Review of Leading Cases: The “Good”, the “Bad” and the “Ugly”

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Themes

- The “Good” - Review of Tribunal Interpretation of Enabling Legislation
- The “Bad” - Reasonableness Review and the Adequacy of Reasons
- The “Ugly” - Constitutional Protection of Tribunal Independence

The “Good”

The Cases

- *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1
- *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7
- *Envision Edmonton Opportunities Society v. Edmonton (City)*, 2011 ABQB 131
- *375850 Alberta Ltd. v. Noel*, 2011 ABQB 218

Background

- Traditional view was that unless protected by a privative clause, a tribunal had to be "correct" in its determinations on both jurisdictional questions and questions of law
- Gradual move to more sophisticated "standard of review" analysis consolidated in *Pushpanathan*, [1998] 1 S.C.R. 982
- Standard of review analysis simplified in *Dunsmuir v. New Brunswick*, 2008 SCC 9

Dunsmuir

- "As we will now demonstrate, questions 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." (para. 51) (emphasis added)

- "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context." (para. 54) (citations omitted, emphasis added)

Celgene

- SCC unanimously upholds Patent Medicine Prices Review Board's determination that it has authority to regulate sales of drug produced by appellant
- "This specialized tribunal is interpreting its enabling legislation. Deference will usually be accorded in these circumstances . . .Only if the Board's decision is unreasonable will it be set aside." (citations omitted) (para. 34) (emphasis added) per Abella, J.

Smith (1)

- SCC rules that ad hoc arbitration committee appointed under *National Energy Board Act* reasonably interpreted and applied its power to award costs

- "Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*". On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity"; (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues ." (para. 26) (citations omitted, emphasis added) per Fish, J.

Smith (2)

- In this case, the Committee was interpreting its home statute. Under *Dunsmuir*, this will usually attract a reasonableness standard of review. And nothing in these reasons or in *Celgene Corporation v. Attorney General of Canada*, represents a departure from *Dunsmuir.* (para. 28) per Fish, J. (citations omitted)
- . . .[P]rinciples of administrative law expressed in jurisprudence and commentary support the position that according deference to an administrative decision-maker's interpretation of its home statute is anchored in the need to respect legislative intent to leave these interpretative issues to certain decision-makers when there is good reason to do so. Most of the time, the reason is that the decision-maker possesses expertise or experience that puts it in a better position to interpret its home statute relative to a court. <u>There is no presumption of expertise or experience flowing from the mere fact that an administrative decision-maker is interpreting its enabling statute</u>. (para. 80) per Deschamps, J., concurring in the result (citations omitted)

Envision Edmonton (1)

- Chief Justice Wittman draws on reasoning in *Smith* and *Celgene* to conclude that Chief Administrative Officer's interpretation of limitation period in s. 233(2) of *Municipal Government Act* should be reviewed using the "reasonableness" standard
- "The fourth factor is the expertise of the tribunal, in this case the Chief Administrative Officer, who must be taken to have some expertise in interpreting the home statute, i.e., the provisions of the **MGA having to do with** petitions and their sufficiency as that person is the only person called upon by the statute itself to make the determinations of sufficiency. " (emphasis in original) (para. 44)

Envision Edmonton (2)

- “At first glance, one might question whether a more principled approach is to have all questions of law decided on the basis of correctness. After all, when courts review questions of law, surely they are capable of giving the correct interpretation of the question and this interpretation in turn can and will guide the administrative decision makers as well as lower courts in future. But that is not the law. The law is that where a statute is capable of more than one reasonable interpretation, the decision maker’s conclusion ought not to be disturbed if it has picked one of them, provided the standard of review is reasonableness, as opposed to correctness.” (para. 46) (emphasis added)

Noel

- Justice Greckol rejects the argument that *Smith* affects prior Alberta Court of Appeal jurisprudence concerning the standard of review of interpretations of the *Alberta Human Rights Act* by Alberta Human Rights Commission tribunals
- Accordingly, the correctness standard was applied to the tribunal's interpretation of the term "employer" in s. 7(1)(b) of the *Act*

The “Good” Implications for Tribunals

- Useful recognition that there is not only one “correct” interpretation of statutes
- Useful recognition of the general value of allowing tribunals to have primary responsibility for the interpretation of their enabling legislation
- Useful acknowledgement that “relative expertise” flows from specialization of functions rather than from personal characteristics of adjudicators

The “Bad”

The Cases

- *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193
- *Walsh v. Council for Licensed Practical Nurses*, 2010 NLCA 11
- *Sussman v. College of Alta. Psychologists*, 2010 ABCA 300
- *Moll v. College of Alberta Psychologists*, 2011 ABCA 110

Background (1)

- Prior to *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, there was no general common law obligation to provide written reasons for a decision
- “The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.” *Baker* (para. 43)
- Post-*Baker* there has been considerable litigation in both the judicial and administrative law setting on what constitutes adequate reasons for decision

Background (2)

- *Dunsmuir v. New Brunswick* 2008 SCC 9
- "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." (para. 47)

Background (3)

- *R. v. R.E.M.*, 2008 SCC 51
- Most recent in a series of SCC decisions addressing adequacy of reasons in criminal context
- Purposes of reasons (para. 11)
  - (1) to tell the parties why a decision was made
  - (2) to provide public accountability for that decision;
  - (3) to permit effective appellate review
- Adequacy of reasons should be viewed in context (paras. 15-41)
- It may not always be able to articulate the basis for credibility assessment with precision (paras. 28-32, 48-51)

Neinstein (1)

- Ont CA rules Law Society Hearing Panel's reasons for finding that appellant was guilty of professional misconduct because of sexual harassment of complainants were inadequate

- "I am dubious about the merits of arguments claiming that reasons for judgment are inadequate. Experience teaches that many of those arguments are, in reality, arguments about the merits of the fact finding made in those reasons. By framing the argument in terms of the adequacy of the reasons, rather than the correctness of the fact finding, an appellant presumably hopes to avoid the stringent standard of review applicable to findings of fact. Despite my scepticism about arguments that allege that reasons are inadequate, I am satisfied that the appellant has demonstrated that the reasons given by the Hearing Panel are so inadequate as to foreclose meaningful appellate review. The inadequacy of the reasons constitutes an error in law requiring an order directing a new hearing." (para. 4) (per Doherty, J.A.)

Neinstein (2)

- “Paragraph 94 is the heart of the Hearing Panel’s reasons with respect to C.T.’s complaint:

  > Taking all of the evidence into consideration, the Panel prefers the evidence of C.T. with respect to material matters. She withstood cross-examination well. There was also independent evidence, as noted, which corroborated her version of the relevant events. While there was contradictory evidence of the lay-out of the Member’s office and related matters, the Panel concludes that this evidence, in itself, was not material to a finding of whether sexual harassment took place. Otherwise, where C.T.’s testimony differs from that of the member, taking all of the evidence into account, and the tendering of it, the Panel prefers hers.” (para. 51)

- Court of Appeal is critical of Panel’s failure to identify what evidence corroborated C.T.’s version of events, why contradictory evidence was not material, or why the Member’s evidence was not believable

Walsh

- Court of Appeal concludes that Council's decision sanctioning nurse for failure to meet professional standards was unreasonable

- "Finally, a summary of the evidence by the tribunal, without more, was insufficient to permit the parties or the courts to ascertain the basis on which it was decided, assuming it was decided, that the evidence was sufficient to meet the balance of probabilities test regarding the applicable standard of practice within the profession. Where there was a difference of view among the witnesses as to the requirement to report this situation, it was incumbent on the tribunal to give some explanation for choosing one view over the other. " (para. 22) per Walsh, J.A. (emphasis added)

- "Applied to a professional discipline case, the requirement for provision of adequate reasons means that the tribunal's reasons must relate to and deal with, explicitly or implicitly, the tribunal's three functions of fact-finding, identification of standards of conduct, and application of those standards to the facts, and they must contain more than a mere recitation of evidence and a conclusion." (para. 34) per Green, C.J.N.L. (concurring)

Sussman

- Court of Appeal relies on *Walsh* in quashing Council's decision that psychologist's personal relationship with patient amounted to professional misconduct
- "In our view, applying an unexplained zero-tolerance policy to this flexible and circumstance sensitive Standard would be inconsistent with the Guideline on which the Appeal Panel relied, and would be unreasonable. If that was not the intent of the Appeal Panel, and their reasoning was something else, it was unreasonable for the Appeal Panel to fail to explain that reasoning." (para. 62) per Coté, J.A. (emphasis added)

Moll (1)

- Court of Appeal majority (per Fraser, C.J.A.) relies on *R.E.M.* in dismissing appeal based in part on alleged inadequacy of Council's reasons for finding that appellant's conduct constituted "unskilled practice"

- "The Council, in confirming the findings of the Discipline Committee, was also alive to the core issues before it. Its reasons, while concise, are cogent and understandable and sufficient to explain why it determined that the findings of the Discipline Committee were reasonable. The Council concluded that Moll's Report contained "multiple misapplied DSM-IV codes". . .. It rejected the argument that Moll offered no professional opinion and gave reasons for so concluding. It inferentially accepted Massey's testimony that opinions on brain dysfunction "could not be supported by the test instruments used". . .. It concluded that the Discipline Committee had reached a reasonable decision on the evidence before it. These reasons too suffice for appellate review." (para. 37) (references to record omitted)

Moll (2)

- Coté, J.A. dissents and finds that Council's reasons are inadequate

- "For convenience, I repeat the Committee's reasons on whether the appellant offered conclusions:

  > this testimony failed the test of agreeing with the judgment of fellow psychologists of good repute and competency. Dr. Massey further testified in his capacity as expert in psychological assessment and report preparation, that Ms. Moll's report contained a competent psycho-educational assessment, if one stripped out all comments on brain function and all neuropsychological content.

  To the extent that the quotation contains the Committee's final **conclusions** about the charge, they are never explained, and so are not really reasons at all. See the *Sussman* decision, *supra*. To the extent that the quotation contains **statements of fact,** they are significantly and demonstrably inaccurate." (emphasis in original) (paras. 126-127)

Implications for Tribunals

- It is critical to identify the relevant issues and provide reasons that are responsive to the issues (*Moll*)
- It may be necessary to particularize the rules or sources of authority the tribunal is relying on in its reasons (*Sussman*)
- “Boilerplate” reasons are unlikely to meet the adequacy standard if reviewed by an unsympathetic court (*Neinstein*; *Walsh*)
- The tribunal’s rationale for making contested factual findings may have to be particularized (*Neinstein*; *Walsh*)
- Credibility assessments may require detailed justification (*Neinstein*)

“Bad” Implications for Tribunals

- Difficult to tell in advance whether reviewing court will use more forgiving *R.E.M.* standard of adequacy of reasons or more searching *Neinstein*, *Walsh* and *Sussman* standards

- Adequacy of reasons review can create significant opportunities to challenge factual findings by tribunals, either on basis that reasons are insufficient to meet standards of fairness or that findings not supported by adequate reasons are unreasonable (*Sussman*)

- Detailed scrutiny of reasons puts pressure on even experienced adjudicators in crafting their reasons (*Neinstein*)

- Detailed scrutiny of reasons may make it very difficult for non-lawyer adjudicators to craft reasons without substantial assistance

- Is the increase in quality control worth the time and effort expended in generating reasons that can withstand review?

The Ugly

Case

- *Saskatchewan Federation of Labour v. Saskatchewan*, 2010 SKQB 390

Background (1)

- Prior to SCC decision in *Canadian Pacific v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, no case law support for proposition that tribunals are entitled to the type of institutional guarantees of independence enjoyed by courts
- In *PEI Judges Reference*, [1997] 3 S.C.R. 3, SCC recognizes unwritten constitutional protection of institutional independence of all provincial court judges

Background (2)

- In *Ocean Port Hotel Ltd. v. British Columbia,* 2001 SCC 52, SCC unanimously rejects extension of constitutional guarantee of institutional independence enjoyed by courts to B.C. Liquor Appeal Board

Ocean Port (1)

- Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. (para. 24) per McLachlin, C.J.C. (emphasis added)

Ocean Port (2)

- ". . . I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government." (para. 33)

McKenzie (1)

- *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCSC 1372

- BC Supreme Court decides that removal of residential tenancy arbitrator without cause on payment of compensation is inconsistent with the constitutional guarantee of judicial independence.

- "The question left unanswered by ***Ocean Port*** was what to make of tribunals that are not "government" decision makers. In finding that tribunals such as the Liquor Appeal Board are not constitutionally required to be independent, the court was addressing a decision-making entity with functions that could not conceivably be folded straight back into the courts, owing to its nature. Its policy-making and policy-driven adjudicative responsibilities are of a type that could only ever be supervised, not performed, by courts." (para. 149)

McKenzie (2)

- “A tribunal, constituted to try issues of law as between private citizens that is equipped with none of the indicia of independence required to ensure impartiality or to engender public confidence or respect, must necessarily run afoul of the unwritten principle of independence identified in the *PEI Reference* and in [*Ell v. Alberta*]. The work of residential tenancy arbitrators is a judicial function that “relates to the basis on which [that] principle is founded.”” (para. 152, quoting *Ell v. Alberta*, 2003 SCC 35)
- Government’s appeal dismissed as moot due to change in structure of residential tenancy arbitration. 2007 BCCA 507
- “At that stage of the proceedings, the statutory interpretation and constitutional issues were clearly moot. The chambers judge's subsequent analysis was unnecessary *obiter dictum*.” (para. 7)

Sask. Federation of Labour (1)

- Sask. Q.B. rejects constitutional challenge to legislation authorizing governmental dismissal of Chair and members of Labour Board following change of government in 2008 election
- “Whatever else *Ocean Port Hotel* decided, it clearly held (at para. 24) that administrative tribunals created for the primary purpose of implementing government policy do not attract constitutional guarantees of judicial independence, written or unwritten, because they do not fulfill the constitutional role of courts.” (para. 24) per Ball, J.

Sask. Federation of Labour (2)

- “In summary, I find that although the [Saskatchewan Labour Relations Board] is an administrative tribunal that exercises quasi-judicial functions, its primary purpose is to formulate and implement policy intended to achieve *The Trade Union Act*’s primary goals and objectives. Those goals and objectives include, at their core, the regulation of labour relations in a manner that will secure fair and reasonable wages, benefits and working conditions for employees while, at the same time, promoting industrial stability. The [Board] is given a wide discretion as to how those goals and objectives should best be achieved. It remains a textbook example of a statutory tribunal which, to parse the language of the Supreme Court of Canada in *Ocean Port Hotel*, spans the constitutional divide between the executive and judicial branches of government. (para. 75) (emphasis added)

The “Ugly” Implications for Tribunals

- Courts reluctant to either acknowledge that unwritten constitutional protection of judicial independence is overextended or accept the logical implication that it applies to adjudicative tribunals
- Courts seeking to avoid the potential for constitutional protection of institutional independence for tribunals mischaracterize the nature of tribunals’ adjudicative role
- Courts fail to draw fundamental distinction between fulfilling “legislative” purpose and fulfilling “governmental” purpose

Conclusion

- “Good” line of authority reinforces role tribunals play in managing the interpretation of their own statutory regimes
- “Bad” line of authority may help correct questionable decisions but overlooks systemic cost of producing reasons that stand up to searching judicial scrutiny
- “Ugly” line of authority mischaracterizes nature of tribunal relationship to government in an effort to avoid the logic of expansive constitutional protection of judicial independence