Lang Michener LLP

The Standard of Review: Simplifying Reasonableness

June 27, 2008

The Supreme Court of Canada recently undertook a major reassessment of the approach courts should employ in reviewing the decisions of administrative tribunals. The Supreme Court's decision will have an impact on a wide variety of administrative tribunals, including securities commissions and labour relations boards.

The Supreme Court had previously held that the appropriate standard of review was to be found on a spectrum. At one end, deference to the decision below was lowest, and the reviewing court would reverse the decision below if it found that it was incorrect. This was known as the "correctness" standard of review. At the other end of the spectrum, where the level of deference was highest, the appeal court would not reverse the decision below unless it found the decision to be "patently unreasonable." Between the correctness standard of review and the patently unreasonable standard lay the standard of "reasonableness *simpliciter*," where deference was moderated.

In *Dunsmuir* v. *New Brunswick*, the Supreme Court departed from this earlier jurisprudence and acknowledged that, "[T]he system of judicial review in Canada has proven difficult to implement." After considering "both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation," the Court concluded that, "There ought to be only two standards of review: correctness and reasonableness." The Court reasoned that:

> The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

In light of these difficulties, the Court chose to effectively collapse the two standards – "reasonableness *simpliciter*" and "patently unreasonable" – into a single standard referred to as "reasonableness." The Court then explained the analytical approach required when applying each of those standards:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

In contrast:

> 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.

The Court also explained what deference means in the context of judicial review:

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does

> not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers… [T]he concept of deference as respect requires of the courts not submission, but a respectful attention to the reasons offered or which could be afforded in support of a decision…
>
> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

The Court then explained the method for selecting the proper standard of review in particular cases. It held that:

> [Q]uestions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

The Court noted that guidance in determining the appropriate standard of review can be found in existing caselaw, and outlined the following factors for courts to consider in determining the standard of review:

- 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).
- The nature of the question of law. 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 two above factors so indicate.

Dunsmuir provides some much-needed reconsideration of the approach to determining the appropriate standard of review of decisions of administrative tribunals. Whether the duality of correctness and reasonableness proves more workable than the spectrum that existed before remains to be seen. One thing is certain, *Dunsmuir* will be a landmark in the evolution of Canadian jurisprudence on the standard of review applicable to administrative tribunals.

Tom Hakemi is a member of the Bar of New York State and is now of a member the Bar of British Columbia. Contact him at **604-691-6852** or thakemi@lmls.com.

This article appeared in InBrief Summer 2008. To subscribe to this publication, please visit our Publications Request page.