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Judicial Review of Coroners and Modern Administrative Law: The Impact of the Supreme Court's Decisions in Dunsmuir, Alliance Pipeline, and Alberta Teachers' Association

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The Supreme Court of Canada's decisions in New Brunswick (Board of Management) v. Dunsmuir, Alliance Pipeline Ltd. v. Smith, and A.T.A. v. Alberta (Information & Privacy Commissioner) have reformed the analysis used to determine the standard of review to be applied by courts undertaking judicial review of decisions of administrative decision makers. The authors provide a review of recent changes to administrative law standard of review principles, and aim to provide a practical guide to identifying the appropriate standard of review for coroners' rulings. The modern standard of review inquiry is explained followed by summaries of common types of coroners' decisions for which the standard of review has been determined by the jurisprudence.

Les décisions rendues par la Cour suprême du Canada dans Dunsmuir c. Nouveau-Brunswick, Smith c. Alliance Pipeline Ltd. et Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association ont modifié l'analyse employée par les cours pour déterminer la norme de contrôle judiciaire à appliquer lorsqu'elles révisent les décisions de tribunaux administratifs. Les auteurs présentent un survol des changements récents apportés aux principes en matière de norme de contrôle en droit administratif et souhaitent fournir un guide pratique pour déterminer la norme de contrôle appropriée à appliquer aux décisions des coroners. L'analyse selon la norme de contrôle moderne est expliquée et est suivie de résumés des types de décisions couramment rendues par les coroners et pour lesquels une norme de contrôle a été déterminée par la jurisprudence.

1. INTRODUCTION

The coroner's inquest is a unique administrative tribunal. With roots in criminal law, purposes similar to a public inquiry, and oversight by a doctor, judicial review poses challenges not faced in the context of other administrative tribunals. The scope of the coroner's mandate and variety of procedural rulings coroners are

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called upon to make further complicate the first question we ask on judicial review: what is the applicable standard of review?[1]

Three administrative law decisions from the Supreme Court of Canada, *Dunsmuir*,[2] *Alliance Pipeline*,[3] and *Alberta Teachers' Association*,[4] have reformed the process for determining the appropriate standard of review. This article will consider the impact of these cases and aims to serve as a guide to determining the applicable standard of review for a coroner's ruling.

Depending on the context, the standard of review for a coroner's decision will be correctness (no deference) or reasonableness (deference). *Dunsmuir*'s abandonment of the standards of reasonableness *simpliciter* and patent unreasonableness does not, however, preclude the application of jurisprudence applying the old standards. Where earlier case law has determined the standard of review for a decision maker's finding to be reasonableness *simpliciter* or patent unreasonableness, the standard to be applied post-*Dunsmuir* is reasonableness[5] — unless there is a reason the prior case law should no longer be applied.

2. THE NATURE OF CORONERS' DECISIONS — FINAL OR INTERLOCUTORY, PROCEDURAL OR SUBSTANTIVE

Coroners have historically been accorded deference. The reasons for deference are logical: medical expertise, a special understanding of the *Coroners Act*,[6] and the discretionary nature of certain decisions.[7] However, coroners are frequently

1 There is no statutory right of appeal from a decision of a coroner. Coroners' rulings are, however, at least since the 1979 judgment of the Court of Appeal for Ontario in *Evans v. Milton*, [1979] O.J. No. 4171, 1979 CarswellOnt 1584 (Ont. Div. Ct.), at paras. 151–165, affirmed 1979 CarswellOnt 526 (Ont. C.A.); leave to appeal refused (1979), 28 N.R. 86 (note) (S.C.C.), liable to supervisory review of the courts under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

2 *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, 2008 CarswellNB 125, 2008 CarswellNB 124 (S.C.C.) [*Dunsmuir*].

3 *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, 2011 CarswellNat 203, 2011 CarswellNat 202 (S.C.C.) [*Alliance Pipeline*].

4 *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, 2011 CarswellAlta 2069, 2011 CarswellAlta 2068 (S.C.C.) [*Alberta Teachers' Association*].

5 *Pourzand v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 395, 2008 CarswellNat 1860, 2008 CarswellNat 831 (F.C.), at paras. 19-20, *Kaminski v. Canada (Minister of Social Development)*, 2008 FCA 225, 2008 CarswellNat 3509, 2008 CarswellNat 2093 (S.C.C.), at para. 8, *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, 2009 CarswellNat 435, 2009 CarswellNat 434 (S.C.C.), at para. 53.

6 R.S.O. 1990, c. C.37.

7 *Canadian Chiropractic Assn. v. McLellan*, [2003] O.J. No. 3904, 2003 CarswellOnt 3838 (Ont. Div. Ct.), at paras. 16–18.

called upon to address issues beyond their curial expertise and, in these cases, their decisions may be subject to scrutiny on the correctness standard.[8]

The timing of the challenge to a particular coronial ruling is an important preliminary consideration. By the time an inquest is complete, the concerns a party may have regarding adverse publicity are largely spent and, since coroners' jury verdicts cannot result in the pain of imprisonment or an award of damages, parties will not likely be moved to incur the expense of a judicial review. Thus, most challenges to coroners' decisions are interlocutory. In interlocutory cases, courts have rejected applications for judicial review on "prematurity" grounds, citing the need to prevent delay, avoid interruptions, and to protect the coroner's ability to maintain control over ongoing proceedings.[9] These considerations have, perhaps erroneously, been the grounds both for refusals to review coronial decisions and for deference to decisions being reviewed.[10] We say perhaps erroneously because tests for

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8 A recent well-publicized example is the issue of the scope of the coroner's power to determine the validity of the jury roll in the context of First Nations underrepresentation: see *Nishnawbe Aski Nation v. Eden*, [2009] O.J. No. 3203, 2009 CarswellOnt 4518 (Ont. Div. Ct.), at para. 56, reversed 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.).

9 In *Stanford v. Ontario (Eastern Regional Coroner)*, 1989 CarswellOnt 441, 38 C.P.C. (2d) 161 (Ont. Div. Ct.), at 173 [C.P.C.], the Court wrote that:

> The coroner is faced with a very difficult task and must be afforded a sufficient degree of insulation from review. He must have the power to keep the inquest from turning into a circus and the power to prevent every busybody from using the inquest as a platform for their particular views. Applications for judicial review should be discouraged as they detract from the coroner's ability to control the proceedings and they produce delay.

See also *Canadian Chiropractic Assn. v. McLellan*, [2003] O.J. No. 3904, 2003 CarswellOnt 3838 (Ont. Div. Ct.), at para. 16 and 18, *Sears Canada Inc. v. Ontario (Regional Coroner, Southwest Region)*, [1997] O.J. No. 1424, 1997 CarswellOnt 976 (Ont. Div. Ct.), at paras. 11-12, *People First of Ontario v. Ontario (Niagara Regional Coroner)*, [1992] O.J. No. 3, 1992 CarswellOnt 3327 (Ont. C.A.), at para. 7, *C.U.P.E., Local 2316 v. Evans*, [2010] O.J. No. 5612, 2010 CarswellOnt 10027 (Ont. Div. Ct.), at para. 11, *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*, [2011] O.J. No. 2028, 2011 CarswellOnt 3283 (Ont. Div. Ct.), at paras. 46-48, additional reasons 2011 CarswellOnt 8477 (Ont. Div. Ct.).

10 Indeed, the jurisprudence addressing standard of review reveals a mixing of procedural concerns relating to the efficient conduct of inquests (prematurity) with the factors relevant to determining whether deference is owed to the decision under review: *People First of Ontario v. Ontario (Niagara Regional Coroner)*, [1991] O.J. No. 3389, 1991 CarswellOnt 705 (Ont. Div. Ct.); reversed 1992 CarswellOnt 3327, 6 O.R. (3d) 289 (Ont. C.A.), at paras. 113–118, *C.U.P.E., Local 2316 v. Evans*, [2010] O.J. No. 5612, 2010 CarswellOnt 10027 (Ont. Div. Ct.), at para. 11, *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*, [2011] O.J. No. 2028, 2011 CarswellOnt 3283 (Ont. Div. Ct.), at paras. 43-44 and 48, ; additional reasons 2011 CarswellOnt 8477 (Ont. Div. Ct.), *Canadian Chiropractic Assn. v. McLellan*, [2003] O.J. No. 3904, 2003 CarswellOnt 3838 (Ont. Div. Ct.), at paras. 16–18 *Nishnawbe Aski Nation v. Eden*, [2009] O.J. No.

prematurity and standard of review should be considered as separate — albeit overlapping — legal determinations.

The interlocutory nature of a coroner's decision will not, however, preclude a successful application for judicial review. Judicial review may be appropriate where the decision under review would result in a denial of natural justice or "a fundamental failing of justice", would create a risk that the inquest may need to be repeated, or where the error "undermines the entire proceeding."[11] Such concerns may support an application for judicial review of an interlocutory ruling even where the coroner has indicated the ruling may be revisited later in the proceedings.[12]

It should also always be kept in mind that coroners, as with other decision makers, will never be entitled to deference on questions of procedural fairness or natural justice.[13] Whether the questions under review have fairness elements that could preclude deference should be considered in every case and may have a significant impact on counsel's characterization of the issues for review.

Despite the justifications for deference to coroners and leaving procedural fairness issues aside, there will be questions on which coroners will not be accorded deference and will be subject to correctness review. There is no singular "at-large" standard of review applicable to administrative adjudicators, and this includes coroners. To determine which standard is to be applied, it will be necessary to look at the particular decision under review. The process to be followed is outlined below.

3. SUMMARY DETERMINATION OF STANDARD OF REVIEW

As we know, in Canadian administrative law the standard of review has traditionally been determined by conducting a standard of review analysis weighing the following factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. However, in recent years the Supreme Court has instructed

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3203, 2009 CarswellOnt 4518 (Ont. Div. Ct.), at para. 56, reversed 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.), at paras. 48, 50-51, and 53.

11 *Sears Canada Inc. v. Ontario (Regional Coroner, Southwest Region)*, [1997] O.J. No. 1424, 1997 CarswellOnt 976 (Ont. Div. Ct.), at paras. 11-12, *Committee for Justice for Otto Vass v. Lucas*, 2006 CarswellOnt 7200, [2006] O.J. No. 4553 (Ont. S.C.J.), at para. 7, *Proper v. Ontario (Chief Coroner)*, [2008] O.J. No. 4992, 2008 CarswellOnt 7382 (Ont. S.C.J.), at paras. 18-19, *Smith v. Ontario (Coroner)*, [2011] O.J. No. 2240, 2011 CarswellOnt 3618 (Ont. Div. Ct.), at paras. 6–9, *Ontario (Provincial Advocate for Children & Youth) v. Evans*, [2011] O.J. No. 2521, 2011 CarswellOnt 4374 (Ont. Div. Ct.), at para. 34.

12 *Smith v. Ontario (Coroner)*, [2011] O.J. No. 2240, 2011 CarswellOnt 3618 (Ont. Div. Ct.), at paras. 8-9.

13 *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, 2009 CarswellNat 435, 2009 CarswellNat 434 (S.C.C.), at para. 43, *Canada (Attorney General) v. Davis*, 2010 FCA 134, 2010 CarswellNat 1466, 2010 CarswellNat 2956 (F.C.A.), at para. 3, *Smith v. Ontario (Coroner)*, [2011] O.J. No. 2240, 2011 CarswellOnt 3618 (Ont. Div. Ct.), at paras. 22-23 and especially the concurring opinion of Lederer J., at paras. 27–29.

that summary determination of the applicable standard of review without a standard of review analysis is preferable.[14]

Where the appropriate standard of review has been satisfactorily determined by existing jurisprudence it will be unnecessary to conduct a fresh standard of review analysis.[15] Existing jurisprudence can dictate the standard of review in two ways:

> 1. where the question to be determined falls within one of the so-called "identified categories" for which the Supreme Court has identified a certain standard of review, regardless of the decision maker; or
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> 2. where the existing jurisprudence has satisfactorily determined the standard of review for the specific decision maker (*i.e.* a coroner) on the particular issue being determined.

(a) Identified Categories

In *Dunsmuir*, *Alliance Pipeline*, and *Alberta Teachers' Association* the Supreme Court has articulated categorical presumptions about standard of review, the application of which may avoid the need for a standard of review analysis. A quick check to see if the question to be determined falls within one of these "identified categories" is thus the logical first step.[16] The Supreme Court has held that the correctness standard will apply to:

> 1. a constitutional issue;

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14 *Alliance Pipeline*, *supra*, note 3, at paras. 25-26, *Alberta Teachers' Association*, *supra*, note 4, at paras. 30, 38, and 44.

15 As the Supreme Court held in *Dunsmuir*, *supra*, note 2, at paras. 57 and 62:

> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, 2004 SCC 26). This simply means that the analysis required is already deemed to have been performed and need not be repeated.
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> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

This applies in the coronial context; see *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*, [2011] O.J. No. 2028, 2011 CarswellOnt 3283 (Ont. Div. Ct.), at para. 42, additional reasons 2011 CarswellOnt 8477 (Ont. Div. Ct.). See also, for example, *Johnston v. Alberta (Director of Vital Statistics)*, 2008 ABCA 188, 2008 CarswellAlta 644 (Alta. C.A.), at para. 10, leave to appeal refused 2008 CarswellAlta 1755, 2008 CarswellAlta 1754 (S.C.C.).

16 *Dunmsuir*, *supra*, note 2, at paras. 58–61, *Alliance Pipeline*, *supra*, note 3, at paras. 25-26, *Alberta Teachers' Association*, *supra*, note 4, at paras. 30–44.

2. 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'";[17]

3. the drawing of jurisdictional lines between two or more competing specialized tribunals; or

4. a "true question of jurisdiction or *vires*" (although the ongoing applicability of this category is unclear, as outlined below).

Conversely, the reasonableness standard will apply where none of the identified categories for correctness review applies and where the question to be determined:

1. relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (*i.e.* the *Coroners Act*);[18]

2. raises issues of fact, discretion or policy; or

3. involves inextricably intertwined legal and factual issues.[19]

These categories are non-exhaustive and new categories may be recognized in the future. For example, the Supreme Court has recently indicated that the correctness standard will automatically apply where a decision maker's jurisdiction is shared with the courts.[20]

At the same time, some of the categories may cease to be recognized or may be tightly circumscribed. The continued existence of the category of "true questions

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17 In the coronial context, see *Picha v. British Columbia (Presiding Coroner)*, 2008 BCSC 818, 2008 CarswellBC 1292 (B.C. S.C.), at para. 14, affirmed 2009 CarswellBC 1921 (B.C. C.A.).

18 In *Alliance Pipepline*, *supra*, note 4, at paras. 90 and 106, Justice Deschamps dissented on the holding that a decision maker's interpretation of its home statute should automatically be accorded deference, indicating that *Dunsmuir* should not be interpreted as going this far and that:

> . . . A broad category of question that accords deference solely because the decision-maker is interpreting its home statute, without reference to the particular familiarity of the decision-maker with it pays lip service to legislative intent and creates what Professor Jacobs calls a "detrimental risk of sweeping a wide variety of issues into a single standard, without analysis of the expertise of the decision-maker (L. Jacobs, "Developments in Administrative Law: The 2007-2008 Term — The Impact of *Dunsmuir*" (2008), 43 *S.C.L.R.* (2d) 1, at p. 31).

See also *Alberta Teachers' Association*, *supra*, note 4, at para. 39 and following.

19 *Dunmsuir*, *supra*, note 3, at paras. 51–54, *Alliance Pipeline*, *supra*, note 3, at para. 26.

20 In *Shaw Cablesystems G.P. v. Society of Composers, Authors & Music Publishers of Canada*, 2012 SCC 35, 2012 CarswellNat 2379, 2012 CarswellNat 2378 (S.C.C.), at paras. 14–19, the Court held that the standard of review applicable to the Copyright Board was correctness on the basis that the shared jurisdiction between the courts and the Board was indicative of Parliament's intent not to recognize the Board's superior expertise over the matters at issue. This shared jurisdiction meant that there was not, using the language from *Dunsmuir*, a "discrete administrative regime".

of jurisdiction or *vires*" is questionable after the Supreme Court's decision in *Alberta Teachers' Association*, where the Court suggested that the application of this category is "narrow" and "exceptional" and that it may be time to reconsider whether the category even exists.[21] The Supreme Court noted that since *Dunsmuir*, the Court has not identified a single true question of jurisdiction.[22] Importantly, the Court held that where the question being reviewed involves a decision maker's interpretation or application of its home statute, the decision will be presumed to be reviewable on the reasonableness standard, and a party invoking the "true question of jurisdiction" category must demonstrate why the reviewing court should not apply the reasonableness standard.[23]

A number of court decisions reviewing coroners' rulings have applied the correctness standard on the basis of the application of the true question of jurisdiction category.[24] Following the Supreme Court's decision in *Alberta Teachers' Association*, these court decisions should be approached with caution.

There are also a great number of decisions indicating that the courts will only interfere with a coroner's decision based on so-called "jurisdictional error".[25] Given the shift away from the paradigm of jurisdictional error stretching from the Supreme Court's 1979 *CUPE* decision[26] to *Alberta Teachers' Association*, decisions applying the language of jurisdictional error no longer represent the current state of the law and may not be determinative of the standard or availability of review. Coroners' decisions can be set aside if they are incorrect or unreasonable, depending on which standard of review applies. An applicant need not establish that the coroner's error was "jurisdictional" as that term no longer has its historical meaning or importance.

(b) Specific Standard of Review Determined by Jurisprudence

In addition to considering the general "identified categories" referred to above, the first step in the *Dunsmuir* analysis[27] invites consideration of whether the juris-

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21 *Alberta Teachers' Association*, *supra*, note 4, at paras. 33-34, 39 and 42.

22 *Ibid.*, at paras. 33-34.

23 *Ibid.*, at para. 39.

24 *Canadian Chiropractic Assn. v. McLellan*, [2003] O.J. No. 3904, 2003 CarswellOnt 3838 (Ont. Div. Ct.), at para. 7, *Nishnawbe Aski Nation v. Eden*, [2009] O.J. No. 3203, 2009 CarswellOnt 4518 (Ont. Div. Ct.), at para. 56, reversed 2011 CarswellOnt 1474, 2011 ONCA 187 (Ont. C.A.).

25 *Proper v. Ontario (Chief Coroner)*, [2008] O.J. No. 4992, 2008 CarswellOnt 7382 (Ont. S.C.J.), at para. 18, *People First of Ontario v. Ontario (Niagara Regional Coroner)*, [1991] O.J. No. 3389, 1991 CarswellOnt 705 (Ont. Div. Ct.); reversed 1992 CarswellOnt 3327, 6 O.R. (3d) 289 (Ont. C.A.), at para. 113, *Committee for Justice for Otto Vass v. Lucas*, 2006 CarswellOnt 7200, [2006] O.J. No. 4553 (Ont. S.C.J.), at para. 7, *Hanley v. Eden*, [2005] O.J. No. 55, 2005 CarswellOnt 67 (Ont. Div. Ct.), at para. 48.

26 *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 1979 CarswellNB 17F, 1979 CarswellNB 17 (S.C.C.).

27 See *supra*, note 15.

prudence has determined the applicable standard of review for the particular decision maker on the particular type of question under review.[28]

The standard of review will only be conclusively identified by the "determined by jurisprudence" branch, for coroners or any other administrative adjudicator, where prior jurisprudence deals with both the same decision maker and the same type of question. Again, there is no "at-large" standard of review for a coroner generally. Both decision maker and question must align for earlier jurisprudence to be determinative of the standard of review.[29]

Thankfully, the standard of review for many questions commonly facing coroners has been determined by the jurisprudence. Counsel should, however, consider whether a particular case still applies in light of the recent changes in administrative law discussed above.

- *Decisions on whether or not to hold an inquest*: in *Snow v. Ontario (Minister of Community Safety & Correctional Services)*,[30] the Divisional Court concluded that the applicable standard of review was patent unreasonableness. In conducting its standard of review analysis the Court considered the statutory scheme and fact-driven nature of the inquiry.
- *Decisions on start date of a hearing*: in *Hanley v. Eden*,[31] a case involving a death at a ski hill, the Coroner chose a start date of the hearing in "high season" for skiing in order to increase the publicity for the hearing. The Court concluded the Coroner had the jurisdiction to make the order and declined to interfere with the decision, but cautioned that it was "not to be taken as adopting the Coroner's reasons" — thus suggesting the application of the deferential reasonableness standard.
- *Decisions on standing*: in *Katz v. McLellan*,[32] a physician sought and was denied standing. The physician, Dr. Katz, wished to meet challenges to his reputation and to air his views of the chiropractic profession as well as to assist in answering the jury questions. In dismissing the judicial review application, the Court held that the courts should only interfere with

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28 For example, the decision of the Immigration Appeal Division of the Immigration and Refugee Board made under s. 67(1)(c) of the *Immigration and Refugee Protection Act (Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, 2009 CarswellNat 435, 2009 CarswellNat 434 (S.C.C.), at para. 53), arbitral awards under a collective agreement (*M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, 2011 SCC 59, 2011 CarswellMan 607, 2011 CarswellMan 606 (S.C.C.), at para. 31), or decisions of arbitrators under the *Insurance Act* on questions of mixed fact and law (*Zurich Insurance Co. v. Personal Insurance Co.*, [2009] O.J. No. 2157, 2009 CarswellOnt 2968 (Ont. S.C.J.), at para. 29).

29 See, for example, *C.U.P.E., Local 2316 v. Evans*, [2010] O.J. No. 5612, 2010 CarswellOnt 10027 (Ont. Div. Ct.), at para. 9 and following, discussing jurisprudence establishing the standard of review for a coroner's decision on standing as reasonableness.

30 (October 27, 2006), Doc. DV-702-05, [2006] O.J. No. 5755 (Ont. Div. Ct.), at paras. 22–29.

31 *Hanley v. Eden*, [2005] O.J. No. 55, 2005 CarswellOnt 67 (Ont. Div. Ct.), at paras. 34 and 54.

32 [2002] O.J. No. 4219, 2002 CarswellOnt 3693 (Ont. Div. Ct.).

a coroner's decision on standing "where the coroner commits a serious error in principle that results in unfairness or a denial of justice." The Court also noted that the completion of the inquest without interruption must be a "paramount" consideration when balancing fairness to Dr. Katz against the smooth operation of the inquest process. In *Committee for Justice for Otto Vass v. Lucas*,[33] the Court again concluded that a coroner's decision on standing was to be granted deference, unless the coroner "has made a jurisdictional error or a serious error in principle that would result in an unfair inquest". Post-*Dunsmuir*, courts have confirmed that the deferential standard of review continues to apply to coroners' decisions on standing. In *C.U.P.E., Local 2316 v. Evans*,[34] the Divisional Court rejected an argument that *Dunsmuir* had changed the standard of review and confirmed that the reasonableness standard still applies, again focusing on historical deference to coroners' decisions and the nature of the coroner's role. *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*, reached a similar conclusion.[35]

- *Decision on scope of an inquest*: in *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*,[36] the Court determined that the standard of review applicable to a coroner's decision on the scope of an inquest was reasonableness, holding that the reasoning applicable to decisions on standing must also apply to decisions on scope. The Court also rejected the argument that the scope of the inquest was a jurisdictional question attracting the correctness standard.
- *Whether a coroner may order the removal of counsel*: *Canadian Chiropractic Assn. v. McLellan*[37] held that as a jurisdictional question, the correctness standard applied.
- *Decision on stating a case for contempt under s. 51(c) of the Act*: *Canadian Chiropractic Assn. v. McLellan*[38] held that a deferential standard of review was applicable, particularly given the discretionary nature of the question.
- *Decision on whether to order disclosure from a party*: in *Proper v. Ontario (Chief Coroner)*,[39] a party sought to review the coroner's deci-

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33 *Committee for Justice for Otto Vass v. Lucas*, 2006 CarswellOnt 7200, [2006] O.J. No. 4553 (Ont. S.C.J.), at para. 7.

34 *C.U.P.E., Local 2316 v. Evans*, [2010] O.J. No. 5612, 2010 CarswellOnt 10027 (Ont. Div. Ct.), at paras. 9–15.

35 *C.U.P.E., Local 416 v. Ontario (Deputy Chief Coroner)*, [2011] O.J. No. 2028, 2011 CarswellOnt 3283 (Ont. Div. Ct.), at para. 51, additional reasons 2011 CarswellOnt 8477 (Ont. Div. Ct.).

36 *Ibid.* at paras. 49-51.

37 *Canadian Chiropractic Assn. v. McLellan*, [2003] O.J. No. 3904, 2003 CarswellOnt 3838 (Ont. Div. Ct.), at para. 7.

38 *Ibid.*, at paras. 16-18.

39 *Proper v. Ontario (Chief Coroner)*, [2008] O.J. No. 4992, 2008 CarswellOnt 7382 (Ont. S.C.J.), at paras. 34-35.

sion not to order disclosure of material which was in the possession of another party but not in the coroner's possession. The Court held not only that procedural fairness did not require the coroner to order the disclosure of the material, but also that the decision was one relating to the conduct of the inquest in an efficient manner and accordingly was entitled to deference.

- *Decision to summon Crown prosecutors as witnesses*: in *Picha v. British Columbia (Presiding Coroner)*,[40] the Court held that a coroner's decision to subpoena Crown prosecutors as witnesses was subject to the correctness standard given the absence of a privative clause and that the scope of Crown immunity was a question of law of central importance to the legal system not falling within the coroner's expertise, and with constitutional dimensions.

4. "CLASSIC" STANDARD OF REVIEW ANALYSIS

If the question under review does not fall within an identified category and existing jurisprudence is inconclusive or conflicting, the court will proceed to a "classic" standard of review analysis[41] and weigh the following well-known factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute.

This balancing will necessarily vary from case to case given that the nature of the question and the coroner's expertise will depend on the question under review. However, there is no privative clause barring review of coroners' decisions, which will always weigh against deference. In addition, it should be noted that judicial interpretation of the object of the statute has evolved over the years and now emphasizes the public interest function of coroners' inquests. As explained by the Ontario Court of Appeal in *Nishnawbe Aski Nation v. Eden*:[42]

> Although an inquest jury cannot make findings of legal responsibility, recent case law has emphasized the importance of the inquest's public interest function in exposing systemic failings that cause death. In *People First of Ontario v. Porter, Regional Coroner Niagara* (1991), 5 O.R. (3d) 609 (Div. Ct.); reversed on other grounds (1992), 6 O.R. (3d) 289 (C.A.), the Divisional Court wrote about this public interest function:
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> > A separate and wider function is becoming increasingly significant; the vindication of the public interest in the prevention of death by the public exposure of conditions that threaten life. The separate role of the jury in recommending systemic changes to prevent death has become more and more important. The social and preventive function of the inquest which focuses on the public interest has become, in some cases, just as important as the distinctly separate

40 2008 BCSC 818, 2008 CarswellBC 1292 (B.C. S.C.); affirmed 2009 CarswellBC 1921 (B.C. C.A.).

41 Known as the "pragmatic and functional approach" prior to *Dunmsuir*.

42 2011 ONCA 187, 2011 CarswellOnt 1474 (Ont. C.A.), at para. 22.

> function of investigating the individual facts of individual deaths and the personal roles of individuals involved in the death.

5. CONCLUSION

At times determining the appropriate standard of review may seem like a burdensome prelude to consideration of the issue under review. Even if counsel are able to agree on the standard of review, the court is under no obligation to accept their submission as the correct standard — the parties cannot simply "contract out" of the appropriate standard of review.[43] Hopefully, the simplified framework of administrative law articulated in *Dunsmuir*, *Alliance Pipeline*, and *Alberta Teachers' Association* will bring conceptual clarity to the necessary task of identifying the standard of review to apply to coroners' decisions. After all, Canadian administrative law and our coronial system share the same ultimate objectives of a clear, principled, and efficient method of review.

43 *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, 2011 CarswellNat 35, 2011 CarswellNat 34 (S.C.C.), at para. 33.