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BLOG

SUPREME COURT OF CANADA TO REVISIT *DUNSMUIR*

In a 2016 paper, Justice Stratas of the Federal Court of Appeal bemoaned the state of administrative law in Canada, stating: *"*Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan."

That construction crew is at it again.

On May 10, 2018, the Supreme Court of Canada announced that it would jointly hear three appeals from the Federal Court of Appeal – *Bell Canada v Canada (Attorney General)*, *National Football League et al. v Attorney General of Canada,* and *Minister of Citizenship and Immigration v Alexander Vavilov.* In a rare move, the Court announced that it would use these appeals as "an opportunity to consider the nature and scope of administrative action, as addressed in *Dunsmuir v New Brunswick* and subsequent cases." To this end, the Court has invited the parties in each of these cases to devote a substantial part of their written and oral submissions on the appeal to the question of standard of review. It will also allow for an increased page-limit of 45 pages per factum.

Dunsmuir has been, for the last decade, the foremost authority on the judicial review of administrative action. A quick search reveals that lower court and tribunal decisions have cited it nearly 15,000 times. The stated goal of the *Dunsmuir* Court was to simplify the standard of review analysis, making it easier for lower courts to apply. A reviewing court would find decisions of tribunals to either be "reasonable" or "correct". In essence, the chosen standard of review dictates how much deference a reviewing court gives to an administrative decision-maker. Acting as a blueprint on how to decide which of these standards applied to a given situation, *Dunsmuir* would, in theory, reduce the amount of argument devoted to the standard of review. As many critics have pointed out, *Dunsmuir* may have had the opposite effect. Lengthy arguments about the standard of review are near ubiquitous in the administrative law world.

While it is not clear how the Court plans to further simplify the framework with this new set of decisions, one possible outcome is that the correctness standard will be eliminated. Justice Abella argued as much in *Wilson v. Atomic Energy of Canada Ltd.* Under her formulation, courts would review all administrative decisions under a single, unified reasonableness standard. This change would supposedly create certainty and predictability on judicial review, with courts showing greater deference to administrative decisions. Justice Abella is nearing retirement age, and these cases likely represent her last attempt to win over her colleagues on this issue.

The arcane discussion above is all to say that local governments should take note of the new framework, when it arrives. Municipalities are often subject to judicial review, for both their legislative and adjudicative actions. In municipal law, *Dunsmuir* has had mixed impact. On the adjudicative side of things, *Nanaimo (City) v Rascal Trucking*, decided eight years before *Dunsmuir,* is still the leading authority for many municipal decisions, notably for remedial action requirements under the *Community Charter*. *Rascal Trucking* retains a relatively unintuitive framework wherein a reviewing court subjects the municipal decision to both a correctness and a reasonableness analysis. This stands in stark contrast to *Catalyst Paper Corp v North Cowichan (District),* where the impugned decision was legislative in nature. There, the Court applied a very deferential reasonableness standard.

Whatever the finished product may be, it will surely be of great interest to local governments across Canada.

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