Administrative Law Update – A West Coast Perspective

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Standard of review continues to trouble litigants in British Columbia, notwithstanding the fact that in 2004 the provincial government enacted the *Administrative Tribunals Act*, RSBC 2004, c. 25, which was intended to clarify this area of the law. There is ongoing debate whether the *Act* succeeded in clarifying the law. It is clear that the debate has heated up in light of the recent decisions of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. In this paper we review the standard of review provisions of the *Administrative Tribunals Act* and the issues that have arisen subsequent to the recent Supreme Court of Canada decisions.

The Administrative Tribunal Act (the "*ATA*")

The *ATA* is a comprehensive piece of legislation. It is a grab bag of various provisions. The *ATA* addresses the appointment of tribunal members, what is to happen in the event of absence or incapacity of a member, the power to issue interim orders, hearing procedures, and more. The enabling legislation for various tribunals then incorporates the specific terms of the *ATA* intended to apply to each Tribunal. For the purposes of this paper, we will focus on the standard of review provisions established in the *ATA*.

When the *ATA* was enacted, then Attorney General Geoff Plant stated: (***Debates of the Legislative Assembly (Hansard)***, Volume 25, Number 15, May 18, 2004, at 11193):

> In the bill before us today, the government is for the first time taking up the challenge of defining legislative intent by simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise…this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals…the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.
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> …I believe these provisions offer the promise of greater certainty and finality to those British Columbians who want tribunals to help them on the matters that concern their health, their jobs and their futures.

The Provincial Government's approach arose from decisions of the Courts. In *Pushpanathan v. Canada (Ministry of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), the Supreme Court of Canada held:

> 26 The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board?" (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, 1997 CanLII 316 (S.C.C.), [1997] 2 S.C.R. 890, at para. 18, *per* Sopinka J.).

In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 27, the Supreme Court of Canada stated that, "[t]he overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law."

The standard of review provisions of the *ATA* provide:

> *Standard of review if tribunal's enabling Act has privative clause*
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> 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.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (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,
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> (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
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> (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.
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> (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.

We will review a series of recent British Columbian cases that have considered the *ATA*.

1. *British Columbia v. Bolster* 2007 BCCA 65

Mr. Bolster had a visual impairment. Notwithstanding the impairment, he held a commercial driver's licence and had driven without incident for several years. When he applied for a new job, he had to take a medical examination. He duly reported his visual impairment and that led

to a process of medical reviews. Eventually a doctor (although he did not foresee a problem) felt it was his duty to report to the Ministry. Thus started a long and frustrating journey for Mr. Bolster. His Class 1 driver's licence was cancelled without notice in 1998 and he lost his job. After much time and effort, he was able to get a Class 5 licence, but with restrictions. Eventually in January 2003, he filed a complaint against the government under the British Columbia *Human Rights Code*. He was successful. On April 22, 2004, the Tribunal awarded him over $140,000.00. The dates are important as the *ATA* came into force on May 30, 2004.

The Crown sought judicial review. The judge hearing the petition held that (1) the *ATA* did not apply as it was not in force at the time of the Tribunal decision, and (2) the standard of review was reasonableness, and (3) the Tribunal's decision was reasonable.

The Crown appealed. The Court of Appeal held that the *ATA* applied. The standard of review provisions of the *ATA* were not purely procedural; standards of review have a substantive element in that they define the extent to which the courts, exercising their supervisory authority, may interfere with a decision delegated to the tribunal. However, the right to a specific standard of review is not a "vested right" that belongs to or is in the control of a party.

As the British Columbia *Human Rights Code* does not have a privative clause the Court turned to s. 59 of the *ATA*. To repeat, s. 59 provides:

> 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.

In *Bolster*, the issue, in general terms, was this: For part of the material time, the leading case on discrimination in the context of motor vehicle licensing for individuals with visual disabilities was the decision of the British Columbia Court of Appeal in *Grismer*. That Court held that failing to provide individual functional assessments was not discriminatory. In 1999, the Supreme Court of Canada overturned that decision, and held that failure to provide such a test was discriminatory. In *Bolster*, the Crown argued that for the period the BC Court of Appeal decision was the law, the Crown could rely on the "de facto" doctrine, and to the extent the

Ministry had acted in accordance with the law at the time, it should not be held liable. In that context, what was the question to be determined? Was it law or mixed fact and law?

The Tribunal counsel argued that the issue was the application of the law to the facts, and because of the factual component, the matter fell within the exception to s. 59(1) and under s. 59(2), which provides a standard of review of reasonableness. S. 59(2) provides:

> 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.

The Tribunal argued that the standard of review of correctness for questions of mixed fact and law effectively allowed the Courts – who lack specific expertise in the field of human rights – to determine issues of discrimination. The Tribunal referred to the established body of law that recognized that some deference should be afforded specialized tribunals, even in the absence of a privative clause.

The Court of Appeal concluded that the question was whether the de facto doctrine applied to the facts as found by the tribunal. It was therefore a question of mixed fact and law. Under s. 59 of the *ATA*, questions of mixed fact and law were not "excepted" from the general standard of correctness. The Court found that as a matter of statutory interpretation, the Tribunal's argument could not be sustained.

Bolster provides guidance on the application of the *ATA* and the interpretation of the standard of review provisions of the Act. Effect must be given to the plain language of the *Act*.

2. *Dunsmuir v. New Brunswick* [2008] SCC 9

After British Columbia enacted the *ATA*, the Supreme Court of Canada issued its decision in *Dunsmuir*.

Dunsmuir collapsed the standard of reasonableness simplicitor and the standard of patent unreasonableness into one standard of reasonableness.

> [41] As discussed by LeBel J at length in *Toronto (City) v. C.U.P.E*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of

> patent unreasonableness and *reasonableness simplicitor*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory…
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> …
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> [42] 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*. As LeBel J explained in his concurring reasons in *Toronto (City) v. C.U.P.E.* at para. 108
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> > In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applies is *reasonableness simplicitor* or patent unreasonableness.

Thus *Dunsmuir* eliminated patent unreasonableness as a standard of review.

Under the *ATA*, where the enabling legislation has a privative clause, "(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", but does not define "patently unreasonable". Whether the enabling legislation does or does not have a privative clause, the court is directed not to "set aside a discretionary decision of the tribunal unless it is patently unreasonable", as that term is defined in the *ATA*[1].

Where does that leave BC? Under the *ATA*, decision-makers are statutorily obliged to apply the patent unreasonableness standard to findings of fact and law, but the Supreme Court of Canada has held that any difference between patent unreasonableness and reasonableness is "illusory"

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[1] The *ATA* defines as a discretionary decision as being patently unreasonable if it:

> (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.

and that attempting to apply the patent unreasonable standard is "unpalatable". Should the *ATA*'s reference to patently unreasonable be read as simply "unreasonable".

3. *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12

Khosa provides some guidance on the point, albeit in dicta:

> [19] 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)

Subsequently, a number of decisions grappled with the impact of *Dunsmuir* and *Khosa* on the *ATA*.

A review of three recent decisions involving reviews and appeals of decisions of the Workers' Compensation Appeal Tribunals (WCAT) illustrates the ongoing uncertainty.

4. (i) *Jensen v. Workers' Compensation Appeal Tribunal* 2010 BCSC 266

In this March 1, 2010 decision, the Court reviewed the jurisprudence on the impact of *Dunsmuir* and whether "patent unreasonableness" in the *ATA* had been redefined in the wake of *Dunsmuir*. The Court concluded that the definition had not changed. The legislators had an understanding

of the standard of "patently unreasonable" and that understanding must have come from the common law. As *Dunsmuir* abolished the standard of patent unreasonableness, the definition for the *ATA* must be that immediately prior to *Dunsmuir*.

(ii) *Djakovic v. Workers Compensation Appeal Tribunal* 2010 BCSC 1279

Six months later, on September 10, 2010, the issue was again before the Court in *Djakovic*. The Court followed *Jensen* and found two of the three WCAT decisions in issue to be patently unreasonable, as the standard was understood pre-*Dunsmuir*.

(iii) *Viking Logistics Ltd. v. Workers Compenation Board of British Columbia, Workers Compensation Appeal Tribunal* 2010 BCSC 1340

About two weeks later on September 22, 2010, the issue of the standard of review of WCAT decisions was the subject of the decision in *Viking Logistics Ltd*. The Court referred to the passage in *Khosa* that "the content of the expression" and the degree of deference would be measured "in accordance with general principles of administrative law" and that the meaning of "patently unreasonable" was different post-*Dunsmuir*. The court in *Viking Logistics* concluded it was not bound by the decision in *Jensen* as it appeared that the court in *Jensen* did not have the benefit of the slightly earlier decision in *Pacific Newspaper Group Inc. v. Communications Energy and Paperworkers Union of Canada, Local 2000,* BCSC 1795, which held that the standard of review of patent unreasonableness had changed post-*Dunsmuir*. Applying *Re Hansard Spruce Mills Ltd.*, [1954] 4 DLR 590, the Court held that the earlier decision in *Pacific Newspaper Group Inc.* should be followed.

To this point, there are divergent views on the impact of *Dunsmuir* on the *ATA*. What does this mean? *Viking Logistics* concludes on the issue of standard of review as follows:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the

process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [underlining added in original]

[58] In my view, the *Dunsmuir* description of the common law's broad reasonableness standard bears on the manner in which the court will interpret and apply the statutory patent unreasonableness standard.

[59] From this perspective, "patently unreasonable" in s. 58(2)(a) of the *ATA* stands at the far end of a spectrum of "reasonableness", requiring the greatest deference to the decision under review.

[60] The "patently unreasonable" standard in s. 58(2)(a) requires the tribunal's decision to have rational support. The decision must also, since *Dunsmuir*, fall within a range of outcomes defensible in respect of the facts and the law.

[61] To assess whether the decision is defensible in respect of the facts and the law will require some inquiry into the decision-making process, but the extent of that inquiry will turn on the degree of deference to be afforded in the particular circumstances. This is in part because deference amounts to respecting an outcome without second-guessing the reasoning that reached it. In a sense, this was always the approach to the "patently unreasonable" standard, which differed from the "reasonableness" standard largely in degree and by demanding less of the tribunal's reasons.

[62] In the inquiry in this case, the WCAT's decision should enjoy the high degree of deference that the legislator clearly intended.

[63] In sum, "patently unreasonable", in s. 58(2)(a) of the *ATA*, is not to be simply replaced by "reasonable", because such a substitution would disregard the legislator's clear intent that the decision under review receive great deference. Standing at the upper end of the "reasonableness" spectrum, the "patently unreasonable" standard in s. 58(2)(a) nonetheless requires that the decision under review be defensible in respect of the facts and the law. It is in the inquiry into whether the decision is so "defensible" that the decision will enjoy the high degree of deference the legislator intended.

This post-*Dunsmuir* view of patently unreasonable is different from the pre-*Dunsmuir* view that patently unreasonable means the decision is clearly irrational.

Is this the end of the story?

No.

On October 15, 2010 the Court of Appeal issued its decision in *Coast Mountain Bus Company Ltd. v. National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada)* Local 111, 2010 BCCA 447.

This was an appeal from a judicial review decision from a human rights matter. One of the issues was the standard of review of a question of mixed fact and law. *Bolste*r decided the standard under the *ATA* for questions of mixed fact and law was "correctness". In *Coast Mountain*, the issue was whether that had been changed by *Dunsmuir* and *Khosa*. We understand (although it is not set out in the decision) that the Tribunal argued that where the language permits, the courts should fill in any gaps or ambiguities in the *ATA* by reference to the principles set out in *Dunsmuir*. The Tribunal argued that the standard of review for the questions of mixed fact and law is not expressly dealt with in the *Act*: the question did not fall neatly under either s. 59(2) which deals with "findings of fact" or s. 59(1) which sets the standard of review for matters other than findings of fact. That argument was made and rejected in *Lavender Co-Operative Housing Association v. Ford*, 2009 BCSC 1437, where the Court found there was no "gap" and that the language of s. 59 was clear[2]. The Court of Appeal in *Coast Mountain* held:

> [53] I also agree with the reasons of Gray J. in *Lavender Co-Operative* that *Bolster* has not been overtaken by the decisions in *Dunsmuir* and *Khosa*. *Dunsmuir* dealt with standards of review at common law, and nothing said in that decision related to the interpretation of legislation mandating standards of review, which was the issue in *Bolster*. Although Mr. Justice Binnie referred in *Khosa* to the *Administrative Tribunals Act* and similar legislation, he was making the point that the content of a standard of review stipulated by legislation must be interpreted in the common law context. He was not saying that the common law meaning of a

[2] The appeal of *Lavender Co-Operative Housing* was heard in September 2010. As of the time of writing, the decision of the Court of Appeal has not been given.

> standard of review should affect the interpretation of legislation with respect to the applicable standard of review and, indeed, he observed that effect must be given to the standard of review of patent unreasonableness prescribed by s. 58 despite the fact that this standard of review no longer exists at common law after the decision in *Dunsmuir*.

Unfortunately, the Court of Appeal did not address the second part of *Khosa,* that the degree of deference will "necessarily continue to be calibrated according to general principles of administrative law".

Last words:

On October 28, 2010 the Supreme Court of Canada issued its decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

The Utilities Commission was considering an Energy Purchase Agreement (the "2007 EPA"). Part way through the proceedings, the Carrier Sekani Tribal Council sought to have the scope of the hearing expanded to consider whether the Crown had satisfied its duty to consult First Nations regarding infringement of aboriginal interests.

The Utilities Commission had a hearing on the issue of whether the proceeding should be rescoped and concluded that aboriginal interests could not be infringed by the 2007 EPA. The Commission concluded that there would be no impact on water levels, no physical impact on the Nechako River and its fishery, there was no transfer or change of control of licenses or authorizations, etc. The Commission therefore declined to rescope the proceeding. As regards the standard of review, the Court held:

> [64] Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:
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> > The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. . . Absent error on legal issues, the tribunal may be in a better position to evaluate

> the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness…

…

[65] It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), 2009 SCC 12, [2009] 1 S.C.R. 339. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

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[78] The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act.* Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), 2008 SCC 9, [2008] 1 S.C.R. 190.

[93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the

> organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

The standard of review provisions of the *ATA* have not been expressly incorporated under the *Utilities Commission Act*, and it is not clear how much weight should be given to the reference to the *ATA* in this decision.

Of interest is the passage that a question of mixed fact and law is subject to the reasonableness standard "(understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable)".

Where the *ATA* does not apply, the Courts have imposed a standard of reasonableness for questions of mixed fact and law (see for example, *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, 2008 BCCA 31). Does the statement in *Rio Tinto Alcan* that relying on an incorrect principle of law in a question of mixed fact law means the decision is not reasonable open the door to, in effect, applying a correctness standard of review to the question of law in a question of mixed fact and law?