

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)

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

Heenan Blaikie LLP
Suite 2600 – 200 Bay Street
South Tower, Royal Bank Plaza
Toronto, ON M5J 2J4

David Stratas / Brad Elberg
LSUC Nos. 29017K / 46854O
Tel: (416) 643-6846 / (416) 360-2618
Fax: (416) 360-8425

Workplace Safety and Insurance Appeals Tribunal
505 University Avenue
7th Floor
Toronto, ON M5G 2P2

Dan Revington
LSUC No. 21830T
Tel: (416) 314-8834
Fax: (416) 326-5164

Co-Counsel for the Respondent (Appellant),
The Workplace Safety and Insurance Appeals Tribunal

TO: **Mr. John Kromkamp**
Senior Legal Officer
The Court of Appeal for Ontario
Osgoode Hall
130 Queen Street West
Toronto, ON M5H 2N5

AND TO: **Office of the Worker Advisor**
123 Edward Street – Suite 1300
Toronto, ON M5G 1E2

Cindy Trower
LSUC No. 33069W
(416) 326-9688
(416) 327-2237 (fax)

Counsel for the Applicant (Respondent in Appeal),
Dennis Mills

AND TO: **Sack, Goldblatt, Mitchell LLP**
1100-20 Dundas St. W.
Toronto, ON, M5G 2G8

Steven M. Barrett
(416) 979-6422
(416) 591-7333 (fax)

Counsel for the Applicant (Respondent in Appeal),
Dennis Mills

**SUBMISSIONS OF THE WORKPLACE SAFETY AND INSURANCE TRIBUNAL:
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A. *Points of agreement*

1. A review of the submissions of the respondent, Dennis Mills (the “worker”), shows that the parties are completely agreed on the following:

- *Dunsmuir v. New Brunswick*, 2008 SCC 9 does not “pave the way for a more intrusive review by courts” (Worker’s Responding Submissions, para. 3).
- The standard of review is the “reasonableness standard” (Worker’s Responding Submissions, para. 2).
- In this case, it is not necessary to engage in a new standard of review analysis (Worker’s Responding Submissions, para. 2). If “previous cases have indicated that the standard of patent unreasonableness...is appropriate in respect of a particular tribunal and a particular question, then the standard of reasonableness will apply” and this “does not mean that the standard of review has been lowered” (Worker’s Responding Submissions, para. 8).

B. *Degrees of deference within the reasonableness standard*

(1) *The worker’s submissions*

2. The worker suggests that there is one static standard of deference within the “reasonableness standard” that is to be applied to all decisions, and that there is no “spectrum” of

deference within it. The only basis for the worker's submission seems to be that the majority in *Dunsmuir* said nothing on the issue.

(2) *This issue need not be decided in this appeal*

3. At the outset, the Tribunal wishes to emphasize that it is not necessary for this Court to decide this issue on the facts of this appeal. The pre-*Dunsmuir* jurisprudence has settled the “degree of deference” to be given to the Tribunal’s decision (majority, para. 62) – the highest levels of deference. The decision in this case – a factual determination about causation made by an expert tribunal protected by the strongest privative clause known to our law – was based solidly on evidence before the Tribunal. In the new language of *Dunsmuir*, the Tribunal made a decision that was within the “range of possible, acceptable outcomes” (majority, para. 47).

4. Nevertheless, a brief review of the majority’s reasons, read with logic and common sense, will show that, as a practical matter, certain decisions will enjoy more deference within the “reasonableness standard” than others.

(3) *The majority’s reasons: the “reasonableness standard” means that there is a “range of possible, acceptable outcomes”*

5. The majority in *Dunsmuir* defines the reasonableness standard as one of “deference”. Questions that come before the tribunal “give rise to a number of possible, reasonable conclusions” (majority, para. 47). Tribunals “have a margin of appreciation within the range of acceptable and rational solutions” (majority, para. 47). The question for a reviewing court is whether “the decision falls within a range of possible, acceptable outcomes” (majority, para. 47).

6. The Tribunal submits that the “range of possible, acceptable outcomes” in particular cases that are subject to the “reasonableness standard” may vary (*e.g.*, be broader or narrower) depending on the particular legal and factual context. What is “possible” or “acceptable” or within the “range” in one case may not be “possible” or “acceptable” or within the “range” in another case. We set out below some examples of how “possible” or “acceptable” or within the “range” might vary depending on the particular factual and legal context.

7. The majority in *Dunsmuir* does not disagree with this proposition. Nowhere does it suggest that there is one “range of possible, acceptable outcomes” that fits all circumstances. Nowhere does it suggest that there is a “one size fits all” approach. As will be seen, the majority seems to suggest the contrary.

(4) *The nature of the decision must affect the “range of possible, acceptable outcomes”*

8. Purely as a matter of logic and common sense, the number of “possible, acceptable outcomes” must vary according to the nature of the particular decision. For example, a tribunal deciding a legal question under a “reasonableness standard,” which involves much more narrower terms of debate, may have a much narrower “range of possible, acceptable outcomes” than a tribunal deciding an amorphous concept such as “factual causation,” which is based on a number of different pieces of evidence before it. In the case of a legal question decided under a “reasonableness standard”, this narrower “range of possible, acceptable outcomes” may mean that a court can more readily interfere. In the case of “factual causation”, the broader “range of possible, acceptable outcomes” available to the Tribunal may mean that a court is less able to interfere.

9. Binnie J. recognized this practical effect of the majority's decision. He observed that "the nature of the question" helps "to define the range of reasonable outcomes within which the administrator is authorized to choose" (para. 138).

(5) *The existence of a privative clause must affect the "range of possible, acceptable outcomes"*

10. Binnie J. also recognized that the existence of a properly worded privative clause "is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review" (para. 143). The majority in *Dunsmuir* accepts this when it recognizes that:

- "legislative supremacy" is a paramount principle (majority, para. 30);
- "determining the applicable standard of review is accomplished by establishing legislative intent" (majority, para. 30); and
- a "privative clause" provides "a strong indication of legislative intent" (majority, para. 31).

11. In recognition of "legislative supremacy", there must be a broader "range of possible, acceptable outcomes" under the reasonableness standard, or more outcomes that must be said to be "possible" or "acceptable" under the reasonableness standard, where, as in this case, there is a very strong privative clause protecting the Tribunal's decisions.

(6) *The identity of the decision-maker must affect the “range of possible, acceptable outcomes”*

12. Binnie J. recognized that the identity of the decision-maker affects the degree of deference (para. 136). The majority, in discussing deference, also recognized this, noting that “those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (majority, at para. 49, quoting, with approval, D.J. Mullan in “Establishing the Standard of Review: the Struggle for Complexity?” (2004), 17 C.J.A.L.P. 59 at 93). As a logical matter, it is to be expected that there will be more outcomes that are “possible” or “acceptable” where a tribunal is deciding an issue that arises many times under a statutory regime that it has familiarity with (*e.g.*, the factual issue whether an injury was caused by a workplace incident).

(7) Further confirmation

13. Quite aside from the majority’s description of a “range of outcomes” and the fact that as a logical matter that range must be narrower or broader depending on the context, further support for the existence of a “spectrum” of deference is found in para. 62 of the majority’s reasons. In para. 62, the majority suggests that the pre-*Dunsmuir* jurisprudence can determine the “degree of deference.” The worker suggests (in footnote 5 of the Worker’s Responding Submissions) that “degree of deference” refers to the choice between “correctness” and “reasonableness”. However, this does not make sense. “Correctness” is a completely non-deferential standard. The phrase, “degree of deference,” does not suggest an “on-off switch” between “correctness”

and “reasonableness,” but rather the existence of a spectrum of deference that varies according to the context.

14. So far, all of the authorities that have commented on this issue support the Tribunal’s submission that there is a spectrum of deference:

- In *Coffey v. College of Licensed Practical Nurses of Manitoba*, [2008] M.J. No. 116 (Man. C.A.) at para. 41 (April 1, 2008), the Manitoba Court of Appeal, applying *Dunsmuir*, held that the deference to be given to a finding of professional misconduct is “fairly high” (para. 41) under a standard of review of reasonableness. On the penalty decision (which it identified as a “a question of mixed fact and law, or perhaps more likely a question of fact alone”) it held that a “high degree of deference” is owed (para. 42), again under a standard of review of reasonableness. This language suggests that there is a spectrum of deference within the reasonableness standard. Notably for the case at bar, para. 42 of *Coffey* confirms that, in the post-*Dunsmuir* era, questions of fact and mixed questions of law and fact from which there is no readily extricable question of law – such as the causation issue in the case at bar – are entitled to a “high degree of deference.”
- The existence of a spectrum of deference within the reasonableness standard has just been confirmed (in *obiter*) by the British Columbia Supreme Court: *Canadian Union of Postal Workers v. Canada Post Corporation*, 2008 BCSC 338 at para. 25 (March 25, 2008).
- No cases yet have rejected the existence of a spectrum, though this precise issue has not yet fallen for decision in the other decided cases (other than the ones mentioned here).

C. Application of these principles to this case

(1) The worker has incorrectly described the test

15. When applying the standard of review to the facts of this case, the worker suggests that the test is whether the “Tribunal’s decision is reasonably supportable” (Worker’s Responding Submission, para. 12). That is *not* the correct test and there is *no* support for such a low standard in any of the judgments in *Dunsmuir*.

16. A test of “reasonably supportable” would drive the standard of review much further below the “degree[s] of deference” that were established under the former case law and that are still to be applied to decisions of the Tribunal (majority, para. 62, and see the collection of decisions in para. 5 of the Tribunal’s submissions in chief concerning *Dunsmuir*). A low standard of “reasonably supportable” would “pave the way for a more intrusive review by courts,” contrary to the majority’s admonition at para. 48 of *Dunsmuir*.

(2) The correct test

17. Instead, the test is whether the Tribunal’s decision lies outside the “range of possible, acceptable outcomes” available to the Tribunal. In the circumstances of this case, that range is broad. The Tribunal decided a question of factual causation based on multiple items of evidence before it. Questions of causation frequently arise under the Tribunal’s “discrete and special administrative regime”, a regime in which the Tribunal has developed “a considerable degree of expertise or field sensitivity to the imperatives and nuances of the...regime” (majority, para. 55).

The Tribunal decides such questions under the protection of the strongest privative clause known to our law. The former jurisprudence accorded the highest levels of deference to the Tribunal's decisions (see para. 5 of the Tribunal's submissions in chief on *Dunsmuir*). That "degree of deference", settled in the former jurisprudence, is to be maintained (majority, para. 62).

(3) *Errors made by the worker in applying these principles*

18. In paragraph 12 of its submissions, the worker suggests that there was no "competing medical evidence" before the Tribunal. That is wrong: the Tribunal had before it the competing evidence of Dr. Malayil, the original diagnosis of the treating doctor of "back strain" just after the workplace incident, the X-ray and related observations from it, as well as the words and actions of the worker at various times that shed light on his medical condition. The Tribunal found that the workplace incident, which the treating doctor diagnosed at the time as just "back strain," was not responsible for the worker's current condition. This was a factual finding that was within the "range of possible, acceptable outcomes" available to the Tribunal. It is not for a reviewing court to sift finely through the medical evidence, re-weigh it, and disagree with the Tribunal's decision on factual causation – a decision that, in this case, lies within the very broad range of outcomes that are possible and acceptable.

All of which is respectfully submitted,

April 9, 2008

David Stratas

Brad Elberg

Dan Revington

Heenan Blaikie LLP

Suite 2600 – 200 Bay Street
South Tower, Royal Bank Plaza
Toronto, ON M5J 2J4

David Stratas / Brad Elberg
LSUC Nos. 29017K / 46854O
Tel: (416) 643-6846 / (416) 360-2618
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505 University Avenue
7th Floor
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LSUC No. 21830T
Tel: (416) 314-8834
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Heenan Blaikie LLP

P.O. Box 185, Suite 2600
South Tower, Royal Bank Plaza
Toronto, ON M5J 2J4

David Stratas LSUC No. 29017K
Tel: (416) 643-6846

Brad Elberg LSUC No. 46854O
Tel: (416) 360-2618

Dan Revington LSUC No. 21830T
(of the Workplace Safety and Insurance Appeals
Tribunal)
Tel: (416) 314-8834

Fax: (416) 360-8425

Co-Counsel for the Respondent (Appellant),
The Workplace Safety and Insurance Appeals
Tribunal