

2009 01T 5287

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION

BETWEEN:

VINLAND RESOURCES LIMITED

APPELLANT

AND:

MINERAL CLAIMS RECORDER FOR THE  
GOVERNMENT OF NEWFOUNDLAND  
AND LABRADOR

FIRST RESPONDENT

AND:

HELPS-DODGE CORPORATION  
OF CANADA LIMITED

SECOND RESPONDENT

AND:

NORANDA INC.

THIRD RESPONDENT

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FACTUM OF THE SECOND RESPONDENT  
HELPS-DODGE CORPORATION OF CANADA LIMITED

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## OVERVIEW

This is an appeal by Vinland Resources Limited against the decision of the Mineral rights Adjudication Board (the “Board”) dismissing its grievance, ruling after review of the evidence that it is “far more probable than not” that the disputed lands were part of those taken by the AND Company.

The appeal seeks to re-litigate this matter before this Court. In the Factum that follows, the Second Respondent takes the position that the Board is entitled to deference by the Court on the matters before it, and that in any event, it was correct in its decision.

### I. FACTS

The second Respondent accepts the facts as found by the Mineral Rights Adjudication Board.

## II. LEGAL ISSUES

- (1) *What is the correct approach to the review of the Mineral Rights Adjudication Board's decision?*
- (2) *Are the issues raised by the Appellant subject to review?*

1. At paragraph 72 of his factum, counsel for Vinland Resources Limited ("Vinland") cites the Court of Appeal in *Vinland Resources Ltd. v Mineral Claims Recorder et al*, 2008 N.L.C.A. 12; (2008) 274 Nfld. & P.E.I.R. for the proposition that "correctness" is the standard of review with respect to "any" decision of the Board.

**Reference:** *Vinland Resources Ltd. v. Mineral Claims Recorder*, (2008) N.L.C.A. 12; (2008) 274 Nfld. & P.E.I.R. 66 (Tab 1).

2. With respect, the sole determination by the Court of Appeal was to the effect that "correctness" was the required standard of review for the particular "challenged decisions" of an earlier Board which was overturned by Russell J. in *Newfoundland & Labrador v Vinland Resources Ltd.*, 2006 NLTD 122, 781 A.P.R. 25, 259 Nfld. & P.E.I.R. 25. That decision was concerned with the adequacy of reasons of the earlier board, which had made profound errors on questions of onus, *inter alia*. These are questions of law of central importance to the legal system, that engage the supervisory responsibility of the Courts. It does not follow that this is the standard for any decision.

**Reference:** *Vinland*, para. 16 (Tab 1).

3. In following the direction provided to it in the matter now under appeal by Vinland, the Board was careful to undertake its tasks, consistent with the decision of the Court of Appeal. The Board's reasons for decision, reflect a considered response to the case advanced by Vinland. The issue for this Court lies in applying the direction the Courts have been given, by the *Duressniir* decision of the Supreme Court of Canada.
4. In *New Brunswick Board of Management v Duressniir*, 2000 S.C.C. 9, the Supreme Court revisited the analytical framework for administrative law reviews of tribunals. While the key change was to eliminate the concept of a three level assessment in favour of a two standard review

(“correctness” or “reasonableness”), it fundamentally restated the process to be followed. What is clear is that the issue of whether a legal question is asked is not determinative of a correctness standard. The question for the Courts in approaching an appeal or judicial review rather is directed to determining first the nature of work the tribunal has been given, and then to undertake the appropriate analysis of the level of deference to be accorded. The question is whether there is a discrete and special administrative regime in which the decision maker has special expertise, and the nature of the question which must be asked.

**Reference:** *New Brunswick Board of Management v. Dunsmuir*, 2000 S.C.C. 9 (Tab 2)

5. As put in *Dunsmuir*,

A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

A question of law that is of ‘central importance to the legal system... and outside the... specialized area of expertise’ of the administrative decision maker will always attract a correctness standard. On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the above factors so indicate.

**Reference:** *Dunsmuir*, para. 55.

If these factors, considered together, point to a standard of reasonableness, the decision maker’s decision must be approached with deference in the sense of respect discussed earlier, in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided on the basis of reasonableness. It simply means giving the adjudicator’s decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

**Reference:** *Dunsmuir*, para. 56.

6. As stated in *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 S.C.C. 12, the task is to focus on the nature of the issue before the administrative tribunal under review. Even when a statute provides for a right of appeal or review it is now required that the supervising court evaluate the level of deference to be accorded to the tribunal.

The appellant Minister sought leave to appeal to this Court to argue that in any event s. 18.1 of the Federal Courts Act establishes a legislated standard of review that displaces the common law altogether. On this view, *Dunsmuir* is largely irrelevant to the current appeal. However, it is apparent that while the courts below differed on the choice of the appropriate common law standard of review, neither the judge at first instance nor any of the judges of the appellate court considered the common law of judicial review to be displaced by s. 18.1 of the Federal Courts Act. The trial court took the view that s. 18.1 of the Federal Courts Act deals essentially with grounds of review of administrative action, not standards of review, and the Federal Court of Appeal proceeded in the same way. I think this approach is correct although, as will be discussed, s. 18.1(4)(d) does provide legislative guidance as to "the degree of deference" owed to the IAD's findings of fact.

*Dunsmuir* teaches that judicial review should be less concerned with the formulation of different standards of review and more focussed on substance, particularly on the nature of the issue that was before the administrative tribunal under review. Here, the decision of the IAD required the application of broad policy considerations to the facts as found to be relevant, and weighed for importance, by the IAD itself. The question whether *Khosa* had shown "sufficient humanitarian and compassionate considerations" to warrant relief from his removal order, which all parties acknowledged to be valid, was a decision which Parliament confided to the IAD, not to the courts. I conclude that on general principles of administrative law, including our Court's recent decision in *Dunsmuir*, the applications judge was right to give a higher degree of deference to the IAD decision than seemed appropriate to the Federal Court of Appeal majority. In my view, the majority decision of the IAD was within a range of reasonable outcomes and the majority of the Federal Court of Appeal erred in intervening in this case to quash it. The appeal is therefore allowed and the decision of the Immigration Appeal Division is restored.

*Khosa* para. 3 and 4.

*Dunsmuir* stands against the idea that in the absence of express statutory language or necessary implication, a reviewing court is to 'apply a correctness standard as it does in the regular appellate court...'. With respect, I would reject my colleague's efforts to roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess.

**Reference:** *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 S.C.C. 12 at para. 26 (Tab 3).

7. The level of deference when an administrative tribunal is dealing with its “home statute” can be seen in other post *Dunsmuir* cases.

The decision under appeal in this case is a departure from that deferential approach. In my view, with respect, the standard of review applied in the earlier cases by Dalphond and Chamberland J.J.A. is to be preferred and is in greater compliance with *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190, 2008 SCC 9 (S.C.C.) (at paras. 54 and 55). In particular, the presence or absence of a privative clause, while relevant, is not determinative (*Dunsmuir*, at para. 52).

What is at issue here is the interpretation by the discipline committee, a body of experts, of its home statute (*Dunsmuir*, at para. 54. See also *Moreau-Berube v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.); *Q v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.); *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.); *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 32). The legislature assigned authority to the Association, through the experience and expertise of its discipline committee, to apply - and necessarily interpret - the statutory mandate of protecting the public and determining what falls beyond the ethical continuum for members of the Association. The question whether *Proprio Direct* breached those standards by charging a stand-alone, non-refundable fee falls squarely within this specialized expertise and the Association's statutory responsibilities. I see nothing unreasonable in the discipline committee's conclusion that the provisions requiring a sale before a broker or agent is entitled to compensation, are mandatory.

**Reference:** *Proprio Direct Inc. c. Pigeon*, 2008 S.C.C. 32 para 20-21 (Tab 4).

8. In *Mount Pearl (City) v. Newfoundland & Labrador (Workplace Health, Safety Compensation Review Division)* 2008 N.L.C.A. 69, 282 Nfld. & P.E.I.R. 14, the Newfoundland and Labrador Court of Appeal provided further guidance on the approach to be taken:

A brief synopsis of the previous state of the law is necessary to provide a context for the application judge's reference to the standard of patent unreasonableness. Our system of judicial review was established and developed in a series of Supreme Court of Canada decisions. It is founded upon an acceptance that the courts should properly defer to the determinations of administrative tribunals, including those involving legislative interpretation, made within their jurisdiction. *C.U.P.E., Local 963*

*v New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. To assess whether an alleged error was jurisdictional in nature and to determine the appropriate standard of review a pragmatic and functional analysis was developed which required a review of four factors - (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal on the issue in question relative to that of the court; (3) the purpose of the legislation and the provision under consideration; and (4) the nature of the issue. *Syndicat national des employés de la commission scolaire régionale de 'Outaouais v U.E.S.*, local 298, [1988] 2 S.C.R. 1048 (S.C.C.); *Pushpanathan v Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.);

para. 16

The applications judge, proceeding on the basis that the review Commissioner's decision of November 18, 2003 was correct as to jurisdiction, reviewed that decision to determine if it was patently unreasonable. I observe that post-*Dunsmuir* when a decision of the Review Division falls to be reviewed on non-jurisdictional issues the applicable standard of review is reasonableness as described in *Dunsmuir*. That conclusion follows from the analysis in *Chamberlain* and *Jesso* and need not be repeated.

**Reference:** *Ibid.* para. 26.  
*Mount Pearl (City) v Newfoundland & Labrador (Workplace Health, Safety Compensation Review Division)* 2008 N.L.C.A. 69, 282 Nfld. & P.E.I.R. 14 (Tab 5).

See also: *Association of Seafood Producers Inc. v Newfoundland & Labrador (Standing Fish Price Setting Panel)*, 2008 N.L.T.D. 93; 842 A.P.R. 268, 275 Nfld. & P.E.I.R. 268 (Tab 6)

### III. ANALYSIS

9. Looking at the *Mineral Act* and the task undertaken by the Mineral Rights Adjudication Board dictates a "reasonableness" standard in terms of the review by this Court. Notwithstanding the availability of an appeal on a point of law, post *Dunsmuir*, this court must review the function undertaken by the Board, and the nature of the review sought by a party.
10. The conferral of statutory powers and duties on the Board is consistent with deference at a reasonableness standard:

"37. (1) There shall be a board, known as the Mineral Rights Adjudication Board, appointed by the Lieutenant-Governor in Council consisting of 3

persons, at least 1 of whom is a barrister, who shall be chairperson, and 1 of whom is experienced in mining.

(2) The members of the board shall

(a) hold office for a period of 3 years from the date of their appointment, and shall be eligible for reappointment;

(b) carry out the function and duties required of the board by this Act and the regulations; and

...

(5) For the purposes of enabling the board to determine questions within its jurisdiction, the board and each member is vested with all the powers that are conferred on commissioners under the Public Inquiries Act and, if the regulations confer upon the board the power of an investigating body within the meaning of the Public Investigations Evidence Act, it is vested with all the rights of a body under that Act.

#### Jurisdiction of board

38. (1) It is the function of the board and the board has exclusive jurisdiction to hear and determine a question, dispute or matter arising out of the application of this Act and those provisions of the regulations pertaining specifically to this Act, including hearing and determining on

(a) the rights of persons to the issuing of licences, certificates and leases, including extensions of licences and leases;

(a.1) the suspension and reinstatement of a person's right to stake out claims;

(c) questions of priority for the right to obtain licences;

(d) all matters respecting the cancellation of licences and leases, including allegations of default of the conditions of licences and leases, and whether a misrepresentation by applicants for licences or leases is material;

(e) the right of persons to certificates;

(g) other matters pertaining to the rights, privileges, obligations or duties of persons claiming or holding licences or leases conferred or imposed under this Act whether or not specifically referred to in paragraphs (a) to (f) of this section.

(2) The board does not have the jurisdiction to hear or determine a question, matter or dispute relating to an order made under section 31.1 or to

the cancellation of a lease where that cancellation results from an order made under section 31.1.

(3) It is the function of the board and the board has exclusive jurisdiction to hear and determine a question, dispute or matter arising out of the application of the Mining Act and the regulations under that Act.

#### Adjudication

39. (1) A person affected and aggrieved by a matter falling within the jurisdiction of the board, in this section referred to as the "grievor", may apply to the board to have the matter adjudicated.

(3) The minister shall produce before the board on the hearing of the grievance, and to the Trial Division upon a reference made under subsection (6), or on appeal under section 40, all papers and documents which are in the possession of the Crown and which may affect the outcome of the grievance, reference or appeal.

(4) The board, comprising all of its members, shall hear the grievance on a day appointed by it for the purpose, and shall decide the matter of the grievance, record its decision in writing, disclosing in that record whether the decision is unanimous or by majority, and transmit copies of the decision to the grievor, other persons affected by the appeal and the minister.

(6) The board may, before deciding the matter of the grievance, refer a question of law raised at the hearing of the grievance for the opinion of a judge of the Trial Division, and the Rules of Court made under the Judicature Act relating to a special case apply to a reference made under this subsection as if that reference were made by the parties to the grievance.

(7) The board may award costs in an adjudication under this section for or against a party to the grievance, or the Crown, and fix the amount of the costs.

#### Appeal to Trial Division

40. (1) An appeal lies from a decision of the board under section 39 to a judge of the Trial Division upon a point of law raised during the hearing of the appeal before the board, and the practice and procedure under the Judicature Act and the Rules of Court relating to appeals apply to proceedings under this section.

(2) The judge may award costs in an appeal under subsection (1) for or against the appellant or another party to the appeal, or the Crown, and may fix the amount of the costs.

11. From this extract, it can be seen that functionally and pragmatically,
- (1) The Board has a requirement for particular expertise in a specialized area (mining);
  - (2) It is chaired by a barrister;
  - (3) It has broad statutory powers to conduct an inquiry;
  - (4) It has exclusive statutory jurisdiction to hear and determine a question, dispute or matter arising out of the application of the *Mineral Act*, including questions of priority for licence, and rights or privileges of persons holding licences; and,
  - (5) A statutory right of appeal is present, restricted to points of law raised during the appeal before the Board.

The application of a point of law to facts, in particular within a “home” statute, is a process to which the courts show deference.

12. The enormous bulk of the task assigned the Board both under the *Mineral Act*, and by the previous decision of the Court of Appeal, was to sift the facts with respect to the evidence advanced by Vinland engaging the exclusive jurisdiction of the Board under section 38(1) of the Act. In the rare instance in which a legal element can be identified in the Board’s decision, it was a question of mixed fact and law. This was a natural consequence of the legal parameters having previously been determined by the Courts in prior decisions.

... Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises* [[1981] 2 S.C.R. 2], is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

... In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law. [Emphasis added.]

(Emphasis added in the per curium decision of the Court of Appeal)

**Reference:** *City of St. John's v. Coady Construction and Excavating Ltd.*, 2005 N.L.C.A. 68 (Tab 7).

See also *Housen v. Nikolaisen*, (2002) S.C.C. 33, [2002] 2 S.C.R. 235 (Tab 8).

*Dunsmuir para. 160-164.*

13. Nothing in the Board's decision raises questions of fundamental importance to the rule of law. The question before the Board was, in effect, whether the factual evidence amassed by Vinland was sufficient to displace the assumptions of law that the Court of Appeal directed the Board to accept.
14. A minimum of 81 paragraphs of the Vinland Factum seeks to reargue the facts decided by the Board. These are wholly outside the purview of the Court and there is nothing in the record that suggests the Board in any way failed to completely address the evidence before it.
15. It is neither permissible nor necessary for this Court to review the findings of fact made by the Board. The enormous volume of evidentiary material brought before the Board was carefully considered. For example at paragraphs 72-75 the Board analyzes the position advanced by Vinland with respect to one piece of evidence, Map 245I, and rejects the position advanced by Vinland before the Board, that it now seeks to re-litigate before this Court.
16. At all stages the Board was alive to the issue of the relative weight to be assigned to evidence (see eg. Para. 75 of the Board decision, also para. 81, 107, 137, 138, 143, 144, 152, 154, 155, 156, 157 158). Nothing in the Board's reasons in any way suggests a fundamental error requiring this Courts intervention.
17. The decision of the Board is cautious, cogent and correct, but is in any event, not subject to appeal with respect to findings of fact.

*Public Documents*

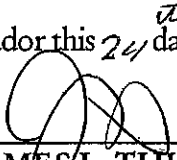
18. The issue of the admissibility of certain documents, and the weight to be placed upon them does not involve issues of law per se. The Board noted that all tendered documents were admitted, with the issue to be addressed to be the weight accorded the documents.
19. In strongly, and it is submitted correctly, preferring the evidence and documents relied upon by the Mineral Claims Recorder witnesses, and the evidence of the Mineral Claims Recorder himself, the Board weighed such evidence against some other evidence, such as some forestry maps, that appeared to be ambiguous. The evidence addressing the position of the mineral branch of the AND Company was performed over some mapping from the Forestry Division. The key witness called by Vinland conceded his lack of knowledge with respect to AND and Abitibi mineral branch activities.
20. The analysis of the Board undertaken with respect to the evidence before it was careful, thorough and correct. It led to the conclusion that there was no body of evidence sufficient to overcome the record produced by the Mineral Claims Recorder. Indeed, a reading of the Board's reasons shows that there were many difficulties with the evidence produced by Vinland:
  - (1) The knowledge of their witnesses;
  - (2) The dubious nature of any "evidence" contrary to the position of the Mineral Claims Recorder; and,
  - (3) Their failure to produce evidence that went to the central factual issue of whether or not the AND Company had taken the lands in question.
21. The complete, well reasoned and correct rejection of the Vinland Resources Limited grievance was within the jurisdiction of the Board, based upon their interpretation of voluminous records before the Board in a manner wholly consistent with the direction of the Courts. It was "reasonable" as that term is used in the cases, and the Appeal of Vinland Resources Ltd. to this Court is wholly without merit, and should be dismissed.

**IV. ORDER SOUGHT**

22. The Second Respondent, Phelps Dodge Corporation of Canada respectfully requests that the Appeal of Vinland Resources Limited be denied with costs of the Appeal be awarded to the Second Respondent.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

DATED at St. John's, Newfoundland and Labrador this 24<sup>th</sup> day of March, 2010.

  
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