

**SUPREME COURT OF CANADA REFORMS JUDICIAL REVIEW LAW AND HOLDS THAT
PUBLIC OFFICE HOLDER GOVERNED BY EMPLOYMENT CONTRACT IS NOT ENTITLED
TO PROCEDURAL FAIRNESS WHEN DISMISSED**

Dunsmuir v. New Brunswick, 2008 SCC 9

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Introduction

The Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick* is groundbreaking for bringing about significant reforms to the law of judicial review, and drastically scaling back the rights of dismissed public office holders.

Facts

A public office holder (the "Employee") of the province of New Brunswick (the "Employer") grieved the Employer's decision to terminate his employment, pursuant to the *Public Service Labour Relations Act* (the "PSLRA"), asserting that he was not given a reasonable opportunity to respond to the Employer's concerns about his performance, which he alleged constituted a breach of procedural fairness.

The adjudicator found that the Employee did not receive procedural fairness in the Employer's decision to dismiss him and reinstated the Employee. On judicial review, the reviewing judge quashed the reinstatement order, holding that the Employee's right to procedural fairness had not been breached. The Court of Appeal upheld the reviewing judge's finding.

Prior to determining the substantive issue of whether the Employee had the right to procedural fairness, a majority of the Supreme Court of Canada (the "SCC") took the opportunity to revisit the proper approach to be taken when judicially reviewing a decision of an administrative tribunal.

Judicial Review Reform

Before the *Dunsmuir v. New Brunswick* decision, there were three standards of review that courts applied when reviewing decisions of adjudicative tribunals. The first standard was correctness, where no deference was shown to the administrative tribunal's decision. Second was the patent unreasonableness standard, which showed the most deference to the administrative tribunal's decision. Third was the reasonableness *simpliciter* standard, which fell somewhere between the two.

The SCC stated that the existing system for judicial review was difficult to implement, particularly with respect to distinguishing between the patent unreasonableness and reasonableness *simpliciter* standards. It noted that a review of the cases revealed that an actual difference between the two reasonableness standards appeared to be illusory. Therefore, it concluded that it was time to collapse the two reasonableness standards into a single standard of

reasonableness such that there would remain only two standards of review: correctness and reasonableness.

The SCC emphasized that the reasonableness standard recognizes that certain questions that come before administrative tribunals do not lend themselves to a specific result, but give rise to a number of reasonable conclusions. In applying the reasonableness standard, courts must consider whether the decision falls within a range of reasonable outcomes, which are defensible in respect to the facts and law.

The SCC made clear that the move toward a single reasonableness standard would not pave the way for a more intrusive review by the courts, or allow the courts to pay “lip service” to the concept of reasonableness review while, in fact, imposing their own view. At the same time, it would not render courts “subservient” to administrative tribunals or require courts to show “blind reverence” to their interpretations. Rather, deference required respect for the legislature’s choice to leave certain matters in the hands of administrative tribunals in light of their particular expertise, and for the different role of the courts within the Canadian constitutional system.

The SCC also did away with the phrase “pragmatic and functional approach” that was previously used to describe the analytical framework for arriving at the appropriate standard of review. In its view, that phrase tended to misguide courts. The SCC renamed it simply the “standard of review analysis,” which it described as a contextual approach whereby the courts must consider:

1. Whether there is a statutory direction from Parliament or a legislature indicating the need for deference in the form of a privative clause;
2. The purpose of the tribunal as determined by its enabling statute;
3. The nature of the question at issue; and
4. The expertise of the tribunal.

The SCC stated that a reasonableness standard would likely be appropriate:

- If there is a strong privative clause;
- If a tribunal is interpreting its own statute or statutes closely connected to its function;
- When questions of fact, discretion and policy are at issue, as well as legal issues that cannot be easily separated from the factual issues; or
- When an administrative tribunal has developed a particular expertise in the application of a general common law rule in relation to a specific statutory context, such as labour arbitrators.

Conversely, the correctness standard would be appropriate:

- If the issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise;
- With respect to issues relating to the administrative tribunal’s jurisdiction or *vires*;
- With respect to issues relating to jurisdictional lines between two or more competing specialized tribunals; or
- With respect to constitutional questions regarding the division of powers between Parliament and the provinces.

Public Office Holders and Procedural Fairness

The SCC reversed aspects of its earlier decision of *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, in which it held that a holder of a public office was entitled to a public law duty of fairness, such as the right to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed.

The SCC noted that one of the primary justifications for providing public office holders with procedural fairness was that, unlike contractual employees, they generally did not benefit from contractual protections from summary discharge, such as just cause and reasonable notice. Accordingly, it was desirable to impose minimal procedural requirements to ensure that they were not deprived of their positions arbitrarily. However, the SCC found that when a public office holder is employed under a contract of employment, this justification loses force because the public office holder would have access to ordinary contractual remedies.

The SCC, therefore, held that the distinction between a public office holder and a contractual employee for the purposes of determining entitlement to procedural fairness should be abolished. Instead, courts must focus on the nature of the employment relationship. Where the employment relationship is contractual, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. While this would mean that most public office holders would not be entitled to procedural fairness, the SCC noted that there would be exceptions, such as when the employment contract did not, in fact, entitle the employee to common law remedies or when the employment contract implied a duty of fairness.

On the facts before it, the SCC concluded that the Employee, who was employed pursuant to an employment contract, was not entitled to procedural fairness in respect to his dismissal, since he was adequately protected by contractual remedies.

Conclusion

Although the SCC's reforms to the judicial review analysis may not change the outcome of cases that are judicially reviewed, this decision is significant because it has simplified and clarified the analytical process, which was highly criticized for being difficult to apply.

This decision also represents a significant reversal of the notion that public office holders are entitled to procedural fairness as a matter of course. Since most public office holders are employed pursuant to employment contracts, this means that most of them will no longer be entitled to procedural fairness when dismissed.