Dunsmuir v. New-Brunswick: the Perceived Choice between Fairness and Flexibility in Public Service Employment

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Dunsmuir v. New Brunswick has been described as a "watershed" in Canadian administrative law.[1] Very few law students and practitioners of the discipline are now unaware that the standard of "patent unreasonableness" has disappeared. The simplification of standards of review has caught the eye of many commentators, almost to the extent that it would seem that *Dunsmuir* would appear to deal exclusively with that issue. Nevertheless, their conclusion is that in relation to judicial deference, *Dunsmuir* has not really changed that much.[2] Whether *Dunsmuir* leads to less judicial deference because of the disappearance of "patent unreasonableness" or more because "patent unreasonableness" is now diluted into a larger doctrine of reasonableness falls into one of the great perennial inquiries of administrative law: what is reasonableness?

While commentators have centered their discussions on the issue of standards of review, it is rather the less discussed aspect of the decision relating to the rights of non-unionized public servants to a hearing prior to dismissal that could have important implications for Canadian administrative law. *Dunsmuir* is important because it changes a fundamental rule—notably the right to a hearing prior to dismissal —that had been developing in Canadian administrative law, in parallel with other jurisdictions, over several decades. Until now, Canadian administrative law offered a pragmatic and nuanced answer to this problem through the doctrine of natural jus-

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1 *Dunsmuir v. Nouveau Brunswick*, 2008 SCC 9; D.Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008) 21.2 C.J.A.L.P. 117 [Mullan, *Dunsmuir*].

2 Lorne Sossin, "Dunsmuir Plus ca Change" <http://www.thecourt.ca/2008/03/17/dunsmuir-%E2%80%93-plus-ca-change/> Mullan, *Dunsmuir*, *ibid*; Alice Woolley, "The Metaphysical Court : *Dunsmuir v. New Brunswick* and the Standard of Review" (2008) 21.2 C.J.A.L.P. 259; Marc G. Underhill, "*Dunsmuir v. New Brunswick*: A Rose by Any Other Name?" (2008) 21.2 C.J.A.L.P.247; Audrey Macklin, "Back to the Future: Dunsmuir v. New Brunswick" <http://www.law.utoronto.ca/documents/conferences/Dunsmuir-Macklin.pdf>; R. Goltz, "'Patent Unreasonableness is Dead. And We Have Killed It.' A Critique of the Supreme Court of Canada's Decision in *Dunsmuir*" (2008) 46(1) Alta. L.Rev. 253; R. Sharma, "Deference, The Universe of Discourse and the Standard of Review" (2008) 46(1) Alta. L. Rev. 267.

tice. However, in *Dunsmuir*, the Supreme Court ruled that civil servants, being mostly contractual employees, are subject to ordinary contract and not administrative law.

1. The Facts and Legal Issues

Following a competition organised under the *Civil Service Act* (CSA), David Dunsmuir began work on 25 February 2002 as legal advisor at the Department of Justice of New Brunswick.[3] Three weeks later, on 14 March 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton. Dunsmuir's employment was far from trouble free. His probationary period was extended from six to twelve months. During his employment, Dunsmuir was reprimanded on three separate occasions, the last being in July 2004 by his regional director who threatened Dunsmuir with termination should his organization and output not improve. Dunsmuir answered that he would obtain legal advice and would not meet with her to discuss the matter further.

During his evaluation, dated 19 August 2004, the Regional Director informed Dunsmuir that he did not fulfill the needs of his employer. The following day, a letter of termination was sent to his lawyer, informing Dunsmuir that his employment was terminated as of 31 December of that year, but that he would not have to go to work in the meantime. On 3 February 2005, an order in council revoked Dunsmuir's appointment to the Court. In the meantime, Dunsmuir lodged a grievance under the *Public Service Labour Relations Act* (*"PSLRA"*), arguing that his employer had not made known its reasons for dissatisfaction; that he was not given any opportunity to respond to any of his employer's concerns; that his employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate.[4] The grievances were all denied and Dunsmuir referred his grievances to the adjudicator under that same Act.

According to the Province, termination of Dunsmuir's contract was only limited by a duty to give reasonable notice. Dunsmuir argued that he could only be terminated with cause, which had not been the case. According to him, he had been unreasonably disciplined by the Province. The adjudicator ruled that Dunsmuir had in fact been terminated with cause, but not for disciplinary reasons. The adjudicator recognised that the Province could terminate Dunsmuir's employment with notice or immediately with cause, but could not do so without providing Dunsmuir with a proper hearing. Dunsmuir's appeal was therefore allowed; being an office holder at pleasure, he was reinstated for not having had a proper hearing.

The central legal issue that developed, however, was not Dunsmuir's right to a hearing, but the extent to which his statutory rights of appeal allowed the adju-

3 *Civil Service Act*, S.N.B. 1984, c. C-5.1 [*CSA*].
4 *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 [*PSLRA*].

dicator to inquire into the cause of his termination. The adjudicator stated that the employer could not rely on its contractual right to end the relationship at will, and thereby weaken Dunsmuir's right of appeal. The legal uncertainty arose because of a conflict between the PSA and the *PSLRA*. "Employees" within the *PSLRA* may file a grievance in relation to dismissal and disciplinary measures. Such grievances can be appealed to an adjudicator. The powers of the adjudicator are defined as follows:

> Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.[5]

That being said, the terms of dismissal of persons qualifying as "civil servants" are set out in section 20 of the *CSA*, which provides that "Subject to the provisions of this *Act* or any other *Act*, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract." Ordinary rules of contract law allow for employment at will, subject to reasonable notice or severance pay in lieu. This right of termination still has to be read in conjunction with the *PSLRA*, which provided certain government officials with statutory rights of appeal. The problem that arose from these statutory regimes was concerned the powers of the adjudicator to overturn the government's decision of dismissal.

The fact that the adjudicator's powers have been extended to non-unionized civil servants is important because collective agreements have allowed unionized civil servants to be protected against dismissal without cause. The wording of s. 97(2.1), however, is not so clear and in no way "cuts and pastes" the standard protection against dismissal without cause found in most collective agreements.[6]

The question is: does s. 92(201) provide protection against termination without cause? Moreover, to what extent does this section override the *CSA* which provides that employee rights upon termination are those of ordinary contract law?

2. Judicial Review of the Adjudicator's Decision

The Province applied for judicial review of the Adjudicator's decision, arguing that he did not have jurisdiction to qualify the nature of the termination. What followed, however, was a debate on the appropriate standard of review to be applied in the case rather than a discussion about Dunsmuir's right to a proper hearing. These discussions centered on the assumption that Dunsmuir was an office holder "at pleasure" whose right to notice had been extended by s. 20 of the *CSA*, and whose

5 *PSLRA ibid.* s. 97(2.1).
6 *PSLRA, ibid.*

procedural rights were set out comprehensively in legislation. Under this assumption, procedural fairness was necessarily extant given Dunsmuir's rights of appeal.

In spite of a privative clause, Rideout J qualified the issue as one of statutory interpretation and therefore subject to a correctness standard of review.[7] On the merits, Rideout J stated that the Adjudicator had made an error of law by looking at the reasons for Dunsmuir's termination. Section 97(2.1) did not allow him to look into the reasons of Dunsmuir's termination since the employer had not sought any. As employable "at pleasure", Dunsmuir was not entitled to a full hearing. His rights under the *PSLRA* were procedural in nature, not substantive. As a result, the adjudicator's ruling looking into the reasons for dismissal was patently unreasonable and accordingly quashed.

On appeal, Robertson JA confirmed Rideout J's ruling while stating that the standard of review was that of "reasonableness simpliciter".[8] In doing so, he stated that under s. 20 of the *CSA*, the employer was entitled to terminate Dunsmuir as in ordinary employment contracts. In his view, the Adjudicator was not entitled to evaluate the appropriateness of Dunsmuir's termination where the employer did not invoke any disciplinary reasons. Dunsmuir's only recourse upon termination would be to invoke discrimination or illicit grounds of termination which was not the case at hand. The Court also stated that given that the parties had conceded Dunsmuir's status as a contractual employee, it was unnecessary to deal with Dunsmuir's right as an "at pleasure" appointee. As for procedural fairness, Dunsmuir's right of grievance was itself a fulfillment of his employer's duty of procedural fairness. Importantly, the Court of Appeal did not see the case as one of natural justice. In its words:

> Finally, the issue of procedural fairness does not arise in this case. Mr. Dunsmuir's employment was terminated with notice and he exercised his right to grieve, albeit with respect to the length of the notice period. In these circumstances, a finding that the fairness duty has been breached has no legal foundation.[9]

The Supreme Court unanimously confirmed the judgment of the Court of Appeal.[10] Faced with uncertainty regarding the appropriate standard of review, the Supreme Court decided to propose a general overhaul of the issue, stating that there ought to be two standards of review — correctness and reasonableness.[11] Much discussion was given to methods of judicially reviewing administrative action such as the

7 See the ruling of Rideout J: (2005), 293 R.N.B. (2e) 5, 43 C.C.E.L. (3d) 205, [2005] A.N.B. no 327 (QL), 2005 CarswellNB 444, 2005 NBBR 270.

8 New Brunswick Court of Appeal (Turnbull, Daigle and Robertson JJ) (2006), 7 R.N.B. (2e) 151, 265 D.L.R. (4th) 609, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, [2006] CLLC at para 220-030, [2006] A.N.B. no 118 (QL), 2006 CarswellNB 156, 2006 NBCA 27.

9 *Ibid.* at para. 34.

10 Bastarache and Lebel JJ, McLachlin, Fish and Abella JJ concurring.

11 Mullan, *Dunsmuir*, *supra* note 1 at para. 34.

arbitrator's decision.[12] In spite of being divided on the standard of review, the court was unanimous on the point that Dunsmuir was not entitled to a hearing, as he had claimed. As provided in s. 20 of the CSA, Dunsmuir was subject to the ordinary rules of contract and hence reasonable notice or severance pay in lieu.[13] More importantly, not all civil servants, whether they are under contract or statutory office holders, are entitled to a hearing unless it is expressly provided for in their contract, collective agreement or otherwise. Moreover, "(w)here the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies".[14] As a result, Dunsmuir was not entitled to any additional hearing other than that provided by statute.

Despite saying that Dunsmuir should have utilized "ordinary contractual remedies", the Court included much discussion on the standard of review before ultimately concluding that the standard of review in this case was reasonableness.[15] The Court also held that administrative law should have nothing to do with the resolution of this case or future cases involving public servant dismissals.

While jurists have debated *Dunsmuir*'s apparently simplied standards of review at length, much less attention has been given to the issue of procedural rights for public servants. As I hope to demonstrate in this comment, the issue of standard of review should have been secondary to resolve Dunsmuir's legal argument. In the end, if judicial review is simplified to two standards instead of three, that is all the better, but rather than debate the meaning of reasonableness, something that has perplexed legal professionals of all stripes and that will certainly not be resolved with the *Dunsmuir* case, I propose to turn my attention to the problem of procedural fairness and demonstrate how the simplification of standard of review analysis conceals the much greater problem of defining the rights and legal status of government employees.

PUBLIC SERVANTS' STATUTORY RIGHTS OF APPEAL AND LIMITATIONS THEREOF BY CONTRACTUAL STATUS

The first difficulty with the *Dunsmuir* case concerns the scope of the Adjudicator's jurisdiction over the dispute between David Dunsmuir and his employer. The very existence of such jurisdiction, however, was contingent on Dunsmuir's status as a public service employee. This leads to a second problem: the court record at every level is silent about how to establish Dunsmuir's status. Dunsmuir's status has important consequences on his rights of grievance and adjudication under the *PSLRA* and ultimately what would have been his right to a hearing at common law. Moreover, New Brunswick public service legislation is complex, and persons such as David Dunsmuir have unwittingly been allowed to fall through the cracks not only

12 *Ibid.* at paras 27-76.

13 Termination, however, is subject to an obligation of good faith. See *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 and *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54.

14 Mullan, *Dunsmuir*, *supra* note 1 at para. 113.

15 *Ibid.*; *ibid.* at para. 71.

by the courts, but more importantly by the Legislative Assembly of New Brunswick.

3. Jurisdiction of the Adjudicator over Termination of Contractual Relationships

At the outset, it is not clear why the adjudicator was not allowed to inquire into the cause of Dunsmuir's dismissal. In the Court's opinion, if the employer does not raise any reasons for terminating the contract, the arbitrator does not have jurisdiction to inquire into the cause of dismissal. The adjudicator can only take notice of the dismissal and determine whether appropriate notice has been given.[16] Allowing the adjudicator "to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal". [17] The majority continued: "There can be no justification for this; no reasonable interpretation can lead to that result."[18] However, as Mullan stated,[19] the provision could be interpreted—and was in fact interpreted—as stating that non-unionized employees dismissed for any reason should be entitled to appeal their dismissal under the *PSLRA*. The Adjudicator could then determine whether there was cause, and should he find that there was none that he should be able to order the employee's reinstatement. The Adjudicator could thus examine the existence of cause rather than its justification.[20] According to this interpretation, the employer could not (1) invoke a non-existent cause nor (2) dismiss the employee without cause if in fact there would be a cause for dismissal. Such an interpretation is entirely within the reasonable possibility left open by the combination of s. 97(2.1) of the *PSLRA* and s. 20 of the *CSA*. This is all the more possible since the standard of review the majority determined at the outset was not correctness but reasonableness.

Indeed, s. 97(2.1) of the *PSLRA* provides that certain non unionized employees may appeal their discharge for cause and that the adjudicator may "substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances." It would have been pointless to allow non-unionized employees to appeal a dismissal for cause by simply allowing the employer to circumvent s. 97(2.1) of the *PSLRA* by not spelling out the cause.[21] While there may be reasons to prevent the unionization of some public servants, there is no reason to automatically exclude them from protection from dismissal without cause.

16 *Ibid.* at para. 75. See s. 97(2.1) *PSLRA*, *supra* note 4.
17 Mullan, *Dunsmuir*, *supra* note 1 at para. 75.
18 *Ibid.*
19 Mullan, *Dunsmuir*, *supra* note 1 at 137.
20 See also *New Brunswick Power Corp. v. Hadfield* [1999] N.B.J. No. 477 where the Court recognized the adjudicator's jurisdiction and "patently reasonable" exercise of power to order reinstatement of a non-unionized employee who had been discharged.
21 We should add that s. 97(2.1) was added to the *PSLRA*, *supra* note 4 in 1990, the same year as *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 [*Knight*] broadened the applicability of procedural to select contractual employees dismissible without cause.

Moreover, s. 20 of the *CSA* does state that the employer's right to terminate is subject to the provisions of any other *Act*. Can it really be said that an Adjudicator's decision and reasoning "does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law"?[22] On a broader level, it is worth questioning now what exactly will be the value of providing public servants with statutory rights of appeal against dismissal, whether they be subject to dismissal for cause or otherwise. From the reasoning offered, it appears that the only remaining function of these bodies is to determine whether or not adequate damages have been awarded.[23]

4. Did the Adjudicator have Jurisdiction over David Dunsmuir?

There are other, more fundamental reasons to question the adjudicator's jurisdiction. Neither party to the dispute appears to have questioned the applicability of the *PSLRA* or the CSA to Dunsmuir. Rather, each assumed that because he was recruited pursuant to a competition organized under the *CSA* he was entitled to file a grievance under the *PSLRA*. Rights of grievance and adjudication under that Act are not available to all public servants but reserved for "employees".[24] That Act defines "employee" succinctly as "a person employed in the Public Service".[25]

However, things are not that simple and it is difficult to see from the record on what basis Dunsmuir was allowed to proceed with a grievance and a request for adjudication. A government lawyer such as Dunsmuir might be excluded as "*(g)* a person employed in a managerial or confidential capacity", or on the grounds that he is "a person appointed by the Lieutenant-Governor in Council under an Act of the Legislature to a statutory position described in that Act and to whom the Civil Service Act does not apply".[26] Such persons would not be entitled to file a grievance under the *PSLRA* nor to request adjudication thereunder. The question therefore becomes how these exclusions were circumvented in Dunsmuir's case.

The record of the Court of Queen's Bench shows that Dunsmuir was initially engaged following a competition under the CSA as a Legal Officer for the Court Services Division.[27] Moreover, the CSA would apply to Dunsmuir because he was employed by the Department of Justice.[28] However, three weeks after his initial engagement by the Department of Justice as Legal Officer in the Fredericton Court Services Branch, he was appointed by order in council Clerk for the Court of Queen's Bench (Trial and Family Divisions) and Clerk for the Probate Court.[29] The power to appoint such persons and their terms of employment are not provided in the *CSA* but

22 Mullan, *Dunsmuir*, *supra* note 1 at para. 139.
23 See below "Judicial Remediation".
24 *PSLRA*, *supra* note 4 s. 100.1(2) and 100.1(3).
25 *Ibid.* s. 1.
26 *Ibid.* s. 1(a)-(g).
27 Mullan, *Dunsmuir*, *supra* note 1 at para. 3.
28 The *CSA*, as stated in its regulations, applies to the Department of Justice: CSA, *supra* note 3 s. 1; *General Regulation - Civil Service Act*, N.B. Reg. 93-137, s. 3.
29 Mullan, *Dunsmuir*, *supra* note 1 at para. 2.

pursuant to the province's *Judicature Act* (JA) and the *Probate Court Act* (*PCA*).[30]

There is a strong argument that his appointment as Clerk of the Court of Queen's Bench and Probate Court brought him outside the scope of the *CSA* and *PSLRA* and under those of the *JA* and *PCA*. This crucial change in Dunsmuir's status and function appears to have been ignored by all the parties to the dispute. It is true that the *PSLRA* does refer to persons appointed under another act *and* to whom the *CSA* does not apply.[31] Thus, it might be thought that Dunsmuir was appointed under the *JA* and *PCA* while the *CSA* might continue to apply to him, thereby retaining his status as "employee" under the *PSLRA*. However, "appointment under" an *Act* has generally meant that the person appointed thereunder is subject to that *Act*. Any additional legislation governing the employment of such an individual would have to be clear and explicit. Moreover, it is difficult to see which exact provisions of the *CSA* are supposed to apply to Dunsmuir given that the terms of his appointment, his responsibilities and functions are described in the *JA* and *PCA*, not anywhere in the *CSA*. Dunsmuir's hiring process was organized according to the *CSA*, but this seems to have taken place to facilitate the selection of possible clerks among a pool of candidates. Once appointed as Clerk and Deputy Registrar, all the terms of Dunsmuir's employment are set out in the *JA* and the *PCA* (conditions for appointment, oath of office, functions and remuneration).[32] Dunsmuir's probationary period seems to have been borrowed from s. 23(1) of the *CSA*, although nothing in the *PCA* or the *JA* requires a probationary period and the application of such a period does not necessarily extend the applicability of those *Acts*. The administrative uncertainty of Dunsmuir's position as Clerk might have explained his contacting the Chief Justice of the Court rather than his Regional Director.[33]

It is likely that Dunsmuir was administratively responsible to his Regional Director in the Department of Justice while nevertheless, following his appointment as Clerk and Deputy Registrar, being subject to the *JA* and *PCA* and therefore beyond the scope of the *CSA*. New Brunswick legislation regarding court registrars and clerks is very different from other Canadian jurisdictions, which seem to have updated their public service legislation to give broader and more coherent coverage to court staff. Generally speaking, in other provinces the functions of Registrar and Clerk are not described in the "*Judicature Acts*" (or equivalent) of those provinces, as is the case in New Brunswick. These updates provide them with much greater certainty as to their status as public servants and the benefits they receive under public service legislation.

For instance, in Ontario, the law states explicitly that Clerks and Registrars

30 *Judicature Act*, R.S.N.B. 1973, c. J-2, ss. 61 (Deputy Registrar of the Court of Queen's Bench and Court of Appeal) and 68(1) – trial division and 68(2) – family division; Probate Court: *Probate Court Act*, C. P-17.1, s. 12(1). See Order in Council 2002 – 101 and 2002-102 of March 14, 2002, *The Royal Gazette* – April 17 2002 at 429.

31 *Supra* note 28.

32 "A clerk or an administrator shall be paid for all services performed by him such fees as the Lieutenant-Governor in Council may prescribe." See S. 70(3) JA, s. 12(4) *PCA*.

33 Mullan, *Dunsmuir*, *supra* note 1 at para 4.

are appointed under the *Public Service of Ontario Act, 2006*.[34] This is also the case in British Columbia, in the Supreme Court of Canada and Quebec.[35] A second category of jurisdiction does not even mention the appointment of court registrars and clerks in its "*Judicature Act*" or equivalent. Alberta, Manitoba, Nova Scotia, the Federal Courts, and Saskatchewan do not refer to Clerks and the Registrar in their "*Judicature Acts*" (or equivalent).[36] This omission suggests that Court Registrars and Clerks are employed under general public service legislation. A final category of jurisdictions are those that mention court registrars and clerks in their "Judicature Acts" (or equivalent) and describe their terms of appointment, powers and responsibilities therein. This is the category in which New Brunswick finds itself, along with Newfoundland and Labrador, the Northwest Territories, Prince Edward Island and the Yukon.[37] Viewed from this perspective, it is easy to see that New Brunswick has not followed the general Canadian trend of withdrawing Court Registrars and Clerks from special *Judicature* legislation. Instead, New Brunswick follows an administrative practice where Court Clerks and Registrars are treated as though they are subject to general public service legislation although they have not amended the relevant statutes.

The next exception that Dunsmuir might have fallen into is s. 1(g) *PSLRA* which excludes persons employed in a "confidential capacity".[38] However, s. 100.1(1) of that Act provides a right of grievance to persons not qualifying as "employees" "but for the fact that the person is a person employed in a managerial or confidential capacity." Although this was not discussed in any published judicial proceedings, we can speculate that Dunsmuir might have been allowed to file a grievance and proceed to adjudication because it was assumed that the only impediment to his qualification as an "employee" under the *PSLRA* was his confidential capacity.

However, it is not even clear how Dunsmuir qualified for such a designation. S. 1 of the *PSLRA* distinguishes between persons automatically designated as "confidential" and those designated as "confidential" by collective agreement. Since Dunsmuir was not a member of a bargaining unit, nor a legal officer of the Attorney General, we can assume that his designation of "confidential capacity" would have fallen within s. 1 of

34 *Courts of Justice Act*, R.S.O. 1990, CHAPTER C.43, s. 73(1). Note the wording and use of "appointed under" as meaning "subject to".

35 *Supreme Court Act*, RSBC 1996, C.443, s. 13(1); the federal *Supreme Court Act*, S-26 R.S., c. S-19 describes the duties, functions and terms of employment of the Registrar and other officers, but states in s. 12(1) that officers of the Court shall be appointed under the *Public Service Appointment Act;* Quebec legislation provides negatively which persons—notably judges—are not covered by public service legislation and the *Code du travail*. See *Loi sur les tribunaux judiciaires*, L.R.Q., chapitre T-16 s. 3.

36 *Judicature Act*, R.S.A. 2000, c. J-2 (Alberta); *Court of Queen's Bench Act*, C.C.S.M. c. C280, ss. 12(1)-15 (Manitoba); *Judicature Act*, R.S.N.S. 1989, c. 240(Nova Scotia); *Federal Courts Act*, R.S.C. 1985, c. F-7 does not speak of Registrars or Clerks but s. 12(5) says that prothonotaries are subject to the *Public Service Superannuation Act*; Saskatchewan provides special legislation for Court officials: the *Court Officials Act*, 1984, S.S. 1984-85-86, c. C-43.1. This Act does not mention whether they are subject to the province's *Public Service Act*, although it does speak of "court officials who are not employed in the Public Service": see s. 20(1)(c).

37 *Judicature Act*, R.S.N.L. 1990, c. J-4 ss. 60(1) – 63(1) (Newfoundland and Labrador); *Judicature Act*, R.S.N.W.T. 1988,c.J-1 ss. 61-66 (Northwest Territories); *Supreme Court Act*, R.S.P.E.I. 1988, c. S-10, ss. 20.1 and 20.2 (Prince Edward Island); *Judicature Act*, R.S.Y. 2002, c. 128 ss. 39-45 (Yukon).

38 *Supra* note 27.

the *PSLRA*, which includes a person who "is employed in a position confidential to the Lieutenant-Governor, a Minister of the Crown, a judge of The Court of Queen's Bench of New Brunswick, a judge of The Court of Appeal of New Brunswick, a judge of the Provincial Court of New Brunswick or the deputy head or the chief executive officer of any portion of the Public Service".[39] However, assuming that Dunsmuir was employed "to a judge" (i.e. a judge's secretary) and therefore in confidential capacity, the "but for" in s. 101(1) exception means that confidentiality would have to be the only possible reason for excluding him from the scope of the *PSLRA*. Dunsmuir was not, however, appointed under the *CSA* nor is there any evidence that he was subject to that *Act*.

In any case, the only relevant provision in the *CSA* that seems to apply to Dunsmuir is s. 20, and yet the terms of his dismissal should have been found, in principle at the very least, in the *Acts* that provide for the terms of his appointment—s. 68(1) and (2) *JA* and s. 12(1) of the *PCA*.[40] However, nothing is said in those *Acts* as to the terms of his dismissal. In the absence of any further such details, the next logical applicable provision would not be the *CSA* but the *Interpretation Act*, notably s. 20, which provides that "Every public officer now or hereafter appointed by or under the authority of an *Act*, or otherwise, shall remain in office during pleasure only, unless it is otherwise expressed in his commission or in the *Act* under or in pursuance of which he is appointed."[41] Section 20 of the *IA* therefore recognizes that some public servants may be outside the scope of the *CSA*. Applying the *CSA* to Dunsmuir in regards to his termination negates any utility of the *Interpretation Act* ("*IA*").

Recognizing that Dunsmuir was appointed and subject to legislation other than the *CSA* has two important consequences. First, he should not have been entitled to any right of grievance under the *PSLRA* since he is not an "employee" within the terms of that *Act*. Dunsmuir's only recourse would have been to apply for judicial review at the Court of Queen's Bench and hope for reinstatement, or Crown liability for breach of contract (although the former recourse has now been excluded by the Court's judgment). Dunsmuir should therefore not have been allowed to file a grievance under the *PSLRA* nor appeal to an adjudicator since such rights were reserved—for better or for worse—for *PSLRA* employees. The second important consequence is that being within s. 20 of the *IA* means that Dunsmuir falls within the precise exception set out by the majority which gives rise to a duty of natural justice and entitlement to a hearing.[42] According to the reasoning proposed, Dunsmuir is at the will of the Crown and employable "at pleasure", and therefore subject to the very provision (s.

39 Persons within this category are specifically appointed under *An Act Respecting the Office of the Attorney General*, S.N.B., C. A-16.5, which was not the case of David Dunsmuir. Such persons would qualify under the *PSLRA*, *supra* note as "confidential employees" and therefore be entitled to file a grievance and request adjudication; *PSLRA*, s. 1, *supra* note 4.

40 "The Lieutenant-Governor in Council may appoint for each judicial district of the Trial Division of the Court of Queen's Bench, a suitable person as clerk who shall perform and exercise within that judicial district all the duties, powers and authority of clerk prescribed by any Act, regulation or the Rules of Court." See also s. 68(2) *JA* and s. 12(1) *PCA*, which provide identical terms of appointment.

41 *Interpretation Act*, CHAPTER I-13, s. 20.

42 *Infra* note 55.

20 IA) the Court used to designate persons entitled to principles of natural justice.

However, according to the Court, Dunsmuir was not only an "office holder at pleasure" but equally a contractual employee.[43] This hybrid status prevented him from being granted a hearing at common law.

PUBLIC SERVICE AND ENTITLEMENT TO COMMON LAW PROCEDURAL FAIRNESS

On the surface, *Dunsmuir* appears to confirm the general role of procedural fairness (*audi alteram partem*) in Canadian administrative law. As the majority stated: "Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual."[44] However, the Court stated that where there is a contract of employment, administrative law principles of procedural fairness will no longer apply. Thus, "public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness."[45]

As such, all public service employees, whether they are under contract, statutory office holders nominated by order in council, or hybrid contractual employee/ statutory office holders at pleasure such as Dunsmuir, are now subject to ordinary rules of contract law upon termination and not administrative law principles of procedural fairness. Thus, the right to a hearing, which until now had been described as a "cornerstone" of administrative law, is set aside for civil servants, save in two situations:[46]

(1) Judges, ministers of the Crown and others who "fulfill constitutionally defined state roles".[47] The Court also stated a right to a hearing would also be applicable where the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. New Brunswick Interpretation Act, s. 20; Interpretation Act, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously."[48]
(2) A second exception occurs "when a duty of fairness flows by necessary implication from a statutory power governing

43 How exactly the Court came to the conclusion that Dunsmuir was an office holder "at pleasure", without recognizing that he was subject to s. 20 *IA* is not clear.
44 Mullan, *Dunsmuir*, *supra* note 1 at para 79.
45 *Ibid.* at para 112.
46 *Ibid.* at para 79.
47 *Ibid.* at para 115.
48 *Ibid.*

> the employment relationship."[49] For instance, as the majority stated, where a statute provides for a duty to give notice before termination. In such cases, it is only logical that a right to a hearing be given.

It is not clear why Dunsmuir did not fall into any of the exceptions listed by the Court. On the one hand, it is clear that Dunsmuir's position is not "constitutionally defined" as would be the Minister of Justice, for example. However, as an office holder at pleasure, he was truly subject to the will of the Crown, as defined by the majority in its first exception.[50] The critical factor was that in addition to being an office holder "at pleasure", Dunsmuir had a contract of employment. This hybrid status as both "office holder at pleasure" and contractual employee meant that Dunsmuir fell outside the realm of administrative law and natural justice, not because his contract might have provided for additional rights (we do not know if the contract did, but the facts suggest that it did not and that it was silent regarding the terms of his dismissal) but because he would have to comply with the rules of ordinary contract law, not administrative law. Moreover, the Court could have stated that Dunsmuir fell into the second exception and that his rights of grievance implied a prior hearing or were an application of the right to a hearing that occurred "by necessary implication" of the *PSLRA*. The majority could also have stated that Dunsmuir waived his right to a hearing by refusing his employer's invitation to a meeting to discuss his dismissal.[51]

In creating these new exceptions, the court was coming back on a precedent that accorded a right to a hearing to contractual employees whose employment had "sufficient statutory flavor" in the *Knight* case.[52] The court, however, did not go as far as overrule itself. As we shall see, while proclaiming procedural fairness to be a cornerstone of administrative law, the court actually reversed the general rule. Indeed, procedural fairness is no longer the principle, but the exception. The impact of *Dunsmuir* on procedural fairness is therefore much broader than the court was willing to concede.

5. The Real versus Proclaimed Impact of *Dunsmuir* on Procedural Fairness

Until *Dunsmuir*, administrative law had developed the doctrine of procedural fairness by limiting its application to office holders dismissible for cause, as opposed to other employees. Over time, it crept and broadened its application.

In *Ridge v. Balwin*, Lord Morris proclaimed that an office holder's right to a fair hearing prior to dismissal was "basic to our system".[53] The *ratio* of that case was based on Lord Reid's tripartite classification: (i) master-servant relationships, (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal. The

49 *Ibid.* at para 116.
50 *Supra* note 54.
51 *Dunsmuir*, *supra* note 1 at para. 6.
52 *Knight*, *supra* note 22.
53 [1963] 2 All E.R. 66; [1964] AC at 114 [*Ridge*].

importance of that case was that it moved beyond the "acting judicially fallacy" to extend the duty to all office holders dismissible for cause, regardless of function of their employer (judicial, quasi-judicial, or administrative).[54] Over time, the classification has been read as distinguishing between contractual employees, office holders at pleasure, and office holders dismissible for cause, although nothing in the opinion suggests such interpretation.[55] The critical idea, it seems, was the idea of subordination, especially since contractual employees could conceivably be dismissible for cause. However, rather than cause, the critical factor for allotting common law procedural fairness became the status of the employee as "office holder", versus that of contractual employee.

Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police extended the *Ridge* precedent to Canada.[56] Following an oral agreement, Nicholson had been serving on a twelve-month probationary basis. Two months after the end of his probation, that is, fourteen months into his employment, he received notice of termination. Police regulations, however, only provided a hearing prior to dismissal upon eighteen months of employment. It would have been natural to assume that the parties had agreed to a shorter probationary period that required by statute and that the right to a hearing prior to dismissal came into effect upon the end of the probation period, but the employer did not give Nicholson such a benefit. Laskin CJ, however, extended the right to a hearing by squeezing Nicholson into Lord Reid's third category (requiring common law procedural fairness). This classification was accomplished by holding that a constable is the "holder of a police office", thus qualifying as an "office holder".[57] Moreover, police regulations refer to the "office", i.e. employment. Second, Laskin CJ considered that Nicholson was not purely "at pleasure" because that expression was not contained in police statutes and regulations. The idea of employment "at pleasure", that is without reasons or notice of dismissal, was growing incongruent with modern administrative and employment law. As a result, the right to a hearing prior to eighteen months could not be interpreted as excluded from the regulations, and was especially required given Nicholson's promotion during his fourteen months of service. The four dissenting judges opined that Nicholson did not fit within the "office holder dismissible for cause" category, and moreover, that the regulations provided Nicholson with no right to a hearing.[58]

Nevertheless, *Nicholson* marked the beginning of a general wave of procedural fairness that applied generally to the administrative decision-making process, although it did not alter the rule that only statutory office holders dismissible for cause

54 See generally Sir W. Wade, F. Forsyth, *Administrative Law*, 9th ed. (Oxford University Press: Oxford, 2004) at 490 [Wade and Forsyth].

55 See *Dunsmuir*, *supra* note 1 at para 85.

56 [1979] 1 S.C.R. 311 [*Nicholson*].

57 Regulations spoke of the beginning of employment as beginning of "office". See *Nicholson*, *ibid.*

58 *Ibid.* See dissenting opinion of Martland, Pigeon, Beetz and Pratte JJ.

have a right to a hearing.[59] The next stage in procedural fairness in public servant dismissals was *Knight v. Indian Head School Division No. 19*, which limited the importance of the distinction between office holders and contractual employees.[60] The right to procedural fairness was derived from the employer's status as a public entity drawing its powers from statute and therefore subject to general principles of administrative law.[61] In this case, the duty was not derived from the narrow context of the employment relationship, but from the general administrative duty to act fairly.

However, rather than allow a right to procedural fairness across the board, L'Heureux-Dubé J devised three criteria, through which a right to procedural fairness could be determined. First, the nature of the decision: was it final and specific, or preliminary and general? Only in the first case should a right to a hearing be accorded. Secondly, L'Heureux-Dube J considered the relationship between the employer and the employee–master and servant or statutory office holder. L'Heureux-Dubé J restated Lord Reid's classification, concluding that because Knight was in the second category of office holder "at pleasure", he was entitled to procedural fairness since that was the direction in which the law had been moving since *Nicholson*.[62] Knight was indeed bound by contract, but he was an office holder since his position was not one of the "master and servant" category. Moreover, it was statutorily recognized and hierarchically important. The third factor to be considered was the impact of the decision on the employee. Although Knight's employer was held to have followed its common law obligations of procedural fairness, the case is important because it imported the idea that the right to a hearing should be extended beyond office holders to contractual employees with sufficient "statutory flavor", and even those dismissible without cause.[63] The separate opinion held that there was no general common law duty of procedural fairness, only exceptions, and that the Board was not bound by any duty of fairness since Knight was an office holder "at pleasure" requiring no duty of procedural fairness could be imposed unless it was required by statute.[64]

Taking these precedents into account, it is possible to say that the Dunsmuir decision falls into a background of "creeping procedural fairness". As a dual office holder and contractual employee, Dunsmuir would likely have been entitled to procedural fairness under the *Knight* precedent since his status as "office holder" would

59 *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602 (band council); *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105 (tenured professor in relation to university three month suspension) ; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, [1980] 2 R.C.S. 735 (federal cabinet); *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, 69 B.C.L.R. 255 (prison director); the House of Lords had already taken the step of imposing procedural fairness on employees "at pleasure": see *Malloch v. Aberdeen Cpn.* [1971] 1WLR 1578 [*Malloch*], holding that a school board could not dismiss a teacher, employable at pleasure, without according him a hearing. This case was even referred to at several instances in *Dunsmuir, supra* note 1.

60 *Knight, supra* note 22.

61 *Ibid.* at 668.

62 Note that the expression "at pleasure" in this case is being used as meaning a right to be dismissed with notice, rather than without, as was the case in *Nicholson, supra* note 64.

63 *Knight, supra* note 22 at para. 108.

64 *Ibid.* Per Wilson, Sopinka and McLachlin JJ.

have given his employment sufficient "statutory flavor" (especially had the *JA* and *PCA* been invoked). However, the Court did not follow the *Knight* precedent, stating that the office holder/contractual employee distinction is difficult to maintain both in principle and in practice.[65] Moreover, if the *Dunsmuir* reasoning were applied to the facts in both *Nicholson* and *Ridge v. Baldwin*, neither employee in the latter two cases would be entitled to common law procedural fairness. In *Ridge v. Baldwin*, Mr. Ridge had been employed for thirty-three years and it is likely that he was engaged immediately on purely contractual terms.[66] Rather like David Dunsmuir, Ridge had been appointed to his office as deputy chief constable and there is nothing in the record to suggest that there had not been any contract between both parties. In many instances, their Lordships make reference to the law of contract, thereby recognizing Ridge's contractual relationship with his employer. Thus, procedural fairness would not have been granted through common law principles, but only because it was provided for in a regulation. In contrast, a majority of three Lords who decided that case stated that the duty of procedural fairness would apply as a matter of common law, regardless of the content of the regulation. In *Nicholson*, it would also follow that the employee, under the *Dunsmuir* reasoning, would not be entitled to a hearing. Being of hybrid contractual or office holder status, Nicholson could not claim reinstatement but only damages in accordance with contract law principles. Therefore, putting the matters clearly and honestly, it is not only *Knight*, but equally *Nicholson* and also *Ridge v. Baldwin* that have been set aside.[67]

6. The Residual Role of Common Law Procedural Fairness in Public Service Employment

Having recognized that *Dunsmuir* does change much more than certain aspects of the *Knight* case and that it is not in fact specific to New Brunswick legislation, we can now move on to consider what role procedural fairness now plays in the public service.

The court only allowed for procedural fairness in two cases: (1) for constitutionally defined roles, namely office holders truly at pleasure; (2) when it is required by statute or otherwise. Thus, rather than abolish the distinction between contractual employees and office holders, *Dunsmuir* simply raised the bar, so to speak, by stating that although most public servants are contractual employees, those at the top are not. This allows the Court to maintain *Nicholson* and *Ridge v. Baldwin* while severely limiting the impact of those cases. More important, constitutionally recognized office holders "at pleasure" receive broader protection because in *Ridge* and *Nicholson*, only office holders dismissible for cause were protected. Thus, since the vast majority of

65 First, it stated public offices are no longer the property of their holder; second, that dismissal of an office holder implicates delegated statutory power, whereas the dismissal of a contractual employee implicates the employer's contracting power; third, office holders were seen as employed "at the pleasure" of government, and therefore susceptible of summary dismissal without any rights attached thereto (i.e. notice).Mullan, *Dunsmuir*, *supra* note 1 at para. 83.

66 *Ridge*, *supra* note 60.

67 *An Act Respecting the Office of the Attorney General*, S.N.B., C. A-16.5, s. 3(1).

employees can be viewed as having a contract of employment, common law procedural fairness and reinstatement can be viewed as the exception rather than the rule. How the Court brought about such a reversal in a field that has been consistently described as a "fundamental principle of English law" has yet to be properly explained.[68]

At the outset, we can only guess as to what exactly are "constitutionally defined roles". The *Constitution Act, 1867* is notoriously silent about many important governmental roles. What then is a "constitutionally defined role"? Is the court referring to "important" roles? In the case of judges, there are either already specific regimes to protect such office holders from unwarranted dismissal, or, Ministers that have traditionally been employable "at pleasure" and need not be granted a hearing for the loss of their position before the end of term.[69] By convention, Ministers are responsible to the elected assemblies they represent and have absolutely no right to their offices. Their status has long been regulated by convention although the Supreme Court is now saying that a Minister may request a hearing prior to dismissal although the lowly civil servant cannot! Who exactly are they now to request a hearing with? The Prime Minister? The Governor General?

Moreover, even in situations where individuals are truly "at the pleasure" of the Crown and procedural fairness does apply, the standard has been so low that entitlement to procedural fairness means very little. In these situations, there are very few rights to protect.[70] In any event, the distinction is based on the idea that public servants in general—except those at the top qualifying as "office holders at pleasure"—negotiate the terms of their employment. At the same time, the Court itself recognized that the distinction between contractual employees and office holders was artificial and unworkable.[71] Ironically, *Knight* had moved beyond the office holder/contractual employee distinction by proposing a more factual and context specific approach to procedural fairness. However, the distinction lies in the perceived absence of a contract at higher levels of employment. At lower levels, it would seem, negotiation would be all the more possible and would afterwards discharge any common law duties of procedural fairness. Thus, whatever realism the law accorded to the employment of public servants, particularly those of more "permanent" status, such realism has now been lost in favour of the illusion of a contractual relationship where both parties are perceived as having the power to "cut a deal". Even if this were the case, it would be difficult to conceive of a neutral and professional public service that is constituted solely in such a manner. If the common law tradition was criticized for regarding its public service "as if it still consisted of a handful of secretaries working behind the scenes in a royal palace", *Dunsmuir* has helped maintain

68 *Rex v. North. Ex parte Oakey* ([1927] 1 K.B. 491, 502; 53 T.L.R. 60, C.A., cited by Lord Morris of Borth-y-Gest in *Ridge,* supra note 60 at 107.

69 See for instance, s. 99(1) of the *Constitution Act, 1867*; the *Supreme Court Act*, S-26 R.S., c. S-19 s. 9(1).

70 *Martin v. Vancouver (City)* 2008 BCCA 197; *Nova Scotia v. Nova Scotia (Minister of Education)* 2008 NSCA 62.

71 *Dunsmuir, supra* note 1 at para 92.

that illusion.[72] More important, though, is that the only members of the public service that are now perceived as worth protecting are those at the top who are close to political power and thereforedo not have to openly compete for their position.

7. Reinstating Common Law Procedural Fairness in Public Service Employment

The contractualisation of public servants' rights is not necessarily a cause for concern since unionized public servants are protected against dismissal without cause and provided that a right to unionize is available.[73] Until *Dunsmuir*, the issue was not whether common law procedural fairness existed, but whether procedure was in fact fair. The general criticism made of the law, however, was that it was incoherent. That said, it was never said why that should be a problem since fairness was in fact specific. Attempts to systematize the law are therefore based on raised expectations of coherence to the detriment of fairness and thus lead to greater dissatisfaction. Some authors argue that the distinction should not be between employees dismissible with cause and those dismissible without, but between office holders and contractual employees.[74] In other words, all office holders (at pleasure or dismissible for cause) should be entitled to procedural fairness; contractual employees should not.[75] This distinction, however, was precisely what was made in *Dunsmuir*, although the bar was simultaneously moved so as to exclude most public servants from the ambit of procedural fairness. Moreover, it is not even clear what the distinction between office holder and contractual employee is supposed to represent.

It is important to remember that the development of procedural fairness was intended to keep the public sector up to date with developments in collective negotiation, but also to provide an example to the private sector.[76] In earlier cases such as *Ridge v. Baldwin*, the right to notice (or payment in lieu) had not yet made its appearance in contract law. Thus, neither "employment at pleasure" nor contract law provided damages in lieu of notice.[77] Procedural fairness was therefore a limitation on government's power of dismissal. Nowadays, taking into account the general protection of unionized employees through termination for cause, one would imagine that the trend would be to recognize a general public law requirement of cause for the termination of public service employees. The position in *Dunsmuir*, however, has been to view the administrative law as providing a bare minimum of

72 Wade and Forsyth, *supra* note 62 at 62.

73 According to the OECD, 86 percent of Canadian public service employees were unionized in 2007: <www.oecd.org/dataoecd/47/40/39400468.pdf>; see Jody Freeman & Martha Minow (eds.) *Government by Contract – Outsourcing and American Democracy*, (Cambridge, MA: Harvard University Press, 2009) stating that the contractualisation of government should neither be applauded nor be a cause for panic.

74 Wade and Forsyth, *supra* note 62 at 545.

75 For support of this position, see D. J. Mullan, J. M. Evans, *Administrative Law – Cases, Text and Materials*, 5th ed. (Emond Montgomery: Toronto, 2003) at 120.

76 "A private employer may act in secret but a responsible elected public body can hardly do so." Lord Reid, in *Malloch*, *supra* note 68.

77 See generally Molot, "Employment During Good Behaviour or at Pleasure" (1989) 2 C.J.A.L.P. 238 [Molot].

protection, that is, one that is dictated by the lowest common denominator available in the private sector. However, unionization is much more accessible in the private sectior, which gives some public servants such as Dunsmuir even less protection.

As was well known, procedural fairness in the public service was intended to act as a countervailing power to government's unilateral power of dismissal. Procedural fairness was not a guarantee of immovability, but a minimal guarantee of neutrality of the public service—the permanent aspect of Canadian government. In theory, the dismissal of a public servant should be reviewable under traditional grounds of reasonableness, bad faith and irrelevant considerations since it qualifies as an administrative "decision". However, doing so would alter the common law rule allowing an employer to dismiss an employee immediately with notice or payment in lieu, at least in the public sector. Procedural fairness is therefore a compromise between imposing dismissal for cause and total judicial deference to governmental employment policy.

Founded on legitimate expectations and fair play, procedural fairness is not an absolute, but rather a variable right intimately connected to fair treatment and purporting to fill any possible legislative gaps.[78] Procedural fairness is therefore not that different from the duty to exercise discretionary power reasonably, rather than arbitrarily. Moreover, as some have stated, procedural fairness is not a duty to give reasons, but a duty to state the case that has to be met.[79] The reasoning in *Dunsmuir,* however, is not that public servants are already adequately protected—indeed Dunsmuir does not have as much protection as unionized employees—but that the relationship is contractual rather than unilateral as in the case of appointed statutory office holders. While the Court recognized a variable duty on the part of government in terms of independence and impartiality of administrators (not to mention that procedural fairness is itself a variable duty), *Dunsmuir* provides a Manichean division between no common law right to natural justice (most public servants) and an exceptional right for those at the top who are termed office holders of the "pure" variety.

The value of the office holder/contractual employee distinction, however, has slowly been decreasing. In the past, office holders were considered proprietors of their office and hence entitled to it if deprived of it. The term "office holder" has traditionally implied the possibility of enforcing one's rights through judicial review—i.e. reinstatement as opposed to only damages.[80] The office holder–contractual employee distinction was also maintained by viewing the Crown as having special prerogatives in employ-

78 *St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170, 75 D.L.R. (4th) 385; *Re Canada Assistance Plan,* [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297; *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paras. 26 & 29 ; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281, 2001 CSC 41 at paras. 22-38 (minority opinion) ; *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11, [2002] 1 S.C.R. 249 at para78; *Furnell v. Whangarei High Schools Board,* [1973] A.C. 660 at 679, cited in *Nicholson, supra* note 64 and *Knight, supra* note 22.

79 Wade & Forsyth, *supra* note 62 at 544..

80 Wade and Forsyth, *supra* note 62 at 543-545.

ment relations. Termination "at pleasure" was founded on the Crown's prerogative not to bind itself.[81] As a result, "office holders at pleasure" are generally described as having no right to notice prior to dismissal. Combining such a prerogative with the proprietary origins of public offices, the office holder/ contractual employee distinction was solidified. It is from this perspective that viewing employment with the Crown as "contracted" could be seen as an advance.[82] The evolution of the law, however, has eroded many of the practical distinctions between office holders and contractual employees.

It is well recognized that the exercise of state contracting power finds its legal origins in common law, not prerogative power.[83] Just as there is no distinct *droit administratif* founded on separate and special considerations that do not apply in private law relations, there should be no special category of public servants that are "above" the ordinary law, except insofar as provided by statute. Thus, with the advance of contract law, the term "at pleasure" has been subject to variable meanings and it is not even clear at present if it means "no right to notice".[84] If the term does appear in statutes, it must be remembered that they must be read insofar as possible as complying with the common law, not as going against it. In any case, there is no general minimal period of notice; notice varies customarily from sector to sector. It follows that it is difficult to read a statute containing the mere expression "at pleasure" as derogating from the common law. Contractual employment and office holder status should therefore not be seen as differences in nature but differences of degree, or of level of employment. Thus, as was the case prior to *Dunsmuir*, employment relationships with government were considered as contracts in which statute and regulation were, in variable degrees, implicitly incorporated.[85]

Moreover, while courts have long recognized a right to a hearing for members of associations and quasi-public collective organizations, common law procedural fairness is no longer applicable to members of the public service.[86] The question

81 R. Dussault, L. Borgeat, *Traité de droit adminsitratif*, vol. II (Quebec: Presses de l'Université Laval, 1986) at 258.

82 "The movement of progressive societies has hitherto been a movement from status to contract": Maine, Ancient Law, Pollock, ed., at 174, cited in Molot, *infra* note 81 at 238.

83 P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, Looseleaf ed.) at para. 19..

84 However, the Court stated that the expression "at pleasure" contained in a contract or statute could withdraw, by necessary implication, the duty to pay damages for lack of notice. *Dunsmuir*, *supra* note 1 at para 97, citing P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000) at 240. This, however, goes against the trend of reading "at pleasure" as requiring notice of variable length. See for instance, *Knight*, *supra* note 22, where both minority and majority qualified Knight's employment as "at pleasure", even though he was entitled to 3 months notice upon termination.

85 *Attorney General of Quebec v. Labrecque et al.*, [1980] 2 S.C.R. 1057, 125 D.L.R. (3d) 545 at 1082.

86 *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 97 D.L.R. (4th) 17, holding that a Hutterite community had violated principles of natural justice in expelling one of its members without providing a hearing. See generally D. Mullan, *Administrative Law* (Irwin Law: Toronto, 2001) at 23-26 [Mullan, *Administrative Law*]; see also *Struchen v. Burrard Yacht Club* 2008 BCCA 271 - regarding the reinstatement of a Yacht Club member following a disagreement with the club. The Court of Appeal stated that the Supreme Court of British Columbia failed to consider a "vital factor" - whether the Board had prejudged the matter and failed to give the appellant an opportunity to respond. It is difficult not to regard such a relationship as contractual.

is not why government ought not be subject to the same rules as the private sector (employment at will). The question is why the government ought to be required to abide by procedural fairness, not only by common law tradition, but equally by constitutional obligation, with regard to the public as users of government services, but not in relation to those who serve within it? One would imagine that the lowest common denominator would not set the standard of fairness, but equally, that within the public sector itself, fairness would be at least as demanding as what is required of it as concerns the public at large.[87] Recent case law demonstrates a total lack of direction by lower courts on where to take the Dunsmuir ruling. Some courts have followed the precedent, while others have simply gone on determining whether principles of procedural fairness have been followed.[88] In this respect, moving back to *Knight* and the considerations of criteria such as the weighing of the employee's position and the impact of the decision would restore both flexibility and fairness, although it may not be as simple as the general rule offered in *Dunsmuir*. Nevertheless, it would restore the general coherence in procedural fairness that exists with regard to the general public.[89] The law need not be squeezed into orderly categories.

JUDICIAL REMEDIATION OF ARBITRARY DISMISSAL OF PUBLIC SERVANTS

Aside from the distinction between "contractual employees" and office holders "purely at pleasure", an even greater problem now stems from the remediation of civil servants' dismissals. *Dunsmuir* confirms the general rule that public servants are subject to ordinary rules of contract and also that public servants could be both contractual employees and office holders.[90] What *Dunsmuir* does change, however, is that "hybrid" public servants no longer have the choice between contract and administrative law; all must now seek judicial intervention through the application of "ordinary contractual remedies". *Dunsmuir* nevertheless does provide a right to a hear-

87 See however, *Quebec v. Cyr*, 2008 SCC 13, [2008] 1 S.C.R. 338, holding that an employee, whose employer had been engaged by contract by government to inspect vehicles, was entitled to a hearing before government removed his name from a list of inspectors. Such removal would have meant his dismissal. He was therefore entitled to a hearing before government because he had no contract with it.

88 See for instance *Redmond v. Hamilton (City)*, 244 O.A.C. 391 2008, where the Ontario Superior Court of Justice (Divisional Court), invoking the *Dunsmuir* precedent, stated that the dismissal of city employees was not subject to judicial review and procedural fairness. See also *Marc Forest c. Ville de Varennes*, C.A. Qc. le 17 Novembre 2008 (32938). Leave to appeal dimissed without reasons: [2008] C.S.C.R. no. 537. However, the promotion and hiring of government employees still appears to be subject to administrative law principles of procedural fairness: see *Baragar v. Canada (Attorney General)* 2008 FCA 841 - although it is not clear in this case whether there was in fact a contract of employment between the applicant and the government, the Federal Court agreed to review a decision not to promote the applicant. One case to keep an eye on is *Dalstrom v. British Columbia (Organized Crime Agency)* 2008 BCSC [*Dalstrom*] regarding the dismissal of a police officer, allowing an application for judicial review to proceed in order to obtain a possible reinstatement.

89 See L'Heureux-Dubé J's opinion in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 [*Baker*], which listed non exhaustive criteria for determining the public's right to a hearing, building upon those established in *Knight*, *supra* note 22.

90 See for instance *Wells v. Newfoundland*, [1999] 3 S.C.R. 199.

ing and general subjection to administrative law and judicial review of office holders "truly at pleasure" who are not bound in any way by contract to the Crown. Persons "performing constitutionally defined roles" and select senior public servants "at pleasure" may nevertheless seek judicial review and reinstatement. As the Court stated,

> The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority (...) A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.[91]

This statement can be interpreted in two ways. At face value, it indicates that all public service employees unionized or not, will only be entitled to private law contractual remedies if they are dissatisfied with the outcome of their grievances and adjudication. This result would be a radical outcome, although it can be read from the courts' opinion. A second reading would be to limit the application to persons such as David Dunsmuir, that is, non-unionized public servants with or without rights of grievance. It is difficult to accept the first interpretation and most optimists would accept the latter. It is also difficult to assume that the remediation aspect of the judgment only applies to public servants in Dunsmuir's non unionized category.

Until *Dunsmuir*, the premise of judicial review of arbitral rulings has been that these should generally be regarded as the expression of statutory power, not private consent. Where arbitration is not the sole method of resolving a dispute, its nature has been held as consensual, not statutory.[92] Therefore, *Dunsmuir* could be read as coming back on this idea insofar as labor arbitrators might now be regarded as consensual private tribunals, not statutory bodies.[93] However, this has not been the case. There has even been much confusion and contradiction on how to deal with the dismissal of contractual employees who do not fall into the exceptions listed by the Court. Courts have taken contradictory positions, and seemingly in some cases have totally ignored the position taken in *Dunsmuir* that public sector contractual employees are not entitled to seek judicial review of their dismissal.[94]

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91 *Dunsmuir, supra* note 1 at para. 113. However, at para 114 the majority seemed to insinuate otherwise: "Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law." *A contrario*, does the silence of one's contract imply a right to public law remedies?

92 D.J.M. Brown, D.M. Beatty, *Canadian Labour Arbitration* (Aurora: Canada Law Book, Loose-Leaf ed.) at para 1: 5100.

93 See *Port Author Shipbuilding Co. v. Arthurs* [1969] S.C.R. 85, 90-94

94 See for instance *Dalstrom*, supra note 88 allowing judicial review for the dismissal of a contractual employee. Compare *Bansal v. Stringam* 2009 ABCA 87. that a non unionized university employee was not entitled to procedural fairness prior to dismissal, nor even to judicial review given that his action was barred by a privative clause and he did not demonstrate that he was unionized employee who could benefit from arbitration. Compare *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 – which makes no mention of the professor's status.

The *Dunsmuir* ruling also weakens the scope of judicial powers of remediation. As the Court stated, Dunsmuir should only have been able to seek damages, not judicial review.[95] From an administrative law point of view, the annulment of his dismissal entitles the employee to reinstatement where government violates procedural fairness.[96] However, even where the dismissal of a civil servant has been quashed, courts, addressing identical concerns raised by specific performance in a private law context, have not always followed through with the logic of reinstatement.[97] Damages, ordinary but also aggravated, can now be given to the victim of a breach of contract for violation of principles of good faith.[98] Reinstatement, however, is now virtually out of the question because specific performance is not available in the context of contracts of service whether they are for determinate or indeterminate periods, terminable for cause or not.[99]

Moreover, even where a contractual employee or hybrid officer/contractual employee dismissible with cause, or dismissed without cause, are we to assume they must only seek damages, since specific performance is not available in the context of contracts of service? Is this also the case where the employee has a defined mandate? *Dunsmuir* not only lessens the protection of office holders "at pleasure" such as Dunsmuir but also weakens the protection of those dismissable with cause since they may no longer avail themselves of reinstatement normally available in administrative law.

Indeed, as Holmes famously wrote, "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it — and nothing else."[100] Even in the private sector, the Court has long recognized that adjudicator decisions are subject to judicial review and the *Charter*.[101] Speaking of "ordinary contract remedies" thus implies the application of the "ordinary law" applicable to private individuals. Are we to assume that the *Charter* no longer has a role to play in the exercise of administrative discretion to terminate a public servant's employment? In an oft-quoted passage of *Baker*, L'Heureux-Dubé J stated that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.[102] However, following the reasoning in *Dunsmuir*, the only constraint on administrative discretion

95 This would also apply to the government, who like in the *Dunsmuir* case, may want to apply for judicial review of the adjudicator's decision.

96 Mullan, *Administrative Law supra* note 91 at 230.

97 *Ibid.* at 16. However, this does not imply that reinstatement is altogether excluded: see *Murphy v. Ontario (A.G.)* (1996), 28 O.R. (3d) 220 (G.D.); *contra Hewat c. Ontario* (1998), 37 O.R. (3d) 161 (C.A.) and *Dewar v. Ontario* (1998), 37 O.R. (3d) 170 (C.A.). In this last case, the court allowed the parties to negotiate the terms of the settlement.

98 *Wallace c. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1. A duty of good faith was explicitly recognised by the Supreme Court in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54.

99 See generally J. D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 931.

100 Oliver Wendell Holmes, Jr., "The Path of the Law" (1897) 10 Harvard Law Review 457 at 462.

101 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

102 *Baker*, *supra* note 82 at para. 56.

is the duty to provide adequate notice (or payment in lieu thereof) for termination. Since judicial review is no longer available, bad faith, capriciousness and other motives can no longer be kept in check through procedural fairness and judicial review.

Until now, with commentaries focusing on the standard of review, the consensus appeared to be that *Dunsmuir* does very little violence to the holding and principles articulated in *Baker*.[103] Indeed, *Baker* was interpreted as a judicial mandate to look more closely at the exercise of administrative discretion, to consider the reasons for decisions, to consider non-binding administrative directives and circulars and internationally ratified treaties, which nevertheless would inform the interpretation of statutory discretion. The necessary vehicle for such intervention is judicial review —by definition a "public law remedy". However, when we look not only at the letter but also at the spirit of *Dunsmuir* and *Baker* they are very different, especially when we remember that neither deals exclusively with the question of standards of review. Indeed, *Baker* reminded governments that discretionary powers are subject to the *Charter* and could be reversed under s. 32(1) of the *Charter*. Moreover, *Baker* articulated an integrated vision of administrative law and the *Charter* and the idea that the exercise of administrative discretion was subject to reasonableness and judicial review. *Dunsmuir* does not speak explicitly of *Charter* principles, but by withdrawing judicial review and replacing it with "ordinary contractual remedies", it is difficult to see how the *Charter* cannot be part of such a withdrawal. Whether the courts develop a doctrine of "constitutional torts" is beside the point: damages will always be a lesser remedy than reinstatement. Thus, by offering private law remediation instead of what has until now been public law means of redress, the Court is surreptitiously dissociating many fundamental legal principles that have long been a part of the public service.

In the context of private law, judges have long avoided inquiring—public policy considerations aside—into the "reasonableness" of a contractual relationship through the doctrine of freedom of contract. However, in relation to public authorities, absolute discretion has long been viewed as inappropriate.[104] *Dunsmuir* establishes absolute discretion (though with the possibility of paying damages) whereas *Baker* is founded on its control through the doctrine of reasonableness. In this respect, the difference in spirit between *Dunsmuir* and *Baker* could not be greater.

Moreover, it is not entirely clear how exactly the new scheme for the remediation of public service employee termination is supposed to work. On the one hand, the Court recognizes that public servants have statutory rights of appeal to an adjudicator. On the other, it withdraws the possibility of judicial review of the adjudicator's deci-

103 Mullan, *Dunsmuir*, *supra* note 1 at 120.

104 Wade and Forsyth, *supra* note 62 at 355. These authors cite French administrative authorities Vedel and Devolvé, who state: "En droit privé un particulier peut agir par raison, par intérêt, par générosité, par caprice ; le contrôle du juge ne s'exercera qu'a l'encontre d'un but illicite ou immoral. Au contraire, il n'existe pas en droit administratif de principe d'autonomie de la volonté. La volonté de l'Administration n'est pas autonome ; l'Administration ne doit se décider que pour des raisons de fait ou de droit ayant existence objective réelle et adéquates à l'acte fait." *Droit administratif*, 12th ed. at 328.

sion. A problem may now arise where employees appeal their dismissal to an arbitrator and thereafter find themselves in court, either as applicant or defendant. How exactly a Court can address the adjudicator's decision, if it is contrary to what the employer has decided, is not clear. Normally, in an application for judicial review, the adjudicator's decision would be the very subject of the proceedings. It could be quashed although judicial intervention is now centered on assessing damages. If an adjudicator orders reinstatement—as in Dunsmuir's case—how exactly is the employer supposed to address the question of reinstatement if damages are the only applicable remedy? In light of this, it now seems that judicial review will continue to play a role where there is a statutory right of appeal before an arbitrator, unless courts decide to enforce privative clauses, in contradiction of long standing authority to the contrary.[105]

In this respect, it is worth questioning whether the *Dunsmuir* case has weakened the status of public servants. The counterweight, it seems, would be collective bargaining. This argument would presume that the public servants in question are covered by such agreements and are entitled to seek remediation thereunder. However, this presumption is far from being the case of Clerks and legal personnel.[106] We can even inquire as to whether the recent abrupt dismissal of Crown prosecutors is a product of the *Dunsmuir* precedent.[107] It is therefore possible to see how a lack of collective bargaining coverage or at least protection against dismissal without cause would enable a government to surround itself with favorable legal opinions and, in the image of what has happened under Alberto Gonzales, enable the dismissal of lawyers refusing to toe the official party line. Nothing short of political fallout seems to prevent this from happening now in Canada.

CONCLUSION

While the *Dunsmuir* decision merged "patent unreasonableness" and "reasonableness simpliciter", its greatest effect on administrative law is arguably not on standards of review. Indeed, the *Dunsmuir* decision took the extraordinary step not of confirming that public servants are bound by contract to their employer, something that has long been recognised, but of establishing that public servants are no longer subject to administrative law; with the exception, to put it succinctly, of those at the top.

In this respect, the *Dunsmuir* decision and its perceived impact on administrative law demonstrates the growing disjuncture between administrative reality and administrative law. From a legal standpoint, *Dunsmuir* provided an excellent opportunity to either recognize the subsidiary nature of principles of natural justice in the public service and how the common law could be used to "fill in" statutory gaps,

105 See *Crevier v. A.G. (Quebec)* et al., [1981] 2 S.C.R. 220, regarding a privative clause to protect Quebec's Professions Tribunal from judicial review.

106 The Director of Prosecution is solely protected against dismissal. See *An Act Respecting the Office of the Attorney General, supra* note 35 at s. 4(2).

107 *L'Acadie Nouvelle* (5 September 2008) 9.

where necessary. However, the case does not appear to have been properly argued and the solution is very weak in justification. Its bottom line is that there are no gaps to fill since administrative law generally has no business in the public service. As a result, some public servants such as Dunsmuir will be allowed to fall through the cracks if they are not unionized and do not qualify for protection against dismissal without cause and such persons do not even fall under the Court's exception of employees "truly at pleasure". In doing so, it would seem that they bring much of the public service with them—except to Minister and Judges—given that administrative law and judicial review are no longer supposed to play a role in the public service. In this respect, *Dunsmuir* demonstrates how administrative law has become so disconnected with the realities of public administration that Ministers and other "constitutionally defined roles" are now seen as entitled to hearings upon dismissal whereas public servants all the way up the ladder are not. Such disconnect is all the more highlighted by the predominance of conceptual debates about standards of review that have been reignited in the wake of *Dunsmuir*.

Regardless of whether we believe standards of review necessary to resolve issues of natural justice, the change from "patent unreasonableness" to "reasonableness" is arguably of collateral significance. Even if one believes that Dunsmuir was subject to the CSA, why was there so little argument on this issue by the parties? Why was his appointment under the *Judicature* and *Probate Court Acts* not even part of the record and the jurisdiction of the adjudicator and grievance not even addressed as part of the debate? Much time and effort was given at every step of the dispute to first define the standard of review before turning to the issue of procedural fairness. Indeed, even at the highest level, the Court made much effort to debate the different types of reasonableness, but comparatively little justification or even explanation was given in regard to the rather seismic changes brought about in the law of natural justice.

In the end, should Dusmuir have been entitled to a hearing? First, Dunsmuir had rights of appeal that might have "cured" any possible prior violation of procedural fairness. As stated earlier, Dunsmuir declined his employer's invitation to a meeting on 21 July 2004 until he could receive legal advice. His letter of dismissal was sent thereafter directly to his employer and no meeting was held. Whether he actually waived his right to a hearing is not clear, although it is more likely that his employer "jumped the gun" by simply addressing his legal representative by mail and not calling for another meeting. This is unfortunate because Dunsmuir did not appear to be doing a good job even though his employer did decide to engage his services at the end of his probationary term. Did his rights of appeal "cure" the Crown's violation of principles of procedural fairness? The lower courts were divided on that question. However, if we continue to assume that Dunsmuir should not only have been excluded from making such appeals under the *PSLRA*, but also that the adjudicator did not have jurisdiction to consider the issue afresh but simply to determine whether appropriate notice had been given, it is more than likely that the principles of procedural fairness

had not been followed.[108] Such rights of appeal on limited technical questions (rather than a *de novo* hearing) would never have had any curative effect on any initial violation of procedural fairness. Thus it seems that in either case, Dunsmuir should have been entitled to a hearing.

However, it remains the legislature's responsibility, not the courts', nor the parties litigating their case before them, to provide clear legal regimes and rights for the individuals who serve under their governments. In this respect, it seems like as good a time as any to update *New Brunswick's Civil Service Act* to a new *Public Service Act* that would provide identical benefits to the Province's clerks, registrars, government lawyers and other concerned public servants against summary dismissal without necessarily unionizing them.

108 *Harelkin v. University of Regina* [1979] 2 S.C.R. 561.