THE COMPETITION TRIBUNAL CAN BE REVIEWED ON CORRECTNESS

Posted on January 31, 2015

Categories: Insights, Publications

The law on standard of review of administrative decisions is a constantly shifting landscape. Every few years, the Supreme Court of Canada ("**SCC**") rejects discernible trends and recrafts this area of jurisprudence. The SCC's decision in *Tervita Corp. v. Canada (Commissioner of* Competition)[1] is notable for its status as rarely issued competition law merger jurisprudence. However, lawyers who argue administrative matters in Canada's courts and their clients must take notice of the decision for another reason. The SCC has compartmentalized a fresh category of decisions governed by the standard of review of correctness.

Reasonableness Appeared to Govern

Standard of review is the standard applied by the court when reviewing a decision. As an example, in Tervita, the SCC had to consider on what grounds it was appropriate for the courts to interfere with the decision of the Competition Tribunal ("**Tribunal**") on the proper legal tests to be applied under sections 92(1) and 96 of the *Competition Act*.[2]

Archaic distinctions in standard of review between reasonableness *simpliciter*, reasonableness and correctness were eliminated in 2008 by the SCC's decision in *Dunsmuir v. New Brunswick*.[3] Since then, appeal and SCC jurisprudence has trended to affording administrative tribunals deference on a variety of decisions. Decisions were most frequently reviewed for whether they were reasonable or not. One category of decisions afforded deference, and frequently considered for reasonableness, were decisions involving a tribunal's "interpretation of its home statute".

The more strict standard review of correctness was applied to limited categories of decisions. Correctness, at least in name, was on life support.

The benefit to this approach, arising from SCC cases including *Smith*[4] and *Alberta Teachers*[5] and *Canada v. Canada*,[6] was that courts and lawyers could be relatively certain that decisions made by tribunals would be afforded significant deference if questioned in court. This certainty benefitted clients as well, who could consider whether seeking relief from the court was tenable, despite the cloud of deference that would likely blanket the original decision.

Statutory Language Can Result in a Correctness Standard

Tervita lessens that certainty. In Tervita, the majority agreed that a standard of reasonableness presumptively applies. However, that presumption was rebutted. The Tribunal's decision on questions of law would be reviewed on a correctness standard. That is, less deference would be afforded to the Tribunal's determinations about the application of *Competition Act* sections 92 and 96(1).

The majority came to this conclusion because of the language of the appeal provision in the *Competition Tribunal Act*.[9] That provision dictated that a decision or order of the Competition Tribunal on a question of law was to be treated as if "it were a judgment of the Federal Court".[10] The majority held that because this clause directed that the appeal were to be considered as though it originated from a court and not an administrative source, a standard of correctness applied to the Tribunal's conclusions of law.[11] The SCC majority signalled that the legislative intent contained in the Competition Tribunal Act appeal provision rebutted the presumption of reasonableness.

The SCC majority distinguished its other decisions where a reasonableness standard had been applied to a statutory appeal on the basis of the specific language of the appeal provision at issue in those decisions.

A Strong Dissent Solely on Standard of Review

The SCC majority's application of correctness is distinct among recent SCC jurisprudence. Justice Abella, in a frankly worded dissent solely on the issue of standard review, categorized the problem with this distinction:

> [...] judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause — that is notwithstanding legislative wording — when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away — again — at this precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.[12]

Justice Abella also referred to the majority's use of correctness as "an inexplicable variation from our jurisprudence that is certain to engender the very 'standard of review' confusion that inspired this Court to try to weave the strands together in the first place".[13]

Conclusion

It is worth noting that although Justice Abella disagreed with the majority on the standard of review, she agreed with the majority on the outcome. In her view, the Tribunal's interpretation of section 96 of the

Competition Act unreasonable. This demonstrates an unfortunate aspect of adjudication of standard of review, even at the SCC. Parties may be hard pressed to see why the distinction is important if the outcome is the same.

Another interesting aspect of the SCC's use of a correctness standard is the context in which the majority endorsed interfering with the Tribunal's legal conclusions. Two of the three Tribunal members who made the original divestiture order were judicial members of the Tribunal. As a result, it is unlikely that there was any policy concern about who was making the determinations of law that would have encouraged the SCC to apply correctness.

At least for now, the standard of review landscape remains unsettled. Any party seeking a statutory appeal before a reviewing court must consider the statutory language granting the right of that appeal. The question will be whether that statutory language warrants departure from the presumption that reasonableness applies. The standard of correctness is off of life support, for now.

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1 2015 SCC 3 [Tervita]. Our colleagues, James Musgrove, François Tougas and Joshua Chad, are releasing a separate *McMillan bulletin* to discuss the competition law implications of the Supreme Court's decision.

2 R.S.C. 1985, c. C-34, ss. 92, 96.

3 *Dunsmuir v. New Brunswick,* 2008 SCC 9.

4 *Smith v. Alliance Pipeline Ltd*., 2011 SCC 7, [2011] 1 S.C.R. 160.

5 *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

6 *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471.

7 *Tervita, supra* note 1 at para. 35.

8 *Tervita, supra* note 1 at para. 35.

9 R.S.C., 1985, c. 19 (2nd Supp.).

10 *Tervita*, supra note 1 at para. 36, Competition Tribunal Act, ibid., s. 13(1).

11 *Tervita*, supra note 1 at para. 39.

12 *Tervita*, supra note 1 at para. 170.

13 *Tervita*, supra note 1 at para. 171.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.