Judicial Review of Labour Relations Board and Labour Arbitration Decisions in the Post-*Dunsmuir* Period in Ontario

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Abstract

In 2008, the Supreme Court of Canada issued a groundbreaking administrative law decision in *Dunsmuir* (*Dunsmuir v New Brunswick*, 2008 [*Dunsmuir*]). The Court reduced the number of judicial review standards to *correctness* and *reasonableness*, and directed the lower courts to afford a high degree of deference to the administrative decisions dealing with findings of fact, inextricably intertwined legal and factual matters, and question of discretion. Nonetheless, since *Dunsmuir*, there has been a growing concern that the courts' intervention in labour board and labour arbitration decisions has increased. This small empirical study is undertaken to examine the frequency of the judicial review applications from the Ontario Labour Relation Board (OLRB) and labour arbitration decisions, and whether, in fact, the courts' interference has increased in the post-*Dunsmuir* period as compared to the pre-*Dunsmuir* period. The data constitutes a total of 249 judicial review decisions for the period from 2003 to 2013. The research results reveal that the number of the OLRB decisions quashed on the application for judicial review has increased from 7% in the pre-*Dunsmuir* period to 21% in the post-*Dunsmuir* period, while the number of quashed labour arbitration awards has increased from 18% to 30%. In the majority of those decisions, the courts conducted an intrusive analysis of the arbitral and Board's reasoning, reweighed factual evidence and made their own findings of fact. Also, there is a high degree of inconsistency regarding the applicable standard of review to the issues of the arbitral and Board's authority to award common-law and equitable damages, interpretation of statutes and common-law doctrines. This paper offers a detailed statistical and substantive overview of the lower courts' choice of the judicial review standard and reasoning based on the alleged grounds for review, the outcomes, and employer-union success rates based on the disputed legal issues and the industrial sector.

Introduction

In Canada, Labour Relations Boards and Labour Arbitrators have a broad mandate to oversee various aspects of workplace relations in both unionized and non-unionized contexts. Canadian labour relations statutes clearly specify that the administrative tribunal decisions are to be final and binding. The labour relations tribunals and labour arbitrators have been put in place by legislature to operate in a timely way, and to provide efficient resolutions to the labour disputes.

However, according to the Canadian Constitution, which is based on the "idea of sanctity of the judicial function, no legislature may completely preclude the courts from reviewing the decisions of the administrative tribunals and arbitrators." The judicial function, which is based on constitutional supremacy of law, is to ensure that the tribunal or the arbitrator does not go beyond the limits of its legal authority. On the other hand, judicial review can slow down the resolution of labour disputes and greatly increase the costs.

Given the importance of the labour boards and labour arbitration's function, as well as the impact of the judicial review on the labour arbitration and labour boards' processes, the outcomes of the judicial review applications are worth some research and analysis.

Brief overview of the Supreme Court of Canada Decision in *Dunsmuir*

In 2008, the Supreme Court of Canada issued a groundbreaking administrative law decision in *Dunsmuir v. New Brunswick.* The court reduced the number of judicial review standards from three to two. Prior to 2008, the courts used three standards of review: patent unreasonableness, reasonableness *simpliciter* and correctness. In *Dunsmuir,* previous distinction between patent unreasonableness and reasonableness *simpliciter* was replaced by

one standard of reasonableness. Accordingly, the courts now use two standards to review the decisions of the administrative tribunals and arbitrators: reasonableness and correctness.

Dunsmuir provides that in applying the reasonableness standard, the court must consider such factors as justification, transparency and intelligibility of the decision-making process, and whether the decision falls within the range of possible acceptable outcomes that are defensible in light of the facts and law. The court should not at any point ask itself what the correct decision would have been, but should ask only whether there was any tenable support for what the tribunal decided.

In applying the correctness standard, the court conducts a much more intrusive inquiry into whether, in the court's view, the tribunal's decision was correct; in other words, whether the court would have made the same decision if it had been hearing the case. Review on the correctness standard is in effect indistinguishable from a full appeal on the merits. The court does not defer to the administrative tribunal or the arbitrator's reasoning.

Further, in *Dunsmuir,* the Supreme Court provided guidelines as to which standard should be used based on the particular grounds of review. According to *Dunsmuir*, an administrative tribunal's decision will be reviewable for correctness if it raises a constitutional issue, a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, or a true question of jurisdiction. In addition, the correctness standard must be applied to issues that involve drawing of jurisdictional lines between two or more competing specialized tribunals. On the other hand, the reasonableness standard should be applied where the tribunal's decision raises issues of fact, inextricably intertwined legal and factual matters, a question of discretion, policy or an interpretation of the tribunal's "home" statute (i.e., statute that is

closely connected to the tribunal's function, with which it has particular familiarity).

Another important role of *Dunsmuir* is it has addressed the question of the degree of supervision the courts should play in reviewing the arbitral and administrative tribunal decisions, particularly the question of deference. The courts have long struggled with the degree of deference, which should be afforded to the labour arbitrators and the labour relations boards.

Purpose of the Paper

Since the introduction of two standards of judicial review in *Dunsmuir*, there has been growing concern that the courts' intervention in labour board and labour arbitration decisions has increased.

This small empirical study is undertaken to examine how frequently the courts are asked to review Labour Relation Board and labour arbitration decisions on judicial review, and whether, in fact, the courts' interference in the labour tribunal and arbitral decisions has increased in the post-*Dunsmuir* period as compared to the pre-*Dunsmuir* period in Ontario.

Although *Dunsmuir* attempted to address this question by indicating that the administrative decision-makers should be afforded more deference, it has not eliminated the tension in courts between choosing to conduct a review, where the court can prefer its own view of the matter, or taking a less deferential position to the arbitrator's or the board's area of expertise.

Method

The data for this small empirical study constitutes a total of:

- **102** court decisions on applications for judicial review of Ontario Labour Relations Board for the period from 2003 to 2013:
    - 55 OLRB decisions for the period 2003 to 2007; and
    - 47 OLRB decisions for the period 2009 to 2013
- **147** court decisions on applications for judicial review of the Ontario Arbitration Awards for the period 2003 to 2013:
    - 73 Arbitration Awards for the period 2003 to 2007; and
    - 74 Arbitration Awards for the period 2009 to 2013

The year 2008 is purposefully left out from the analysis as it is the year when the Supreme Court of Canada rendered the decision in *Dunsmuir*; the assumption is that in that year the courts were still in transition with regards to the application of the revised standards of review, and the data will not accurately reflect the effect of *Dunsmuir*. In addition, only the judicial review applications of the OLRB and Arbitration decisions for the period 2009 to 2013 were reviewed and analyzed in great detail:

- **47** OLRB decisions, and
- **74** Arbitration decisions
- **121** total decisions

The judicial review applications of the OLRB and Arbitration decisions for the period 2003 to 2007 were only used as a comparator to determine whether or not there has been an increase in the court's interference in the labour board and arbitral awards in the post-*Dunsmuir* period as compared to the pre-*Dunsmuir* period. Further, only those decisions that address the

merits of the judicial review application were included. This study does not include the decisions that were dismissed because of delay, prematurity or mootness. In addition, this study does not include various kinds of motions and stay applications for judicial review.

The primary source for the decisions was the LexisNexis electronic database. The decisions were searched using the following two search term combinations:

- "judicial review" and "labour" and "arbitration"; and
- "judicial review" and "Labour Relations Board."

The search results were further narrowed by "Ontario" and the years "between 2003 and 2013."

The method of data collection follows the pattern set out in similar empirical studies done by Erica L. Ringseis and Allen Ponak in 2001 in Alberta, and Leonard Marvy and Voy Stelmaszhynski in 2009 in Ontario. For each decision, the following data was collected:

- Names of the primary applicant and the primary respondent (i.e., employer, union, employee, intervener);
- Court that dealt with the application (i.e., Ontario Superior Court of Justice or Ontario Court of Appeal; note: for those decisions where the judicial review was done on both levels of the court, only the higher court's decision was entered for the purpose of calculation);
- Disposition by the court (i.e., arbitrator's/board's decision upheld or overturned);
- Subject matter of the case before the Board or an Arbitrator (e.g., termination, certification, related employer declaration, lay-off, etc.);
- Standard of review proposed by the parties and the standard of review applied by the court (i.e., reasonableness, correctness, no standard);
- Grounds for judicial review alleged by the applicant (e.g., breach of procedural

fairness, jurisdiction, error of law, etc.);

- Notes of the court's reasoning and analysis.

Results

The data findings indicate that courts' intervention in labour board and labour arbitration decisions has almost doubled in the post-*Dunsmuir* period as compared to the pre-*Dunsmuir* period.

Judicial review of the Ontario Labour Relations Board's decisions.

Tables 1 and 2 summarize the outcome of judicial review cases in pre-*Dunsmuir* and post-*Dunsmuir* OLRB decisions, respectively. According to tables 1 and 2, the number of Labour Relations Board's decisions that were overturned on the application for judicial review has increased from 7% in the pre-*Dunsmuir* period to 21% in the post-*Dunsmuir* period.

Table 1
Outcomes of Judicial Review of the OLRB Decisions in pre-*Dunsmuir* period: 2003–2007

	Decisions Challenged on Judicial Review	*Decisions Upheld*	*Decisions Overturned*
2003	10	9	1
2004	8	7	1
2005	10	10	0
2006	6	6	0
2007	11	9	2
Total	**55 (100%)**	**51(93%)**	**4 (7%)**

Table 2
Outcomes of Judicial Review of the OLRB Decisions in post-*Dunsmuir* period: 2009–2013

	Decisions Challenged on Judicial Review	*Decisions Upheld*	*Decisions Overturned*
2009	13	11	2
2010	3	3	0
2011	9	8	1
2012	9	7	2
2013	13	8	5
Total	**47 (100%)**	**37(79%)**	**10 (21%)**

Judicial review of the Ontario Labour Arbitration Awards.

Tables 3 and 4 summarize the outcomes of judicial review applications from the Ontario Labour Arbitration Awards in the pre-*Dunsmuir* and post-*Dunsmuir* period. The number of arbitration awards overturned on application for judicial review in the five-year pre-*Dunsmuir* period constitutes 18% of the total applications for judicial review in that period, while the total number of arbitration awards in the five-year post-*Dunsmuir* period constitutes 30%.

Table 3
Outcomes of Judicial Review of the Ontario Labour Arbitration Awards in pre-*Dunsmuir* period: 2003–2007

	Awards Challenged on Judicial Review	*Awards Upheld*	*Awards Overturned*
2003	10	9	1
2004	7	5	2
2005	17	12	5
2006	23	19	4
2007	16	15	1
Total	**73 (100%)**	**60 (82%)**	**13 (18%)**

Table 4
Outcomes of Judicial Review of the Ontario Labour Arbitration Awards in post-*Dunsmuir* period: 2009–2013

	Awards Challenged on Judicial Review	*Awards Upheld*	*Awards Overturned*
2009	16	12	4
2010	11	9	2
2011	18	12	6
2012	15	10	5
2013	14	9	5
Total	**74 (100%)**	**52 (70%)**	**22 (30%)**

Another interesting factor to note is that only 11 out of 22 arbitration awards and 3 out of 10 OLRB decisions overturned on judicial review were sent back to the arbitrators or the Board for reconsideration based on the court's instructions. For those applications that were not sent back for reconsideration, the court's order was on the terms of the relief sought by the applicant.

Charts 1 and 2 provide a brief overview of which party — the union or the employer — was most frequently the initiator of the judicial review applications in the post-*Dunsmuir* period, and which party was more successful. As indicated in charts 3 and 4, in the post-*Dunsmuir* period the employer was the applicant in about twice as many cases as the union, while the employer-union success rates were relatively equal. This trend is similar to that of the pre-*Dunsmuir* period. As indicated by Leonard Marvy and Voy Stelmazhynsky (2009) in their paper on judicial review of the OLRB decisions, in the pre-*Dunsmuir* period, the factor the employers initiat the judicial review more frequently than the unions could be attributed to the fact that the employers have more resources, and thus are in a better position than the unions to engage in further litigation, if the administrative decision is not in their favour. However, this may also be attributed to the unions potentially being more successful in arbitration and/or in the OLRB hearings. Another possible explanation may be that the

subject matter (i.e., the substantive legal issue) of the case is of particular importance to the employers and makes it worthwhile for them to litigate it further.

Chart 1
Outcomes of Judicial Review of OLRB Decisions, by Initiating Party: 2009–2013

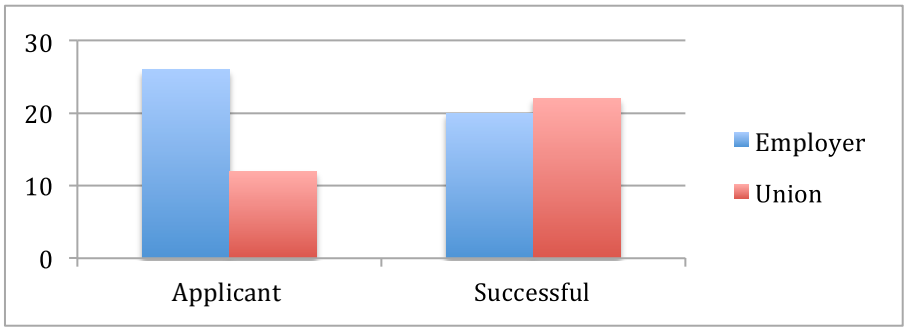


Chart 2
Outcomes of Judicial Review of Ontario Labour Arbitration Awards, by Initiating Party 2009–2013

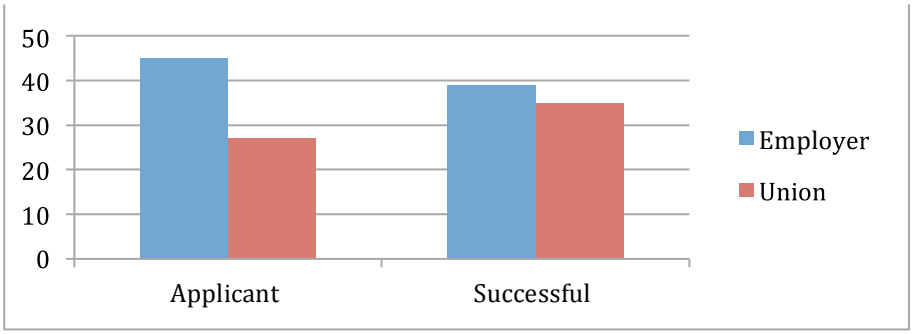


Chart 3 provides a breakdown of the outcomes of the judicial review applications from the OLRB decisions based on substantive legal issues. As indicated in Chart 3, the legal issues most frequently advanced to the judicial review were certification, related and successor employer declarations, and issues pertaining to the *ESA* interpretation. In addition, according to Chart 3, courts were more likely to interfere in the applications dealing with related/successor employer declarations and the *ESA* interpretation.

Chart 3
Outcomes of Judicial Review of OLRB Decisions, by Legal Issue: 2009–2013

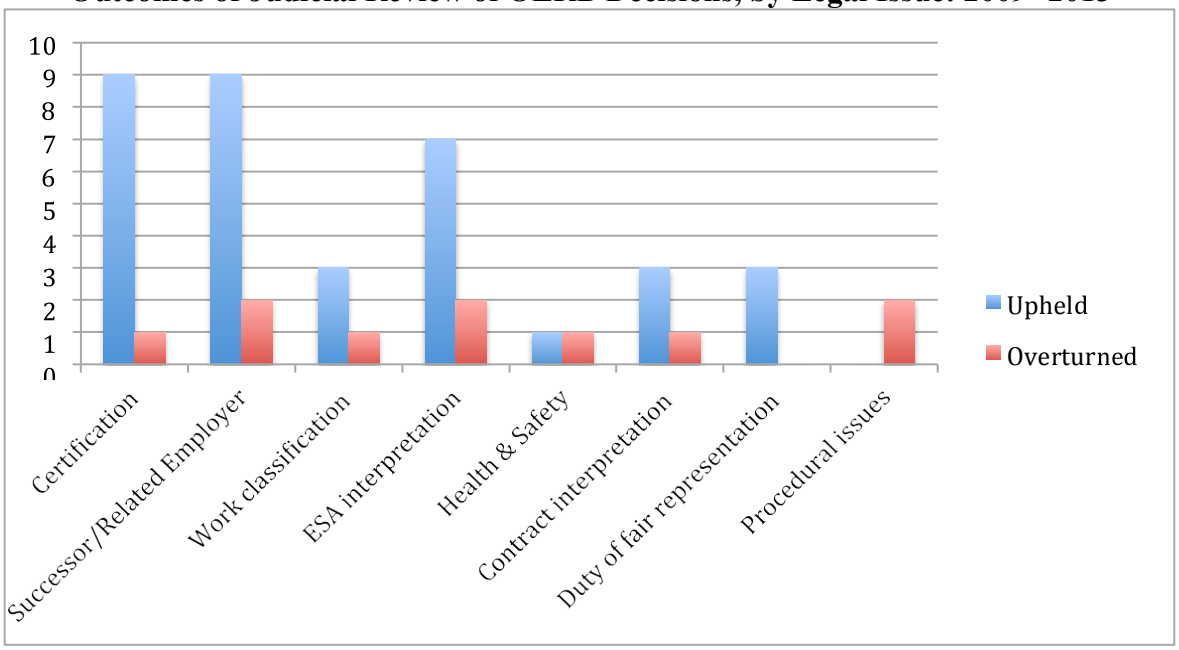
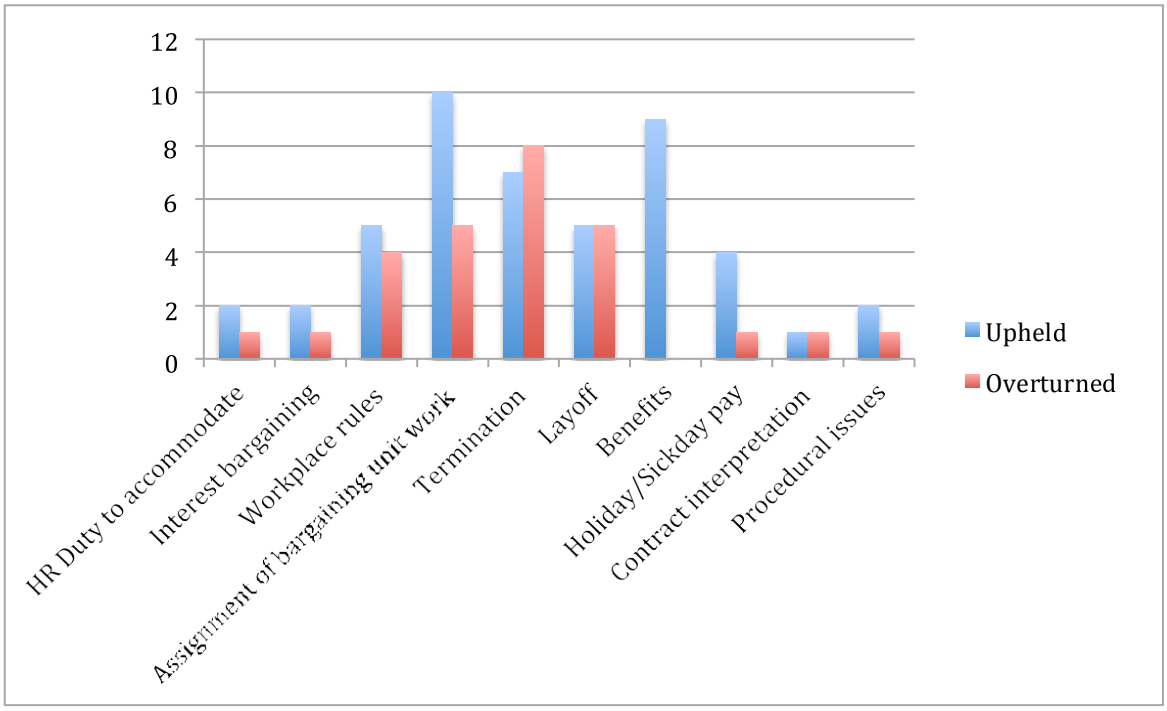


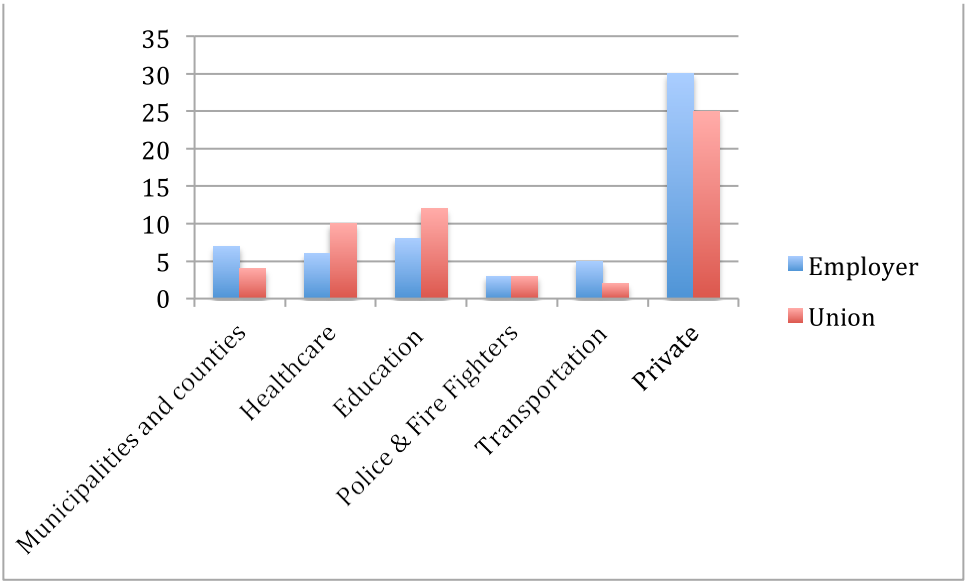
Chart 4 indicates that the most frequently litigated issues on the applications for judicial review of the arbitration awards were issues dealing with termination, assignment of bargaining unit work and benefit entitlements, followed by issues involving lay-offs and disputes regarding workplace rules. According to Chart 4, courts were more likely to interfere with the arbitral awards dealing with such substantive legal issues as termination, followed by lay-offs, assignment of bargaining unit work and workplace rules. In contrast, courts upheld all arbitration awards dealing with the issue of benefit entitlements.

Chart 4
Outcomes of Judicial Review of Ontario Labour Arbitration Awards, by Legal Issue: 2009–2013



Finally, Chart 5 provides a breakdown of employer-union success by sector. In reviewing the judicial review applications for this study, the following sectors in which labour disputes were advanced to the judicial review level were coded: municipalities/counties, healthcare, firefighters, police, education, transportation and private sector. According to the research results, both unions and employers enjoy a fairly equal rate of success. However, unions tend to be more successful in the healthcare and education sectors, while employers are more successful in the private sector.

Chart 5
Employer and Union Success on Judicial Review, by Sector: 2009–2013



Discussion: Lower Courts' Interpretation and Application of *Dunsmuir*

Given the increase in the number of applications that have been overturned on judicial review in the past five-year period in Ontario, the question arises whether this increase can be attributed to the change in the standard of review introduced by the Supreme Court of Canada decision in *Dunsmuir* and the lower courts' interpretation of that change.

Tables 5 and 6 indicate that a vast majority of the judicial review applications were decided by the application of reasonableness standard; while only four labour arbitration and four OLRB decisions were reviewed for correctness. Further, there is still quite a high degree of confusion and disagreement between counsel and court regarding the applicable standard of review based on the alleged grounds review. Specifically, in 23% (17 applications) of all judicial review applications from labour arbitration decisions, the parties and the court disagreed as to whether the correctness or reasonableness standard should apply. It must be

noted, however, that the disagreement regarding the applicable standard of review was much lower on the judicial review from the OLRB decisions, which is only 8% (4 applications).

Table 5
Outcomes of Judicial Review of Ontario Labour Arbitration Awards, by Judicial Review Standard: 2009–2013

	Awards Upheld	*Awards Overturned*
Reasonableness	34(46%)	12(16%)
Standard in dispute (court applies reasonableness standard)	12(16%)	5(7%)
Correctness	2(3%)	2(3%)
Natural Justice/Procedural Fairness	4(5%)	3(4%)
Total	**52(70%)**	**22(30%)**

Table 6
Outcomes of Judicial Review of OLRB Decisions, by Judicial Review Standard: 2009–2013

	OLRB Awards Upheld	*OLRB Awards Overturned*
Reasonableness	31(67%)	2 (4%)
Standard in dispute (court applies reasonableness standard)	2(4%)	2(4%)
Correctness	2(4%)	2(4%)
Natural Justice/Procedural Fairness	2(4%)	4(9%)
Total	**37(79%)**	**10(21%)**

As noted above, during the five-year post-*Dunsmuir* period, 22 labour arbitration decisions and 10 OLRB decisions were overturned by the courts on judicial review. To give a sense of the sort of issues that led to the reversal of the labour arbitration and OLRB decisions, the following sections of this paper will look briefly at the thrust of those cases, grouping them under the standard of review used in each case. Tables 7 and 8 provide the breakdown of the most frequently advanced grounds for judicial review applications from the labour arbitration and OLRB decisions respectively, and the standard applied by courts in dealing with those grounds for review.

Table 7
Grounds for Judicial Review of Labour Arbitration Decisions and the Applicable Standard: 2009-2013

Grounds for Review	*Reasonableness*	*Correctness*	*Standard in dispute-court proceeds with reasonableness*	*No standard*
Amending Collective Agreement			9	
Application/Interpretation of Common Law Doctrines		1	4	
Application of Statutes	6	1	2	
Issues of Fact/ Inextricably Intertwined Fact & Law	40(54%)	2	2	
Breach of Procedural Fairness/Natural Justice				7
Total	**46(62%)**	**4(6%)**	**17(23%)**	**7(9%)**

Table 8
Grounds for Judicial Review of OLRB Decisions and the Applicable Standard: 2009-2013

Grounds for Review	*Reasonableness*	*Correctness*	*Standard in dispute-court proceeds with reasonableness*	*No standard*
Constitutional Issues		2		
Application/Interpretation of Common Law Doctrines		2		
Application/Application of Statutes			2	
Issues of Fact/ Inextricably Intertwined Fact & Law	33		2	
Breach of Procedural Fairness/Natural Justice				6
Total	**33(71%)**	**4(8%)**	**4(8%)**	**6(13%)**

Application of Judicial Review Standard: Labour Arbitration Decisions.

In *Dunsmuir* the Supreme Court provided that an administrative tribunal's decision is reviewable for correctness if it raises a constitutional issue, a question of general law that is both of central importance to the legal system as a whole and outside of the adjudicator's specialized area of expertise, or a *true* question of jurisdiction. Regarding the issue of *true* jurisdiction, the Court commented:

> "*Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires. We mention true questions of vires to distance ourselves from the extended definitions adopted before CUPE. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that*

> *plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.*" (*Dunsmuir* at para 59*)*

Nevertheless, a detailed review of cases decided during the five-year post-*Dunsmuir* period indicates that there has been confusion, and frequently contestation, between courts and counsel as to what kinds of legal issues fall within the range of *true* jurisdiction and what standard of review should be applied on judicial review dealing with those issues.

As outlined in Table 7, the following grounds were most commonly in contention between the parties and the court regarding their categorization as questions of *true* jurisdiction warranting a review on a correctness standard: interpretation and application of statutes (i.e., *ESA, LRA, Human Rights Code*); interpretation and application of common law doctrines (i.e., *res judicta*, issue *estoppel*, etc.), amendment of collective agreement, incorrect finding of fact and/or incorrect determination on the matters of inextricably intertwined facts and law. The applicants alleged that these grounds constitute *true* question of jurisdiction, but the courts were inconsistent in their interpretation and choosing the applicable standard when reviewing these issues.

According to Table 7 in 9 out of 17 cases, in which the standard of review was in dispute between the parties and the court, the applicant alleged that the arbitrator exceeded his or her jurisdiction by going beyond mere interpretation and thereby amending the collective agreement. The most frequently argued grounds that involve amendment of a collective agreement include imputing terms into collective agreement that were not intended by the parties at the time of collective agreement formation, and using extrinsic evidence (e.g., evidence of past practice) in order to determine the parties' intentions at the time of collective

agreement formation. In all of those cases, the court noted that the issue of collective agreement interpretation was squarely in the arbitrator's expertise. Therefore, interpretation of the rights flowing to the parties under the collective agreement was entitled to deference from the court (*Community Nursing Homes v. Ontario Nurses' Assn*, 2010 [*Community Nursing Homes]).* In addition, the court held that arbitrators are entitled to rely on both the extrinsic evidence of past practice, evidence of parties' negotiating history, and the precedent set out by relevant jurisprudence in order to resolve any ambiguity in the collective agreement that forms a foundation of the parties' dispute.

Thus, generally, there is a consensus among the judges that an arbitrator interpreting and applying collective agreement is entitled to deference. In such cases, a reviewing court cannot substitute its own version of what it considers to be an appropriate solution. Rather, the court must determine whether the decision under review falls within the range of possible, acceptable outcomes, which are defensible by facts and law. In order to interfere, the court must find that there are no lines of reasoning that could have reasonably led the arbitrator to reach the decision he/she has made. (*Ontario Shore Mental Health Centre v. Ontario Public Service Employees Union*, 2011 [*Ontario Shore*])

Another ground, based on which the counsel tend to allege that the arbitrator exceeded jurisdiction involves interpretation and application of common law doctrines, such as *res judicta*, issue *estoppel*, and the arbitrator's authority to determine and award different heads of damages (i.e., damages for wrongful termination, illegal strike, etc.). In considering the issue of the arbitral authority to interpret and/or apply common law doctrines, the courts often refer to the decision in *Dunsmuir*, which reinforces the principle that arbitrators are to be given a wide discretion in applying common law and equitable law principles in crafting remedies.

The courts also refer the Supreme Court's decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Healthcare Professionals*, which dealt with the arbitral and tribunals' jurisdiction to interpret and apply common law doctrines. (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Healthcare Professionals*, 2011 [*Nor-Man*]) It provides that courts should take a deferential approach when reviewing the application of equitable and common-law principles by arbitrators and the Labour Relations Boards, when these principles are being adapted to the unique context of workplace relations.

Generally, there's a degree of consensus among judges that the reasonableness standard should apply to the review of arbitral decisions that involve the interpretation and application of common law doctrines.

For example, in *TTC v. Amalgamated Transit Union*, the arbitrator dealt with application and interpretation of common law principles to the provisions in the collective agreement. (*TTC v. Amalgamated Transit Union*, 2012 [*TTC*]) On judicial review, the applicant argued that the arbitrator exceeded jurisdiction by amending the collective agreement to include the duty to mitigate to the article of collective agreement, which dealt with the shortage of repayments. According to the applicant, common law duty to mitigate only applies in tort or breach of contract. The court indicated that pursuant to *Nor-Man*, the arbitrators should be afforded deference in common law interpretation. Specifically, the court noted the following:

> "*…reviewing court must remain alive to the distinctive features of collective bargaining relationship and reserve to arbitrators and the right to craft labour specific remedial doctrines…if the arbitrator is to modify common law, it must be done clearly and in recognition of what those principles are…An arbitral award that flexes a common law or equitable principle in a manner that does not reasonably respond to the distinctive nature of labour relations necessarily remains subject to the judicial review for its reasonableness*." (*Nor-Man* at para 51)

Accordingly, this decision was reviewed on the reasonableness standard.

This case is distinguishable from other cases, where the court applied the correctness standard in reviewing the arbitrator's interpretation and application of the common law doctrines as they relate to the arbitral jurisdiction to hear the matter in dispute between the parties.

In Anishinabek Police Service (APS) v. Public Service Alliance of Canada, the court applied the correctness standard in reviewing the arbitrator's interpretation and application of the issue of *estoppel*. (*Anishinabek Police Service (APS) v. Public Service Alliance of Canada*, 2012 [*Anishinabek*]) In this case, the substantive legal issue involved termination for conduct outside of the workplace. On judicial review, the employer submitted that the doctrines of abuse of process and issue *estoppel* barred arbitration due to an earlier adjudication under the APS Code of Conduct and Professionalism. The court applied the correctness standard. The court set out the test for requirements for the issue of *estoppel* based on jurisprudence, then indicated that the arbitrator correctly interpreted and applied legal principles respecting abuse of process and issue *estoppel*. The court further noted that the adjudicator's decision was not a judicial decision, and the issues determined by the adjudicator were not the same as the issues that were before the arbitrator. Therefore, the court concluded that the arbitrator correctly determined that the doctrine of abuse of process and issue *estoppel* did not preclude him from hearing the grievances.

The application of the correctness standard in the *Anishinabek Police Services*, appears to be consistent with the Supreme Court's guidelines in *Dunsmuir* that the issue of *true* jurisdiction that is reviewable for correctness relates to the "narrow" sense of whether or not the tribunal has the authority to make the inquiry (i.e., involves a question of jurisdiction as between tribunals). Although the issue in this case involved the arbitrator's interpretation and

application of the issue of *estoppel*, which according to the Supreme Court's decision in *Nor-Man* should be reviewed with a significant degree of deference (i.e., by application of a reasonableness standard), the issue of *estoppel* here was clearly related to the determination of the arbitrator's jurisdiction to hear the matter, which was alleged by the applicant to have already been heard by an adjudicator appointed under the employer's code of conduct. Thus, the issue here involved a question between the arbitral jurisdiction and the jurisdiction of the adjudicator, which constitutes a *true* question of jurisdiction.

In addition, dealing with the issue of arbitral authority to award common law and equitable damages (e.g., for wrongful termination, illegal strike, etc.), a review of the court's reasoning indicates that the judges are in agreement that the remedial authority of an arbitrator does not constitute a *true* question of jurisdiction. In other words, the courts hold that the arbitrators have jurisdiction to determine disputes between the parties and fashion appropriate remedies, which are not at odds with the collective agreement and are supported by relevant jurisprudence.

While the judges appear to be in consensus that the issues, such as application of equitable and common law doctrines and collective agreement interpretation do not constitute a question of "narrow" jurisdiction and should be reviewed on the reasonableness standard, the judges' positions appear to diverge regarding the standard of review that should be applied on review of the arbitral decisions that involve interpretation and application of extrinsic statutes, particularly the *Human Rights Code*.

The issue of true jurisdiction as it relates to the arbitral authority to interpret and apply extrinsic statutes was dealt with by the Supreme Court of Canada in *Alberta (Information and Privacy Commission) v. Alberta Teachers Association*. (*Alberta (Information and Privacy*

Commission) v. Alberta Teachers Association, 2010 [*Alberta*]) In this case, Justice Rothstein writing for the majority of the court emphasized that there should be a presumption of deference based on the standard of reasonableness where a tribunal is interpreting its home statute or statutes closely connected to its function with which it has a particular familiarity. Although, Justice Rothstein also noted that the correctness standard would still apply even though a tribunal is interpreting its home statute where the issues involve a constitutional question, an important point of law that applies beyond the adjudication of parties, and, as noted earlier, a question of jurisdiction as between tribunals.

However, a detailed review of the grounds for the judicial decisions in the post-*Dunsmuir* period reveals that the decisions in *Alberta (Information Privacy Commission)*, *supra*, did not succeed in eliminating the confusion and inconsistency with regards to the standard of review applied to the issue of the arbitrator's allegedly incorrect statutory interpretation.

For example, in *Ottawa Hospital v. OPSEU, Local 464*, the issue between the parties was whether their collective agreement requalification provision for short-term benefits dealing with returning employees discriminated against those who were unable to work full time due to a disability. (*Ottawa Hospital v. OPSEU, Local 464*, 2009 [*Ottawa Hospital*]) This issue required the interpretation of "discrimination" under the *Human Rights Code*. On judicial review, the employer argued that the interpretation of human rights principles is not within the arbitrator's expertise and urged the court to apply the correctness standard. In this case, the court disagreed with the employer and indicated that the *Labour Relations Act* expressly directs an arbitrator to have regard to the *Human Rights Code* when interpreting the provisions of collective agreements and in resolving other labour-related disputes between the parties.

Therefore, according to court, interpretation and application of the *Human Rights Code* falls within the arbitrator's expertise. The court noted that the deferential standard is required when an arbitrator is interpreting an external statute that is "intimately connected" to the mandate of the tribunal, and is encountered frequently as a result. The court found that the arbitrator's decision was reasonable and dismissed the application.

In contrast, in *UFC v. National Grocerers Co.*, the court applied the correctness standard in reviewing the arbitral decision, which involved interpretation and application of the *Human Rights Code*. (*UFC Local 1000A v. National Grocers Co.*, 2009 [*UFC*]) The case dealt with the termination of the employee for absenteeism due to a disability. The issue before the arbitrator was whether the fact that the parties' collective agreement provided severance benefits, but did not provide such benefits for employees fired for absenteeism due to a disability, amounted to discrimination as defined in the *Human Rights Code*. The arbitrator determined that it did not. On judicial review, the court noted: "while the review here is correctness, given the labour arbitrators are intimately connected with not only the *Labour Relations Act*, but also human rights legislation, some significant deference ought to be accorded to them." The court did not explain why, given this statement, it nevertheless applied the correctness standard in reviewing this case.

Finally, in the five-year post-*Dunsmuir* period, 44 judicial review decisions dealt with the issues of fact and inextricably intertwined legal and factual matters. The following grounds for judicial review were categorized as issues of fact and inextricably intertwined legal and factual matters: an arbitrator or the board making findings of fact in the absence of supportable evidence, an arbitrator or the board making determinations on issues not raised by the parties,

failure to make finding of fact, failure to follow precedent, and failure to provide adequate reasoning to support the decision.

In *Dunsmuir* the Supreme Court noted that the reasonableness standard should apply where the tribunal's the arbitral decision raises issues of fact and inextricably intertwined fact and law. Nevertheless, the review of the post-Dunsmuir judicial decisions reveals inconsistency in the courts' application of the appropriate standard dealing with the arbitral or the board's determinations of fact and inextricably intertwined facts and law. It is interesting to note that in some of those cases the applicant and/or the court indicated that such grounds as making findings of fact in the absence of supporting evidence, making determinations of issues not raised by the parties, failure to follow precedent, and failure to provide adequate reasons constitute jurisdictional errors and should be reviewed for correctness.

In *Ontario Shores Mental Hospital v. Ontario Public Service Employees Union*, the substantive legal issue involved the interpretation of the collective agreement in order to determine whether the employees' sick leaves may run concurrently with lay-off periods and whether the requirement that the employee, who is concurrently on a lay-off and a sick leave, can make a decision whether or not he will return to work within a 14-day period constitutes discrimination under the *Human Rights Code*. (*Ontario Shore Mental Health Centre v. Ontario Public Service Employees Union*, 2011 [*Ontario Shores*]). The arbitrator considered the evidence of different types of leaves and concluded that there was a possibility for discrimination depending on the circumstances of the individual who was on sick leave. The employer argued that the arbitrator made some findings of fact in the complete absence of evidence to support those findings. Accordingly, the employer argued that the decision should be reviewed for correctness in that an arbitrator making findings of fact in the complete

absence of evidence to support those findings makes a jurisdictional error. The court rejected this argument and applied the reasonableness standard. The court looked into language of the arbitrator's reasons to see whether or not the findings were supported by evidence and how the arbitrator described the evidence. The court commented that where there is explanation as to why the finding was made and how the arbitrator arrived to that particular conclusion, the reasoning is sufficient.

In contrast, in *Thames Valley District School Board v. Elementary Teachers Federation of Ontario* the court applied the correctness standard and overturned the arbitral decision based on the ground that the arbitrator left the issues undecided and failed to make factual findings. (*Thames Valley District School Board v. Elementary Teachers Federation of Ontario*, 2011 [*Thames Valley*]) The court noted that failure to make finding of fact constitutes an error going to jurisdiction and in this case it requires a correctness standard. The substantive legal issue in this case involved termination for cause (i.e., harassment against a co-worker). The court interpreted the arbitrator's wording, "I am unable to conclude whether the act (of harassment) occurred at all" to mean that the arbitrator left the issue undecided. The court noted that the arbitrator should have specified whether or not the complainant proved her allegations of harassment on a balance of probability. In reviewing the decision on the correctness standard, the court also concluded that the arbitrator incorrectly interpreted the test of harassment. Specifically, the court reviewed the jurisprudence relied upon the arbitrator when setting out a test for harassment and concluded that, based on jurisprudence, the arbitrator's test for harassment was reasonable. However, the court disagreed with the arbitrator's interpretation and noted, "In my opinion the correct definition of harassment is an objective one, consistent with the definition of the *Human Rights Code*." The court concluded that the arbitrator should

have adopted the test described in the *Human Rights Code*, because the language of the Code regarding harassment was similar to the language in the parties' collective agreement and therefore, according to court, the Code's definition was incorporated into the collective agreement.

In *Religious Hospitaliers of Saint Joseph of the Hotel Dieu Hospital of Kingston v. Ontario Service Employees Union Local 645*, the parties proceeded to interest arbitration regarding wage increase. (*Religious Hospitaliers of Saint Joseph of the Hotel Dieu Hospital of Kingston v. Ontario Service Employees Union Local 645*, 2009 [*Religious Hospitaliers*]) In deciding the issues in dispute, the arbitrator also addressed and decided the issue regarding retroactivity of wage increase for individuals who were no longer employees. At judicial review, the employer alleged that the issue of "retroactivity of wage increase" was not advanced by both parties before the arbitration board. The employer argued that the arbitration board exceeded its jurisdiction by deciding the issue that was not in dispute between the parties and urged the court to adopt the correctness standard. The court noted that the correctness standard is applied only to matters of narrow jurisdiction, i.e., when the arbitrator or the arbitration board has to determine whether it has authority to decide a particular matter. In this case, the court noted that the *Hospital Labour Dispute Arbitration Act* contained a privative clause, which indicated that the arbitration board had specialized knowledge to deal with this issue. Accordingly, the arbitration board was well within its jurisdiction and the issue of retroactivity should be reviewed on the reasonableness standard. The court, however, found that the arbitral decision was unreasonable based on the fact that the board failed to explain why it dealt with the "wage retroactivity" matter that was not raised by the parties, which made the decision not justifiable and not transparent. The court also noted that the board failed to

give the parties an opportunity to make submissions on the "wage retroactivity" matter, which amounted to a breach of natural justice.

In *CUPE v. Aramark Canada*, the substantive legal issue involved the determination of who should bear the cost of the interpreter. (*Canadian Union of Public Employees, Local 4000 v. Aramark Canada Ltd.*, 2011 [*CUPE*]) In this case the court adopted the correctness standard of review and overturned the arbitral decision based on the ground that the arbitrator failed to support his findings by facts and law. Specifically, the court noted that "the arbitrator failed to follow the earlier decision, which involved determination of the same issue, by the same parties, governed by the same collective agreement, was an error of law and should be reviewed on a correctness standard." However, the court also noted that the arbitrator's failure to explain why the decision was not followed was "unreasonable".

The aforementioned decisions signify a high degree of inconsistency with regards to the courts' application of the standard of review when dealing with the arbitrator's findings and interpretations of fact or inextricably intertwined fact and law, statutory and precedent interpretation. Although the decisions in *Nor-Man* and in *Alberta (Information Privacy Commission)*, *supra*, have brought down the numbers of judicial review applications reviewed on the correctness standard, they nevertheless did not succeed in eliminating the confusion and inconsistency with regards to what kinds of legal issues fall within the range of *true* jurisdiction and the standard of review applicable to those issues. Further, as will be evident from the review of other cases in the following sections of this paper, despite the fact that the courts applied the reasonableness standard in majority of the judicial review cases, the degree of deference to the arbitral decisions differed significantly from case to case. In some cases the

review on reasonableness standard was indistinguishable from the review on the correctness standard.

Courts Application of Judicial Review Standard on Review of OLRB Decisions

The data provided in Table 8 indicates that the number of judicial review applications of OLRB decisions, in which the standard of review was in dispute is significantly lower from the number of judicial review applications of similar labour arbitration decisions. However, similar to judicial review applications from labour arbitration decisions, the disagreement regarding the proper standard of review was based on the courts' and the parties' differing views of what constitutes a *true* question of jurisdiction.

In *Greater Essex County District School Board v. International Brotherhood of Electrical Workers*, the OLRB denied the employer's request to make a declaration that the employer is a "non-construction employer" as per s. 126 of the *Ontario Labour Relations Act* (*OLRA*). (*Greater Essex County District School Board v. International Brotherhood of Electrical Workers*, 2012 [*Greater Essex*]) At the judicial review, the employer alleged that the OLRB did not have expertise regarding statutory interpretation of ss.126 and 127 of the *OLRA*, and that the OLRB's decision should be reviewed for correctness. The court noted that the *OLRA* is a home statute of the Board and the jurisprudence has long established that the proper standard of review of the OLRB decisions, which involve interpretation of the *OLRA*, is reasonableness.

The court provided similar reasoning in *Schuit Plastering v. Ontario Labour Relations Board*. (*Schuit Plastering v. Ontario Labour Relations Board*, 2009 [*Schuit*]) In this case, the OLRB certified the bargaining unit after the employer failed to respond to the notice of

certification served by the Registrar. The substantive issues in this case required the Board to interpret and apply s.128.1 of *OLRA*. Similar to *Greater Essex County District School Board*, supra, the court disagreed with the applicant that the Board's interpretation of the *OLRA* constituted the issue of *true* jurisdiction. Accordingly, the court noted that the Board had jurisdiction to decide the union's application under s. 128.1, and the Board had all necessary evidence from the union regarding the employer and the bargaining unit structure in order to make such a decision. The Board's decision was found to be reasonable.

In *Warren v. Ontario Labour Relations Board*, the substantive legal issue involved consideration of an unfair labour practice complaint, i.e., termination of the employee due to anti-union animus. (*Warren v. Ontario Labour Relations Board*, 2013 [*Warren*]) The OLRB found that termination was not due to anti-union animus. On judicial review, the applicant alleged that the Board erred in law by misapprehending, disregarding and considering improper evidence and submitted that the OLRB's decision should be reviewed for correctness. The court noted that the applicant attempted to engage the court in weighing evidence and drawing different conclusions from those of the OLRB. The court further noted: "the factual determination at the heart of the OLRB's experience and expertise must be respected on the judicial review, unless it is plainly wrong." The OLRB's decision was found to be reasonable.

In addition, as indicated in Table 8, only four judicial review applications of OLRB decisions were reviewed for correctness. The review of those decisions indicates that unlike the judicial review of arbitral decisions, the judicial review of OLRB decisions seems to be more consistent with the guidelines provided by the Supreme Court of Canada in *Dunsmuir*.

For example, in *Independent Electricity System Operator (IESO) v. Canadian Union of Skilled Workers*, the substantive legal issue involved declaration of the *IESO*, the company that

never employed and never intended to employ construction workers, a non-construction employer under s. 127.2 of the *OLRA*. (*Independent Electricity System Operator (IESO) v. Canadian Union of Skilled Workers*, 2012 [*IESO*]) Such a declaration meant that unions would lose collective bargaining rights with respect to IESO. The union argued that non-construction employer provisions of the *Labour Relations Act* violated members' freedom of association. The OLRB denied making such a declaration. The OLRB found that s. 127.2 of the *OLRA* violated s. 2(d) of the *Charter* as the declarations required by that section, when an employer was found to be a non-construction employer substantially interfered with the collective bargaining process. The Board further found that the section was not saved by s.1 of the Charter. IESO challenged the correctness of that decision. On judicial review, the court applied the correctness standard, because the issue was one of *Charter* interpretation and application, which is categorized as a constitutional question in *Dunsmuir*. The Divisional Court determined there was no violation of *Charter* rights under s. 2(d), because the employees of non-construction employers would still continue to have bargaining rights under the general provisions of the *OLRA*. The Ontario Court of Appeal agreed with both the Divisional Court's choice of standard of review and its substantive decision.

In *Defence Contract Management Agency-Americas (Canada) (DCMA) v. Public Service Alliance of Canada,* the substantive legal issue involved certification of Public Service Alliance of Canada as the bargaining agent for DCMA's civilian employees. (*Defence Contract Management Agency-Americas (Canada) (DCMA) v. Public Service Alliance of Canada*, 2013 [*DCMA*]) The employer argued that DCMA was part of the US government and was entitled to immunity under ss. 4, 5 of the *State Immunity Act*. Thus, one of the issues before the Board was application and interpretation of the *State Immunity Act*. The board granted the union's

certification application. On judicial review, the court determined that application and interpretation of the *State Immunity Act* was a question of law, which was outside of the OLRB's specialized expertise and was of general importance to the legal system. Therefore, the court applied the correctness standard and quashed the OLRB's certification decision.

In summary, a review of the OLRB decisions in the five-year post-*Dunsmuir* period indicates that only 4 out of 47 OLRB decisions were reviewed on a correctness standard, and the court's choice of standard in those decisions strictly followed the Supreme Court of Canada's guidelines in *Dunsmuir*. However, the situation is quite different when it comes to judicial review of labour arbitration decisions. Although the number of judicial review of labour arbitration decisions in which the courts adopted a correctness standard is low, it does not appear that the court's choice of judicial review standard was consistent with the Supreme Court's directions in *Dunsmuir.* In addition, it appears that the courts afford greater deference to OLRB decisions, while subjecting the arbitral decisions to greater scrutiny.

Deference and Judicial Review on Reasonableness Standard

In *Dunsmuir*, the Supreme Court of Canada instructed the reviewing courts to apply the reasonableness standard to inquire "into the qualities that make a decision reasonable referring to both the process of articulating the reasons and the outcomes. Both the result and the reasoning in *Dunsmuir* is generally interpreted by counsel and courts to affirm a continuing stance of deference to the arbitrators and boards in the field of labour relations.

The Supreme Court has further elaborated on the standard of reasonableness in *Newfoundland & Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* (*Newfoundland*

& Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 [*Newfoundland*]). Justice Abella writing for the majority stated:

> *"Adequacy of reasons is not a stand alone basis for quashing the decisions or as advocating that a reviewing court undertake two discrete analysis — one for the reasons and a separate one for the result…It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible outcomes…This, it seems to me is what the Court was saying in Dunsmuir when it told the reviewing courts to look at "the qualities that make the decision reasonable referring to the process of articulating the reasons and to outcomes.*" (*Newfoundland* at paras 1 & 14)

Commenting on the issue of adequacy of a tribunal or arbitrator's reasoning and the degree of deference, Justice Abella noted the following:

> *"Reasons may not include all the arguments, statutory provisions, jurisprudence or other details that the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under the reasonableness analysis."* (*Newfoundland* at para 16)

Justice Abella further noted that a tribunal or arbitrator's failure to explicitly deal with an argument raised by a party does not necessarily render the decision unreasonable. She stated:

> *"A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion*. *In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria is met*." (*Newfoundland* at para 16)

The Court's efforts both in *Dunsmuir* and in *Newfoundland Nurses* were to develop a principled framework that is more simplified, coherent and workable. However, a detailed analysis of the judicial review decisions in the five-year post-*Dunsmuir* period indicates that while the contest over the applicable standard of review has been eliminated in favour of the reasonableness standard, the problem has shifted to the inconsistent allocation of the degree of

deference that, according to *Dunsmuir* and *Newfoundland Nurses'*, should be afforded to the tribunals or arbitrators on application of this standard. In other words, while the judges agree that *Dunsmuir* calls for greater deference to the administrative tribunals' and arbitrators' decision-making, there seems to be two differing judicial approaches with regards to the courts' role/function on the judicial review applications: some judges prefer a more deferential approach, while others adopt a reasonableness standard, which essentially involves a "disguised" review on a correctness standard.

It appears that the judges' opinions with regards to the degree of deference that should be afforded to the arbitral decisions are particularly inconsistent when the alleged ground for judicial review involves assessment of "adequacy of reasons." In other words, it is particularly unpredictable what degree of deference a judge will afford to the arbitral decision if the judge thinks the arbitrator failed to address factual evidence and/or jurisprudential precedent, or if the judge thinks the arbitrator failed to give adequate weight to certain evidence that the judge considers important in reaching the decision.

The category of judges that prefer a more deferential standard of review opine that the Court in *Dunsmuir* and in *Newfoundland Nurses'* has not signalled that the lower courts must puzzle over the degree of deference to give to a tribunal or an arbitrator within the reasonableness standard. This category of judges show a respectful appreciation of the expertise of specialized decision-makers and are loath to interfere. They appreciate that the arbitrators or the boards can deviate from a strict interpretation of legal principles and craft doctrines that are tailored to the labour dispute before them as long as the decision is within the realm of reasonableness.

In addition, they do not substitute their own reasons in the event the arbitrator or the board failed to explicitly deal with an argument raised by a party, and do not consider that failure to address every single argument or precedent renders the decision unreasonable. Once these judges choose a reasonableness standard, so long as they find that the explanation for the board's or the arbitrator's decision is intelligible, they defer to the outcome of the arbitrator or the board.

For example, in *Hamilton (City) v. Amalgamated Transit Union*, the substantive legal issue involved determination of proper work assignment under the collective agreement. (*Hamilton (City) v. Amalgamated Transit Union*, 2013 [*Hamilton*]) On judicial review, the employer argued that the arbitrator's decision was unreasonable because the arbitrator failed to consider some facts, failed to give proper consideration to some evidence put before her and relied on improper evidence (i.e., of past practice) in order to resolve ambiguity in the collective agreement. The court noted:

> *"Since the standard of review is reasonableness, it is not open to court to substitute its version of what the court considers to be the appropriate decision. Instead the court must determine whether the arbitrator's decision falls within the range of possible, acceptable outcomes, which are defensible in respect to the facts and law. In order to interfere, it would be necessary that the court find there to be no line of reasoning that could reasonably have led the arbitrator to reach the decision she made."* (*Hamilton* at para 9)

In *Alliance Environmental and Abatement Contractors Inc. v. International Union of Painters and Allied Trades* (*Alliance Environmental and Abatement Contractors Inc. v. International Union of Painters and Allied Trades*, 2012 [*Alliance Environmental*]), the employer applied for a judicial review of the decision of the OLRB, in which the Board found that there was a sale of business pursuant s. 69 of the *Labour Relations Act*. The applicant alleged that the Board made arbitrary findings of fact. The applicant also argued that the

Board's findings of fact were made on evidence that was highly speculative and the Board's reasons failed to disclose a basis for reaching conclusions on evidence that was inconsistent and irreconcilable. The court noted at paragraph 6 that the Board may have made one minor mistake in interpreting certain fact (i.e., the Vice-Chair did incorrectly refer to B&B as the "non-union arm" of the company), but it did not change the main finding that two companies operated as one. The court relied on Justice Iacobucci's reasoning in *Law Society of New Brunswick v. Ryan* (*Law Sociaty of New Brunswick v. Ryan*, 2003 [*Law Society*]):

> *"A decision will be unreasonable only if there is no line of reasons that could reasonably lead from evidence to conclusions. This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons taken as a whole are tenable as support for the decision. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision, which do not affect the decision as a whole."* (*Alliance Environmental* at para 8)

However, as noted earlier, there is another category of judges that interpret *Dunsmuir* and *Newfoundland Nurses*' differently. Specifically, such judges interpret these decisions as an attempt by the Supreme Court of Canada to rectify the problem that was inherent in using the patent unreasonableness standard. Particularly, the concern that many decisions that were "unreasonable" could withstand the judicial review scrutiny because they did not quite rise to the degree of "patent unreasonableness." Although these judges "officially" invoke the standard of reasonableness, they nevertheless tend to conduct an exhaustive review of the arbitral and OLRB decisions, challenging their interpretation of jurisprudence, characterization of the alleged misconduct, penalty imposed and even go so far as to challenge factual findings. In addition, such judges require that the tribunal or arbitrator provide adequate reasons for their findings.

For example, *in Ellis Don Corporation v. Ontario Sheet Metal Workers and Roofers' Conference*, Justice Molloy noted:

> *"One thing is to read the reasons generously as required by Newfoundland Nurses. It is another thing altogether for the court to substitute its own reasons for those of the arbitrator in cases where such reasoning is missing, which is what Newfoundland Nurses instructs the courts not to do. If the reasons supporting the decision are missing, even though the decision is determined by court to be within the range of possible reasonable outcomes, deference requires the court to remit the matter back to the arbitrator or board to determine what grounds could support its admissibility."* (*Ellis Don Corporation v. Ontario Sheet Metal Workers and Roofers' Conference*, 2013 [*Ellis Don*] at para 58)

In *Canadian Office and Professional Employees v. Yellow Pages*, the substantive legal issue involved termination for cause. (*Canadian Office and Professional Employees v. Yellow Pages*, 2012 [*Canadian Office*]) The grievor was terminated for failure to provide medical information to support his absences from work and for failure to return to work as directed. In this case the arbitrator noted that termination was a harsh penalty, but found it was a fair penalty because the grievor was aware that termination would ensue if he failed to provide medical information (i.e., the grievor's knowledge of consequences justified the discharge). The Divisional Court found the arbitral decision reasonable and dismissed the application. The Court of Appeal indicated that the lower court failed to examine whether the arbitrator's reasons demonstrated a consideration of the context of the situation and balance nature of the misconduct with the severity of penalty. Specifically, the Court of Appeal noted that the arbitrator failed to consider the grievor's 20 years of unblemished service. However, even in the court's own words in paragraph 12, "the arbitrator recognized that, although termination was a severe penalty for a 20-year employee with previously unblemished record, the employee's knowledge that the penalty will ensue would justify termination," it points to the fact that the arbitrator did the balancing in the context and had given consideration to the 20-

year service. Thus, it is evident from the court's reasoning that the arbitration board did not fail to consider the 20-year factor in assessing the appropriateness of the penalty. Instead, it gave more weight to the fact that the grievor knew termination would ensue if he failed to provide medical information. It appears that in this case, the court essentially disagreed with the weight that the arbitration board afforded to certain facts in determining the appropriateness of penalty.

In addition, the arbitration board found that the grievor's lack of candour at arbitration was likely to interfere with his reintegration to the workplace. The Court of Appeal noted that this finding had no bearing on the decision for the appropriateness of the penalty imposed for the misconduct. Instead, the court stated that the board's finding that the lack of candour would make it impossible to re-integrate to the workplace was not supported by any evidence.

As indicated in table 5, 8 out of 12 labour arbitration decisions reviewed on the reasonableness standard were quashed by courts, based on incorrect factual findings and failure to provide adequate reasoning. In all of those decisions, the courts conducted a very intrusive analysis of the arbitrators' reasoning, made their own findings of fact and disagreed with the weight that the arbitrators gave to evidence presented by the parties. Thus, a review of the post-*Dunsmuir* judicial review applications signals the move toward a single reasonableness standard has not paved the way for a less intrusive review by courts. In fact, the lower courts are not consistent in their interpretation and following of the Supreme Court's guidelines in *Dunsmuir* that issues of fact, inextricably intertwined legal and factual matters, and questions of discretion should be afforded a high degree of deference and should not be interfered with by courts. Thus, it cannot be predicted with reasonable clarity which standard and what degree of deference will be afforded to arbitral and OLRB decisions going forward.

Conclusion

As indicated by David Mullan in his article *"Dunsmuir v. New Brunswick,* Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), in the pre-*Dunsmuir* era, when the courts used three standards of review, there was frequently a contestation as to the precise meaning and content of the four components of the pragmatic and functional analysis. There was confusion among the judges regarding the difference between an unreasonable and a patently unreasonable decision. Counsel and lower courts were frustrated, and often inordinate amounts of time were spent in factums and oral arguments on the identification of the appropriate standard of review. The purpose of *Dunsmuir* was to bring both clarity and, somewhat simply the review of administrative action.

However, as noted by scholars and confirmed by this small empirical study, the reduction of standards of review did not make the process less confusing. The previous contestation regarding the application of the appropriate standard of review has been substituted with perplexity regarding the degree of deference within the reasonableness standard. (Mullan, 2008) As Jeffrey Sack, Q.C., put it, "Indeed, it is on its face, less of a bright line drawing exercise than previously, and as such, more susceptible to judicial difference of opinion. It also might demand an even more problematic and extensive vocabulary than that which grew up around the difference between the reasonable and patently unreasonable." In short, while the court's goal of creating a more coherent and workable framework for standard of review analysis is laudable, whether the changes brought by *Dunsmuir* will be entirely successful in achieving that goal remains an open question.

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