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Where Are We Going on Standard of Review in Alberta?

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Case Commented On: *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, [2015 ABCA 85](#)

In *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)* the Court of Appeal has upheld an earlier chambers decision of Associate Chief Justice Rooke to set aside an Edmonton assessment review board decision. This ought to have been a fairly routine administrative law case, however the Court of Appeal chose to engage in the fundamentals of judicial review and purports to add a new exception to the presumption of deference I wrote about early in January 2015 on ABlawg (see [Some Thoughts on the Presumption of Deference under the Dunsmuir Framework on Substantive Judicial Review](#)). The Court of Appeal has perhaps also significantly altered the relationship between the superior courts and administrative tribunals in Alberta. I say this because on an initial glance, it is difficult to reconcile the reasoning of the Court of Appeal in this judgment with recent jurisprudence from the Supreme Court of Canada on standard of review generally and the jurisprudence in Alberta which has developed in relation to the Edmonton assessment review board itself. Administrative law scholars and practitioners will no doubt be interested to watch how this unfolds in Alberta.

In [Some Thoughts on the Presumption of Deference](#) I gave a brief overview of the fundamentals at issue in judicial review, and I won't reiterate those at length here. Simply put, a reviewing court must arrive at its conclusion on whether to set aside a tribunal decision taking into account the rule of law which demands a measure of rigor and accountability by administrative tribunals to legal principles, but the court must also respect the intention of the legislature to empower a statutory tribunal to make legal determinations for the area in question. The standard of review chosen by the court speaks largely to which of these considerations it favours in a given case: correctness suggests more concern with the rule of law and reasonableness suggests a court deferential to legislative intent. This is proving to be a difficult exercise, as evidenced by the number of iterations the Supreme Court has given on the standard of review problem over the last couple of decades.

The administrative law issue in this case concerns the Edmonton assessment review board, a statutory tribunal empowered by Part 11 of the *Municipal Government Act*, [RSA 2000, c M-26](#) to hear complaints from city taxpayers on their property assessments, typically arguing the assessed value is too high and should be reduced by the Board. Municipalities in Alberta assess property values every calendar year, and the assessed value for a property determines the amount of property tax payable by the owner to the municipality in a calendar year. In this case the Board

had decided it had the authority under the *Municipal Government Act* to not only dismiss a complaint seeking a reduction in assessed value but also to increase the assessed value of the complainant's property as requested by the City during the hearing. The complainant obtained leave to appeal the Board's decision to the Court of Queen's Bench under section 470 of the *Municipal Government Act*, which provides for a right of appeal on questions of law or jurisdiction with leave of the Court. The Court of Queen's Bench had earlier granted leave to Edmonton to appeal, and in hearing the merits of the appeal Justice Rooke concluded the applicable standard to review the Board's decision was correctness on the basis that the Board's determination that it could increase assessed property value was a true question of jurisdiction – one of the established exceptions to the presumption of deference owed by a reviewing court to a statutory tribunal interpreting its home legislation (see *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, [2013 ABQB 526](#) at paras 18-31). Justice Rooke applied the correctness standard to conclude the *Municipal Government Act* did not provide the Board with jurisdiction to increase the assessed value of a complainant's property at the request of the City and thus set aside the Board's decision (at paras 43-53).

The Court of Appeal dismisses Edmonton's appeal, and thereby upholds Justice Rooke's decision to set aside the Board's decision. The Court of Appeal likewise concludes the applicable standard of review to assess the Board's decision in this case is correctness. Given that the Court of Appeal agreed with Justice Rooke on the applicable standard of review, it isn't clear to me why the Court did not also adopt the jurisdictional analysis provided by Justice Rooke on standard of review – which seems to fit comfortably within the articulated scope of the 'true question of jurisdiction' exception to the presumption of deference (as provided in the leading case *Dunsmuir v New Brunswick*, [2008 SCC 9](#) at para 59).

Instead, the Court of Appeal purports to carve out a surprising new exception to the presumption of deference owed to administrative tribunals. In the context of this case the Court rules that the statutory right of appeal set out in section 470 of the *Municipal Government Act* demonstrates a legislative intent for an intrusive judicial role into municipal property tax assessment, and reasons more generally as follows (at para 24):

Where the Legislature has specifically provided for a right of appeal to the ordinary courts, the Legislature clearly intended that the administrative decision maker make the initial decision, subject to review by the court. As pointed out in Pushpanathan . . . if a correctness review is not applied, this legislative scheme makes little sense. The presence of a statutory right of appeal may not invariably signal a correctness standard of review, but it is clearly enough to displace any presumption that reasonableness applies.

Some readers will observe that many statutes in Alberta create an administrative regime and include a right of appeal to the superior courts. The role of the superior courts to review statutory decisions does not rely on this right of appeal because of the inherent jurisdiction of superior courts to judicially review the exercise of statutory powers. Nonetheless it is common for modern legislation enacted by Alberta and other jurisdictions to provide for a right of appeal from statutory tribunals. If these provisions are viewed as an invitation for judicial scrutiny – as the Court seems to suggest here – then the presumption of deference has just been lost for many administrative tribunals in Alberta. This includes the Alberta Energy Regulator and the Alberta Utilities Commission, whose decisions on energy or power transmission project approvals are subject to a statutory right of appeal in section 45 of the *Responsible Energy Development Act*, [SA 2012 c R-17.3](#) and section 29 of the *Alberta Utilities Commission Act*, [SA 2007 c A-37.2](#)

respectively. This ruling that the presence of a statutory right of appeal rebuts the presumption of deference comes as a real surprise to me.

In a similar vein, the Court of Appeal makes short work of the recent Supreme Court of Canada decisions which have found statutory tribunals have a measure of expertise in providing interpretations of their home legislation and should presumptively be accorded deference in this regard (I reference several of these decisions in [Some Thoughts on the Presumption of Deference](#)). The Court of Appeal concludes that the Edmonton Assessment Review Board does not have expertise relative to the superior courts in interpreting the *Municipal Government Act* (at para 28):

...[T]he relative expertise of the tribunal and the courts is in favour of a correctness standard of review. The statutory scheme allows a taxpayer to complain to the assessment review board. That board's particular expertise and mandate is to review issues relating to the categorization and value of property. It must necessarily interpret the statutes and regulations which cover taxation, but statutory interpretation is not the core of its expertise. The "expertise" of the tribunal is not fully engaged here. In recognition of that, the statute allows appeals on questions of law, with leave. The statute recognizes the expertise of the assessment review boards, but it also recognizes the expertise of the superior courts in the interpretation of taxing statutes. The Legislature has decided not to choose between one kind of expertise or the other; rather the Legislature has created a regime which gains the benefit of both.

The Court reaches this conclusion making no reference to the Alberta case law that suggests the Board is an expert on interpreting its home legislation (see e.g. *Shepherd's Care Foundation v Edmonton (City)*, [2014 ABQB 733](#) at paras 35-43; *Edmonton (City) v Edmonton Composite Assessment Review Board*, [2012 ABQB 439](#) at para 15). This in itself is problematic because the ability to rely on existing precedent to determine the applicable standard of review was arguably the most important contribution of *Dunsmuir* (at para 62) towards simplifying the standard of review analysis in Canadian administrative law. Nor does the Court engage with the jurisprudence on how to decipher the expertise of a statutory tribunal relative to the courts (see e.g. *Canada (Director of Research and Investigation) v Southam*, [1997] 1 SCR 748, [1997 CanLII 385](#) at paras 50-53 and *Dr Q v College of Physicians and Surgeons of British Columbia*, [2003 SCC 19](#) at paras 28, 29).

In [Some Thoughts on the Presumption of Deference](#) I suggested that the blanket use of a presumption of deference risks overlooking the context or subtle wrinkles that arise in the exercise of statutory power. I also observed the concerns set out in concurring opinions at the Supreme Court of Canada which caution against a blanket presumption of deference towards statutory interpretation by administrative tribunals of their home legislation and assert the need for deference to rest on a more principled foundation like demonstrated expertise or familiarity of the tribunal with that legislation. One might suggest the Court of Appeal's findings on expertise here are grounded in these concurring opinions, but we are unfortunately left to speculate in that regard because no explicit connection is made with these opinions, and the Court likewise makes no attempt to reconcile its reasons with earlier decisions of the Court of Queen's Bench that have observed the Board as an expert in interpreting the *Municipal Government Act*.

The Court also notes that there are many assessment review boards operating under the *Municipal Government Act* – since each municipality must have one – and accordingly correctness is the appropriate standard of review to ensure consistency in the interpretation of provisions in the Act (at para 30). I remark on the tension between the need for consistency in administrative tribunal decision-making and the fact that *stare decisis* does not apply to administrative tribunals in [Some Thoughts on the Presumption of Deference](#). Addressing this tension seems to be a growing problem in administrative law and, in my view, is worthy of more judicial scrutiny. Here the Court of Appeal cites *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#), as authority for the proposition that where there are multiple tribunals applying the same statute, and there is a right of appeal on issues of general importance, the standard of review is correctness. However *Rogers Communication* involved shared authority between an administrative tribunal and the superior courts, and Justice Rothstein explicitly stated that the decision concerns situations where the statutory scheme provides for the possibility that both a tribunal and a court may decide the same legal question at first instance (at para 19). So it isn't clear to me how *Rogers Communication* is good authority for establishing the correctness standard here where the issue is determinations by multiple tribunals, not the courts.

The issues of consistency in how administrative tribunals interpret legislation and whether judicial deference must rest on demonstrated – rather than presumptive – expertise are some of the more difficult issues facing substantive judicial review in administrative law post-*Dunsmuir*. Thus I would like to have seen more than just a few paragraphs of analysis from the Court on these points and how they support the standard of correctness in this case. I also think the Court of Appeal should have explained how the *Capilano* decision reconciles with recent jurisprudence from the Supreme Court on standard of review generally and the jurisprudence in Alberta which has developed in relation to the Edmonton assessment review board itself. In the absence of that analysis I think *Capilano* just adds (or returns us) to the confusion in regards to the standard of review in Alberta administrative law.

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