Can we make it any clearer?
BC's experience with legislated standards of review

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British Columbia has an almost 15-year experience with express legislated standards of review from administrative tribunals. Has this experiment succeeded in isolating BC as an administrative law utopia, free from painful debates and analyses as to standard of review? Has the West Coast cracked the code?

The answers to these questions, and more, may disappoint.

I. The Mischief & the Proposed Remedy

The years leading up to 2004 saw the Supreme Court of Canada increasingly focussed on standard of review issues. In cases such as 2003's *Dr Q v College of Physicians and Surgeons of British Columbia*[1] and *Law Society of New Brunswick v Ryan*,[2] the Court spent far more time discussing curial deference than discussing the ultimate substantive outcome. All this attention, perhaps expectedly, led to fissures on the bench: months after the two unanimous decisions above, Justice LeBel's concurring reasons in *Toronto (City) v CUPE, Local 79*[3] took aim at elements of administrative law orthodoxy.

Already geographically removed from this din, British Columbia sought to chart its own path that would render lengthy dissertations on standard of review things of the past. In May 2004, out in somnolent Victoria, BC's Attorney General introduced a major prong in the BC Liberals' administrative law reforms to the Legislative Assembly. Bill 56 – later to become the *Administrative Tribunals Act*[4] ("ATA") – tackled a variety of issues, including standard of review.

Speaking in support of the Bill on second reading, the Attorney General indicated that among other things the statute would "clarify the role of the courts in their review of tribunal decisions".[5] He explained:

> While the authority of the courts to oversee the work of administrative tribunals is vital and unquestioned, there has been a huge amount of debate and uncertainty about what standard of review should be applied by the courts in reviewing tribunal decisions. There is a large body of jurisprudence that tries to make sense of this area of the law, but unfortunately, as the jurisprudence has developed, it has tended to create confusion rather than certainty.
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> The question of what the standard of review should be on a case-by-case basis is often interpreted by the courts as a search for legislative intent. The words "legislative intent" are, in fact, the words that you see in the judicial decisions. What the courts are trying to do is find out what the intention of the Legislature was around the role of the courts in supervising decisions of administrative tribunals. Frankly, the Legislature does not always do as good a job as it should in making its intent clear. Accordingly, searching for that intent tends to be a time-consuming, expensive and sometimes disruptive exercise.

[1] 2003 SCC 19, [2003] 1 SCR 226.
[2] 2003 SCC 20, [2003] 1 SCR 247.
[3] 2003 SCC 63 at paras 60ff, [2003] 3 SCR 77.
[4] SBC 2004, c 45.
[5] British Columbia, Legislative Assembly, *Hansard*, 37th Parl, 5th Sess, No 25 (18 May 2004) at 11192.

> Really, in practical terms, what often happens is that when there is a challenge made to a decision of a tribunal, particularly a tribunal that is newly constituted, then a significant amount of time and money must be spent by lawyers on constructing the argument about what the standard of review is before the parties get to argue the merits of the case.
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> Absent express legislation – that is, in cases where there is not a clear statement of the legislative intent in this area – what the courts have done is develop standards of review on a case-by-case basis within the factual context of individual decisions and according to some basic principles of approach. But the result is that there are a number of different standards, and the standards are sometimes confusing. The variety of standards in itself is a source of confusion. Sometimes the standards conflict with each other, and they are often difficult to apply when questions are raised in other contexts and circumstances.
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> In the bill before us today, this government is for the first time taking up the challenge of defining legislative intent by simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise, like the Farm Industry Review Board and the Employment Standards Tribunal, this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals — including, for example, the mental health review panels — the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.[6]

The ATA seeks to achieve this aim, in part, by restricting those circumstances calling for application of the "reasonableness *simpliciter*" standard, and by articulating definitions for "privative clause" (in s 1)[7] and for patently unreasonable discretionary decisions (ss 58(3) and 59(4)). In brief:

- sections 58 and 59 provide standards of review for cases that involve privative clauses and those that do not, respectively;
- section 58 (*Standard of review with privative clause*) states that if the Act under which an application for judicial review is made contains a privative clause: (a) the court must not interfere with findings of fact or an exercise of discretion by the tribunal unless they are patently unreasonable; (b) the court must ask, concerning questions about the application of common law rules of natural justice and procedural fairness, whether the tribunal acted fairly in all of the circumstances; and (c) for all other matters, the court is to apply a correctness standard of review;

[6] *Ibid* at 11193.

[7] "[P]rovisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court".

- section 59 (*Standard of review without privative clause*) states that, where there is no privative clause: (a) the court is to apply a correctness standard of review "for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness"; (b) findings of fact are subject to a reasonableness standard of review, and a finding of fact will be unreasonable if there is no evidence in support of it; and (c) the court must not interfere with a discretionary decision unless it is patently unreasonable; and
- subsections 58(3) and 59(4) each specify that "a discretionary decision is patently unreasonable if the decision (a) is exercised arbitrarily or in bad faith, (b) is exercised for an improper purpose, (c) is based entirely or predominantly on irrelevant factors, or (d) fails to take statutory requirements into account."

The government had a laudable goal in passing the ATA, and one that the Court had arguably invited in its many pronouncements on the "pragmatic and functional approach". That is, the Court had continually (and rightly) emphasized that the end goal of the standard of review analysis was to discover and give effect to the intent of the legislatures that created the administrative schemes.[8] A legislature that might remove or reduce any mystery as to the deference it intended courts to show to its tribunals should naturally be one that improves judicial efficiency and, by extension, access to justice.

II. *Dunsmuir* and Sequellae

The BC courts had less than four years' experience with the ATA before the Court released *Dunsmuir v New Brunswick*,[9] taking "common law" administrative law in a different direction. Most notably, the Court abandoned the language of "patent unreasonableness" and collapsed the distinction that had previously existed between that standard and "reasonableness *simpliciter*".

Perhaps expectedly, the *Dunsmuir* sea change led to discussion in a series of BC judicial reviews – precisely the mischief that the ATA was intended to avoid – about the effect the new administrative law regime would have on judicial reviews pursuant to the ATA.

In one early case, the BC Supreme Court held that, since the ATA only defined what is patently unreasonable *for discretionary decisions*: (a) it was necessary to "look to the common law for the definition of patently unreasonable" relevant to questions of fact and law; and (b) the "common law" having been recently altered, it was the *Dunsmuir* approach to reasonableness review that applied.[10] This was all notwithstanding the Legislature's reference to patent unreasonableness and the definition it had provided for patently unreasonable in the exercise of discretion.

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[8] See, *e.g.*, *Law Society of New Brunswick v Ryan*, *supra*, at paras 29, 40, 42, 50; *Toronto (City) v CUPE, Local 79*, *supra*, at paras 71, 73 (LeBel J).
[9] 2008 SCC 9, [2008] 1 SCR 190.
[10] *Howe v 3770010 Canada Inc*, 2008 BCSC 330 at paras 17-19. See also *Lavigne v British Columbia (Workers Compensation Review Board)*, 2008 BCSC 1107; *Asquini v British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 62; *Manz v Sundher*, 2009 BCCA 92.

Meanwhile, later in 2008, the same court held:

> ...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:
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> > 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.
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> 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.[11]

The BC Legislature's attempt to bring clarity to the issue was already running into difficulty.

Before long, the ATA came to the attention of the Supreme Court of Canada, which offered its own view of the "dialogue" between the legislatures and courts. Speaking for the majority in *Canada (Citizenship and Immigration) v Khosa*,[12] Justice Binnie stated:

> Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58(2)(a) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable". The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of *indicia* of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford

[11] *Brown v. Residential Tenancy Act*, 2008 BCSC 1538 at paras 34, 35.
[12] 2009 SCC 12, [2009] 1 SCR 339.

> administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.[13]

It is difficult to see how this approach does not undermine both (a) the legislature's specific goal to bring clarity to the standards of review in the ATA and also, more generally (b) the proper institutional competencies of, and relationship between, the legislative and judicial branches of government. It is the legislature that creates the administrative bodies and endows them with decision-making power; apart from constitutional constraints, it is the legislature's intention alone that governs how deferential the courts should be to administrative processes and results. The basis for asserting that the BC Legislature's expressly calibrated standard of review can or should be subject to changing judicial winds is, with respect, unclear to this writer. (The natural difficulty one might have fathoming how the Legislature could have possibly seen a benefit in hitching the ATA wagon to the courts' unruly steed is but one reason to conclude that it had no intention to do so.)

In any event, the BC Court of Appeal brought some much-needed clarity to the issue – almost six years after the release of *Dunsmuir* – in *British Columbia Ferry Services Inc v British Columbia Labour Relations Board*.[14] There, Saunders JA held:

> The question is the meaning of the phrase "patently unreasonable", most particularly after passage of the Administrative Tribunals Act and the subsequent release of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Prior to those developments numerous cases grappled with the term, including, helpfully, *Speckling v. British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77. There, Madam Justice Levine stated:
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> > [33] Having confirmed the correctness of the patently unreasonable standard of review, I agree with the chambers judge's summary of the approach to be taken in applying that standard. He noted the following principles (at para. 8):
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> > 1. The standard of review is that of patent unreasonableness: *Canada (Attorney General) v. P.S.A.C.* (1993), 101 D.L.R. (4th) 673 (S.C.C.).
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> > 2. "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
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> > 3. The review test must be applied to the result not to the reasons leading to the result: *Kovach v. British Columbia (Workers' Compensation Board)* (2000), 184 D.L.R. (4th) 415 (S.C.C.).

[13] *Ibid* at para 19 [underlining and italics in original].
[14] 2013 BCCA 497.

> 4. The privative clause set out in s. 96(1) of the [*Workers' Compensation*] Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.)[.]
> 5. A decision may only be set aside where the board commits jurisdiction error [*sic*].
> 6. A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not: *Douglas Aircraft Co. of Canada Ltd. v. McConnell*, [1980] 1 S.C.R. 245, and *Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation et al.* (1997), 144 D.L.R. (4th) 385 (S.C.C.).
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> [Emphasis added.]
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> Although the term "patently unreasonable" is not a standard applied in most jurisdictions as a result of *Dunsmuir*, the phrase continues to have effect in British Columbia because s. 58 of the *Administrative Tribunals Act* invokes it in respect to an expert tribunal in an area of its expertise (see *Khosa*). It is clear that whereas the term "reasonableness" describes a range of decision, "patently unreasonable" is at the high end of the deference spectrum and it retains its pre-*Dunsmuir* character.[15]

III. Lessons

To say that the courts in BC are now settled that the pre-*Dunsmuir* understanding of patent unreasonableness retains its force under the ATA is not to say that the standard of review does not continue to bedevil litigants, counsel and the courts.

One of the lessons, in my view, that can be drawn from the BC experiment is that legislative persistence is important. Sections 58 and 59 of the ATA helpfully provide a definition for a patently unreasonable discretionary decision, but they do not indicate whether the same criteria define patently unreasonable decisions as to findings of fact or law. Surely, it was incumbent on the Legislature – when it became clear shortly after *Dunsmuir* that the courts were struggling with the issue – to introduce amendments to the ATA to bring clarity. However, ss 58 and 59 have (other than some cosmetic changes to s 58(1)) remained untouched by the amender's pen. To some extent then, the Legislature appears to have abdicated its responsibility to lead on the matter, such that rather than "simplifying and codifying the standards of review [for] courts to apply in their review of tribunal decisions" the ATA has only managed to create a separate battlefield for judicial review proceedings.

One is left to wonder what might the ATA have achieved – or what it might yet achieve with some minor legislative attention – if only the Court had refrained from tinkering with the administrative framework in cases like *Dunsmuir*, and had instead demanded greater clarity from

[15] *Ibid* at paras 52-53.

the legislatures across the country. This, in my opinion, would have been the appropriate approach in light of the respective strengths and mandates of the legislative and judicial branches of government.

In the result, the ATA has not yet led to the gains in efficiency that the Legislature had hoped. Thus, I suppose, is the fate of many well-laid plans. Of course, the Legislature has all along retained the ability to bring further clarity to the matter by effecting some surgical amendments to the ATA. Perhaps it will one day do so, and BC will become that administrative utopia that all jurisdictions no doubt aspire to be. Time shall tell.