Looking at the effects of B.C.'s new *Administrative Tribunals Act*

By Dianne Flood

B.C.'s new legislation, the *Administrative Tribunals Act*, SBC 2004, c. 45, has codified the standard of review applicable to the decisions of various B.C. tribunals, effectively focusing judicial review applications on the matters really at issue between the parties: did the tribunal make a reviewable error?

Judicial review is an important element of an effective administrative justice system, ensuring public confidence that tribunals make their decisions within their statutory mandates, fairly and in accordance with the applicable principles of natural justice.

On a judicial review application, prior to considering whether the tribunal erred in making the decision under review, the court is first required to determine the standard to which the tribunal should be held. The answer to that threshold question determines the amount of deference the court applies when reviewing the tribunal's decision for error.

In order to determine the applicable standard of review, the court was required to discern the intent of the legislature on a case-by-case basis, often with little or ambiguous statutory direction. As a result, the courts developed and applied the pragmatic and functional approach, which generated much legal and scholarly debate, but often lacked clearly predictable outcomes. After deciding the complex issue of the standard of review, the court could then consider whether the tribunal erred, which was often quite easily answered. As a result, determining the standard of review often became the focus of judicial review applications, consuming more time and resources than answering the real issue. This, combined with the difficulty in predicting the result, discouraged some persons from accessing judicial review, while others used judicial review to delay resolution of the real issue.

B.C.'s new Act now provides clear and unambiguous legislative direction, simplifying and codifying the standard of review applicable to decisions of a number of B.C. tribunals, by selectively applying one of two distinct legislative provisions to the review of a tribunal's decisions, by adopting the selected standard by amendment to the tribunal's own legislation.

Section 58 of the Act provides that on judicial review of a decision made by a tribunal with specialized expertise recognized by a privative clause, the tribunal's findings of fact, law or an exercise of discretion within its exclusive jurisdiction are not to be interfered with, unless the decision is patently unreasonable. Fairness is the standard to be applied to questions related to the application of the rules of natural justice and procedural fairness, and correctness applied to jurisdictional and constitutional questions.

For certain other tribunals, s. 59 provides that the standard of review is to be reasonableness for findings of fact, patent unreasonableness for exercises of discretion, and fairness for the application of the rules of natural justice and procedural fairness, with the correctness standard to apply to all other questions. Sections 58 and 59 also both set out when a discretionary decision is patently unreasonable.

These provisions will allow the courts to focus on whether a reviewable error was made, enhancing predictability and reducing time and costs for all involved. By using standard, consistent language applied to a number of tribunals, case law will develop that will provide clear guidance for B.C.'s administrative justice sector.

While some have questioned whether setting legislated standards will result in a loss of flexibility, others, including the courts, have commented positively about the new legislated standards.

In *McIntyre v. British Columbia (Employment and Assistance Appeals Tribunal)*, [2005] B.C.J. No. 1808 (BCSC), the court held: "Determining the applicable standard of review has historically involved a complicated and labyrinthine analysis aimed at discovering the legislative intent of the statute creating the tribunal whose decision is being reviewed. Fortunately, in British Columbia, the *Administrative Tribunals Act* has removed the need for this analysis as it statutorily prescribes the appropriate standard of review for tribunals protected by privative clauses and those not so protected."

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And in *Public Service Alliance of Canada, Local 05/20500 v. British Columbia (Labour Relations Board)* [2005] B.C.J. No. 848 (BCSC), the court held: "The ATA [*Administrative Tribunals Act*] codifies the standard of review with respect to those tribunals to which it applies. Moreover, it is clear that the legislative intention in codifying the standard of review was to eliminate the need to engage in a pragmatic and functional analysis and to simplify the complexity of determining the standard of review."

This clarification of the standard of review is only one aspect of the significant recent reforms undertaken by British Columbia to provide an effective and modern administrative justice system, establishing British Columbia as a leader in justice innovation.

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