.L.R. (4th) 415 (S.C.C.), adopting the dissenting reasons of Donald, J.A, the Supreme Court of Canada said it is the result that must be tested for patent unreasonableness: *Kovach, supra*, para. 26. Whether there are defects in reasoning is not the issue. Mr. Justice Donald said:

> … the review test must be applied to the result not to the reasons leading to the result. In other words, if a rational basis can be found for the decision it should not be disturbed simply because of defects in the tribunal's reasoning. (para. 26)

[50] If *Dunsmuir* applies in this respect, the reference to reasons can be reconciled with cases such as *Kovach* and *Via Rail* on several bases, and the law has not changed substantively. The quote adopted from *The Politics of Deference: Judicial Review and Democracy* by Dyzenhaus found at para. 48 of *Dunsmuir*: Courts must show "deference as respect", in other words, "a respectful attention to the reasons offered *or which could be offered* in support of a decision" (*emphasis added*). The emphasized portion of the quote reflects the concept that reasons are not read in isolation but against the backdrop of the Record before the decision maker: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, para. 31; *D.M.G. v. British Columbia (Director of Family and Child Services)*, [2007] B.C.J. No. 682, 2007 BCSC 461, para. 55.

[51] Some courts have decided that the focus in *Dunsmuir* on the articulation of reasons continues to be nothing more than a restatement of the need for adequate reasons as set out in *Sheppard*. In *Jacobs Clytic Ltd*. v. *International Brotherhood of Electrical Workers, Local 353*, [2008] O.J. No. 2186 (Ont. S.C.) (QL), para. 44, the court reviewed *Dunsmuir* as well as *Sheppard*, and took this approach noting that "the question for this Court is whether the reasons, *in light of the record*, provide the basis for meaningful judicial review on the standard of reasonableness". (*emphasis added*)

[52] In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, [2003] S.C.J. No. 17, 2003 SCC 20, the Supreme Court of Canada in explaining its more probing examination of a tribunal's reasons under the reasonableness *simpliciter* test said:

> … If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para, 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> *This does not mean that every element of the reasoning given must independently pass a test for reasonableness*. The question is rather whether the reasons, *taken as a whole*, are tenable as support for the decision. … (paras. 55, 56, emphasis added)

[53] In *Greyhound Canada Transportation Corp*. v. *Brzozowski* (2000), 76 B.C.L.R. (3d) 266 (C.A.), application for leave to appeal dismissed [2000] S.C.C.A. No. 42.), a case involving a decision of the Appeal Division of the Workers' Compensation Board, Mackenzie J.A., for the court, stated, "…it is not enough to criticize a tribunal's reasoning if the result can be rationally supported" (para. 7).

[54] As the Court relying on *Kovach* said in *Wyant, supra*: "The reviewing court is not obliged to minutely examine the tribunal's logic or reasoning process." (para. 36)

[55] In *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, (1998) 157 F.T.R. 35, the Federal Court Trial Division reasoned as follows:

> 16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration*) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration*) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> 17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court

> may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration*) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[56] These cases have suggested that reasons are to be read in light of the record and any defects may be cured if the basis for the decision is obvious on the face of the whole record: *Kovach*. On the other hand, some judges have taken a closer look at reasons and indeed, have said that if reasons are defective, inarticulate, or unclear, then the result cannot fall within the range of reasonable results available in that case.

[57] However, “justification, transparency and intelligibility” arguably refers to whether the decision is understandable taken as a whole in light of the Record. It may not mean that the decision has to be correct, or that the reasoning must be compelling, or that each element must independently pass muster, or that a court must be in agreement. If there is a defective strand or a defect in the reasoning, a court should be mindful of reasons, including material in the record, that offers support for the decision. In other words, if a rational and understandable basis exists in the record that supports the outcome, the result should not be disturbed.

[58] The majority in *Dunsmuir* quoted from *The Politics of Deference* which postulates that a court’s job is to presume the correctness of an administrative decision and to look for a basis on which to uphold it in the record whether that basis is articulated in the reasons or not. Consequently the reference to “reasons that were offered *or could be offered* to support the decision.

[59] An application of this approach post-*Dunsmuir* is in *British Columbia Ferry and Marine Workers' Union v Workers Compensation Board*, 2008 BCSC 1184, where the Court stated at paragraphs 79 and 80:

> The law is clear that it is the ultimate decision of an administrative tribunal, and not each of the reasons for the decision, which must be subjected to the test of reasonableness. The reasons are to be looked at as a whole, in deciding whether they provide rational support for the decision. See *Law Society of New Brunswick v. Ryan* [2003] 1 S.C.R. 247 at paragraph 56; *Kovach v. Workers' Compensation Board of British Columbia* (2000) 184 D.L.R. (4th) 415 (S.C.C.), adopting the dissenting reasons of Donald, J.A., particularly paragraph 26.
>
> I have found that the meanings attributed by the review officer to key words in Regulation 31.1, 31.2 and 4.16, were meanings that those words could reasonably bear, having regard to the legislative context and the surrounding circumstances. Even if I had disagreed with the interpretations of the review officer, it would be my opinion that his ultimate decision "is rationally supported" and "falls within a range of possible, acceptable outcomes." It is my view that this conclusion is warranted by the considerable discretion conferred on the Board by the legislature to decide the issue under review, in light of the supporting reasons given by the review officer and the additional reasons which in my view *could be offered* in support of the decision. (emphasis added)

[60] Despite this, the impact of *Dunsmuir* on the question of how closely a court is to read the reasons of an administrative tribunal is likely to cause some considerable debate.

[61] Finally, while recognizing the complexity of the current law, the majority's decision has attempted to simplify how and when the test of "correctness" will apply to questions of law. It applies to "questions of law of central importance to the legal system that are outside the tribunal's area of expertise in the application of a general common law or civil rule in relation to a particular statutory context". As stated by Binnie J., this test will lead to complex debates about when and where the exception should be applied. It will take time for this test to be refined, with the result that litigants will be unable to predict the outcome of the judicial review process for some time. In other words, the "cure" for the current situation will likely muddy the water for the foreseeable future. It would almost certainly make the job of unrepresented parties more difficult, if not impossible.

[62] The answer to the first question, both in terms of the impact that *Dunsmuir* has had on the question of impact on the *ATA*, and in terms of simplification and clarity generally, apart from doing away with the need to conduct a standard of review analysis

on each outing, must be no. The new test in *Dunsmuir* is not sufficiently simple and clear.

• Can the legislature further simplify and clarify standard of review?

[63] Sections 58 and 59 of the *ATA* were intended to codify the common law as it existed at the time the *ATA* was introduced. To answer the question one should first gain an appreciation of whether the *ATA* has managed to advance the goals of simplicity and clarity to date, and if not, where are the problems.

[64] A corollary question may be whether it would be preferable to bring the *ATA* into conformity with the evolution of the common law, to ensure that there is a uniform development and positive refinement of administrative jurisprudence.

[65] In theory, the legislature could modify the *ATA* to further clarify the issue of the correct standard of review to be applied, in light of *Dunsmuir*. However, given the practicalities of the legislative timetable, the possibility of an amendment to the *ATA* seems unlikely in the near to medium term.

[66] There are three shortcomings in the *ATA* which have led to extended litigation. First, the failure to define patent unreasonableness and reasonableness for questions of fact and law has led to a continued reliance on the common law for that definition. It is that failure which also opened the door to the debate on whether *Dunsmuir* has effectively altered the *ATA*.

[67] Second, the failure to set out a methodology for determining whether questions of fact, law or discretion are within a tribunal's exclusive jurisdiction. Indeed, the whole discussion of the "exclusive jurisdiction' "expert tribunal" theme in the *ATA* is circular. This led the BC Court of Appeal to adopt the pragmatic and functional test as the method for answering the exclusive jurisdiction question: *United Carpenters*.

[68] Third, the failure to clearly specify in section 58 what questions of law would fall under section 58(2)(a) and the patent unreasonableness test as opposed to section 58(2)(c)

and the correctness test. This led the BC Court of Appeal in *UBC* to adopt a home statute vs. external statute distinction.

[69] The Legislature could define either patent unreasonableness and reasonableness *simpliciter* for all purposes, or reasonableness, should it choose to adopt the *Dunsmuir* standard.

[70] Further, it could define exclusive jurisdiction by reference to those matters set out in a tribunal's enabling statute including all matters of interpretation of the enabling statute except for the question of whether a tribunal has the jurisdiction to enter into the inquiry. Alternatively, no definition is necessary if the application of the test (patent unreasonableness, for example) was made to apply to scheduled tribunals rather than simply having sections 58 or 59 of the *ATA* apply to scheduled tribunals. In other words, get to the meat of the issue – the test itself, as opposed to the convoluted reference to the section.

[71] Finally, the Legislature could adopt the UBC approach to distinguish between those questions of law subject to patent unreasonableness or unreasonableness and those subject to correctness.

[72] It is possible that the legislature can further simplify and clarify the standard of review. Any of the legislative approaches discussed above would help to simplify and clarify the current situation.

Recommendations

• ***If the ATA were to be amended, what approach should be taken?***

[73] R. Sullivan, *Statutory Interpretation* (Ontario: Irwin Law, 1997) states at 229:

> In a Parliamentary democracy, the legislature is the primary and paramount source of law, and judges – like everyone else – must take direction from the legislature. This basic principle has several implications. First, it means that judge-made law is subordinate to valid legislation, whether federal or provincial, Act or regulation. In the event of a conflict between legislation and the common law, the legislation always prevails. Second, by enacting an exhaustive set of rules dealing

> with a matter, the legislature may occupy the field and preclude further recourse to the common law.

[74] Clearly the Legislature is paramount and can amend the legislation. However, perhaps the first question that ought to be asked is not can the Legislature amend, but rather *should it amend* or perhaps *should it repeal* sections 58 and 59 of the *ATA*.

[75] Sullivan and Driedger on the *Construction of Statutes*, 4th ed. (Ontario: Butterworths, 2002) say at 344:

> Canadian courts outside Quebec generally use the terms "codify" and "codification" to refer to legislative provisions that reproduce the common law without changing it. When a common law rule or principle is "codified" in this sense, it is cast into a fixed statutory form but its substance remains the same. In interpreting a codified rule or principle, the courts look to the common law for clarification. They rely on pre-enactment cases in the enacting jurisdiction and cases in other common law jurisdictions as well.

[76] Legislative review standards can provide clarity, simplicity and certainty to litigants. As a result, the judicial review process should be less time consuming and expensive. They can also be of assistance to boards and tribunals, by providing a clearer template for decisions. On the other hand, legislative review standards can be difficult to modify, to reflect changing circumstances and developing jurisprudence, given legislative time constraints.

[77] An amended standard of review should be one that is fair and as understandable to unrepresented parties as possible. Put simply, a reviewing court should exercise restraint and defer to a tribunal when it is operating within the immediate scope of its jurisdiction. In all other areas, it must be correct.

[78] **BCCAT suggests that if the *ATA* were to be amended, the general approach suggested by Binnie J. is to be preferred**, primarily as it most closely reflects the principles of administrative justice by giving tribunals due deference, whether their specialized expertise is set out in a privative clause or by reference to the overall scope and intent of the enabling legislation. While it is not the simplest approach of the three

judgments, it appears to allow for the highest degree of deference to tribunal decisions and respect for the intent of the legislation.

Dunsmuir v. New Brunswick, 2008 SCC 9:

http://scc.lexum.umontreal.ca/en/2008/2008scc9/2008scc9.pdf

AJO Discussion Paper:

http://www.gov.bc.ca/ajo/down/dunsmuir_discussion_paper_final.pdf