

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

DENNIS MILLS

Applicant
(Respondent in Appeal)

- and -

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

Respondent
(Appellant)

**SUBMISSIONS OF
THE WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL:
*DUNSMUIR v. NEW BRUNSWICK. 2008 SCC 9***

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**SUBMISSIONS OF THE WORKPLACE SAFETY AND INSURANCE TRIBUNAL:
DUNSMUIR v. NEW BRUNSWICK. 2008 SCC 9**

A. *The general effect of Dunsmuir*

1. *Dunsmuir v. New Brunswick*, 2008 SCC 9 changes how the standard of review analysis should be articulated in reasons for judgment. It combines the *reasonableness simpliciter* and patent unreasonableness standards into a single standard of reasonableness (majority, at para. 34). But it does not change the level of deference that the Divisional Court in this case should have given to the decision of The Workplace Safety and Insurance Appeals Tribunal (the “Tribunal”). In the words of the majority of the Supreme Court, its decision “does not pave the way for a more intrusive review by courts” (majority, at para. 48). In the words of Binnie J., the majority’s decision should not “be seen by potential litigants as a lowering of the bar to judicial intervention” (at para. 155).

B. *The decision of the Tribunal in this case*

2. The Tribunal’s decision in this case concerned an issue of factual causation: whether the worker’s present symptoms of disc degeneration were caused by the back strain incident almost three decades ago, in 1979.

C. *The starting point: the existing standard of review jurisprudence*

3. According to the Supreme Court, the standard of review involves two steps (see majority, at para. 62):

- (1) First, “courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of decision” (majority, at para. 62).
- (2) Second, it is only “where the first inquiry proves unfruitful” that courts must proceed to an analysis of the factors making it possible to identify the proper standard of review” (majority, at para. 62).

4. We note and emphasize the words “*degree of deference*” in the first step. The purpose of this inquiry is not just to determine whether the standard of review should be correctness or reasonableness, but what the level of deference should be. Where the jurisprudence has determined the appropriate level of deference, that level of deference is to be applied. This is confirmed by the majority’s statement that its decision “does not pave the way for a more intrusive review by courts” (majority, at para. 48) and Justice Binnie’s statement that “the bar to judicial intervention” is not lowered (para. 155). *Dunsmuir* maintains levels of deference at their former levels where they have been established in the jurisprudence.

5. In this appeal, you need not go beyond the first step in the two step analysis. The standard of review of Tribunal decisions on issues of factual causation, along with other issues of fact, has been exhaustively, repeatedly, and satisfactorily settled by the jurisprudence. That jurisprudence has repeatedly held that such decisions attract the very

highest standard of deference. This is a test that will be met only in the rarest of circumstances.

Roach v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2005] O.J. 1295 (C.A.) (Tribunal's Book of Authorities [previously submitted], Tab 9).

Ahmed v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2000] O.J. No. 2474 at para. 3 (Div. Ct.) (Tribunal's Book of Authorities [previously submitted], Tab 1).

Caleb Charles v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2003] O.J. No. 1388 at para. 3 (Div. Ct.), aff'd [2004] O.J. No. 452 (C.A.) (Tribunal's Book of Authorities [previously submitted], Tab 4).

Gowling v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2004] O.J. No. 919 at paras. 3, 5 and 8-12 (Div. Ct.) (Tribunal's Book of Authorities [previously submitted], Tab 5).

Pasiechynk v. Saskatchewan Workers' Compensation Board, [1997] 2 S.C.R. 890 at 912-914 (Tribunal's Book of Authorities [previously submitted], Tab 7).

6. In this case, as submitted in the Tribunal's factum and as explained further in oral submissions, the Tribunal's decision on the issues of factual causation in this case can only be set aside on the basis of lack of rationality, the highest level of deference. There must be absolutely no line of reasoning or evidence that supports the Tribunal's factual decision. In this case, the Tribunal did have a line of reasoning and evidence before it that supported its factual decision. This evidence included the material in the file of the Workplace Safety and Insurance Board (which the Divisional Court seems to have wrongly assumed was not before the Tribunal).

D. Other issues in *Dunsmuir*

7. Since the first step – the examination of the former jurisprudence – is sufficient to dispose of the issues in this case, it is not necessary to examine *Dunsmuir* further. However, in the course of describing the standard of review analysis to be conducted for administrative decisions where there is no existing case law, the majority of the Court makes a number of comments. These comments confirm that the degree of deference to be given to tribunals when they make factual decisions, such as the one made by the Tribunal in this case, must be very high:

- The existence of a privative clause...gives rise to a strong indication of review pursuant to the reasonableness standard” (majority, at para. 52). It is a “statutory direction from...a legislature indicating the need for deference” (majority, at para. 55). This is because it is evidence that the Legislature intended “that an administrative decision maker be given greater deference” (majority, at para. 52). In this case, the Tribunal is protected by the highest privative clause known to our law.

Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, ss. 123(4) and (5) (Tribunal decisions are to be “final” and “not open to question or review in any court.” Any restraint by “injunction, prohibition or other process”, or any “removal” into a court “by application for judicial review or otherwise” is completely prohibited.)

- Questions “of fact...generally attract a standard of reasonableness” (majority, at para. 51). In fact, “[w]here the question is one of fact...deference will usually apply automatically” (majority, at para. 53). In this case, the Tribunal

determined a pure question of fact. When this Honourable Court deals with appeals from trial courts brought on the basis of a full right of appeal – *i.e.*, no protection by a privative clause – factual decisions can only be quashed if “palpable and overriding error” is present. If deference applies in that context, at least the same deference must be accorded to a Tribunal, protected by a full privative clause, making a purely factual decision. (See also Deschamps J., Charron and Rothstein JJ. concurring, at para. 166).

- “[T]he decision maker should be given deference... [where there is] a discrete and special administrative regime in which the decision maker has special expertise” (majority, at para. 55). Under the Act, the Tribunal adjudicates entitlement and size of benefits to be given to a worker for injuries caused by a workplace injury. It decides over 2,500 such cases every year under this “discrete and special administrative regime” and, thus, has “special expertise” in factual issues of causation in the workplace injury compensation context.

Annual Report 2005, Workplace Safety and Insurance Appeals Tribunal, Tribunal’s Book of Authorities [previously provided], Tab 2, page 38 (more than 2,500 Tribunal decisions in 2005).

- On the facts of *Dunsmuir*, the decision was one of “law”, not fact (majority, at para. 66). Decisions on questions of law will often attract the standard of correctness (majority, at para. 55). However, the standard of review in *Dunsmuir* was reasonableness. This was because of the existence of a “full privative clause” (majority, at para. 67), the nature of the regime which involves “relative expertise” (majority, at para. 68), the arbitrator was

operating within his “enabling statute” (majority, at para. 68) within her “specialized expertise” (majority, at para. 70), and that statute is to provide “a time- and cost-effective method of resolving employment disputes” that is an “alternative to judicial determination” (majority, at para. 69). The Court quashed the arbitrator’s decision not just because it was flawed, but because it was “deeply flawed” (majority, at para. 72), “fatally flawed” (majority, at para. 74), “outside the range of admissible statutory interpretations” (majority, at para. 72) and with “no justification” (majority, at para. 75). That was the standard of review for a question of law; in this case, the Tribunal’s decision is one of factual causation.

8. Binnie J. (concurring in result with the majority) correctly interprets the majority’s decision as requiring the judiciary to be sensitive to “different levels of respect (or deference) required in different situations” and to analyze what “appropriate level of deference” is required within the reasonableness standard in a particular case (para. 139). Binnie J. cautioned that one must not be distracted by the label used to describe the standard of review: “reasonableness.” It is not “an invitation to reviewing judges...to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of ‘reasonableness’ that counts” (para. 141). Adoption of a single ‘reasonableness’ standard “should not be seen by potential litigants as a lowering of the bar to judicial intervention” (para. 155). He noted that a privative clause, the existence of expertise and the nature of the issue being decided (*e.g.*, a factual issue) are important and strong signals that drive up the level of respect to be accorded to an administrative decision (paras. 143, 151).

D. *Application of these principles to this case*

9. At the hearing of the appeal in this case, some of the questioning went behind the evidence of the treating physician in 1979 who diagnosed mere back strain, not degenerative disc disease, and explored issues of what weight, based on medical understandings, should be attributed to individual items of evidence (*e.g.*, what X-rays can or cannot reveal) or what competing medical opinions ought to be accepted. This sort of questioning risked going some way down the road that the Divisional Court travelled: full-scale, second-guessing of the Tribunal's factual decision on causation, engaging in the same weighing and assessment of the evidence that the Tribunal had already done.

10. All of the reasons for judgment in *Dunsmuir* prohibit reviewing courts from doing that. The Legislature of Ontario has established a special time- and cost-effective regime for resolving workplace injury compensation issues, has given exclusive jurisdiction over fact-finding in that scheme to the Tribunal, and has protected the Tribunal with the highest privative clause known to our law. The Tribunal has made a factual decision that attracts the very highest standard of deference. As explained in the Tribunal's factum and in oral argument, unless there is absolutely no line of reasoning or evidence that supports the Tribunal's factual decision, it is entitled to respect. In this case, the Tribunal did have a substantial line of reasoning and evidence before it that supported its factual causation decision. The appeal should be allowed and the Tribunal's decision restored.

All of which is respectfully submitted,

March 28, 2008

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