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Who Gets the Final Say on a Mineral Royalty Calculation? And Some Grumbling on Standard of Review Analysis

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Case considered: *Saskatchewan (Ministry of Energy and Resources) v Areva Resources Canada Inc.*, 2013 SKCA 79

This comment looks at a recent decision of the Saskatchewan Court of Appeal concerning the judicial review of a mineral royalty decision made by Saskatchewan's Minister of Energy and Resources. In *Saskatchewan (Ministry of Energy and Resources) v Areva Resources Canada Inc.*, 2013 SKCA 79, the Saskatchewan Court of Appeal upholds a royalty calculation made by the Minister pursuant to the *Crown Minerals Act*, SS 1984-85-86, c C-50.2 and underlying regulations. I think this case is of interest to ABlawg readers because it involves the judicial review of a mineral royalty decision and it also concerns appellate-level consideration of the standard of review applicable to a ministerial decision – a topic of recent interest in the judiciary and which Professor Olszynski explores in his recent ABlawg post "Of Killer Whales, Sage-grouse, and the Battle Against (Madisonian) Tyranny."

The dispute in this case is straightforward enough. The Minister and Areva disagree on how to calculate the average sale price of non-arm's length uranium sales made by Areva between 2006 and 2009. The governing legislative provision is section 27(3)(a) of the crown mineral royalty schedule attached to the *Mineral Disposition Regulations*, Sask Reg 30/86 which reads:

> 27(3) Subject to section 28 and subsection (5), the fair market value for a sale of uranium that is not at arm's length is deemed to be
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> (a) in the case of uranium that enters a pooled inventory, the average sale price of all arm's length sales of uranium from that pooled inventory in the current royalty year; …

Areva's position was that "average sale price of all arm's length sales" is calculated by adding together the sale price in all arm's length sales contracts and dividing by the number of contracts. The Minister's position was that the calculation involves adding together the total sales revenue in all contracts and dividing by the volume of uranium sold. In other words, the Minister calculated the average sale price as a weighted figure. Pursuant to the Minister's calculation, the sale price in a high volume contract will have more impact on the average sale price calculation than a contract for the sale of less uranium. Presumably the Minister's calculation leads to a higher average sale price and thus more royalty payable by Areva.

The Saskatchewan Court of Appeal decision focuses almost exclusively on the issue of what standard of review should be applied to the Minister's decision. The chambers justice applied the

correctness standard. The Court of Appeal unanimously overturns the chambers justice on this point, and rules the applicable standard of review to apply to the Minister's decision is reasonableness. In other words, the judiciary should defer to the Minister's calculation and only interfere if such decision is unreasonable in the sense it is not transparent or falls outside the boundary of possibilities given the facts and applicable law.

My brief attempt to locate a post-2008 Alberta Court of Appeal decision on this issue was not fruitful. But what I did find tells me there is little doubt the Alberta Court of Appeal would likewise rule that reasonableness is the applicable standard to review a ministerial decision on the calculation of mineral royalties and give plenty of deference to such decision.

The standard of review applicable to a ministerial decision that involves some interpretation or application of its "home" statute(s) seems to be a matter of question these days, notwithstanding that the Supreme Court of Canada attempted to simplify matters on standard of review with its 2008 decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The Saskatchewan Court of Appeal canvasses the recent case law on point (at paras 65-75), concluding the issue is undecided and implicitly suggesting the Supreme Court should address it. The fact that the Court of Appeal provides 116 paragraphs of reasoning on this issue, and splits on why reasonableness is the applicable standard here, tells you that standard of review analysis remains anything but simple these days.

I am surprised by the number of appellate level decisions in Canada that rule correctness is the applicable standard to review a ministerial decision, and I must admit to being somewhat puzzled over why this has become an issue. Once again, it seems we have lost our way on substantive judicial review. The Federal Court of Appeal's decision in *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40, is perhaps responsible for this. Professor Olszynski's recent post succinctly describes how this decision has led to the accepted view that a Minister should not be considered in the same light as an adjudicative tribunal and thus should not enjoy the same presumption of deference when interpreting a "home" statute.

Making distinctions like this between categories of decision-maker in substantive judicial review is, in my opinion, a step in the wrong direction. The primary issue in substantive judicial review should always be what is the nature of the question decided by the administrative decision-maker and who as between the judiciary and the executive or its delegates is best-suited to have the final say in answering it. The category of administrative decision-maker in the case – whether it be cabinet, a minister, or perhaps an adjudicative tribunal – is obviously of some relevance but we should not be making absolute assertions based thereon. To do so will only lead us astray.

Take this case for example. The question at issue involves the methodology by which a mineral royalty payment is calculated. The applicable legislation provides minimal guidance, and leaves it open to some interpretation as to how to calculate "average sale price" of uranium sales made by Areva. One could describe this as a matter of statutory interpretation and/or a discretionary policy decision by the Minister. Either way, should the judiciary have the final say over the Minister of Energy and Resources on how to calculate a royalty payment? I think not, but that would be the result if the Minister's decision were reviewable on the correctness standard.

I think the majority decision in *Dunsmuir* provides some helpful presumptions to employ when it comes to a standard of review analysis. I wish the crucial portions of *Dunsmuir* had been drafted with a bit more clarity, but nonetheless I would have thought the reasoning would do away with litigation on standard of review of the sort in this case.