'Courts have struggled with deference and appropriate intervention'

Battle over ruling may be headed to Supreme Court

BY SHANNON KARI
For Law Times

The scope of a reviewing court's authority to overturn an administrative tribunal that it finds to have erred in its factual conclusions could be headed to the Supreme Court of Canada.

Two of the defendants in a high-profile insider trading prosecution by the Ontario Securities Commission are seeking leave to appeal a decision earlier this year by the Court of Appeal.

The decision in *Finkelstein v. Ontario Securities Commission* upheld the finding that Howard Miller breached the insider trading provisions of the Securities Act.

The Court of Appeal also reversed a decision of the Divisional Court and upheld the original decision by an OSC panel that Francis Cheng had breached the Securities Act.

The Court of Appeal decision, written by Justice David Brown with justices Paul Rouleau and Janet Simmons, found that the Divisional Court had improperly engaged in an "intense parsing" of the OSC panel's ruling as it related to Cheng.

"It over-stepped the proper bounds of appellate review," wrote Brown.

"The function of a reviewing court, such as the Divisional Court, is to determine whether the tribunal's decision contains an analysis that moves from the evidence before it to the conclusion that it reached, not whether the decision is the one the reviewing court would have reached," the Court of Appeal stated.

While the standard of deference on factual findings of an administrative tribunal is clear, the application of this standard can be difficult to interpret, suggests Andrew Matheson, a litigation partner at McCarthy Tetrault LLP in Toronto.

"Courts have struggled with deference and appropriate intervention," says Matheson, who specializes in securities litigation and white collar defence.

"Senior members of the bench [on the Divisional Court panel] said all the right things about deference and yet the Court of Appeal came to a different conclusion. This is a good example of how hard that line is hard to draw."

In fact, in the Divisional Court ruling written by Justice Ian Nordheimer (who has since been elevated to the Court of Appeal), it stresses what a reviewing court is not permitted to do. "Appellate review does not require a minute examination of each piece of evidence or of each witness," wrote Nordheimer, with justices Frank Marrocco and Julie Thorburn concurring. "Reasons are seldom perfect. The real question is whether any such errors are fundamental to the reasonableness of the conclusion reached," the Divisional Court stated.

Bruce O'Toole says the amount of deference shown to the OSC by reviewing courts has 'been very large.'

The OSC panel in its decision about Cheng made a number of factual errors related to the evidence, concluded the Divisional Court.

"The cumulative effect of these errors renders the Panel's conclusion regarding Cheng both an unsafe, and an unreasonable, one."

According to the Court of Appeal, however, it was the Divisional Court that made errors.

"There is a 'standing temptation' for a court conducting a reasonableness review to place itself in the position of the decision-maker of first instance and compare the decision it would have reached with that actually made at first instance. A review of the panel's reasons and the record before it discloses the Divisional Court succumbed to this temptation," the Court of Appeal stated.

Stephen Cavanagh, an Ottawa lawyer, says the conflicting interpretations on how to apply the standard of deference also highlight the difficulty in successfully appealing a decision of an administrative tribunal.

"Figuring out what is reasonable is the challenge," says Cavanagh, who heads Cavanagh LLP and who specializes in professional liability.

"Reasonableness is a pretty low standard," he says.

"At the appellate level, it is challenging. Your focus is not that they got it wrong. You have to show that their conclusion was not even available to them," Cavanagh says.

The Divisional Court decision was significant in the Securities Act context because it was the first time an OSC panel decision "on the merits" had been overturned on appeal, notes Bruce O'Toole, a partner at Crawley MacKewn Brush LLP in Toronto.

"To see it get overturned by the Court of Appeal was upsetting. How can this tribunal be correct 100 per cent of the time?," asks O'Toole, who focuses on securities defence litigation. He was not involved in this case.

The amount of deference shown to the OSC by reviewing courts has "been very large," notes O'Toole. "A finding of insider trading by an OSC panel can have massive professional consequences. But they only have to be reasonable; they do not have to be right," he says.

The impact of the Court of Appeal decision in this case is that a reviewing court should not be "digging down into the inferences that need to be drawn" for there to be a finding of insider trading, O'Toole suggests.

In defending Securities Act prosecutions, he adds that it is now clear that, in nearly every case, the client will have to testify before the OSC panel for there to be any chance of success in an appeal.

"You need to lead strong evidence to counter the commission's evidence. Get your client's side of the story out there and make the panel to deal with it in its reasons. Otherwise, your client's compelled interview is the only thing going in," says O'Toole.

Lawyers for Miller and Cheng declined comment as their leave application to the Supreme Court is pending. **LT**