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Dissent on the Standard of Review: The SCC Splits on True Questions of Jurisdiction

To what extent can, or should, courts review decisions by government decision-makers? Administrative law is all about finding the right balance.

The Supreme Court of Canada announced this spring it has plans to revisit that balance and the standard of review for administrative decisions in a trilogy of cases to be heard by the Court in the fall of 2018. Its recent decision in *West Fraser Mills Ltd v Workers' Compensation Appeal Tribunal and Workers' Compensation Board of British Columbia*, released last week, might hint at how.

Since *Dunsmuir*, the Supreme Court has emphasized a categorical approach to determining the standard of review that includes a default that deference should be owed to administrative decision-makers. In *Alberta Teacher's Association*, it was suggested that, barring exceptional circumstances, when reviewing a Board or Tribunal's decision interpreting its home statute, the appropriate standard of review should be reasonableness. True questions of jurisdiction that would be reviewed on correctness, while theoretically possible, had been extremely rare since *Dunsmuir*.

In *West Fraser Mills Ltd*, in a 6-3 decision with three separate dissenting opinions, Justices Brown, Coté and Rowe made it clear that, in their view, true questions of jurisdiction reviewed on the standard of correctness are alive and well.

The case involved a judicial review of the Workers' Compensation Board of British Columbia's decision to fine West Fraser Mills $75,000 following the fatal accident of a tree faller in a forest area licensed by the company.

West Fraser Mills appealed the Board's decision to the Court on two grounds. First, it argued that s. 26.2(1) of the *Occupational Health and Safety Regulation* was *ultra vires* or outside the Board's authority to enact. Section 26.2(1) requires forestry operation owners to ensure that all activities conducted on the work site meet the Board's safe work practices. Second, it claimed that statutorily the $75,000 dollar fine could only be levied on "employers", not "owners".

The first issue on whether s. 26.2(1) was *ultra vires* caused the

four opinion split regarding the appropriate analytical approach.

Writing for the majority, Chief Justice McLachlin reviewed s. 26.2 on the standard of reasonableness and found that the Board acted reasonably in enacting the safety provision at issue. According to the majority, interpreting s. 26.2(1) was not a question of true jurisdiction. In addition, reasonableness review appropriately recognized the "degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" that administrative decision makers develop in their roles.

By contrast, all three justices in dissent framed the first issue as jurisdictional in nature. They began the analysis by interpreting whether the Board had the authority to enact s. 26.2(2) before looking at how it chose to do so.

Justice Coté highlighted the difference between when a Board acts in an adjudicative capacity and a legislative capacity. When a Board's decision involves the former, there may be a range of reasonable answers. This is the context in which the *Dunsmuir* framework and the default of deference was established.

However, when a Board acts in a legislative capacity, enacting legislation pursuant to a statutory grant of power, Justice Coté held that this must be assessed on a correctness standard. She found as follows: "Respect for legislative intent – a cornerstone of judicial review – requires that courts accurately police the boundaries of delegated power."

Justice Brown also framed the issue of the Board's authority to adopt s. 26.2(1) as an issue of *vires* or jurisdiction of an administrative decision maker to make law. The issue, he held, should be assessed on the standard of correctness as it "does not go to the *reasonableness* of the Board's decision to adopt s. 26.2(1), but rather its *authority* to do so."

Brown J emphasized the Court's role in judicial review to ensure that the Board does not overstep the authority the legislature granted it. A requirement of the rule of law, he held, is that "public power must always be authorized by law."

Finally, Rowe J also found that the judicial review of delegated authority is fundamental to upholding the rule of law. He agreed with the majority's analysis that s. 26.2(1) is *intra vires* but explicitly noted the two steps to this analysis: first, examining whether the Board had the authority to act; and second, a substantive inquiry into how the Board chose to exercise that authority.

With respect to the majority's conclusion that reasonableness recognizes administrative decision-makers' expertise, Rowe J

held that such expertise does not give insight into statutory interpretation of the scope of a Board's authority, which remains a legal analysis.

What *West Fraser Mills* demonstrates is that while the Court has moved toward the default of deference, for Justices Brown, Coté and Rowe, there remain outstanding questions on which respect for legislative intent and the rule of law require a correctness standard of review.

How this will affect their views on the upcoming examination of the standard of review framework to be considered in a series of cases this December remains to be seen.

With notes from Mari Galloway.