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Administrative Law Developments in Ontario
&
Standard of Review Update

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Introduction

The case comments and tables below represent our survey of recent cases that have considered the standard of review applicable to Ontario administrative decision-makers, and other current issues in administrative law.

We have done three successive updates of the case comments and tables, covering the periods from March 2008 through January 2009, January 2009 through November 2009, and November 2009 up to the present. Within each update, we reviewed all of the recent Ontario court decisions at the time that had considered and applied the Supreme Court's reasons in *Dunsmuir* and *Khosa*.[1]

Post-*Dunsmuir* – Greater Certainty?

Dunsmuir has created greater certainty in the standard of review context. *Dunsmuir* has narrowed the circumstances where true jurisdiction arguments might hold sway, and it has shifted the attentions of litigators and courts to the *application* of the standards of review, as opposed to the *determination* of the applicable standard of review. In all but the most contested or novel cases, parties are often agreeing on the standard of review by the time a hearing takes place. The correctness standard is being applied sparingly, and primarily in circumstances where previous jurisprudence has established that correctness is the proper standard to apply, or where the question before the court is clearly one of law that has relevance for the legal system as a whole.

The application of the reasonableness standard has also become clearer with the courts' developing jurisprudence around the two-part test that was briefly set out in paragraph 47 of *Dunsmuir*. Courts are now emphasizing two dimensions of the reasonableness inquiry: (1) the transparency, intelligibility, and justifiability of the process of reasoning, and (2) the range of possible acceptable outcomes, defensible in respect of the facts and the law. Our Court of Appeal has been cautioning lower courts not to engage in correctness analyses when the reasonableness standard is applicable. Ideally, if the standard is reasonableness, a reviewing court will not engage in an analysis of how it would have decided the case, even as a hypothetical alternative. The Court of Appeal has also clarified that the first stage of the reasonableness analysis, relating to the process of reasoning, is distinct from the procedural justice requirement that reasons be adequate.

Method and Summary of Findings

In preparing the first chart we examined more than 90 decisions released by Ontario courts in 2008. In preparing the second update we reviewed an additional 37 decisions of the Ontario Superior Court, the Divisional Court, and the Court of Appeal. These were all decisions that

[1] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

discussed the Supreme Court's reasons in *Dunsmuir*, as well as its more recent decision in *Khosa*, and which engaged in some discussion of the standard of review analysis, or the application of the standards of review by the courts in Ontario.[2] In this, our third and final update, we reviewed an additional 20 standard of review decisions released by Ontario courts from November 2009, through to the end of January, 2010.

Our primary conclusion drawn from our first update was that less time was being spent on the standard of review analysis. The more substantive question of whether a particular decision was in fact reasonable or correct, was becoming more predominant in argument and judicial reasoning. In other words, cases where there was a real issue as to which standard should be applied appeared to be arising less frequently than has historically been the norm. Parties appeared to be focusing their arguments more on the application of a given standard, than on what the standard should be.

Our subsequent review of 2009 decisions discussing either *Khosa* or *Dunsmuir* confirmed that this trend continued. In many cases the standard of review was not in dispute between the parties, and the bulk of the court's focus was on applying the applicable standard. When the standard was reasonableness, Ontario courts appeared to be more or less consistently applying the two-stage analysis described in paragraph 47 in *Dunsmuir* and expanded upon in *Khosa*, and parties were seen to be directing their arguments to this analysis.

The current review surveyed 20 cases released by Ontario courts from November 2009 through January 2010. This final review confirmed the trend towards greater certainty that was observed in prior reviews. The elimination of the patent unreasonableness standard has simplified the standard of review analysis and has made the results of that analysis more predictable.

This paper is set up in two parts. The first part highlights some interesting points of law which have arisen in Ontario administrative law decisions over the past year. These points are not strictly related to the standard of review analysis, but are worth mentioning nonetheless because they either clarify an ambiguity in the law, or highlight the need for further clarification and rationalization in the law. The second part of the paper consists of three successive surveys of how Ontario courts have treated the standard of review issue following the Supreme Court's decisions in *Dunsmuir* and *Khosa*. These surveys are presented in the form of a chart for ease of reference.

[2] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

Current Issues from Recent Ontario Decisions which Cite either *Khosa* or *Dunsmuir*

Further Confirmation that Questions of Jurisdiction Have Been Narrowed by *Dunsmuir*

Religious Hospitaliers of Saint Joseph of the Hotel Dieu Hospital of Kingston v. Ontario Public Service Employees Union Local 465, [2009] O.J. No. 4629

Dunsmuir clarified that only true questions of jurisdiction would be exempt from the standard of review analysis. In the past, some Applicants have been successful in characterizing borderline issues as jurisdictional in the hopes of persuading a reviewing court to give less deference to a particular decision than it might otherwise warrant. The Court of Appeal's recent decision in *Religious Hospitaliers of St. Joseph* now confirms that jurisdiction really only means jurisdiction. In this case the union representing hospital administrative and service staff was seeking a wage increase, but the hospital was reluctant to increase wages by the amount that was sought. The matter went to an Arbitration Board. The Board ruled in the hospital's favour in terms of the quantum of the wage increase, but the Board also ruled that the increase was to be retroactive. The retroactivity of the award was seen by the Hospital to be an excess of jurisdiction because it said the Board had no mandate to make such an award, which effectively rewrote the collective agreement.

> [28] As to the nature of the question, retroactivity is not a jurisdictional issue in the narrow sense described in *Dunsmuir* and interpreted in *Nolan*, because the Board had the authority to deal with retroactivity. According to the *Act*, the Board had the authority to deal with the matters in dispute between the parties, as well as matters "necessary to conclude a collective agreement." Subsection 10(13) permits it to deal with retroactivity with respect to matters in dispute.

This decision limits the application of much of the older jurisprudence which had expansively interpreted the concept of jurisdiction. In the future, Applicants would be hard-pressed to persuade a court that a primarily substantive issue has the requisite jurisdictional content to be reviewed as a true jurisdictional issue. Under the more restrictive *Dunsmuir* analysis, an administrative decision-maker's alleged failure to consider all of the evidence, for example, is unlikely to be seen as a jurisdictional matter.

End of the "Right to be Wrong"

Taub v. Investment Dealers Assn. of Canada, [2009] O.J. No. 3552 (QL), 2009 ONCA 628 per Feldman J.A.

In the past year the Court of Appeal has explicitly put an end to the notion that an administrative decision-maker that is owed deference has the "right to be wrong." Justice Feldman has written that if the standard of review is reasonableness, and the decision is found to be unreasonable, then it is wrong. If the decision is reasonable, then it is not wrong.

> [24] It has been said that where the standard of review is not correctness, on issues within its expertise an administrative tribunal has "the right to be wrong": e.g. *Air Canada v. International Assn. of Machinists and Aerospace Workers*, [1978] O.J. No. 1053 (Div. Ct.), at para. 11. In my view, *Dunsmuir* has made it clear that if this was ever true, it no longer is. Where there is a question that is reviewable on the reasonableness standard, a decision that is found to be unreasonable will in virtually every case for that reason be wrong. If a decision deserves deference because of the process by which it was reached and because the result is a reasonable one, then it will not be wrong. As I stated above, the administrative law concept of deference is not accorded on the basis of deference to an exercise of quasi-judicial discretion, but on the basis of respect for an experienced decision-maker with particular expertise who has engaged in a process and reached an outcome that has been demonstrated to warrant that deference.

Reasonableness Two-Stage Analysis from *Dunsmuir* and *Khosa* Must be Employed in Every Case

Taub v. Investment Dealers Assn. of Canada, [2009] O.J. No. 3552 (QL), 2009 ONCA 628 per Feldman J.A.

One of the implications of *Dunsmuir* that we found in our previous survey of Ontario judicial review decisions was that the courts appeared to be concentrating their analysis on the application of the standard of review, as opposed to determining the standard of review itself. This emphasis on applying the standard of review was expanded upon in *Khosa* between paragraphs 59 through 67, where Binnie J., writing for the majority, applied a two-step analysis wherein a decision could only be found to be reasonable, (1) if the process of reasoning by which that decision was made exhibits justification, transparency and intelligibility, and (2) if the decision itself falls within the range of reasonable, acceptable outcomes, defensible in respect of the facts and the law.

In *Taub* the Ontario Court of Appeal has confirmed this two-step approach and has applied it to a contentious discipline decision of the Investment Dealers Association ("IDA"). At issue was whether the IDA had the power to discipline a former member who had voluntarily surrendered his membership prior to its discipline committee ruling on an allegation of professional misconduct. This was a question of law that dealt with areas within the expertise of the Ontario Securities Commission ("OSC"). The Court of Appeal reversed the Divisional Court's decision that the OSC had acted unreasonably, finding that the Divisional Court was correct in deciding that the reasonableness standard applied, but that the Divisional Court incorrectly applied that standard because it did not employ the two-step approach:

> [30] In this case, the majority of the Divisional Court, having concluded that the issue of statutory interpretation before the tribunal was a question of law within the unique expertise of the OSC and was therefore reviewable on the standard of reasonableness, concluded that the OSC's interpretation was

> unreasonable. However, it did so neither by assessing the process of reasoning used by the OSC to reach its decision, nor by considering whether its interpretation was within a range of reasonable interpretations of the statutory provision in issue. Instead, the majority conducted its own analysis of the provision and came to its own conclusion about its correct interpretation. Some examples of the language used by the majority demonstrate its approach. For example, at para. 35 the majority states: "The court must decide whether the wording of s. 21.1(3) of the *Securities Act* is limiting, in the sense that it prescribes whom a self-regulated organization may regulate." And at para. 47 it states: "In view of our conclusion that the *Securities Act* does not authorize self-regulatory bodies recognized under the *Act* to discipline former members ... ."
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> [31] In other words, the majority employed the approach that the Supreme Court described in *Dunsmuir* is only to be used when reviewing an administrative decision on the standard of correctness, where no deference is accorded and where the court conducts its own analysis of the issue in order to come to the correct decision. In taking this approach, the majority erred in law.

Following *Taub*, it is now relatively clear that the two-step approach will be the focal point of the reasonableness analysis. Counsel should begin crafting their judicial review arguments in ways that will put this approach at the forefront, especially given that the majority of administrative law decisions will continue to be reviewed on the reasonableness standard. Where the standard is correctness, of course, the correctness standard of review would apply and the Court is still required to substitute its decision for the decision of the administrative decision-maker.

Further Confirmation of Importance of Process of Reasoning and Range of Outcomes Analysis

Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), [2009] O.J. No. 5455

In this decision the Divisional Court refers to a line of Nova Scotia cases which have recently interpreted and applied paragraph 47 from *Dunsmuir*, alongside the Supreme Court's earlier decision in *Ryan*. The reasonableness analysis that has come out of these cases emphasizes the importance of not delving into the potential correctness of decisions that are to be reviewed on the reasonableness standard. Instead, the exercise is to review the process of reasoning and the range of possible outcomes:

> [20] The Nova Scotia Court of Appeal has provided some guidance as to how the *Dunsmuir* standard should be applied in *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520*, 278 N.S.R. (2d) 381 (C.A.) as follows:
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> > [23] In *Casino Nova Scotia*, [2009] N.S.J. No. 21, this court elaborated on *Dunsmuir's* reasonableness test:

> [29] In applying reasonableness, the court examines the tribunal's decision, first for process to identify a justifiable, intelligible and transparent reasoning path to the tribunal's conclusion, then second and substantively to determine whether the tribunal's conclusion lies within the range of acceptable outcomes.
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> [30] Several of the Casino's submissions apparently assume that the "intelligibility" and "justification" attributed by *Dunsmuir* to the first step allow the reviewing court to analyze whether the tribunal's decision is wrong. I disagree with that assumption. "Intelligibility" and "justification" are not correctness stowaways crouching in the reasonableness standard. Justification, transparency and intelligibility relate to process (*Dunsmuir*, para. 47). They mean that the reviewing court can understand why the tribunal made its decision, and that the tribunal's reasons afford the raw material for the reviewing court to perform its second function of assessing whether or not the Board's conclusion inhabits the range of acceptable outcomes. *Nova Scotia (Director of Assessment) v. Wolfson*, 2008 NSCA 120, para. 36.
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> [31] Under the second step, the court assesses the outcome's acceptability, in respect of the facts and law, through the lens of deference to the tribunal's "expertise or field sensitivity to the imperatives or nuances of the legislative regime." This respects the legislator's decision to leave certain choices within the tribunal's ambit, constrained by the boundary of reasonableness. *Dunsmuir*, para. 47-49; *Lake*, [2008] 1 S.C.R. 761, para. 41; *PANS Pension Plan [Police Association of Nova Scotia Pension Plan v. Amherst (Town)*, [2008] S.C.C.A. No. 442 para. 63; *Nova Scotia v. Wolfson*, para. 34.
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> [24] The reviewing judge assessing reasonableness does not plot his own itinerary, but tracks the tribunal's reasoning path. *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at para. 47-55; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141 at para. 42-44; *CBRM v. CUPE*, [2006] N.S.J. No. 259, at para. 71-72. So the reviewing judge's first task is to chart the tribunal's reasoning. Here, the arbitrator's reasoning was...

The approach to the application of the reasonableness standard set out in paragraph 47 of *Dunsmuir* is not yet universal however. Some courts are still using correctness language in their applications of the reasonableness standard, while other courts are not referring to the two-step process at all. Nevertheless, the majority of courts are using the new approach and are refraining from commenting on the correctness of decisions under review.

Abdoulrab et al. v. Ontario Labour Relations Board et al. (2009), 95 O.R. (3d) 641

The decision of the Court of Appeal in *Abdoulrab* is particularly helpful from a practical standpoint in terms of understanding how to frame arguments about the process of reasoning and the range of possible acceptable outcomes when a decision is reviewable on the reasonableness standard. In this decision the concepts of "process of reasoning" and "range of outcomes" are fleshed out in greater detail. The range of outcomes can be informed by the statutory or legal framework, precedents or established practice from previous cases, and of course, by the facts in evidence in a particular case. It is presumed in the very concept of the reasonableness standard of review that there will be a range of reasonable decisions, and that at least 2 or more different outcomes will be acceptable.

A common argument that was forwarded by Applicants in reasonableness cases was that the facts in evidence supported a completely different outcome than the one reached by the administrative decision-maker, and that the decision under review was actually outside the range of acceptable outcomes based on the facts alone. The argument can be framed in terms of exploring the possible logical conclusions that could be drawn from the facts in evidence, and then showing how the administrative decision-maker's conclusion was not among the possible outcomes. The subtle aspect of making the "unreasonableness" argument is in not inviting the court to reweigh the evidence, but rather inviting the court to logically consider what conclusions can be legitimately drawn from the evidence that was accepted and given weight at the original hearing.

Summary Chart of Recent Ontario Court Decisions interpreting *Dunsmuir* and *Khosa*

Decisions from November 2009 through January 2010

The decisions summarized in the chart below represent the application of the standard of review analysis by Ontario courts which interpret or apply the Supreme Court's reasons in *Dunsmiur* and *Khosa*. There were 20 such decisions released in Ontario during this time frame, and these decisions are summarized below:

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Hydro One Inc. v. Ontario (Superintendent of Financial Services), [2010] O.J. No. 52	Financial Services Tribunal	What is the meaning of a "significant" reorganization layoff under s. 69(1)(d) of the *Pension Benefits Act*? Assuming that its interpretation of s. 69(1)(d) was correct, was the Tribunal's application of a "subset" analysis regarding a particular class of plan members reasonable in this case?	The Tribunal must be correct in interpreting the statutory language of s. 69(1)(d). Whether a "subset" analysis is appropriate to determine the significance of a layoff is a question of pure statutory interpretation and not a question where the Tribunal would have greater expertise than the Court. In the result, the Tribunal's interpretation was correct. The Tribunal's application of its "subset" analysis was reasonable. It was supported by the facts in evidence and the Tribunal's decision exhibited a transparent, intelligible, and justifiable process of reasoning. The outcome fell within the range of reasonable outcomes per para. 47 in *Dunsmuir*, and the Court of Appeals' reasons in *Taub v. Investment Dealers Association*.
Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), [2009] O.J. No. 5455	Ontario Privacy Commissioner	What is the standard of review for the Commissioner's interpretation of the term "correctional" in s. 49(e) of *FIPPA*? This section creates an exemption to the general entitlement to access for "correctional" records. Commissioner ruled that records from time on remand not "correctional." Also found that information at issue not "supplied in confidence." The Applicant (MCSCS), argued that all records maintained by detention facilities are correctional in nature.	The court looked first to prior jurisprudence, as directed by *Dunsmuir*, to determine whether the issue had been addressed before. Prior decisions found that the IPC/O had specialized expertise in interpreting privacy statutes. Although the interpretation of s. 49(e) is question of law, the standard remains reasonableness. In applying the reasonableness standard, the court uses the two-step process from para. 47 of *Dunsmuir*, citing also the Nova Scotia Court of Appeal's decision in *Maritime Paper Products Ltd. v. Communications, Energy and Paperworkers' Union, Local 1520*, 278 N.S.R. (2d) 381 (C.A.). The Court surveyed the multiple reasons offered by the Commissioner for its decision, concluding that the process of reasoning met the threshold. The result was found to lie within the range of defensible outcomes.

Case	Decision Maker	Standard of Review Issue	***Dunsmuir* or *Khosa* Treatment**
Religious Hospitaliers of Saint Joseph of the Hotel Dieu Hospital of Kingston v. Ontario Public Service Employees Union Local 465, [2009] O.J. No. 4629	An Arbitration Board appointed under the *Hospital Labour Disputes Arbitration Act*	Is the Board's decision to order a pay-increase on a retroactive basis – when neither party had put retroactivity in issue – an excess of jurisdiction?	No, *Dunsmuir* instructs reviewing courts to only treat as jurisdictional, issues pertaining to true jurisdiction. Evidence, reasoning, and other substantive issues are not jurisdictional. The issue of retroactivity was reasonably connected to the Board's award. The reasonableness standard applies to the retroactivity aspect of the Board's award. This award was unreasonable, largely because the process of reasoning on this point was not transparent.
Ottawa (City) v. Minto Communities Inc., [2009] O.J. No. 4913	Ontario Municipal Board	The Board's interpretation of s. 2(1) of the *Planning Act* which requires the Board to "have regard to" decisions of a municipal council. Ottawa's position was that this was a pure question of law relating to OMB's appellate jurisdiction and that standard should be correctness.	The Court looked first at previous jurisprudence as instructed by *Dunsmuir*. The standard of review was settled in previous jurisprudence. The *Planning Act* is the OMB's home statute and the standard for OMB interpretations of that *Act* is accordingly reasonableness. On the issue of whether the Board itself is bound by *Dunsmuir* to show deference to the Ottawa City Council, the Court declined to rule in the City's favour, stating that clearer evidence of legislative intent would be required to show that the OMB was meant to act like a reviewing court regarding municipal planning decisions. The OMB has its own expertise in planning.
Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation), [2010] O.J. No. 156	Ontario Municipal Board	What is the standard applied to OMB decisions regarding "injurious affection"? What is the standard applied to OMB decision on whether there is a requirement to balance the public interest against the individual interest in determining whether an actionable claim in nuisance has been established.	Deciding a question of "injurious affection" involves articulating the common law of nuisance. This is a question of law with general application for the legal system. Previous jurisprudence has established that standard for OMB decisions on pure questions of law is correctness, standard on mixed questions is reasonableness. Court holds that standard for articulating common law nuisance in this case is correctness, but standard for application of test to facts is reasonableness. Whether actionable claim for nuisance exists is a question of law is outside the expertise of the tribunal and engages the standard of correctness. The actual balancing of public and private interests should be reviewed on reasonableness standard.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Bot Construction Ltd. v. Ontario (Ministry of Transportation), [2009] O.J. No. 5309	Ministry of Transportation	Application of reasonableness standard to MTO's decision not to revisit awarding of contract to particular contractor after dispute arose concerning compliance of successful bid with tender terms.	The Court of Appeal reverses the Divisional Court's decision allowing the Application for judicial review. The Court of Appeal finds that although the Divisional Court correctly articulated the two-step analysis for a reasonableness review, it did not apply the analysis in this case. On the facts of this case the Court of Appeal finds that the MTO's investigative response to complaints of unfairness in tendering process fell within the range of acceptable outcomes, and was defensible in terms of facts and law. The Application for judicial review was denied.
Ottawa (City) v. TDL Group Corp., [2009] O.J. No. 4816	This was an application for leave to appeal a decision of the OMB to the Divisional Court.	What is the applicable standard of review for a Board's decision re: grandfathered non-conforming use under s. 34(9)(a) of the *Planning Act*?	This is a pure question of law and one that does not arise often before the OMB, however it is a matter of interpreting one of the OMB's home statutes, and the OMB has expertise in the area. Prior jurisprudence also suggests standard should be reasonableness. Standard found to be reasonableness on the leave application issue of whether there was reason to believe that the decision was unreasonable. Leave denied.
Trinaistich v. Crowell, [2009] O.J. No. 4830	Chief of Police of the Halton Regional Police Service	Does the Chief of Police have jurisdiction to suspend without pay?	This case turned on whether the Applicant was sentenced to "a term of imprisonment" within the meaning of the *Police Services Act*. If so, the Chief would have jurisdiction to suspend without pay, if not then he would have no such jurisdiction. This was found by the Court to be a true question of jurisdiction within the narrow meaning of *Dunsmuir*. The Chief was found to have no expertise in interpreting the *Police Services Act*, and was therefore required to be correct in interpretation of whether or not the individual officer was in fact sentenced to a term of imprisonment.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Ontario (Motor Vehicle Dealers Act, Registar) v. Unity-A-Automotive Inc., [2009] O.J. No. 5198	License Appeal Tribunal	What standard of review applies to Tribunal's determination of mixed fact and law relating to whether Licensee will carry on business in legal manner pursuant to *MVDA*? Applying reasonableness standard to a decision finding that Licensee met the requirements of the Act to continue to operate as a dealer.	The Court looked to previous jurisprudence to find that the standard for such a question is one of reasonableness. Following *Dunsmuir* the Court considered the "existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In finding that the decision of the LAT was not reasonable, the Court emphasized that the outcome did not fall within the range of reasonable outcomes because the evidence accepted by the Tribunal did not permit the conclusion that the Licensee understood his obligations under the *MVDA*.
Simcoe (County) v. Ontario Public Service Union, [2009] O.J. No. 5221	Labour Arbitrator, M.R. Gorsky	What standard of review applies to decision of Arbitrator to return vision-impaired paramedic to active "attend-only" duty on basis that there was no undue hardship in having an on-duty paramedic who could not drive? Applying reasonableness standard.	Parties agreed that standard should be reasonableness. Arbitrator's decision unreasonable because he failed to apply the correct legal test for undue hardship which was a "contextual inquiry." Also unreasonable because outcome not defensible in respect of facts – there was uncontroverted evidence which suggested that not adhering to Class "F" license standard for all paramedics would put patient safety at risk, and no evidence to suggest that it was not a risk.
United Food and Commercial Workers Union, Local 1977 v. Zehr's Markets, a Division of Zehrmarket Ltd., [2010] O.J. No. 13	Labour Arbitrator, Christopher Albertyn	What standard of review applies to Arbitrator's decision re: *ESA, 2000*? Application of reasonableness standard to Arbitrator's decision that employer's calculation of holiday pay after introduction of Family Day holiday during term of Collective Agreement was consistent with *ESA, 2000*.	Previous jurisprudence established that standard of review for decisions of Labour Arbitrators re: greater benefit of *ESA,2000* v. Collective Agreements is reasonableness. Parties agreed on reasonableness standard. The union argued that the decision of the Arbitrator was unreasonable because it was not logically consistent and misapplied the law. The Court concluded that "The Arbitrator's decision falls within a range of acceptable and defensible outcomes and the reasons meet the test of justification, transparency and intelligibility."

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Ceretti (Litigation guardian of) v. Hamilton Health Sciences - McMaster Children's Hospital, [2010] O.J. No. 60	Hamilton Health Sciences-McMaster Children's Hospital	Was procedural fairness denied? What standard applies to policy decisions or exercises of discretion based on mixed fact and law? Applying the reasonableness standard.	The Applicant argued that the hospital's decision to discharge an autistic child from a particular treatment program was done without procedural fairness, and was unreasonable in any event. Standard of review of reasonableness was applied to merits of decision because the discharge decision was based on mixed fact and policy. Duty of procedural fairness was met by virtue of parental involvement in decision-making process. Parents also signed agreement regarding the process. Decision was reasonable: with range of acceptable outcomes defensible in facts and law, and process of reasoning was clearly explained. Outside reviewers involved in Dr.'s decision-making, decision based on objective lack of progress of child in program.
Personal Insurance Co. v. Allstate Insurance Co., [2009] O.J. No. 5021	Arbitrator appointed under the *Insurance Act*	What is standard of review for Arbitrator's decision in priority dispute re: whether injured person was a "dependant" within meaning of *SABS*, taking into account status as student and athletic scholarship? Personal argues for correctness, Allstate argues for reasonableness.	Court refers to *Dunsmuir* as well as to recent decision of D.M. Brown J. in *Zurich Insurance Company v. The Personal Insurance Company*. Conclusion is that this is a mixed question of fact and law – simply because the question of whether receipt of athletic scholarship makes one a dependant had never been raised before does not make it a question of law – issues of fact also relevant to this determination, such as structure of scholarship, etc. Because issued of mixed fact and law, standard determined by previous jurisprudence to be reasonableness. Court finds that decision would be correct in any event. This decision does not explicitly engage in the two-step standard of review analysis set out in para. 47 of *Dunsmuir*.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Anderson v. Hamilton (City), [2009] O.J. No. 5556	Decision of the Property Standards Committee	What is the standard of review applicable to decision of Committee re: obligation to repair retaining wall that was built on property, but has subsided onto adjacent property? Does Court have *de novo* jurisdiction to make substantive order re: repair of retaining wall?	Court does not have *de novo* jurisdiction, - the City has the power to make such orders. Court finds standard of reasonableness on questions of fact and correctness on questions of law – there is a statutory right of appeal – previous jurisprudence conflicting – deference to expertise in planning held by members of Committee and Planning Compliance Officers Court concludes no right to introduce new evidence on appeal because the appeal is effectively a judicial review on the reasonableness standard.
Heinekamp v. Livermore, [2010] O.J. No. 140	Decision of the Consent and Capacity Board	Standard of review of Board's decision that Applicant not capable. Applicant alleged error in law based on conflation of two parts of test for capacity. Also alleged error in mixed fact and law for misapprehension of evidence.	Standards established by prior jurisprudence: *Starson v. Swayze* – reasonableness for questions of fact and mixed questions, correctness for questions of law. On legal test, Board set out two separate prongs of test and considered each separately – this approach was found to be correct. On reasonableness argument, Court does not use *Dunsmuir* para. 47 two-stage approach, but rather assesses reasonableness on the "somewhat probing" standard, stating that "reasonableness is satisfied if a decision is supported by a tenable explanation." Court finds that decision is "reasonable and correct."

Decisions from January 2009 through November 2009

The following survey represents our summary of 2009 Ontario court decisions that have interpreted or applied the standard of review analysis developed in both *Dunsmuir* and *Khosa*. One clear trend in these cases is that Ontario courts have latched on to the two-step reasonableness analysis from paragraph 47 in *Dunsmuir*. Not every decision makes a reference to the process of reasoning, or the range of possible acceptable outcomes, but the majority do engage in that analysis. The Court of Appeal has directed that the analysis always be done (*Taub v. Investment Dealers Association*, *supra*).

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
142445 Ontario Ltd. v. IBEW Local 636, [2009] O.J. No. 2011	Motion to vary decision of motions judge.	What is the standard of review for a motions judge considering evidence or issues by a party regarding the evidence.	*Khosa* cited for the proposition that it is not the role of the reviewing court to reweigh the evidence. The Div. Court upholds the applicability of the decision in *Keeprite*, (1980), 29 O.R. (2d) 513, as to the admission of affidavit evidence on judicial review.
Abdoulrab et al. v. Ontario Labour Relations Board et al. (2009), 95 O.R. (3d) 641	Ontario Labour Relations Board	The standard was accepted to be reasonableness, but the core dispute was whether the Div. Court properly applied the reasonableness standard.	The Court of Appeal considered *Khosa*, *Dunsmuir* and the two-stage reasonableness analysis, and concluded that when the reviewing court is considering the reasonableness standard, it is not open for it to state its own views as to how far the administrative decision deviates from the correct decision. There should be no statement made as to the correct decision – or else the "right to be wrong" concept becomes reanimated. The inquiry is limited strictly to assessing the process of reasoning, and the range of acceptable outcomes.
Barbulov v. Cirone, [2009] O.J. No. 1439	Consent and Capacity Board	Well-accepted that standard is reasonableness for reviewing Consent and Capacity decisions – issue is how to apply reasonableness in this case.	Justice Brown cites at length from *Khosa* and *Dunsmuir* and applies the two stage analysis, looking at process of reasoning, justifiability, and transparency, and looking at range of outcomes. The conclusion is that the decision of the CCB in this case was not defensible in respect of the facts in evidence, and did not fall within the range of acceptable outcomes. No comment on the correct outcome.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Bot Construction Ltd. v. Ontario (Ministry of Transportation), [2009] O.J. No. 3590	Contract tender decision of the Ministry of Transportation	Is the decision an exercise of statutory grant of authority? If so what is the standard of review? Procedural fairness aspect?	The decision under review involved the procedure for a contract put out for tender. The allegation was that the bidders were not given equal opportunity when the Ministry concluded that a particular bid which objectively deviated from the tender requirements was a valid bid. The Ministry accepted the deviant bid. Agreement that reasonableness applied to findings of fact, but dispute as to interpretations of law. Applicant arguing for correctness, but Court finding reasonableness applies based on lack of privative clause, fact that decision-maker not a tribunal, absence of appeal rights, etc.
Clifford v. OMERS, [2009] O.J. No. 3900	OMERS tribunal – appeal from judicial review decision of Div. Court	Procedural fairness in adequacy of reasons. Standard of review on questions of law, questions of fact, mixed questions.	The Court of Appeal's reasons highlight the distinction between sufficiency of reasons as a stand-alone procedural fairness issue, and the transparency and justifiability in the process of reasoning as the first stage in the two-step reasonableness analysis. Procedural fairness still requires correctness and adequacy of reasons is still a procedural fairness issue. Process of reasoning as part of the reasonableness analysis is separate. The Court talks about "sufficiency of reasons in a functional sense" when referring to the standard of review.
Elementary Teachers' Federation of Ontario v. Ontario (Minister of Labour), [2009] O.J. No. 719	Minister of Labour's delegate	Issue was reasonableness of Minister's decision to make an order rescinding earlier order that created a "Multi-Site Committee" for occupational health and safety. Agreed standard was reasonableness.	Court does not accept procedural fairness arguments based on no consultation, absence of written reasons, etc. On reasonableness score, Court cites *Mills* in particular for this proposition which interprets two-step reasonableness process from *Dunsmuir* in a very particular way: "Where for example, the decision-maker is a Minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad."

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900, [2009] O.J. No. 2037	Board of Arbitration pursuant to Collective Agreement	Standard of review applicable to final award. Standard of review applicable to questions of jurisdiction, questions of hearing procedure.	The Board's final award is generally subject to the reasonableness standard – deference required and well established in case law. Board has significant expertise in interpreting collective agreements. Imperial raised objection that Div. Court relied on facts not in evidence – Court of Appeal finds that the impugned paragraphs were not findings of fact from an evidentiary perspective, but were rather comparative analyses of fact scenarios from jurisprudence that was put before the Court by both parties. The Court of Appeal agreed that if the Div. Court had amended the collective agreement, this would constitute a jurisdictional issue and correctness would apply, but found that the Div. Court did not in fact amend the collective agreement.
Municipal Property Assessment Corp. v. BCE Place Ltd., [2009] O.J. No. 3338	Appeal from decision of Ontario Assessment Review Board	Standard of review applicable to statutory interpretations of Board	The interpretation of "current value" and "fee simple if unencumbered" in the *Assessment Act* was central to Board's decision. Board has no special expertise in statutory interpretation – standard also previously found to be correctness – this is an appeal with leave – no privative clause – correctness standard applied. Board found to be incorrect in its interpretation
National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 222 v. Johnson Controls Inc., [2009] O.J. No. 1055	Labour Arbitrator	Standard of review applicable to Labour Arbitrator's interpretation of the *Employment Standards Act*	Previous jurisprudence establishing patent-unreasonableness standard, now the standard post-*Dunsmuir* is reasonableness. The Arbitrator's conclusions in interpreting the *ESA* fell within a range of possible acceptable outcomes and were therefore reasonable.
Nishnawbe Aski Nation v. Eden, [2009] O.J. No. 3203	Coroners	Standard of review of decision of Coroner to refuse to issue summons.	This was an Application for judicial review of the decisions of two coroners who refused to issue a summons to a government employee. The Applicants wanted to question the employee as to the representation of Aboriginal persons on the jury roll. The issues as framed by the Applicants were true jurisdictional issues, and issues of statutory interpretation in which the correctness standard would apply. In the end the Coroner's decision was seen as correct because the Coroner had no power over the jury roll – in effect this Application was brought against the wrong party.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Ottawa Fertility Centre Inc. v. Ontario Nurses' Assn., [2009] O.J. No. 3439	Ontario Labour Relations Board under *Public Service Labour Relations Transition Act*	Standard of review for a final decision of the board on a successor employer / related employer application.	Decision was that standard of review had already been decided to be reasonableness – a deferential standard – but that in any event, presence of strong privative clause, expertise of Board, etc., militated toward deference. Reasonableness applies to interpretation and application of s. 2 of *Act* and to exercise of discretion under s. 9. In applying reasonableness standard two stage test not used – but Court satisfied that decision fell within range of outcomes defensible in fact and law. No explicit commentary on process of reasoning.
Schuit Plastering & Stucco Inc. v. Ontario (Labour Relations Board), [2009] O.J. No. 2082	Ontario Labour Relations Board	Standard of review for statutory interpretation and exercise of discretion on certification application and request for reconsideration.	Employer argued that it was not the true employer and that certification decision was outside Board's jurisdiction. Court found that Board was given broad discretion to make orders re: certification having regard to all circumstances and that there was no jurisdictional issue. Standard of review on exercise of discretion is reasonableness – Board protected by two strong privative clauses, having extensive expertise. Board has discretion to permit process to move forward when Respondent has not complied with deadlines. The decision fell within a range of possible, acceptable outcomes defensible in respect of the facts and law.
Scott v. Ontario (Racing Commission), [2009] O.J. No. 2858	Ontario Racing Commission	Standard of review on findings of fact, interpretation of law, procedural decision re: admission of evidence. Charter rights implicated re: admission into evidence of statement made by Applicant to police officer.	The standard of review of the ORC's findings was reasonableness, but correctness applied to questions of law where a court has more expertise, including questions involving the Charter. There is no privative clause or statutory right of appeal, and the ORC is expert in horse racing issues. The correctness standard was not engaged because no Charter issue arose – admissibility of statement was reasonable in light of procedural standards of ORC, as was conclusion that statement was voluntary. Standard of review on penalty was reasonableness.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
State Farm Mutual Automobile Insurance Co. v. Ramalingam, [2009] O.J. No. 3491	Director's Delegate of the Financial Services Commission of Ontario	Standard of review for decision of Director's Delegate.	Director's Delegate decisions under *Statutory Accident Benefits Schedule* not subject to right of appeal, and protected by privative clause. Delegate has discretion whether to adjourn hearing to permit further medical examinations – reasonable not to permit adjournment in this case. This was not a question of natural justice and correctness standard did not apply.
Toronto Police Services Board v. Information and Privacy Commissioner/Ontario et al. (2009), 93 O.R. (3d) 563 (C.A.)	IPC/O	Standard of review of statutory interpretation of term "record" in *MFIPPA*. Police contesting whether "record" includes records that need to be digitally altered through process that is not normally used by them in order to be released.	The standard of review is reasonableness, given that the IPC/O was interpreting its core legislation, it has expertise in such interpretation, etc. Parties did not dispute standard of review before Court of Appeal, although it was disputed at Divisional Court. Court applied two-step reasonableness analysis, "consideration will be given to the qualities underlying the Adjudicator's decision-making process and whether his decision fell within a range of possible, acceptable outcomes given the particular factual and legal context." The Adjudicator's reasons were found to be clear and found to address the issue of how "records" are produced. Principle of statutory interpretation also showed that Adjudicator had broad discretion to give effect to purpose of *Act*. Decision to order release of records within range of acceptable outcomes.
Woodbine Entertainment Group v. Hamather, [2009] O.J. No. 431	Ontario Racing Commission	Standard of review of ORC decision to quash decision of race track not to allow a particular owner's horses to compete.	No issue with regard to correct standard of review – reasonableness. The Div. Court applied the two-stage test from *Dunsmuir* and found that the process of reasoning met the reasonableness threshold, and the outcome fell within the range of acceptable outcomes. The ORC has the discretion to enforce the public interest in fair racing, and this includes overruling overzealous anti-doping measures taken by individual race tracks.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* or *Khosa* Treatment
Yar v. College of Physicians and Surgeons of Ontario, [2009] O.J. No. 1017	Discipline Committee of College of Physicians and Surgeons	Standard of review applicable to questions of fact, jurisdiction, and mixed questions. Allegation of procedural defects: insufficient notice given, inadmissible evidence considered.	The Applicant framed her Application in terms of jurisdictional and natural justice issues, and argued for a standard of correctness on the issues she raised. The reasons of the Div. Court set out the applicability of the reasonableness from *Dunsmuir*, and then proceeded to find that all of the Applicant's issues were not jurisdictional, and that reasonableness standard was applicable. In the result, decisions found to be reasonable, and to fall within range of acceptable outcomes.
Yazdanfar v. College of Physicians and Surgeons of Ontario, [2009] O.J. No. 2478	Executive Committee of College of Physicians and Surgeons	Standard of review applicable to interim order to restrict practice pending outcome of Discipline Committee hearing	No issue as to standard applied = reasonableness. Applicant argues "defensible in facts and law" aspect of two-stage *Dunsmuir* test – says no factual foundation for interim order. Court finds that test for interim injunction does not apply to interim orders of the Exec. Committee – also finds that record before committee sufficient to reach conclusion that there was "some evidence" to satisfy s. 37 interim restriction test. Restrictions found to take into account public safety and interest of MD.

Decisions from March 2008 through January 2009

The decisions summarized in the chart below represent the application of the standard of review analysis by Ontario courts following the Supreme Court's release of its reasons in *Dunsmuir* in March 2008.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Li v. College of Physicians and Surgeons of Ontario, 2008 CanLII 37613 (ON S.C.D.C.)	College of Physicians and Surgeons	Standard of review applicable to penalty decision. Penalty involved 'permanent' restriction of practice to male patients. Penalty jurisdiction under *Health Professions Procedural Code*. Also raised issue of severity.	Court commented that normally penalty decisions are reviewed on reasonableness standard, but that because penalty jurisdiction here is set out specifically in statute, and because this is a statutory appeal, College must be correct in terms of the nature of the penalty. Does not appear to rely on past jurisprudence. With respect to the complained of harshness of the penalty (alternative ground of appeal), College need only be reasonable.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Toronto Police Association v. Toronto Police Services Board, 2008 CanLII 56714 (ON S.C.D.C.)	Labour Arbitrator	Relates to the interpretation of privacy legislation with respect to the disclosure of mental health records.	The standard of review is correctness since the issue involves a matter of interpretation of general law not within the particular expertise, knowledge or experience of an arbitrator appointed under the *Police Services Act.*
Whitely v. Shuniah, [2008] O.J. No. 2823	Municipality of Shuniah, Chief Building Inspector	Appeal pursuant to s. 25 of the *Building Code Act*, 1992. Decision with respect to statutory definition of 'ground level.' Factual decision on ground level in this case. Definition of 'single storey' in context of dispute.	Whitely argued that standard should be correctness, municipality argued for reasonableness. Conflicting pre-*Dunsmuir* jurisprudence: *Craft-Bilt Materials Ltd. v. Toronto (City)*, [2006] O.J. No. 4710, 2006 CarswellOnt 7451 **and** *Runnymede Development Corp. v. 1201262 Ontario Inc.*, [2000] O.J. No 981 *De novo* analysis: Considers absence of privative clause, expertise of building inspector, nature of question not relevant to legal system as a whole. Mixed fact and law. Reasonableness is appropriate standard. Holds that *Dunsmuir* signals move toward enhanced deference unless question touches on issue of law outside expertise, jurisdiction, or constitutional issues.
Taub v. Investment Dealers Association of Canada, 2008 CanLII 35707 (ON S.C.D.C.)	Investment Dealers Association of Canada **and** Ontario Securities Commission	Review of discipline imposed on former member. Question of statutory interpretation and contract interpretation. Applicant argued for correctness, respondent for reasonableness.	Court noted that previous jurisprudence would still apply, but none was cited. The implication being that there was no established jurisprudence to rely on. Majority undertook full standard of review analysis, looking at all former "pragmatic and functional factors." Noted statutory right of appeal, interpretation of home statute, expertise, not question of general legal significance = standard of reasonableness. In dissent, Carnwath J. agreed with standard but differed in result.
Flora v. Ontario (Health Insurance Plan, General Manager), 2008 ONCA 538 (CanLII)	OHIP (Health Services Appeal Review Board) Divisional Court	Issue was whether treatment received by Appellant was an "insured service" under a Regulation s. 28.4(2) made under the *Health Insurance Act*. Mixed fact and law. No privative clause, statutory appeal. Board experienced, question within field of experience.	This decision relies to some extent on existing standard of review jurisprudence with respect to reviewing Health Services Board decisions, but also undertakes a fulsome standard of review analysis on its own. Comes to the same conclusion that the Divisional Court reached by applying the *Pushpanathan* pragmatic and functional factors. Standard of review here is reasonableness, some deference is owed.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Darragh v. Normar Developments, Inc., [2008] O.J. No. 2586	Landlord and Tenant Board	Statutory appeal from decision of Landlord and Tenant Board. Pure question of law regarding interpretation of *Residential Tenancies Act*, and *Landlord and Tenant Act*. Parties originally agreed that the standard of review would be correctness.	Majority raised point that *Dunsmuir* did not specifically refer to statutory appeals, but applied the new standard of review analysis given the scope of the majority judgment in *Dunsmuir*. Ultimately found that standard on this issue should be correctness, relied to some extent on older jurisprudence, but also considered expertise, nature of question, and other factors.
Toronto (City) v. Wolf, 2008 CanLII 39430 (ON S.C.D.C.)	Ontario Assessment Review Board	What is the standard of review for the Board's decision that the City did not comply with notice requirements under the *Assessment Act*?	"This appeal raises a question of law or specifically, an issue of statutory interpretation that does not engage the Board's expertise. The Board is not protected by a privative clause and there is a right to appeal, with leave, on a question of law, pursuant to s. 43.1(1) of the Act. The standard of review in these circumstances is correctness."
Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal), [2008] O.J. No. 2460.	Environmental Review Tribunal	Tribunal granted leave to a group of concerned citizens and advocacy groups to appeal decisions of Ministry regarding Certificates of Approval granted to Lafarge for use of alternative fuels in its facility. Applicant argued that Tribunal committed jurisdictional error with respect to leave test and that standard should be correctness. Respondent submitted reasonableness.	Did not rely on previous jurisprudence. There was a weak privative clause. Tribunal is a specialized body, with expertise in environmental law and policy. Tribunal was interpreting the leave provision and applying it to the facts of the case. The statute was an environmental statute with which the Tribunal has familiarity. There were questions of mixed fact and law. Therefore, the Tribunal's leave decision is entitled to some deference. This was not a question of true jurisdiction; it was a question of law. Also, not a question of law relevant to legal system as a whole. Standard should be reasonableness.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Jacobs Catalytic v. International Brotherhood of Electrical Workers, 2008 CanLII 26686 (ON S.C.D.C.)	Ontario Labour Relations Board	Dispute with respect to Board's interpretation of collective agreement. Issue related to assignment of fire restoration work to outside contractor. Nature of work at issue, jurisdiction at issue, application of doctrine of estoppel at issue. Counsel for one party submitted that standard should be correctness on estoppel issue because it is an issue of law with general application.	Standard of review analysis performed here does not rely on previous jurisprudence. The Court examined two privative clauses, nature of question mixed fact and law. Board had experience in applying estoppel doctrine, also this was not a pure question of law of general application, but a mixed question. Labour Board has significant experience interpreting collective agreements and relevant statutes = reasonableness standard. Ultimately Board's decision found to be reasonable.
Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal), 2008 ONCA 436 (CanLII)	WSIB Appeals Tribunal	Issue involved determination of whether back injury linked to workplace incident.	This was a significant early decision interpreting *Dunsmuir* because it suggested that well-established pre-*Dunsmuir* patent unreasonableness standards would now be simply re-termed "reasonableness." It also confirmed that *Ryan v. Law Society of New Brunswick* was still good law and that there was to be no sliding scale of deference within the reasonableness standard. Did not address how single reasonableness standard could encompass old "patently unreasonable" jurisprudence alongside old "reasonableness simpliciter" jurisprudence, without spectrum of deference.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
University of Windsor Faculty Association v. University of Windsor, 2008 CanLII 23711 (ON S.C.D.C.)	Labour Arbitrator	Issue involving the University's posting of student evaluations of teacher performance on web. Union claimed collective agreement and *FIPPA* violated. Arbitrator disagreed.	Both parties agreed that standard was reasonableness for interpretations of collective agreement. Court cites para. 57 in *Dunsmuir* for relying on old jurisprudence. Says that level of deference has not changed from old jurisprudence. Labour arbitrators have experience in interpreting collective agreements. With respect to *FIPPA*, however, the Court noted that this was a question of law of general significance. But the Court also noted the strong privative clause. The Court did not decide the standard of review question, but rather concluded that the Arbitrator was correct in any event. The Court here did do a fulsome standard of review analysis however. Some impact may be seen here from dicta in *Dunsmuir* relating to true jurisdiction and pure questions of law with general significance for legal system as a whole. "[46] However, we conclude it is unnecessary for us to resolve this matter based on the unusual facts of this case. Our conclusion on the correctness of the Arbitrator's decision persuades us to review her decision by the standard of correctness."
1673233 Ontario Inc. (c.o.b. Eurohaven Spa) v. Brampton (City), 2008 CanLII 64379 (ON S.C.D.C.)	City of Brampton	Procedural Fairness, Natural Justice, or Duty of Fairness – what is the standard of review?	*Dunsmuir* does not alter the pre-existing jurisprudence which has established that a denial of procedural fairness or natural justice does not require a standard of review analysis. The standard is always correctness.
Limestone District School Board v. O.S.S.T.F., 2008 CanLII 63992 (ON S.C.D.C.)	Labour Arbitrator	Parties did not contest standard of review. Both agreed that it would be reasonableness.	Prior to *Dunsmuir* the standard of review for labour arbitration decisions was patent unreasonableness. Now this is cut down to reasonableness. No difference in amount of deference.
Smyth v. Perth and Smiths Falls District Hospital, 2008 ONCA 794 (CanLII)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Whether correctness standard applied by Applications judge appropriate for question of true jurisdiction with respect to the Arbitrator's power under an Arbitration agreement.	Quotes *Dunsmuir*: "[a]n exhaustive review is not required in every case to determine the proper standard of review." This was a question of true jurisdiction = correctness standard.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Inforica Inc. v. CGI Information Systems and Management Consultants Inc., 2008 CanLII 60706 (ON S.C.)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Is this a true jurisdictional question? What is the standard of review for private arbitration decisions?	*Dunsmuir* does not alter the usual approach to true jurisdictional questions: correctness. In any event private arbitration decisions of this nature are reviewed on the correctness standard – depends on contractual context.
Ontario Public Service Employees Union v. Ontario (Ministry of Labour), 2008 CanLII 59106 (ON S.C.D.C.)	Labour Arbitrator	Parties agreed that standard would be reasonableness on review of penalty.	Arbitrators have broad discretion with respect to penalty, and are owed great deference. *Dunsmuir* has not changed this.
Hamilton (City) v. United Carpenters and Joiners of America, Local 18, [2008] O.J. No. 4806	Ontario Labour Relations Board	Is the Board's practice of deeming management to accept content of application where employer doesn't respond reasonable? Is the Board's practice with respect to delay a natural justice issue?	Board's decision with respect to matters within its expertise is reviewable on reasonableness standard. No decline in deference from pre-*Dunsmuir* jurisprudence. Decision with respect to delay is reviewed on correctness standard as a natural justice issue.
Lombard Canada v. Kent & Essex Mutual Insurance Co.,	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Interpretation of insurance policy and related regulation.	Standard of review was reasonableness.
Horochowski v. Ontario English Catholic Teachers' Association, 2008 CanLII 55139 (ON S.C.D.C.)	Ontario Labour Relations Board	What is the standard of review for the board's decision? What is standard of review on procedural fairness.	Cuts down patent unreasonableness standard to reasonableness on substantive questions. Procedural fairness not subjected to standard of review analysis – must be correct.
Ontario Nurses' Association v. Rouge Valley Health System, [2008] O.J. No. 4566	Board of Directors of Rouge Valley Health System	Administrative exercise of statutory discretion re: consolidation of mental health program.	Decision is one within the discretion or policy role of the board = reasonableness standard.
Hamilton Street Railway Co. v. Amalgamated Transit Union, 2008 CanLII 56007 (ON S.C.D.C.)	Labour Arbitrator	Arbitrator performing "core function" – interpreting Collective Agreement.	Decision within Arbitrator's expertise, not jurisdictional, older jurisprudence = patent unreasonableness standard. Now, standard cut down to reasonableness. Same deference.
Conway v. Darby, 2008 CanLII 54773 (ON S.C.)	Consent and Capacity Board	Statutory appeal from a decision of Consent and Capacity Board on a determination of capacity	Pre-*Dunsmuir* standards set out in *Starson v. Swayze*, 2003 SCC 32, still apply, standard = reasonableness.
Lester v. Ontario Racing Commission, 2008 CanLII 48813 (ON S.C.D.C.)	Ontario Racing Commission	Judicial review of penalty decisions of ORC with respect to cheating. Natural justice raised.	ORC has broad mandate and expertise in regulating racing. Standard of review is reasonableness on penalty decisions – already established. There is no standard of review analysis for natural justice.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
TTC Insurance Co. v. Watson, 2008 CanLII 49337 (ON S.C.D.C.)	Director's Delegate of Financial Services Commission of Ontario	What is the standard of review for decisions of the Director's Delegate relating to area of expertise?	Pre-*Dunsmuir* standard of review of decisions of the Director's Delegate was "patent unreasonableness" when the decision was related to the domain of expertise: *Liberty Mutual Insurance Co. v. Young*, [2006] O.J. No. 952. Standard of review post-*Dunsmuir* cut down to reasonableness. No difference in amount of deference given.
Gore Mutual Insurance Co. v. Co-Operators General Insurance Co., 2008 CanLII 46914 (ON S.C.)	An Arbitrator under the *Arbitration Act*, 1991, S.O. 1991, c. 17	Arbitrator's decision interpreting *Statutory Benefits Accident Schedule* and facts of case.	The parties disagreed on the standard of review, one argued correctness, the other argued reasonableness. In the end Perell J. found that the Arbitrator's decision was both correct and reasonable and did not decide which standard of review ought to be applied.
Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board), [2008] O.J. No. 3904.	Ontario Energy Board	Issue in this case was decided to not be a matter of discretion or fact, but rather of jurisdiction and law outside area of expertise.	Pre-*Dunsmuir* jurisprudence held that a board's decisions with respect to the extent of its powers do not attract deference. Here: "no reason to depart from the standard of correctness, nor does the decision in *Dunsmuir* lead to a different conclusion."
Thunder Bay Regional Health Sciences Centre v. Ontario Public Service Employees Union, 2008 CanLII 48154 (ON S.C.D.C.)	Labour Arbitrator	Standard of review for decision of an arbitrator awarding specific work under a collective agreement. Interpretation of agreement and statutory interpretation. Mixed fact and law.	Standard, as in pre-*Dunsmuir* jurisprudence, is deferential, but no longer 'patent unreasonableness.' Deference now contained within 'reasonableness' standard. But Arbitrator's decision ultimately found to be unreasonable. Parties agreed that standard should be reasonableness.
ADGA Group Consultants v. Lane, 2008 CanLII 39605 (ON S.C.D.C.)	Human Rights Commission	Standard of review for questions of fact, mixed law and fact, and law.	Pre-*Dunsmuir* jurisprudence applied. Questions of fact and mixed fact and law are reviewed on reasonableness standard. Questions of law outside area of expertise on correctness standard.
Bajor v. Ontario (Labour Relations Board), 2008 CanLII 37608 (ON S.C.D.C.).	Ontario Labour Relations Board	Primary issues in the case were findings of pure fact, and interpretations of the *Employment Standards Act*. Dr. Bajor wanted correctness standard applied.	Pre-*Dunsmuir* deference to labour arbitrators and labour boards, referenced here to para. 54 of *Dunsmuir*, was adopted. The standard should be reasonableness.
Igbinosun v. Law Society of Upper Canada, 2008 CanLII 36158 (ON S.C.D.C.)	Law Society Discipline Committee and Appeal Panel	Committee interpreting provisions of its home statute, imposing a penalty, making findings of fact, mixed fact and law. Appellant raised issues of procedural justice and natural fairness.	As established in *Evans*, *Dunsmuir* does not change standard of deference to Law Society Discipline Committees. Reasonableness is the deferential standard. Questions of law outside area of expertise (i.e. home statute) are reviewable on the correctness standard. Procedural justice and natural fairness do not attract standard of review analysis.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Jeremiah v. Ontario (Human Rights Commission), 2008 CanLII 46915 (ON S.C.)	Human Rights Commission	Review of Commission's decision not to deal with complaint due to delay.	*Dunsmuir* does not change older jurisprudence which mandates a high level of deference to the OHRC (patent unreasonableness). Standard will now be reasonableness, but high deference remains. Only *true* jurisdictional questions under. s. 34(c) of the *Human Rights Code* will be reviewed on correctness standard. The decision not to deal with a particular part of the complaint may have been a jurisdictional decision, but the OHRC was correct in any event.
Law Society of Upper Canada v. Evans, 2008 CanLII 34276 (ON S.C.D.C.)	Law Society Discipline Committee and Appeal Panel	Involved a decision of first impression: whether to restore membership to former judge found guilty of serious misconduct.	"I do not see *Dunsmuir* as having any impact on the well-established standards for review of decisions from the Society's Appeal Panel. The Appeal Panel is entitled to deference on its findings of mixed fact and law and on its interpretation of the Act and this Court should only intervene if the Appeal Panel's decision is unreasonable. However, on questions of law outside that area of expertise, the Appeal Panel is required to be correct."
Watt v. Classic Leisure Wear, 2008 CanLII 32818 (ON S.C.D.C.)	Ontario Municipal Board (Review Board)	Question involved whether Board has jurisdiction to determine right of way, access and egress issue. Statutory appeal with leave.	On a narrow jurisdictional issue like this the Board is required to be correct. In this case the Board correctly asserted jurisdiction over the issue.
Greater Essex County District School Board v. Ontario Secondary School Teachers' Federation, District 9, 2008 CanLII 32805 (ON S.C.D.C.)	Labour Arbitrator	Primarily interpretation of collective agreement. Mixed law and fact. Arbitrator references other collective agreements as interpretive aid regarding collective agreement at issue.	Parties agreed that standard would be reasonableness. Not much analysis in majority judgment. In dissent, Swinton J. also accepted that standard was reasonableness, but reached conclusion that Arbitrator's decision was ultimately not within "range of acceptable outcomes."
Walsh v. Hamilton (City) Chief Building Official, 2008 CanLII 32325 (ON S.C.)	Chief Building Inspector	Mixed question of law and fact regarding interpretation of building code definition, and nature of contested structure.	"*Dunsmuir* also held that an exhaustive analysis to determine the proper standard is not required where the jurisprudence has already determined in a satisfactory manner the applicable standard. In this case, the appropriate standard has been previously discussed in *Runnymede*, *1218897* and *Rotstein, supra*. These cases held that a standard of reasonableness is applicable when deciding questions of mixed law and fact…"

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Mulligan v. Laurentian University, 2008 ONCA 523 (CanLII)	Laurentian University, Oversight Committee and Dean	Decision whether to admit students to program who did not meet funding requirements, but who met academic standards.	Adopted longstanding, pre-*Dunsmuir* jurisprudence indicating high level of deference to discretionary decisions going to the core of university administration. Decision was reasonable and no denial of natural justice occurred.
Venneri v. College of Chiropractors of Ontario, 2008 CanLII 27824 (ON S.C.D.C.)	Discipline Committee of College of Chiropractors	Questions of mixed fact and law relating primarily to professional misconduct with respect to patient consent. Appellant also raised natural justice with respect to notice and adequacy of reasons.	Parties agreed on reasonableness, court cited pre-*Dunsmuir* jurisprudence such as *Dr. Q.* for reasonableness standard for professional conduct decisions. Already well established that standard of review analysis does not apply to natural justice – decision-maker must be correct.
Lonergan v. Ontario (License Appeals Tribunal), 2008 CanLII 27477 (ON S.C.D.C.)	License Appeals Tribunal	Exercise of discretion, and findings of fact and credibility.	This was a very brief endorsement. Court cited *Dunsmuir* but relied on previous jurisprudence: "*Cecillo v. Tarion Warranty Corp.* [2007] O.J. No. 1692 (Div. Ct.), dictates that the applicable standard of review is correctness on questions of law and, on questions of fact or mixed fact and law, reasonableness simpliciter.
Cotton v. College of Nurses of Ontario, 2008 CanLII 26674 (ON S.C.D.C.)	College of Nurses, Board of Inquiry	Decision of Board to compel Applicant to submit to medical examination regarding fitness to practice. No reasons given, question of natural justice.	The parties agreed that for non-procedural questions the appropriate standard of review was reasonableness. No further analysis done. On questions of natural justice, a standard of review analysis is not performed, decision must be correct.
Clifford v. Ontario (Attorney General), 2008 CanLII 26256 (ON S.C.D.C.)	OMERS Appeal Subcommittee	Issue involved pension entitlement of wife and alleged co-habiting partner of deceased firefighter. Mixed question of law and fact regarding spousal status. Also raised issues of natural justice, reasonableness apprehension of bias.	*Dunsmuir* has "no impact" on standard of review for questions of fact or mixed fact and law. Pre-existing jurisprudence cited, parties also agreed that standard should be reasonableness. Natural justice demands that decision-maker be correct with respect to procedure. Reasonableness of decision could not be assessed due to inadequacy of reasons. Decision quashed and sent back. Dissent relied on previous jurisprudence as well in setting standard of review at reasonableness. Came to different conclusion on procedural fairness.
Shooters Sports Bar Inc. v. Ontario (AGCO), 2008 CanLII 25052 (ON S.C.D.C.)	Alcohol and Gaming Commission, Registrar	Statutory appeal only permitted on question of law.	Pre-*Dunsmuir* jurisprudence consistently held this board to standard of correctness. No privative clause, only questions of law may be appealed. *Dunsmuir* has no impact on standard of review.

Case	Decision Maker	Standard of Review Issue	*Dunsmuir* Treatment
Canadian General-Tower Ltd. v. United Steel, Paper and Forestry, Rubber, etc. Intl. Union, Local 862, 2008 ONCA 404 (CanLII)	Labour Arbitrator	Question relating to definition of "temporary layoff" under collective agreement for purposes of supplementary unemployment benefit. Employer argued for a correctness standard because it said that Arbitrator was interpreting the *EI Regulation* – statutory interpretation of general significance.	This case was on appeal from a decision of the Divisional Court which had been rendered pre-*Dunsmuir* and which had applied the patent unreasonable standard. Pre-existing jurisprudence indicates that standard of review is patent unreasonableness. Court here finds that standard should be reasonableness, citing older jurisprudence, and citing some of the P & F factors. This case involved interpreting a collective agreement, not a question of general legal significance. Court does not address "spectrum of deference" issue within single reasonableness standard.
Wolfe v. Ontario (Provincial Police), 2008 CanLII 23503 (ON S.C.D.C.)	Ontario Civilian Commission on Police Services	Finding of discreditable conduct and imposition of penalty.	Pre-*Dunsmuir* standard cited. Reasonableness continues to be the applicable standard post-*Dunsmuir*.
Visic v. Ontario (Human Rights Commission), 2008 CanLII 20993 (ON S.C.D.C.)	Human Rights Commission	Commission decision not to refer complaint to tribunal. Complaint involving law school's refusal to remove first year marks from transcript when student withdrew for medical reasons.	"[31] …That is to say, the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded (see *Dunsmuir*, para. 62). This jurisprudence is sufficient to determine the standard of review – which is that of reasonableness."
Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819, [2008] O.J. No. 1353	Ontario Labour Relations Board	Dispute relating to late filing of employer's response to certification application from Union. Employer sought judicial review of labour board decision.	Appeal dismissed as moot, however Court of Appeal interpreted *Dunsmuir* in the labour relations context for the first time as follows: "[43] In the nomenclature of old, Board decisions were not to be set aside unless they were patently unreasonable or clearly irrational. *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, has simplified the standard of review... However, both the result and the reasoning in *Dunsmuir* affirm a continuing stance of deference in the field of labour relations... The majority in *Dunsmuir* notes that an exhaustive analysis is not required in every case to determine the proper standard of review: if the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded a decision maker with regard to a particular category of question, the search for the appropriate standard is over."