

Tribunal Remedies and the Supervisory Role of the Courts

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The Broad Scope of Administrative Law

- Administrative Law governs exercise of power delegated by statute
 - Parliament or Provincial Legislature passes statutes and regulations giving powers to government bodies (i.e. boards, tribunals) or individuals (i.e. Ministers)
 - To varying degrees, the Superior Courts have a limited supervisory role with respect to all statutory decision-makers.

The Power to Decide

- Power of Tribunal comes only from its governing statute.
- The powers granted by the statute often include:
 - creating regulations
 - creating policy

Limits on Tribunal's Power



- Tribunal's Enabling Statutes and Regulations set out key elements and limits on its exercise of delegated power.

(See e.g.: *Dunsmuir*, at paras 28 & 29)

- In addition to the statutory limits on a tribunal's authority, two other types of limits apply:
 - Common Law Limits
 - Constitutional Limits

Common Law Limits

- Common Law limits include:
 - Principles of Natural Justice or the Duty of Fairness (*Baker v. Canada, para. 26*)
 - Examples: right to be heard, right to unbiased adjudication
 - Principles of Procedural Fairness (part of the Doctrine of Natural Justice, (*Baker v. Canada, paras 19-48*)
 - Degree of procedural fairness is contextual, and is affected by many factors including the nature of the tribunal's power, the importance of the decision to, and the legitimate expectations of, the affected party.

Constitutional Limits

- Tribunals have always been required to exercise their statutory powers in accordance with constitutional principles. (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.
- Important to remember that the power of tribunals to grant *Charter* remedies differs from tribunals' long-standing obligation to conduct hearings and decide cases based on respect for *Charter* principles. (*Baker*, para. 56, *R. v. Conway* [2010] 1 S.C.R. 765, *R. v. N.S.* [2010] O.J. 4306 (C.A.), at paras 31 & 36 (per: Doherty J.A.)(*N.S.*, *supra*, at para 36)

Judicial Review: determining the reach of the tribunal's authority.

- The degree of the tribunal's discretion determines the reach of its power (see, e.g. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 54)
 - look to the statutory language
 - Limited discretion
 - where the statute contains objective language, specific factors listed, limited and enumerated considerations
 - Wide discretion
 - where the statute contains open-ended, permissive and subjective language

The Courts' Review of Tribunal Decisions (Standard of Review)

- Determination of “standard of review” is important because it often determines the outcome.
- *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, scolded lawyers and judges for making the determination of standard of review too complicated.
- “judicial review has lately become unduly burdened with law office metaphysics”. (Binnie J. at para. 122)
- Notions such as “pragmatic and fundamental approach” replaced with “standard of review analysis”.
- Notions of “patent unreasonableness” and “reasonableness *simpliciter*” are collapsed into a single standard of reasonableness.
- there can’t be degrees of unreasonableness. Parties should never be stuck with an unreasonable decision. (*Dunsmuir* para. 41)

Determining the Standard of Review for Remedial Orders

- "reasonableness" standard 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.
- Reviewing court to consider the precise nature and function of the tribunal, including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision including the existence of a privative clause and the nature of the issue being decided.
- In some cases the court will have to recognize that the decision maker had to balance the adverse impact of a decision on the rights and interests of those directly affected against the public purpose involved.
- Remedial decisions in exercise of tribunal's discretion generally attract a reasonableness standard of review.

Deference in Review of Discretionary Decisions

- A reviewing court should recognize that fundamentally the "reasonableness" of the administrative outcome is an issue given to another forum to decide. (*Dunsmuir*, paras 144, 151-155]
- Courts give "considerable deference" to tribunals when reviewing the exercise of ... discretion and determining the scope of ... jurisdiction". (*Baker, para. 53*)
- Where the statute confers broad choices, "courts should not lightly interfere", and should give "considerable respect to decision-makers when reviewing the manner in which discretion was exercised". (*Baker, para. 53*)

Limits to Judicial Deference

- However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*. (*Baker*, para: 56)
- Deference does not mean subservience (Dunsmuir, para. 48)

How the Courts Apply a Reasonableness Standard of Review

- certain questions before tribunals ... give rise to a number of possible, reasonable conclusions. (*Dunsmuir, para. 47*)
- 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. (*Dunsmuir, para. 47*)
- In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. (*Dunsmuir, para. 47*)
- 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. (*Dunsmuir, para. 47*)
- Reasonableness is in the eye of the beholder.
- The issue is not whether the court agrees with the decision. Instead, the court has to recognize the expertise of the tribunal and defer to its decision if it falls within a range of possible, acceptable outcomes.

Avoiding Judicial Intervention (a few pointers)

- Importance of clear reasons: clear chain of reasoning allows for meaningful review by courts.
- Explain where you derive your authority
- If there is a range of possible remedies, explain why you've chosen a particular remedy.
- Explain how you are balancing the competing interests of the parties directly affected and other public interests that are engaged.
- When granting a remedy, be sure to stay within your statutory power, adhere to common law principles of fairness as well as Charter values.

Remedial Powers under the *Charter* (beware)

- *R. v. Conway* [2010] 1 S.C.R. 265 recently affirmed a tribunal's right to make remedial orders under the *Charter*, provided that the remedy sought is one that the legislature intended would *fit within the statutory framework of the particular tribunal*.
- Most *Charter*-related relief does not require a Charter remedy under s. 24(1). Usually, the remedy can come from the tribunal's statutory power, the common law, or based on the tribunal's duty to make its decision with regard to Charter values.
- Pitfalls in entering *Charter* waters:
 - Must first determine if relief sought fits within tribunal's statutory framework (ie: that you are a 'court of competent jurisdiction')
 - Must make finding of Charter infringement
 - Procedural complexities
 - Standard of review—correctness