BRITISH COLUMBIA’S EXERCISE IN SAMPLING, THE “ADMINISTRATIVE TRIBUNAL ACT”, DUNSMUIR AND KHOSA

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Introduction

With the exception of some of our colleagues who practice in the federal jurisdiction, most administrative law practitioners across the country are intent on analyzing and applying the standards of review established by the Supreme Court of Canada in *Dunsmuir* [2008] 1 S.C.R. 190, 2008 S.C.C. 9. Those practitioners seeking judicial review of administrative decisions of provincially regulated tribunals in British Columbia will be struggling to apply one of three different standards of review, depending on the tribunal under review, and the nature of the decision rendered.

In 2004, the Provincial government passed the *Administrative Tribunals Act*, (the “ATA”) S.B.C. 2004 c. 45. That legislation codifies standards of review for certain provincially regulated administrative tribunals. However, the ATA only applies if the tribunal’s enabling legislation has been amended to adopt various provisions of the ATA. For those tribunals to which the ATA does not apply, the standard of review will continue to be governed by the common law. I will leave it to other panelists to provide their learned opinions on the state of the common law.

For those tribunals whose enabling legislation has adopted the ATA provisions, different standards of review apply to tribunals whose enabling legislation contains privative causes and those without. For ease of reference, I will quote below section 58 which applies to tribunals with privative clauses, and section 59 which applies to tribunals without privative clauses.

**Standard of review if tribunal's enabling Act has privative clause**

58  (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

Standard of review if tribunal's enabling Act has no privative clause

59  (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

(a) is exercised arbitrarily or in bad faith,

(b) is exercised for an improper purpose,

(c) is based entirely or predominantly on irrelevant factors, or

(d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.
For those of you who have happily moved into a post-

Dunsmuir era, I anticipate that the phrase “patently unreasonable,” found in Section 58 (2) (a), 58 (3), 59 (3), and 59 (4) will have leapt off the page. Clearly, when the BC Provincial Government adopted the ATA, it had not had the benefit of the Supreme Court of Canada’s analysis in Dunsmuir where Mr. Justice Basterache, for the majority, said this of the patently unreasonable standard:

Looking to either the magnitude or the immediacy of the defect in the Tribunal’s decision provides no meaningful way in practice of distinguishing between a patently unreasonable, and an unreasonable decision. As Mullan has explained:

To maintain a position that is only the “clearly irrational” that will cross the threshold of patent unreasonableness, while irrationality simpliciter will not, is to make nonsense of the law. Attaching the adjective “clearly” to irrational is a tautology. Like “uniqueness,” irrationality either exists or it does not. There cannot be shades of irrationality.


Moreover, even if one could conceive of a situation in which a clearly, or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear enough.

The question arises whether it was the intention of the Province of British Columbia to preclude judicial review of decisions of certain tribunals whose decisions are irrational, but not irrational enough.

The second feature of s. 58 and s. 59 that will have been apparent to the careful observer is that the standard of patent unreasonableness has been defined under the ATA as it relates to discretionary decisions. However, no definition is provided if, pursuant to section 58 (2), judicial review is sought of a decision of an administrative tribunal whose enabling legislation contains a privative cause where the decision under review is not a discretionary decision, but involves a finding of fact. It was certainly the intention of the Legislature that additional deference be given to such tribunals beyond the standard of reasonableness simpliciter (which standard is also codified in the ATA in section 59 (2)).
In summary:

a) Administrative tribunals which are not governed by the ATA will be subject to judicial review in accordance with the common law standards of review, developed pursuant to *Dunsmuir*.

b) Administrative tribunals whose enabling legislation adopts the ATA and contains a privative clause will be governed by:

   i. A standard of review of patent unreasonableness, (not defined), for reviews of findings of fact, in respect of matters over which it has exclusive jurisdiction;

   ii. A standard of patent unreasonableness (as defined in the ATA) for exercises of discretion over matters for which it has exclusive jurisdiction;

   iii. A standard of fairness for the application of common law rules of natural justice and procedural fairness;

   iv. A standard of correctness in all other matters.

c) Administrative tribunals which do not have a privative clause in their enabling legislation will be subject to the following standards of review:

   i. Correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness;

   ii. Reasonableness *simpliciter* for findings of fact;

   iii. Patent unreasonableness, (as defined in the ATA), for discretionary decisions of the tribunal; and

   iv. Fairness for the application of common law rules of natural justice and procedural fairness.

How is the standard of patent unreasonability applied in British Columbia, post *Dunsmuir*?

Those of us who practice in this area in British Columbia may have taken some comfort in the beginning of this year by two decisions rendered by our Court of Appeal involving judicial review decisions, seeking review of decisions of workers’ compensation tribunals: *Asquini v. British Columbia (Workers’*
The Court of Appeal held in *Manz*:

The next question is whether the effect of *Dunsmuir* is to amend the meaning of patent unreasonableness, such that a definition more akin to the reasonableness standard should be adopted. All parties are agreed that *Dunsmuir* should not be taken to have that effect. Still, it must be addressed because there is some divergence of views on this subject in various decisions of the Supreme Court of British Columbia, discussed by Mr. Justice Blair in *Asquini*.

In my view, the effect of *Dunsmuir* is not to change the meaning of patently unreasonable. As said by Mr. Justice Blair is *Asquini*:

[54] Like Truscott J. in *Lavigne*, I conclude that the standard mandated by the *ATA* is that which existed at common law prior to the issuance of the decision in *Dunsmuir*. *Dunsmuir* had the effect of abolishing patent unreasonableness, and therefore the definition of patent unreasonableness must be that immediately prior to its abolition. I note that only s. 59 of the *ATA* contains reference to reasonableness standard, indicating a differentiation between s. 58, for tribunals operating under a privative clause, and s. 59, for tribunals operating without a privative clause. I also note that the purpose of *Dunsmuir* was not to pave the way for more intrusive review of tribunal decisions, and that the single standard of reasonableness is now analyzed on a spectrum of deference. At one end of the spectrum there still lies a degree of deference similar to that mandated under the former standard of patent unreasonableness. It may be, therefore, that the two positions are not irreconcilable (…).

It is interesting of course that the Court of Appeal suggested that the definition of patent unreasonableness should be that which developed prior to the decision in *Dunsmuir* being rendered. Certainly, one can imagine the challenges that might arise from attempting to apply the standard of “irrational enough” which is referenced in *Dunsmuir*.

However, lest anyone think that our Court of Appeal had the last word on the matter, the Supreme Court of Canada considered a similar issue in its March 2009 decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. In that case, the Court was considering a standard of “patent unreasonableness” that had been adopted in a particular federal statute. In the context of that decision, Mr. Justice Binnie made the following *obiter* remarks about the British Columbia legislation:
Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia Administrative Tribunals Act, S.B.C. 2004, c. 45, can only sensibly be interpreted in the common law context because, for example, it provides in s. 58 (2) (a) that “a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable”. The expression “patently unreasonable” did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s. 58 (3). Despite Dunsmuir, “patent unreasonableness” will live on in British Columbia, but the content of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.

That said, of course, the legislature in s. 58 was and is directing the B.C. courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention. (emphasis added)

The Court was not unanimous in its consideration of the ATA, as Mr. Justice Rothstein made the following comments:

The record of the proceedings of the B.C. legislature also makes clear the legislature’s intent to codify standards of review that would oust a duplicative common law standard of review analysis. The policy rationale for this move was clear. The legislation was aimed at refocussing judicial review litigation on the merits of the case, rather than on the convoluted process of determining and applying the standard of review.

…. It would be troubling, I believe to the B.C. legislature to think that, despite its effort to codify standard of review and shift the focus of judicial review to the merits of the case, this Court would re-impose a duplicative Dunsmuir-type analysis in cases arising under the B.C. A.T.A. [paras 115-116]

British Columbia decisions subsequent to Khosa, have effectively adopted the interpretation urged by Mr. Justice Binnie, but continue to struggle with a definition of when a decision will be “patently unreasonable”. The BC Court of Appeal did accept that the standard of patent unreasonableness equated to a standard of irrationality, at least for the purposes of reviewing a Labour Relations Board decision interpreting its enabling legislation, in *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworks Union of Canada, Local 25-G*, 2009 BCCA 229:
The appellant accepts that the Board’s decisions attract deference at the high end of the Dunsmuir-Khosa range. The appellant frames the standard of review issue as equating patent unreasonableness with irrationality – is the Board’s interpretation of its governing statute irrational? I am not persuaded that “patently unreasonable” and “irrational” are always interchangeable but I accept that the equation as appropriate for the review of the Board’s interpretation of its enabling statute in this case.

In Woods v. British Columbia (Workers’ Compensation Board) [2009] BCJ 2018, Madame Justice Dillon of the BC Supreme Court quoted both Khosa and Manz without commenting on whether the interpretation of patently unreasonable was fixed or capable of metamorphosis under the ATA. However, the body of her decision concludes that the decision under review provided a “rational” interpretation of the enabling legislation and therefore was not patently unreasonable.

Questions of mixed fact and law under the ATA

Another issue which has been the subject of discussions in the B.C. jurisprudence is what standard of review should apply to questions of mixed fact and law arising within the jurisdiction of the tribunal. This issue was initially canvassed in the BC Court of Appeal decision in Bolster v. British Columbia (Ministry of Public Safety and Solicitor General) 2007, BCCA 65 (leave to appeal refused 2007, SCCA 167). That decision held that correctness is the standard for questions of mixed fact and law, relying on s. 59 (1) of the ATA, which holds that the standard of review is correctness for all questions except those specifically enumerated.

In a decision rendered in October, Lavender Cooperative Housing Association v. Ford [2009] BCJ 2081, the Supreme Court considered whether following the Dunsmuir and Khosa decisions, the legislative objectives had altered such that the common law standard of reasonableness which would traditionally apply to questions of mixed fact and law should be applied.

The Court recognized that Khosa expressly provided that judicial review legislation must be read purposively in light of the statutes, text, context, and objectives, but where there were ‘interstices’ in the legislation, the common law may apply. Noting that the Court of Appeal in Bolster had undertaken such an analysis of the ATA, Justice Gray concluded that importing a standard of reasonableness would ignore the clear legislative intent.
Conclusion

The express intent of both the Court in *Dunsmuir* and the BC Legislature in drafting the ATA was to simplify the exercise of defining the standard of review which should apply to administrative decision making. The forest of trees who have been sacrificed in an effort to judicially consider these common law and legislative simplifications in BC tell a different story.