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# ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

CO-EDITORS: ANDREA GONSALVES & JUSTIN SAFAYENI ISSUE 6 • AUGUST 2016

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## Turmoil brews around standard of review: *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29

**FACTS:** W worked for AECL for four and a half years and had a clean disciplinary record when he was dismissed in November 2009. W filed an Unjust Dismissal complaint under the *Canada Labour Code*.[1] AECL claimed that W was "terminated on a non-cause basis" and was given generous severance package. AECL asked the labour adjudicator appointed to hear W's complaint for a preliminary ruling on whether a dismissal without cause and with a general severance package was by definition a just dismissal. The adjudicator found that an employer cannot, by paying a severance package (not matter how generous) avoid a determination under the *Code* of whether the dismissal was unjust. The adjudicator ruled that because W was dismissed without cause, the dismissal was unjust, and he allowed W's complaint.

AECL sought judicial review. The Federal Court application judge applied the reasonableness standard of review and found the adjudicator unreasonably decided that the *Code* precludes employers from dismissing non-unionized employees without cause. The Federal Court of Appeal agreed, but applied the correctness standard on the basis that "rule of law concerns predominate" in this situation where adjudicators have persistently disagreed over whether the *Code* permits dismissal without cause. Wilson appealed to the Supreme Court of Canada.

**DECISION:** Appeal allowed. Writing for a six-judge majority on the merits, Abella J held that the adjudicator's decision should be reviewed on the reasonableness standard as the decisions of labour adjudicators interpreting statutes or agreements within their expertise attract deference. Applying that standard, the adjudicator's decision was reasonable. The text, the context, the statements of the Minister of Labour when the legislation was introduced, and the views of the vast majority of labour arbitrators and labour law scholars, confirm that the entire purpose of the statutory scheme was to ensure that non-unionized federal employees would be protected against dismissal without cause. Permitting an employer to dismiss without cause but with notice or severance pay in lieu undermines that purpose and falls outside the range of "possible, acceptable outcomes which are defensible in respect of the facts and law".

1 RSC 1985, c L.2

In *obiter* comments which were not joined by the other judges of the majority, Abella J suggested that the approach to standard of review might be simplified in the future by eliminating the correctness standard altogether. The rule of law principles discussed in *Dunsmuir* do not require two standards of review, they require only that there *be* judicial review to ensure that decision-makers do not exceed their authority. The system could be reformed to a single reviewing standard of reasonableness so long as that standard accommodates the need for both deference and for the possibility of a single right answer where the rule of law demands it, such as in the four categories singled out for correctness review in *Dunsmuir*.

Four judges who agreed with Abella J on the merits were not prepared "at this time" to endorse any particular proposal to redraw the standard of review framework, though they appreciated her efforts to stimulate a discussion. Cromwell J, the fifth judge, defended the *Dunsmuir* framework as sound and not in need of an overhaul.

Côté and Brown JJ wrote for the three dissenting judges. Largely following the Court of Appeal's approach, they applied the correctness standard of review. Even though the parties agreed that the standard of review should be reasonableness, the parties should not be able to, by agreement, contract out of the appropriate standard of review. Serious rule of law concerns justify correctness review in this case. Deferring on matters of statutory interpretation opens up the possibility that different decision-makers may reach opposing interpretations of the same provision. For decades, labour adjudicators have come to conflicting interpretations of the unjust dismissal provisions in the Code. Lower courts have found both interpretations to be reasonable. This situation compromises certainty and predictability – core principles of the rule of law.

Where there is lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear that the legislature could only have intended the statute to bear one meaning, correctness review is appropriate. A "lingering disagreement" justifying correctness review presupposes that both conflicting interpretations are reasonable (since a conflicting unreasonable interpretation will be quashed on judicial review). Even if only one conflicting but reasonable decision exists, it undermines the rule of law.

Applying the correctness standard, a federally-regulated employer can dismiss an employee without cause, provided appropriate notice and severance pay are given. However, an employee who is dismissed without cause can still apply for an unjust dismissal ruling under the *Code*.

**COMMENTARY:** The majority ruling on the merits is clearly significant to labour and employment lawyers, as well as federally-regulated employers across Canada and their employees. For the purposes of this Case Review, however, we find the judges' discussion of and differing approaches to the standard of review far more interesting. Three points in particular stand out.

First, there is Abella J's suggestion that judicial review might be simplified by collapsing the remaining two standards of review into a single reasonableness standard. Abella J argues that this would remove the struggle of determining which standard of review ought to apply in any given case, and that the reasonableness standard is sufficiently flexible to do the work of both standards – by allowing a wider range of defensible outcomes for those kinds of issues and decision-makers that have traditionally been given deference, and a narrower range of only one reasonable answer in situations identified as appropriate for correctness review in *Dnusmuir*. Lawyers who practise in this area can appreciate Abella J's cry for simplification, but can it fairly be said that in any situation where the correctness standard applies the "correct" result is the only reasonable result? We aren't so sure. Nor does a single standard of review necessarily simplify matters. Instead of arguing over which standard applies, we might find ourselves spending as much time arguing about how broad or narrow the range of defensible outcomes ought to be. To borrow the vivid metaphor of Binnie J in *Dunsmuir*: "the result … may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without

any overall saving to motorists in time or expense."[2]

The second notable aspect of this case is that while Abella J muses about *eliminating* the correctness standard, the dissenting judges would *expand* that standard to a previously unrecognised category: where there is "lingering disagreement on a matter of statutory interpretation between administrative decision-makers, and where it is clear the legislature could only have intended the statute to bear one meaning". Along with failing to explain what is meant by "lingering disagreement", the dissent does not appear to appreciate the potentially vast scope of this new category; indeed, since it is generally presumed that the legislature only ever intends a statutory provision to bear one meaning, this new category would effectively permit correctness review in every situation where decision-makers reasonably disagree on a question of statutory interpretation. A generation of Supreme Court judges has preached that the proper relationship between the courts and administrative bodies requires that courts let decision-makers iron out their own inconsistent decisions. The dissent's approach would fundamentally upset that deference apple-cart.

Third, the application of the two standards by the majority and the dissent forces us to ask whether the whole standard of review discussion is nothing but smoke and mirrors, or as Abella J says, just a "rhetorical debat[e] about what to call our conclusions at the end of the review". The statutory scheme in issue had two possible interpretations: the *Code* permits dismissal without cause or the *Code* does not permit dismissal without cause. Applying the reasonableness standard, the majority held that the latter interpretation is reasonable, while the former is unreasonable. Applying the correctness standard, the dissent found that the former interpretation is correct and the latter is incorrect. How can we say that judicial review is functioning effectively in Canada when an interpretation of a statutory scheme is found to be correct by three Supreme Court judges – and unreasonable by the other six? ⚖

2 *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 139

## *Charter* values framework applied to democratically-elected body: *Trinity Western University* et al. *v. Law Society of Upper Canada*, 2016 ONCA 518

**FACTS:** Trinity Western University is a private university with a mandate anchored in evangelical Christian philosophy. TWU wants to establish a law school. Members of the LGBTQ community may attend the proposed law school only if they adhere to TWU's Community Covenant, which forbids sexual intimacy except between married heterosexual couples.

TWU applied to the provincial law societies for accreditation of its proposed law school. The Law Society of Upper Canada – which has a statutory mandate to govern the legal profession in the "public interest"[3] – rejected TWU's application[4] by a vote of 28-21 among benchers.

The record before the LSUC when it made its decision included: three legal opinions; 210 submissions by members of the profession and the public; oral and written submissions from TWU; and an address by the President of TWU. The LSUC did not issue reasons for denying accreditation, but many of the benchers who voted gave speeches on their respective positions.

TWU brought an application for judicial review of the LSUC's decision not to grant the proposed law school accreditation, arguing (among other things) that the decision did not properly balance the competing *Charter* values of freedom of religion and equality. That application was dismissed by

3 *Law Society Act*, RSO 1990, c L.8, s 4.2

4 So too did the Law Society of British Columbia and the Law Society of Nova Scotia. Both of those decisions were overturned by superior court decisions, which were the subject of subsequent appeals. The Nova Scotia Court of Appeal recently affirmed the lower court decision on jurisdictional grounds: see *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59. The British Columbia Court of Appeal heard its appeal in June, with no decision released yet.

the Divisional Court in a decision summarised in the October 2015 issue of this Case Review.

**DECISION:** Appeal dismissed.

Although the LSUC's decision infringed TWU's freedom of religion, it was a reasonable decision under the *Doré* "*Charter* values" analysis.[5] That analysis requires ensuring any infringement on the freedom of religion is proportionate, having regard to the LSUC's statutory objectives and competing *Charter* values.

The LSUC's statutory objectives include ensuring the quality of those who practise law in Ontario. Quality depends on merit, and merit excludes discriminatory classifications. TWU's admission policy discriminates against the LGBTQ community, undermining the LSUC's objectives and contravening s. 15 of the *Charter*.

The LSUC considered and balanced these competing considerations in its decision-making process. The decision represents a reasonable balance between TWU's right to freedom of religion and the LSUC's statutory objectives.

Although not every bencher's speech reflects reasoning explicitly faithful to the *Doré* framework, the bigger picture is that the benchers were all aware of the clash between religious and equality rights. The LSUC's decision must be assessed as a whole, not from individual speeches.

Moreover, benchers are democratically elected (or, in the case of lay benchers, appointed to office by the provincial government) and made their decision after undertaking a democratic process. In these circumstances, there is no obligation to produce a coherent set of reasons. Reasons are to be deduced from the debate, deliberations and statements of policy giving rise to the decision.

**COMMENTARY:** This decision stands out as one of the more comprehensive appellate court considerations of the *Charter* values framework established in *Doré*. Yet it fails to grapple with a key element of that framework according to a majority of the Supreme Court in *Loyola High School*: the requirement that, in order to be reasonable, the infringing measure be "proportionate", in the sense that the affected *Charter* right is "limited no more than necessary given the applicable statutory objectives."[6]

The Court of Appeal never addresses this question. Instead it asks a different one: whether the LSUC acted reasonably in balancing the appellants' *Charter* rights with the statutory objective of promoting a legal profession based on merit, without discrimination.[7] Framed in this way – without the strictures of any kind of minimal impairment analysis – it is easier to defend the decision under review as "reasonable". This amounts to a dilution of what the majority in *Loyola* requires to satisfy the *Doré* conception of reasonableness. Although both approaches may lead to the same result on the facts of this case, the Court of Appeal's failure to apply *Doré* in the same way as the majority in *Loyola* could nevertheless prove to be fertile ground should this case be granted leave by the Supreme Court of Canada.[8]

Another interesting question that may attract the Supreme Court's attention is how the equality rights implications of TWU's position are best addressed in the *Doré* framework. The Court of Appeal references them in the course of its general balancing discussion, as a *Charter* value that must be reconciled with freedom of religion. A better analytical approach might be to conduct a minimal impairment-type analysis between freedom of religion and the statutory objectives (as required by *Doré*), and then consider the equality rights implications of TWU's position separately, as part a final balancing analysis – similar to the final proportionality stage of the *Oakes* test.[9] The practical consequence of this approach is that even measures found to satisfy the minimal impairment requirement could nevertheless be found unrea-

5 *Doré v Barreau du Québec*, [2012] 2 SCR 395

6 *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613 at para 4 (*per* Abella J)

7 See paras 118*ff*

8 On June 30, TWU announced that it will be seeking leave to appeal the Court of Appeal's decision.

9 This view finds some support in description of the *Doré* framework by the majority in *Loyola High School* (see para 40)

sonable, in light of a final weighing up of their deleterious and salutary effects.

## Discretion to award costs in the regulated health profession context: *Reid v College of Chiropractors of Ontario*, 2016 ONSC 1041 (Div Ct)

**FACTS:** R, a member of the College of Chiropractors of Ontario, was found guilty of five counts of professional misconduct for inappropriate communications with another member of the College, and for failing to cooperate with the College's investigation. The Discipline Committee panel ordered a 12-month suspension from practice, re-education about professional standards, and a $10,000 fine. R was also ordered to pay costs in the amount of $166,194.50, which represented 51% of the College's total costs for the proceeding.

R appealed against the findings of professional misconduct, the penalty imposed and the costs awarded. With respect to the costs award, R conceded that it was appropriate for the panel to impose costs, but took issue with the quantum.

**DECISION:** Appeal dismissed. The Divisional Court unanimously agreed with R that one of the five counts of professional misconduct should be set aside, but concluded that the penalty imposed was reasonable even in light of that finding.

The Court split on the issue of the costs appeal.

Writing for the majority, Marrocco ACJSC and Pattillo J, dismissed the costs appeal, finding that the costs order was proportionate and accorded with the losing party's reasonable expectations. In reaching this conclusion, the majority relied heavily on the language in s 53.1 of the *Health Professions Procedural Code*, which contemplates an unsuccessful party being liable for far more than the College's legal costs.[10] In the majority's view, this made a comparison between R's legal costs and the costs claimed by the College one of "apples and oranges".

The majority held that the College's offer to settle was a relevant consideration. In refusing the offer, R failed to recognize his misconduct and caused significant costs for a 6-day hearing, ending in a result that was worse for him than the offer made.

The majority also gave deference to the Discipline Committee's finding that R prolonged the hearing and concluded that, given the significant reduction of the College's total costs, the cost order was reasonable and defensible in light of the facts.

In dissent, Wilson J accepted R's submission that the Discipline Committee erred in principle by failing to consider the complexity of the proceeding and seriousness of the allegations, and it also ignored the principle that cost awards must be proportionate and in keeping with the reasonable expectations of the unsuccessful party.

In her view, this was a relatively simple discipline proceeding involving a moderately serious complaint. She noted that the costs requested (the bulk of which were associated with legal fees) were 6.5 times those incurred by R in defending the proceedings, and were significantly higher than those awarded in other somewhat similar cases.

Wilson J concluded that the costs award was "excessive", imposed a "barrier to access to justice," and "crosse[d] the line from imposing reasonable costs to the unsuccessful party, to being punishment." She would have reduced the award to $60,000, inclusive.

**COMMENTARY:** This case will be of interest to regulators and practitioners alike because it provides helpful guidance on the factors relevant to a determination of costs under s 53.1 of the

10 Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c 18. Section 53. 1 provides: "In an appropriate case, a panel may make an order requiring a member who the panel finds has committed an act of professional misconduct or finds to be incompetent to pay all or part of the following costs and expenses:

1. The College's legal costs and expenses.
2. The College's costs and expenses incurred in investigating the matter.
3. The College's costs and expenses incurred in conducting the hearing."

*Health Professions Procedural Code*. For the most part, the Court was in agreement about the factors that should be considered. It is evident that proportionality and the reasonable expectations of the losing party are key considerations, as is the unsuccessful party's role in delaying proceedings. It is also clear that offers to settle can be taken into account; the court was in disagreement only about the weight given to that factor in this case.

This case also serves as a powerful reminder that professional discipline proceedings may be accompanied by significant cost liability – and that one faces an uphill battle when challenging such a decision on appeal. The costs award in this case was the highest award ever made by the College, even though the hearing was not particularly long and the case was not overly complex. As the majority's reasons make clear, however, an appeal court will not interfere with a cost award simply because the quantum is higher than normal. There cost decision must be "plainly wrong" and demonstrate and error in principle for the Court to intervene.

## Reasonableness and civility: *Groia v Law Society of Upper Canada*, 2016 ONCA 471

**FACTS:** G, a lawyer regulated by the Law Society of Upper Canada, represented an executive facing charges under the Ontario *Securities Act*[11] arising from the Bre-X scandal. G's client was acquitted after "complex, protracted and exceptionally acrimonious" proceedings. G made repeated allegations of misconduct against the OSC prosecutors. In a decision rendered on an interlocutory application during the proceedings, the application judge found that G conduct in making these allegations had been "improper", "appallingly unrestrained", "unprofessional", "inappropriate", and "extreme".

After the OSC proceedings concluded, the LSUC, acting of its own motion, commenced disciplinary proceedings against G, charging that he had acted uncivilly both in court and through communications with the OSC prosecutors. At first instance, the Hearing Panel of the Law Society Tribunal found G guilty of professional misconduct and ordered a two-month suspension along with costs of $247,000.

The Law Society Tribunal Appeal Panel upheld the finding of misconduct but reduced the penalty to a one-month suspension and decreased the costs award by $47,000. The Appeal Panel held that a lawyer's duty of civility required that allegations of prosecutorial misconduct should only be made by a lawyer who is acting in good faith *and* has a reasonable basis for making the allegation.

G appealed to the Divisional Court, which dismissed the appeal.

He then further appealed to the Ontario Court of Appeal against the finding of misconduct, the penalty, and the costs award.

**DECISION:** Appeal dismissed (Brown JA, dissenting).

Cronk JA, writing for the majority, upheld the decision of the Divisional Court, while holding that a reasonableness standard applied to the Appeal Panel's ruling (the Divisional Court had applied a standard of correctness to the test for incivility).

The majority rejected G's argument that the Law Society's jurisdiction over in-court conduct of lawyers was circumscribed by the fact that this conduct was better regulated by the application judge presiding at the hearing. The Law Society's expertise in professional discipline played a valuable role operating alongside trial judges in policing in-court misconduct by lawyers.

The majority also rejected G's argument that the Appeal Panel's ruling would compromise a lawyer's duty of zealous advocacy on behalf of a client. G had argued that a finding of misconduct could have a chilling effect on the willingness of defence lawyers to advance distasteful arguments

11 RSO 1990, c S.5

on behalf of their clients. The majority held that the duty of civility and commitment to a client's cause are meant to operate in tandem, without one taking precedence over the other. Zealous advocacy does not require or permit an advocate to make repeated, unfounded allegations about the personal integrity of an opponent in court.

In a forceful dissent, Brown JA held that the constitutional independence of the courts mandated a standard of correctness review on matters relating to the in-court conduct of lawyers. He turned to the contextual *Dunsmuir* factors, notably the relative institutional expertise of the courts and law societies, in concluding that there was no reason for the courts to defer to regulators with respect to in-court conduct. Brown JA went on to formulate a test for incivility that allowed a greater role for trial judges in defining the scope of permissible conduct.

**COMMENTARY:** This decision addresses important questions about standards of civility for lawyers and the relative responsibilities of courts and law societies in regulating in court misconduct. Of broader interest to administrative lawyers, the split between the majority and the dissent is another example of the growing dissatisfaction with the prevailing standard of review framework.

The majority applied *Dunsmuir*'s presumption of reasonableness to the Appeal Panel's interpretation of its home statute. In doing so, the majority cited three cases from outside Ontario[12] for the proposition that reasonableness review "applies to decisions of specialized, professional disciplinary bodies", *i.e.* that there was no need for a full *Dunsmuir* analysis as the standard of review was already established by the case law. Although previous cases law may establish the standard of review without a need to conduct an exhaustive analysis, there must be due regard paid to the specific legislative context at hand. The cases cited by the majority did not involve the Law Society Tribunal or its enabling legislation.

Brown JA's dissent also emphasized the importance of framing the question when determining whether the jurisprudence already establishes a standard of review. On his view, the question on review related to standards of civility for barristers in court – a much narrower question than that identified by the majority, and one that had not been decisively resolved by prior case law.

The dissent highlights an unresolved issue in the *Dunsmuir* analysis, namely when a reviewing court should use the "categorical" approach (presumptive reasonableness review for certain categories of decision, *e.g.* a decision-maker interpreting its home statute) and when a court should employ the "contextual factors" (presence of privative clause, relative institutional expertise, and nature of the question). Brown JA employed the contextual factors and reaches the opposite conclusion to that reached by the majority, who applied a presumption of reasonableness.

Given the standard of review tensions on display in this case, if the Supreme Court has the appetite to review the *Dunsmuir* framework, this case would be an ideal candidate.

## Tribunal obligation to file the record of proceedings: *Rew v Association of Professional Engineers of Ontario*, 2016 ONSC 4043 (Div Ct)

**FACTS:** A panel of the Discipline Committee of the APEO dismissed the Applicants' motion for a permanent stay of discipline proceedings against them. The Applicants sought judicial review of that decision. They then brought two motions in relation to their application: a motion to compel the Committee to "complete" the record by including a transcript of oral evidence from the hearing and a motion for an interim stay of the Committee's decision pending the disposition of the application for judicial review.

**DECISION:** Motions dismissed.

12 *Law Society of New Brunswick v Ryan*, 2003 SCC 20, *Doré v. Barreau du Québec*, 2012 SCC 12, and *Goldberg v Law Society of British Columbia*, 2009 BCCA 147

On the Transcript Motion, the Court noted that, as required by s 10 of the *Judicial Review Procedure Act*[13] ("*JRPA*"), the Committee had filed with the Court a record of proceedings. It included transcripts of portions of the proceedings that had been obtained and filed by the parties based on the recording of oral evidence mandated by s. 30(5) of the *Professional Engineers Act*[14] ("*PEA*").

The Committee did not order or file a transcript of the remainder of the proceedings and the Court found that it was not required to do so. Section 20 of the *Statutory Powers Procedure Act*[15] ("*SPPA*") prescribes the contents of the record to be filed with the Court on judicial review, including "the transcript, *if any*, of the oral evidence given at the hearing." Section 10 of the *JRPA* does not require a tribunal such as the Committee to order, pay for and file the complete transcript of a proceeding before it that is the subject matter of judicial review. To conclude otherwise would render meaningless the words "if any" in s 20 of the *SPPA* and would be inconsistent with the nature and scope of judicial review. It would also render the requirements relating to transcripts on judicial review broader than those applicable to appeals.

Although the Applicants were free to obtain a transcript, which the Court would receive if its admission was necessary to allow effective judicial review of findings of fact, the Committee's obligation is limited to including a transcript in the record of proceedings only if one exists. As a result, the Court declined to compel the Committee to "complete" the record by including a full transcript of oral evidence at the hearing.

The Court also dismissed the Stay Motion. The Applicants had failed to demonstrate there was a "serious question to be determined", in accordance with the well-know test for a stay, because it was clear the judicial review had been brought prematurely. The court noted that this leg of the test is not limited to substantive argument proposed to be advanced on judicial review, but that it also relates to the availability of judicial review. Here, the Applicants would have a right to raise issues of fact and law on an appeal under the *PEA* if found guilty. Given that there was no arguable basis for the availability of review at this juncture, the Court dismissed the motion.

**COMMENTARY:** The Divisional Court's decision clarifies an important point about a tribunal's obligations under the *SPPA* and *JRPA* with respect to filing transcripts in a record of proceedings on judicial review: the tribunal must only file a transcript if it exists. These statutes do not require a tribunal to take any positive steps to create a transcript.

Tribunals should be aware, however, of any obligations imposed upon them by their home statutes. In this case, the *PEA* did not require the Committee to order a transcript of the proceedings. If the statute under which a tribunal is exercising is authority requires it to order a transcript, the combined effect of the *SPPA* and *JRPA* will be to require the tribunal to file that transcript in its record of proceedings on judicial review.

It follows that any party to a judicial review application wishing to rely on a transcript not already in existence should order one and file it the Court in accordance with Rule 68.04(9) of the *Rules of Civil Procedure* if the party feels it is necessary to allow effective judicial review of findings of fact.

13 RSO 1990, c J.1
14 RSO 1990, c P.28
15 RSO 1990, c S.22

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