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Article

Dunsmuir and the Independence of Adjudicative Tribunals

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It can be presentably argued that the "Knight" component of Dunsmuir effectively decides that the relationship between governments and adjudicator members of adjudicative tribunals is no more than an employment relationship, terminable mid-term without cause subject only to pay in lieu of notice. In this article, aware that this argument is "making the rounds" as it were, and convinced that its acceptance would put an end to any valid concept of judicial independence for adjudicative tribunals or their members, the author describes the argument and then demonstrates why it is in fact fallacious.

*204 1. THE QUESTION

Is *Dunsmuir* [1] a threat to the independence of adjudicative tribunals and their members? Do the advances in *McKenzie* [2] and in *Hewat* [3] in the protection of the independence of adjudicative tribunal members--protection from their careers and reputations being always in danger from a government empowered to terminate their appointments at any time without cause or explanation merely with pay in lieu of notice-- now "reside", as David Mullan has recently suggested with respect to *McKenzie*, "in the shadow of *Dunsmuir*"? [4] Why does a program devoted to "Meeting the Challenge to Tribunal Independence" at the Canadian Institute's 10th Annual Advanced Admin Law & Practice program in Ottawa in October 2010 include a discussion of "the effect of *Dunsmuir* on the contractual status of tribunal members"?

2. THE ARGUMENT

The answer is that it is, indeed, possible to argue that in *Dunsmuir*, in addition to breaking new ground on the standard-of-review principles, the Supreme Court also established-- on the way by as it were--that the relationship between governments and the members of adjudicative tribunals should not be regarded as arms-length or independent. It appears to have held, so the putative argument goes, that the relationship is no more than a standard, contractual relationship

between employer and employee-- a relationship that, as with any employment relationship, can be terminated at any time during the term of appointment without cause or explanation merely upon payment of compensation in lieu of notice.

It is an argument that must be examined with care for, if it were to prove correct, it would certainly mark the end in Canada of any viable concept of judicial independence for adjudicative tribunals and their members.

The question of the general nature of the relationship between governments and members of adjudicative tribunals was not, on its facts, at issue in *Dunsmuir*-- ***205** Mr. Dunsmuir was not an adjudicator. However, that relationship became potential collateral damage when the Court seized the opportunity presented by the *Dunsmuir* facts to rationalize the law of procedural fairness as it applies generally to the dismissal of people appointed to "public" offices.

The *Dunsmuir* litigation arose from the dismissal from office of a court clerk appointed to his position by Order-in-Council on an at-pleasure basis, but who was also a legal officer appointed under the New Brunswick *Civil Service Act* and entitled to the protection of the contractual employment rights attaching to such officers. Mr. Dunsmuir had been dismissed without cause with four months' pay in lieu of notice. It was a dismissal that met the requirements of the *Civil Service Act*. He objected, however, that the dismissal procedure did not conform to the principles of the established common law of procedural fairness. He had been dismissed without being told the reasons for the dismissal or given an opportunity to respond to those reasons.

The procedural fairness requirements of notice and some form of a hearing as a prerequisite for a valid dismissal of a public office holder had been authoritatively affirmed in 1990 in the Supreme Court's leading case in *Knight.* [5] *Knight* involved the dismissal of a director of education by a board of education and the Supreme Court had held that, notwithstanding an employment contract that explicitly allowed for termination of the employment on notice, the director was entitled not to be dismissed without being given reasons and an opportunity to respond. The application of the principles of procedural fairness was said by the Court in that case to arise from the fact that the employer was a public body whose powers were derived from statute and must be exercised according to the rules of administrative law.

In *Dunsmuir*, the Supreme Court held that in cases where an office holder's relationship with a government is in fact contractual, it was time to forget *Knight*:

> In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements.

> What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder. [6]

The change in direction evidenced in the latter passage did not by itself threaten the independence of adjudicative tribunals or their members. But the Court did not stop there. It went on to say that a dispute about the dismissal of a "public" employee should be "generally viewed" as a "typical employment law dispute" [7]. Most worrying from the point of view of judicial independence for adjudicative tribunal members is the fact that for the latter conclusion the Court found support in ***206** its 1999 decision in *Newfoundland v. Wells*. [8] The reference to *Wells* is ostensibly of particular concern from a tribunal independence perspective because that is a decision in which the Court had characterized the relationship between the government of Newfoundland and a member of a tribunal as an employment relationship governed by the principles of contract.

In 1985, Andrew Wells had been appointed by order-in-council to be a member of the Public Utilities Board with the designation "Commissioner (Consumer Representative)". The appointment was to continue until Wells reached the age of 70, subject only to good behaviour. Four years later, the Newfoundland and Labrador Legislature repealed the legislation under which he had been appointed, replacing it with a new *Public Utility Act*. The new Act eliminated the position of Consumer Representative to which Mr. Wells had been appointed. Upon the proclamation of the new Act in 1989--six months before Well's pension would have vested and seven years before his appointment would have expired in the ordinary course--Wells was out of a job. He had not been removed from the job; the job had been removed from him.

Wells sued the government for damages for breach of its contractual obligations. Conceding an obligation in law to mitigate his damages, he limited his claim to two and a half years of compensation plus the pension benefits he would have earned had he remained in the position for that period of time. Both the Newfoundland and Labrador Court of Appeal and the Supreme Court allowed the claim and made the award of damages he had sought, holding that his relationship with the government was effectively based on a contract of employment.

With the *Dunsmuir* Court citing *Wells* as a principal support for the proposition that the relationships of all persons appointed to public office with the government should now be viewed generally as an employment relationship, it is no doubt inevitable that we will find the executive branch now citing *Dunsmuir* as authority for treating members of adjudicative tribunals generally as contract employees subject to dismissal at any time during their terms without cause or reasons, subject only to pay in lieu of notice.

And this view of the status of tribunal members will no doubt be said to be bolstered by the *Dunsmuir* Court's effort to identify the exceptions to this rule--exceptions that, it is possible to argue, do not include tribunal adjudicators. The Court identified two exceptions that it "can envision ... at present" and only the first of these can be arguably relevant to the status of administrative justice adjudicators:

> ... The first [exception] occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with *judges, ministers of the Crown and others who "fulfill constitutionally defined state roles"* [here the Court cites "Wells, at para. 31"] .... [9]

The wording of the exempted category of "judges, ministers of the Crown and others who fulfill constitutionally defined state roles" originated, as may be seen in the above quoted passage, in *Wells*, and if one looks at the *Wells* reference it seems even more readily argued that this excepted category of office was not intended to ***207** include the office of tribunal member. *Wells* provided an explanation for the Court's exempting the judges and ministers of the Crown category of positions from the employment relationship analysis, and the explanation reads as follows:

> The terms of [the] relationship [of judges, ministers of the Crown and others who fulfill constitutionally defined state roles] with the state are dictated by the terms and conventions of the Constitution. The offices held by these are an integral part of "the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system": *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 3. [10]

The *Wells* Court's reference in this context to *Cooper's* "web of institutional relationships ... which continue to form the backbone of our constitutional system" seems, at first glance, to be especially ominous for the concept of adjudicative tribunal independence because there is no doubt that the Court in *Cooper* was of the view that tribunals were not part of that backbone. It was because they were not part of that backbone that the Supreme Court held in *Cooper* that tribunals did not have any implied jurisdiction to deal with *Charter* issues.

3. THE DEFINITIVE RESPONSE

All of the foregoing will be attractive to the executive branch since, on that view of *Dunsmuir*, all that would be left of the debate about independence for adjudicative tribunal members would be:

what is the amount of notice that a dismissal will be seen to reasonably require? And what is the dismissed adjudicator's obligation to mitigate his or her damages? However, in point of fact, the argument is not sound. It is not congruent with our traditional theory of justice, and its doctrinal base does not survive close analysis.

The issue of whether adjudicator members of adjudicative tribunals appointed to fixed terms can be dismissed in mid-term without cause, subject only to pay in lieu of notice, is not new. It was addressed directly in 1998 by the Ontario Court of Appeal in its often cited decision in *Hewat*. [11]

In *Hewat*, the Ontario government's dismissal without cause of a number of vice-chairs of the Ontario Labour Relations Board in the midst of their fixed terms of appointment had been challenged by an application for judicial view. The Divisional Court had held for the applicants, ruling that the orders-in-council terminating their appointments were invalid and awarding compensation for the loss suffered by the unlawful termination.

However, the applicants were not satisfied with that result. They saw it as effectively confirming the government's right to terminate adjudicators subject only to compensation. They, therefore, appealed, arguing that, in granting relief, the Court "should not countenance the government's actions in treating [the members of the Labour Relations Board] as employees who can be dismissed with compensation". The appellants acknowledged that reinstatement was probably no longer a ***208** practicable remedy: terms had expired, or were expiring, new people had been appointed and it was perhaps too much to expect the Court to unravel all those strings. However, the appellants asked the Court to establish a precedent that would, as the Court of Appeal described the submission, "stand as a signal that, if there is a reoccurrence, then the board member whose fixed term is interrupted can simply ignore the Order-in-Council, treating it as a nullity". And, if the Court could not "see fit to order reinstatement", then the appellants said that they would prefer a simple declaration of invalidity, without an order directing damages, leaving it to the parties to sort out the consequences of that order.

After reviewing the jurisprudence and literature concerning to the importance of the independence and impartiality of members of "quasi-judicial tribunals", including the jurisprudence respecting the *Valente* principles of independence, the Court of Appeal agreed with the appellants' submissions:

> ... [T]he Ontario Labour Relations Board in its quasi-judicial functions must of necessity maintain a public perception of independence from government if the public is to have any respect for its decisions ...

> The image of independence is undermined when government commitments to fixed appointments are breached. The court should not, by its orders, encourage repetition of this conduct. Reinstatement at this stage, with one appointment expired, another about to expire, and the third position undoubtedly filled, is inappropriate. Therefore, it is my view that we should accede to the appellants' request that the sole order of this court be a declaration that the Order-in-Council dated October 2, 1996 was null and void at its inception. The consequences of that order can be left to the parties to resolve. [12]

The point the appellants made in *Hewat* and which the Ontario Court of Appeal accepted is, I would argue, self-evidently correct. Unless we are to abandon any hope of the public perceiving adjudicative tribunals and their members as independent of government, the members cannot be seen to have the vulnerability to dismissal of a government employee. It is universally understood that employees are not in the least independent.

Next question: Why does the employment relationship argument not hold in doctrinal terms? In the first place, *Cooper* has been overruled by *Martin* [13] and *Paul*. [14] In the latter two decisions, the Court disagreed with its own decision in *Cooper* and held that administrative justice tribunals *do* have an implied jurisdiction to deal with *Charter* challenges concerning the law they are mandated to apply. In *Paul*, the Supreme Court also specifically asserted that adjudicative tribunals are an integral part of the "judicial system" [15] and most recently, in *Conway*, the Court has strongly affirmed the generic status of adjudicative tribunals as ***209** "courts of competent jurisdiction" under section 24(1) of the *Charter*. [16]

It would seem, therefore, to follow that adjudicative tribunals *are* part of the backbone of our constitutional system and, therefore, *do* fall within the *Dunsmuir* category of offices that are exempted from the employer-employee relationship analysis.

However, the doctrinal argument against the proposition can also be made in more technical terms. In neither *Dunsmuir* nor *Wells* did the Court have reason to address the justice-system implications of characterizing the relationship of adjudicative tribunal members with governments as an employment relationship, and in neither of them did the Court in fact address those implications. And, of course, in neither were the issues argued.

As I have already noted, Mr. Dunsmuir was not an adjudicator, and Andrew Wells, while a member of a "tribunal"--in fact a Public Utility Board-- was not a member of an *adjudicative* tribunal and not a public office holder exercising a *judicial* function. He was a member of a regulatory agency

whose rights-determining functions were quasi-judicial *administrative* functions. Moreover, Wells' loss of his job did not occur through his being arbitrarily dismissed mid-term without cause but through legislative elimination of the office to which he had been appointed. No one would argue that good-faith, legislative restructuring that eliminates an office would threaten the independence of that office; in point of fact, the only substantive issue in *Wells* was the nature of a government's liability when new legislation precludes it from performing its prior agreements.

Moreover, if *Dunsmuir* were to be seen to have established that adjudicative tribunal members have a contractual employment relationship with the government, terminable, like all such relationships, at any time on reasonable notice, it would be a decision in direct conflict with the security of tenure aspects of the *Valente* principles of judicial independence as they have been held to apply to adjudicative tribunals. It would also conflict with its own decision in *Ell* [17] that the protection of the unwritten constitutional principle of judicial independence identified in *PEI Reference* [18] (including that principle's requirement of security of tenure) extends to "office holders" exercising judicial functions--perhaps not to all such office holders, but, presumably, to most.

Neither *Valente* nor *Ell* are mentioned in *Dunsmuir*, nor in *Wells*, and, with respect, it is really inconceivable that in a case in which, on the facts, the issue of the application of the security of tenure principles of judicial independence to members of adjudicative tribunals did not arise and was not argued, the Court could have intended to overrule the security of tenure principles without reference to the latter leading decisions. Neither could the Court in considering that issue have failed to consider the Ontario Court of Appeal's decision in *Hewat* or the constitutional decision of the B.C. Supreme Court in *McKenzie (supra)* in which the *PEI* ***210** *Reference* constitutional principle of judicial independence, including security of tenure, was held to apply to members of an adjudicative tribunal.

In short, the proposition that *Dunsmuir* may be taken as having categorized the relationship of adjudicative tribunal members with their governments as a dependent, contract-based, employment relationship may be technically plausible but closer inspection proves it to be, with respect, entirely fallacious.

Footnotes

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

2 *McKenzie v. British Columbia (Ministry of Public Safety & Solicitor General)* (2006), 2006 BCSC 1372, 2006 CarswellBC 2262, [2006] 12 W.W.R. 404, 145 C.R.R. (2d) 192, 272 D.L.R. (4th) 455, 52 C.C.E.L. (3d) 191, 61 B.C.L.R. (4th) 57 (B.C. S.C.) [hereinafter "*McKenzie*"]. In *McKenzie*, the B.C. government, relying on what it claimed to be a statutory power to dismiss tribunal adjudicators mid-term without cause merely upon payment of one year's compensation (effectively, an "employer's" power to terminate of the kind referred to in *Dunsmuir*), terminated the appointment of a respected, senior tribunal adjudicator with an unblemished service record and about whom the government acknowledged it had no performance concerns. The Court, after noting that it was "more

than regrettable that servants of the public could behave so badly in their treatment of anyone", held that the power on which the government had relied was incompatible with judicial independence and, therefore, constitutionally invalid.

3 See *Hewat, infra* note 11 and accompanying text.

4 David Mullan, "Regulating the Conduct of Agency and Tribunal Members" (2009), 22 C.J.A.L.P. 339 at 352.

5 *Knight v. Indian Head School Division No. 19* (1990), 1990 CarswellSask 146, 1990 CarswellSask 408, [1990] 1 S.C.R. 653 (S.C.C.).

6 *Dunsmuir, supra* note 1 at para. 112.

7 *Ibid*. at para. 115.

8 *Wells v. Newfoundland* (1999), 1999 CarswellNfld 214, 1999 CarswellNfld 215, [1999] 3 S.C.R. 199 (S.C.C.).

9 *Dunsmuir, supra* note 1 at para. 115 [emphasis added].

10 *Wells, supra* note 8 at para. 31.

11 *Hewat v. Ontario* (1998), 1998 CarswellOnt 806, 37 O.R. (3d) 161 (Ont. C.A.) [hereinafter "*Hewat*"] (the payment in that case equaled the compensation that would have been paid had the members been allowed to complete their terms).

12 *Ibid*. at paras. 21-22.

13 *Nova Scotia (Workers' Compensation Board) v. Martin* (2003), 2003 CarswellNS 360, 2003 CarswellNS 361, [2003] 2 S.C.R. 504 (S.C.C.).

14 *Paul v. British Columbia (Forest Appeals Commission)* (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, [2003] 2 S.C.R. 585 (S.C.C.).

15 *Ibid*. at para. 22.

16 *R. v. Conway* (2010), 2010 SCC 22, 2010 CarswellOnt 3847, 2010 CarswellOnt 3848 (S.C.C.).

17 *Ell v. Alberta* (2003), 2003 SCC 35, 2003 CarswellAlta 915, 2003 CarswellAlta 916, [2003] 1 S.C.R. 857 (S.C.C.).

18 *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997), 1997 CarswellNat 3038, 1997 CarswellNat 3039, [1997] 3 S.C.R. 3 (S.C.C.).

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