JUDICIAL REVIEW "THROUGH THE LOOKING GLASS": ISSUE-BY-ISSUE ANALYSIS

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Introduction

Over the last decade, the Supreme Court of Canada has struggled with the right way to approach its "prodigal child": the standard of review.[1] The Court's 2008 decision in *Dunsmuir* made two significant changes to standard of review analysis. First, it eliminated the standard of patently unreasonable, leaving only two: correctness and reasonableness.[2] Second, it made reasonableness the presumptive standard.[3]

The *Dunsmuir* decision did not address whether the same standard of review had to apply to every issue before the Court. The Court's decision in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*[4] addressed this issue and includes a colourful dissent. The majority held that an issue-by-issue analysis of an administrative board's decision was necessary to determine what standard should be applied to each issue. However, Justices Abella and Karakatsanis disagreed with the majority's approach. While each judge wrote her own dissent, both agreed that the process of reviewing individual issues when applying a standard of review analysis was burdensome and unnecessary. Abella J.'s dissent is particularly aggressive, as she suggested that issue-by-issue review of the standard of review promulgates complexity that the Dunsmuir decision was intended to eliminate.

The Majority's Decision

The decision in *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*[5] focuses on whether payments must be made to reproduce certain works subject to the Copyright Act. Much of the decision, however, relates to how standard of review analysis is to be performed.

The majority of the court, led by Rothstein J., began its review of the Copyright Board's decision by confirming that reasonableness is the presumptive standard.[6] After analyzing each issue before the court, the majority applied the reasonableness standard to four of the five issues in question. The Court held that, because of the unusual statutory regime, one issue was a legal question for which the proper standard to apply was correctness.[7]

Dissenting Decisions

Both dissenting judges agreed it was problematic to apply different standards of review to different issues in administrative decisions. However, they differed significantly in their other concerns.

(a) Justice Abella's Dissent

Abella J. branded the majority's approach as a complicating change in the Court's "tectonic" shift in its approach to standard of review.[8] Abella J. expressed concern that the majority's approach erodes the simple framework developed by the Court in *Dunsmuir*, which has already been plagued by a number of exceptions in the brief period since its release.[9] She highlighted two specific concerns.

First, Abella J. emphasized the practical trouble that may result from the majority's segmented approach. Ought the reviewing court intervene only on those issues that were decided unreasonably or incorrectly, or the decision as a whole? Abella J. asks, "just how many unreasonable or incorrect components of a decision [does] it [take] to warrant judicial intervention?"[10] This shift, according to Abella J., would take judicial review "Through the Looking Glass".[11]

Second, Abella J. worried that the majority's approach will increase court interference in the judgments of administrative decision-makers.[12] The greater the number of opportunities to review a decision on correctness, the more likely it is that a court will substitute its own decision.

(b) Justice Karakatsanis' Dissent

Karakatsanis J. agreed with the majority's consideration of the issue requiring review on the correctness standard.[13] However, Karakatsanis J. disagreed with the majority's issue-by-issue approach to the remaining issues.[14] Her view is that, absent exceptional circumstances requiring the application of the correctness standard, the presumptive standard of reasonableness should govern. As a result, a court is not obligated to review each decision on an issue-by-issue basis. Requiring issue-by-issue analysis unnecessarily adds to the length of parties' submissions and the analysis required by the court.[15]

Karakatsanis J.'s dissenting approach of assuming that issues are reviewed on a reasonableness standard would have accorded with the approach in *Dunsmuir*. An applicant who desires review on the correctness standard would be the one to demonstrate its necessity.[16]

Nonetheless, Rothstein J. interpreted Karakatsanis J.'s dissent as internally inconsistent. His view was that by separating the standard applicable to one legal issue, she had in fact performed an issue-by-issue analysis.[17] In Justice Rothstein's view, "[Justice Karakatsanis] has simply done implicitly what [the majority's reasons] do explicitly."[18]

Conclusion

The Court suggested that litigants challenging administrative decisions should take an issue-by-issue approach to argue whether correctness or reasonableness is the appropriate standard to apply to each issue raised. In past articles, we have warned that the Court may be permitting encroachment of the correctness standard after seemingly giving it the death knell in *Dunsmuir*. The decision in *Canadian Broadcasting Corp. v SODRAC 2003 Inc.* continues that trend.

Canadian Broadcasting Corp. v SODRAC 2003 Inc. is useful for those concerned about jurisdictional issues (or other issues reviewable on a standard of correctness) but still prepared to challenge the reasonableness of other substantive portions of a decision. Litigants seeking judicial review can raise issues reviewable on different standards without fear that a single deferential standard will be applied to all of the issues.

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[1] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 185.

[2] *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para. 34.

[3] *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para. 146.

[4] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 2.

[5] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57.

[6] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 35.

[7] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 35.

[8] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 190, 194.

[9] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 190.

[10] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 190; *Mouvement laique quebecois v Saguenay (City)*, 2015 SCC 16 at para. 173.

[11] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 187.

[12] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 191.

[13] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 193.

[14] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 194.

[15] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 194.

[16] *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9 at para. 147.

[17] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 42.

[18] *Canadian Broadcasting Corp. v SODRAC 2003 Inc.*, 2015 SCC 57 at para. 42.

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A Cautionary Note