CANADIAN ADMINISTRATIVE LAW – SAMPLE QUESTION AND ANSWER

Session: Substantive Constraints

Topic: Standard of Review on Appeal from Administrative Tribunal to Court

Recommended time: 2 hours

Score: 100 Marks

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Facts

The Algonquian First Nation (AFN) in Alberta had objected to the renewal of a mining license granted by the Department of Energy to 2nd Century Mining Corp. Their objection was dismissed by the administrative tribunal and AFN has now filed an appeal to the court, in line with the Mines and Minerals Act which provides that the final decision of the Mines and Minerals Tribunal should be appealed to the court.

The main argument of AFN at the Mines and Minerals Tribunal was that the mining activities interfered with their occupation of the land. AFN is not asserting any specific treaty rights but their claim is based solely on the grounds that the mining activity is the cause of substantial environmental degradation, deforestation, toxicity, loss of biodiversity and pollution, thus fuelling climate change and disrupting wildlife and the community's social activities. AFN argued that the particular method of Dual-Wall Reverse-Circulation Drilling adopted by 2nd Century Mining Corp. exacerbates these problems because technological research has shown that the Air Rotary Drilling method is most suited for drilling the AFN's soft sedimentary rock land formation. To this end, they are of the belief that the mining lease should not have been renewed.

2nd Century Mining Corp. argued to the contrary. The company stated that it has been conducting mining and prospecting operations for the past six years on the same land for which a renewal of license is sought, using the same method of drilling. It submitted that the renewal did not expand

the scope of the company's operations and that AFN failed to identify the specific environmental damage that has been occasioned by the company's method of drilling to support the objection. It insisted that AFN has not shown that any of the environmental impacts listed by them will arise as a result of the renewal.

On appeal against the decision of the Mines and Minerals Tribunal, both counsel to AFN and 2nd Century agreed that the issue before the court falls within the recognised exceptions to the presumption of reasonableness stipulated by the SCC in *Vavilov v. Canada*. They both also agree that since the matter is coming to the court in form of an appeal, the standard of appellate review will apply. But they differ on the applicable appellate standard.

In its ruling, however, the Federal Court had concluded that the appellate standard of review does not apply, as per existing jurisprudence. Part of the Court's ruling goes thus:

- However, it is settled law that when a regulation provides for an appeal from the decision of a tribunal to the court, then it is the principles of judicial review that apply, not the appellate standard of review. This issue was one of the major contentions in **Mouvement laïque québécois *v.* Saguenay (City) (2015)**, and the SCC was compelled to make necessary clarifications in view of the confusing jurisprudence from the courts. The SCC observed thus:

  > There are currently two conflicting approaches in the Court of Appeal's case law as regards the standards of review applicable on an appeal from a final decision of the Tribunal. The first approach is to apply appellate standards as if the decision were that of a trial court. The second is to rely on administrative law principles related to judicial review to determine the appropriate standard of review.

- The Court then said that, "Given the current state of the Court of Appeal's case law on this point, it seems to be hard for litigants to understand the rules. Clarification is needed to ensure greater consistency and some predictability".

- After reviewing existing cases, the SCC reiterated that as regards the standards of review applicable when there is an appeal to the court from a final decision of a tribunal, the court must apply only administrative law principles that are related to judicial review to such final decisions of the tribunal. See also **Dunsmuir v. New Brunswick, (2000).**

The court then established that where a statute provides for an appeal from a decision of a specialized administrative tribunal, the appropriate standards of review are, in light of the principles laid down by the SCC, those standards that apply in judicial review cases, not the standards that apply when a matter is on an appeal.

- In the words of the SCC in **Saguenay** (supra), the law is established that "[w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal…"
- See also the following SCC cases: **Association des courtiers et agents immobiliers du Québec v. Proprio Direct Inc., (2008)**; **Dr. Q v. College of Physicians and Surgeons of British Columbia, (2003)**; **Law Society of New Brunswick v. Ryan, (2003)**; **Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc., (2001)**,
- And in addition to this, when administrative law principles are adopted to review the tribunal's decision, a choice must therefore be made between the two applicable standards of correctness and reasonableness. The choice depends above all on the nature of the question being considered.
- The effect of this decision is that the principles of administrative law will apply to an appeal to the court from the decision of a tribunal, irrespective of whether the review by the superior court is by way of an application for judicial review or one that is by way of an appeal to a court of law.
- I therefore hold that the appellate standard does not apply to the facts of this case. It is the correctness standard under the principles of administrative law reviews that will apply here.

Question

The matter is now on appeal. The major point of the appeal is that the Federal Court erred in law when it held that the principles of administrative law will apply to the appeal, and not the appellate standard.

Is the ruling of the Federal Court correct, in your opinion? If yes or no, please provide reasons for your answer.