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# Divided Supreme Court suggests standard of review framework is unsettled

**JUNE 21, 2018 4 MIN READ**

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## In this Update

- The Supreme Court of Canada's (SCC) split decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* (the Decision), issued June 14, 2018, indicates the SCC is not yet done refining the standard of review analysis enunciated in *Dunsmuir*
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The Supreme Court of Canada's (SCC) split decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* (the Decision), issued June 14, 2018, is the latest indication that the SCC is not yet done refining the standard of review analysis enunciated in *Dunsmuir*. While the SCC was unanimous in result, the majority and two concurring opinions applied different standards based on diverging views on the framework for assessing standard of review. This Decision may be a precursor to the SCC's further anticipated development of the law arising from appeals tentatively scheduled to be heard in December 2018.

## Background

The Decision arose out of two Canadian Human Rights Tribunal (Tribunal) decisions that found that legislative entitlements to registration under the *Indian Act* did not fall within the definition of a "service" under the *Canadian Human Rights Act*. On judicial review, the Federal Court and the Federal Court of Appeal upheld the Tribunal decisions on a reasonableness standard.

## Implications for business

Legal uncertainty regarding the appropriate standard of review increases litigation risk for regulated companies and any person implicated in government or tribunal decision-making. An expansion of the correctness standard of review will encourage litigants to challenge government decisions on the basis that the courts will review the decision without deference.

For now, the 6:3 result in the Decision can give business comfort that *Dunsmuir* and its strong presumption of reasonableness will remain in place. However, such comfort may be short-lived. On May 10, 2018, the SCC granted leave to appeal in three cases on the basis that they

"provide an opportunity to consider the nature and scope of judicial review of administrative action, as addressed in *Dunsmuir*." Those cases will be heard by the SCC later this year, with a decision expected sometime in 2019.

## The Decision

The SCC unanimously affirmed the principle that a presumption of reasonableness applies where an administrative body interprets its home statute, and that presumption may be rebutted where:

1. one of the four identified categories from *Dunsmuir* applies; namely, (i) the constitutional division of powers; (ii) true questions of jurisdiction; (iii) competing jurisdiction between tribunals; and (iv) questions of central importance to the legal system and outside the expertise of the decision-maker (together, Correctness Categories); and
2. where a contextual inquiry shows a clear legislative intent that the correctness standard should be applied.

## Disagreement over scope of contextual inquiry

The SCC was divided on the scope of the contextual inquiry.

The majority decision, authored by Gascon J., found that the contextual approach should be applied "sparingly" because the presumption of reasonableness and jurisprudence since *Dunsmuir* was intended to simplify judicial review by preventing endless litigation over standard of review.

In concurring reasons, Côté and Rowe JJ. disagreed that the contextual approach should be applied "sparingly." Instead, they stated that the courts "must" routinely engage in a contextual analysis to assess whether the reasonableness presumption should be rebutted where: (1) existing jurisprudence has not settled on the appropriate standard of review; and (2) none of the Correctness Categories applies.

Brown J. also expressed concern with the majority's view that a contextual analysis should be applied "sparingly" in deciding the standard of review, noting that if one is considering factors that show legislative intent, they are undertaking a contextual analysis.

## Additional disagreement over existence of true questions of jurisdiction

In *obiter*, the majority and concurring reasons disagreed over the scope and existence of true questions of jurisdiction (or *vires*) as a category of correctness review. The majority found that the category was "on life support" and may not in fact exist. In contrast, each of Côté and Rowe JJ. and Brown J. distanced themselves from these comments. The question was left open, to be fully argued in the future.