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1. *Dunsmuir* Standard of Review Revisited: S.C.C.

In [Canada \(Citizenship and Immigration\) v. Khosa](#), 2009 SCC 12, released March 9, 2009, the Supreme Court revisits the standard of review analysis it developed last year in [Dunsmuir v. New Brunswick](#), 2008 SCC 9. By a 7-1 majority the Supreme Court allowed the appeal of a Federal Court of Appeal decision setting aside a removal order made by the Immigration Appeal Division. The court found that "having in mind the considerable deference owed to the IAD...there was no basis for the Federal Court of Appeal to interfere with the IAD decision to refuse special relief in this case." At issue was whether the general principles of review articulated in *Dunsmuir* were ousted by [s.18.1](#) of the *Federal Courts Act*. On this point the majority found:

...a legislature has the power to specify a standard of review...if it manifests a clear intention to do so. However, where the legislative language permits, the courts (a) will not interpret grounds of review as standards of review, (b) will apply *Dunsmuir* principles to determine the appropriate approach to judicial review in a particular situation, and (c) will presume the existence of a discretion to grant or withhold relief based on the *Dunsmuir* teaching of restraint in judicial intervention in administrative matters... (para.51)

See the following articles for comments on both *Khosa* and *Dunsmuir*:

- [Dunsmuir's Standard of Review Analysis, One Year Later](#) posted March 9th, 2009 by Julian Ho on The Court
- [Dunsmuir Considered](#) published March 20, 2009 in McCarthy Tétrault's *Co-Counsel: Litigation*

2. Private Facebook Profile Relevant and Discoverable: Ont. S.C.

In [Leduc v. Roman](#), 2009 CanLII 6838 (ON S.C.) the court found the content posted by the plaintiff on his limited access Facebook profile to be 'documents' under the Rules of Civil Procedure and granted leave to the defendant to cross-examine the plaintiff on the nature of the content. The plaintiff, who was injured in a motor vehicle accident, claimed damages for loss of enjoyment of life and limitations to his personal life. Disagreeing with the Master's decision that the mere existence of the private profile was not reason to believe it contained relevant lifestyle evidence, Justice Brown said:

I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised

control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident. (para.32) ...

To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial. (para.35)

The judge also warned that, given the growing popularity of social networking, "...it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings." See [Rule 30.03\(4\)](#) of the Ontario Rules, which is similar to our [Rule 30.03\(3\)](#).

The following articles discuss the import of the case:

- [Plaintiff's Facebook Pages Not A "Fishing Expedition" by Defence, Judge Rules](#), a Cavanagh Williams Update posted February 26th, 2009
- [Facebook Not So Private? Ontario Court Finds Facebook Profile Discoverable](#), Blakes Litigation Bulletin, March 2009

3. Recent Manitoba Decisions

In [Hupe v. Manitoba](#), 2009 MBCA 27 the court found the Director of the Residential Tenancies Branch to be an official administering a legislative scheme and, as a result of s. 49 of the *Interpretation Act*, not bound by the limitation periods set out in *The Limitation of Actions Act*.

In [Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson](#), 2009 MBQB 32 the court found that the security documents executed by the debtor showed a clear intent to allow the creditor to enforce its security on Reserve lands. The debtor was therefore found to have waived his rights under the *Indian Act* and there were no impediments to the Receiver Manager taking possession and selling assets on Reserve.

4. Litigation Publications

Volume 2, Issue 3 of [McCarthy Tétrault's Co-Counsel: Litigation](#), published March 20, 2009, contains several articles examining recent developments in such areas as class actions, privacy, privilege, negligence, and contract law.

The article [Five Hot Privacy Topics](#), written by Janina M. Kon and Sara A. Levine and recently published on BC CLE [Practice Points](#), examines current privacy law issues and the developing legislation and case law in this area.

5. Demystifying the Federal Court: MBA CLE

The [Civil Litigation section](#) of the MBA is presenting the program *Demystifying the Federal Court - its Proceedings and Practices* on Monday, May 11, 2009 at 12:00 noon at The Law Society Classroom, 219 Kennedy Street. The Honourable Chief Justice Allan Lutfy, The Honourable Russel W. Zinn, and Prothonotary Roger Lafrenière, all of the Federal Court, will discuss the evolution and impact of case management in Federal Court proceedings. Contact the [Manitoba Bar Association](#) for further details.

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