Dean R. Knight: Locating *Dunsmuir*'s Meta-structure Within Anglo-Commonwealth Traditions

Senior Lecturer, Faculty of Law; Co-Director, New Zealand Centre for Public Law; Victoria University of Wellington

Dunsmuir has exhilarated and puzzled Canadian audiences of administrative law for a decade now;[1] and, before *Dunsmuir*, the enigmatic pragmatic and functional framework excited and frustrated the same audience. But, for an observer from abroad, this is no surprise. So too does the modulation of the depth of scrutiny fascinate and baffle administrative law folk throughout the Anglo-Commonwealth and beyond.

That's because of what is at stake. One of the fundamental features of judicial review of administrative action is the need to draw the balance between the impulses for vigilance, on the one hand, and restraint, on the other. In other words, variability is ubiquitous.

Yet, *how* the courts should express this variability continues to be controversial. Doctrines and methods employed for this task carry a lot of baggage. Witness the lament about the past from Bastarche and LeBel JJ in *Dunsmuir*: "confounding tests and new words for old problems, but no solutions that provide real guidance".[2] Compare this with Binnie J's contemporaneous caution about the *Dunsmuir* future: "the result . . . may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense".[3]

Sharp language towards the doctrines and methods of variability is echoed elsewhere in the Anglo-Commonwealth: *deference*:

- "a dreadful word";[4]
- *jurisdictional error*: a "chimerical distinction";[5]
- "a vague and probably undefinable concept";[6]
- *anxious scrutiny*: "a catch-phrase. . . devoid of legal meaning";[7]

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1 *Dunsmuir v. New Brunswick*, 2008 SCC 9, 2008 CarswellNB 124, 2008 CarswellNB 125, [2008] 1 S.C.R. 190 (S.C.C.). [*Dunsmuir*]

2 *Ibid*., at para. 1.

3 *Ibid*., at para. 139.

4 *Ye v. Minister of Immigration* (NZSC, transcript, 21-23 April 2009, SC53/2008) 179 (Elias CJ).

5 *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001), 206 CLR 57 (HCA) at para. 212 (Kirby J).

6 *Bulk Gas Users Group Ltd v. Attorney-General*, [1983] NZLR 129 (CA) at p. 136.

7 Lord Sumption, "Anxious Scrutiny" (ALBA annual lecture, London, November 2014), at 1.

- *the innominate "instinctual" ground*: "a circular, indeterminate and largely discretionary 'ground'";[8]
- *substantive grounds of review*: surrounded in "fog", of the "pea souper" kind.[9]

So, the variability project is filled with heat and light everywhere, even though its shape differs around the world. I think much of the angst arises from objection to the language and jargon of the project, perhaps more so than the *fact* of variability (a point alluded to by Binnie J in *Dunsmuir*).[10]

Oddly, though, the variability project lacks a shared language. While forms of modulation can be found in all Anglo-Commonwealth jurisdictions, we tend to talk past each other — maybe because of the foreign look and feel of the doctrines in our sibling jurisdictions. However, if we abstract the judicial method and focus on the meta-structure of judicial review, we can identify common styles, while also isolating the points of difference. That then allows us to better internationalize the variability project and engage in sharper conversations about the virtues of different methods.

That is one of the aims of my recent book: *Vigilance and Restraint in the Common Law of Judicial Review*.[11] Using Professor Stanley de Smith's famous textbook on judicial review — and its changing language and structure — as an anchor,[12] I have sketched four schemata representing the key methods over the last half century or so throughout the Anglo-Commonwealth: scope of review, grounds of review, intensity of review and contextual review.

And, for this brief note, it is helpful to think of the pre- and post-*Dunsmuir* approaches in those terms, in order to locate *Dunsmuir*'s meta-structure within Anglo-Commonwealth traditions. Doing so hopefully provides a comparative lens to help understand *Dunsmuir* and its implications, as well as opening up some points of connection.

Scope of review is based on categorical distinctions and formalistic reasoning; in other words, the old-fashioned "classic" English-style of judicial review.[13] *Wednesbury* and all that. Multifarious — often complexly drawn — binary categories and fastidious line-drawing, especially between law-fact-policy, jurisdictional and non-jurisdictional, and so forth. Indirect, often covert,

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8 *AI (Somalia) v. Immigration and Protection Tribunal*, [2016] NZAR 1471 (HC) at para. 44 (Palmer J).

9 *Lab Tests Auckland Ltd v. Auckland District Health Board*, [2009] 1 NZLR 776 (CA) at para. 385 (Hammond J).

10 *Dunsmuir*, *supra* note 1, at para. 121.

11 Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: CUP, 2018).

12 Seven editions starting with de Smith, *Judicial Review of Administrative Action,* 1st ed. (Stevens, London, 1959); and ending with Lord Woolf, Jeffrey Jowell, Andrew Le Sueur and others, *de Smith's Judicial Review,* 7th ed. (Sweet & Maxwell, London, 2013).

13 *Ibid*., at 33.

modulation of the depth of scrutiny. Canadians were first off the block to reject this formalistic reasoning and to explicitly bring issues of deference/variability to the fore. Nowadays, scope of review's abstract formalism is largely consigned to history — except in Australia.[14]

Grounds of review also employs an indirect and categorical approach to the modulation of depth of scrutiny. But is, instead, systemized into a framework of a few key enumerated grounds of review — each emblematic of different depths of scrutiny (viz Lord Diplock's tripartite grounds in *Council of Civil Service Unions*).[15] In Canada, the idea of a few enumerated grounds of review, especially in the sphere of discretion, was overtaken as the deference mission was extended beyond questions of law and the pragmatic and functional approach became the monolithic framework.[16] Elsewhere, in England and New Zealand, the grounds of review style continues to be a typical starting point.

Canada's former pragmatic and functional framework was the poster-child of the *intensity of review* approach. Questions of the depth of scrutiny are brought into the foreground, with calibration of depth being a preliminary step in the supervisory process.[17] It doesn't matter much whether calibration occurs by reference to distinct standards of review or a sliding scale; the key ingredient is explicit reasoning about the depth of scrutiny, generally based on conceptual or constitutional implications. Beyond Canada — and with nods to the pre-*Dunsmuir* experience — we have seen England and New Zealand toy with the variegation of the unreasonableness ground in a variety of ways: the adoption of hard look, anxious scrutiny or graded formulations of reasonableness,[18] and, in

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[14] See, for example, *Craig v. South Australia* (1995), 184 CLR 163; *Kirk v. Industrial Court of New South Wales* (2010), 239 CLR 531; Michael Taggart, "'Australian Exceptionalism' in Judicial Review" (2008), 36 FLR 1; Thomas Poole, "Between the Devil and the Deep Blue Sea" in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Oxford: Hart, 2008), 15 at 42.

[15] *Council of Civil Service Unions v. Minister for Civil Service* (1984), [1985] 1 A.C. 374 (U.K. H.L.). See also *New Zealand Fishing Industry Association Inc v. Minister of Agriculture and Fisheries*, [1988] 1 NZLR 544 (CA).

[16] *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.); *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 CarswellBC 713, 2003 CarswellBC 743, (*sub nom. Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226 (S.C.C.); and David Mullan, *Administrative Law* (Irwin Law, 2001), 108.

[17] *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, 1979 CarswellNB 17, 1979 CarswellNB 17F, [1979] 2 S.C.R. 227 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, 1997 CarswellNat 368, 1997 CarswellNat 369, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan v. Canada (Minister of Employment & Immigration)*, 1998 CarswellNat 830, 1998 CarswellNat 831, (*sub nom. Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) [1998] 1 S.C.R. 982 (S.C.C.), additional reasons 1998 CarswellNat 2637, 1998 CarswellNat 2636 (S.C.C.).

[18] See, for example, *Bugdaycay v. Secretary of State for the Home Department*, [1987] A.C. 514 (U.K. H.L.); and *Wolf v. Minister of Immigration*, [2004] NZAR 414 (HC).

human rights adjudication, (largely unsuccessful) calls for a doctrinal approach to structuring the deference enquiry.[19]

The final approach, *contextual review*, moves towards unstructured normativism, where variability is endless but modulation is embedded in the judicial assessment in-the-round. With its broad-church reasonableness standard, this is *Dunsmuir* par excellence! (The limited gateway for correctness review in some cases continues to throw back to the intensity of review approach.) Doctrine is downplayed in favour of the judicial instinct and a discretionary judgment. Seeds of it can be seen elsewhere too. One court in England framed the trigger for judicial intervention as "whether something has gone wrong that justifies the intervention of the court?"[20] The simplicity project driven by some judges in New Zealand has favoured doctrinal grounds and frameworks so open-textured that their essential feature is an overall evaluative judgment, such as substantive fairness and the like.[21] This non-doctrinal approach is also in vogue in both England and New Zealand for the assessment of any deference due in human rights adjudication.[22] Some go even further and call for the eradication of doctrine in judicial review generally — in favour of the judges' "instinctual impulse".[23]

Thus, while observers from abroad may — in the first instance — find *Dunsmuir* curious, very Canadian and perhaps of limited relevance, deeper reflection finds real points of connection. And the value of this harmonizing analysis is that it allows us to more readily assess the points of difference; in other words, what is the virtue of modulating the depth of scrutiny in different ways? *Dunsmuir* itself was all about that question. But the suite of options is wider than just collapsing the distinction between different standards of reasonableness review. And courts elsewhere have been quite shy about rigorously confronting this *how* question.

It is beyond the scope of this short reflection to specifically draw out the virtues of the *Dunsmuir* turn, especially relative to the pre-*Dunsmuir* approaches (and other approaches elsewhere in the Anglo-Commonwealth). But we might think about turning the rule-of-law on its head and applying it to the judicial

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[19] See, for example, *International Transport Roth GmbH v. Secretary of State for the Home Department*, [2003] Q.B. 728.

[20] *R (Guinness plc) v. Panel on Take-overs and Mergers*, [1990] 1 Q.B. 146 (CA).

[21] See, for example, *Thames Valley Electric Power Board v. NZFP Pulp & Paper Ltd*, [1994] 2 NZLR 641 (CA); *Electoral Commission v. Cameron*, [1997] 2 NZLR 421 (CA); and, recently, *Pora v. Attorney-General*, [2017] 3 NZLR 683 (HC). See generally Dean R. Knight, "Simple, Fair, Discretionary Administrative Law" (2008), 39 VUWLR 99.

[22] See, for example, *Huang v. Secretary of State for the Home Office*, [2007] 2 A.C. 167 (HL).

[23] Philip A. Joseph, "Exploratory Questions in Administrative Law" (2012), 25 NZULR 75 at 101. See also Sian Elias, "The Unity of Public Law?" in Mark Elliott, Jason NE Varuhas, Shona Wilson Stark (eds), *The Unity of Public Law?* (London: Bloomsbury, 2018), 15 (promoting New Zealand's "simpler path of optimistic contextualism" and pondering whether "the search for better doctrine is ultimately doomed?").

power inherent in the modulation of depth of scrutiny. Take, for example, Fuller's criteria for evaluating legal regimes: generality, public accessibility, prospectivity, clarity, non-contradiction, non-impossibility, stability and congruence.[24] These rule-of-law principles provide lines of enquiry allowing us to assess the efficacy of the different approaches.

It is perhaps no surprise that the contextual review approach heralded by *Dunsmuir* tends to fall short, especially as the move to overall evaluation and discretion comes at the cost of general and transparent rules or principles.[25] My concluding reflections give some flavour of the detailed evaluation of this schemata:[26]

> [Contextual review's] rejection of doctrine in favour of normative judicial judgement or instinct is anathema to Fuller's conception of the rule of law. At its heart, contextual review has a strong vision of the courts being active and instrumental in addressing administrative justice and ensuring constitutional righteousness. Attempts to shackle that judicial power or to insist on explicit consideration of the limitations of judicial supervision in individual cases are rejected. The expertise and values of judges provide the necessary, albeit inconspicuous, comfort that the courts will appropriately discharge their supervisory functions. Yet this requires large doses of trust — something that sits uncomfortably with the culture of justification which has become a key catch-cry of administrative law in recent decades.

But each approach has its own rule of law virtues and trade-offs — and the devil is in the detail!

Conversations about the manner in which the balance between vigilance and restraint should be drawn, as we are engaged here in this *Dunsmuir* symposium, are hard but important. Finding points of connections and difference throughout our Anglo-Commonwealth family of administrative law — sharpening our transnational language — allows us to learn lessons from each other's experience.

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[24] Lon L. Fuller, *The Morality of Law,* Revised ed. (New Haven: Yale University Press, 1964), adopted in this context in Knight, *supra* note 11, at 23-31.

[25] Knight, *ibid.,* at 230-242 and 256.

[26] *Ibid*., at 242.