

May 19, 2015

The Application of *stare decisis* in Administrative Decision-Making

By: Shaun Fluker

Case Commented On: *Altus Group v Calgary (City)*, [2015 ABCA 86](#)

In *Altus Group v Calgary (City)*, [2015 ABCA 86](#), the Alberta Court of Appeal confronts the application of *stare decisis* to administrative tribunal decision-making. Some would say it is a truism that statutory decision-makers are not bound by precedent given the fact-intensive and policy-laden nature of their work, and that most tribunal members have little or no substantive legal training. Jurists of Diceyan thought have surely held this position and indeed typically point to the very absence of *stare decisis* in administrative law to bolster their suspicion of and disregard for statutory decision-making and to justify the need for intrusive judicial scrutiny. In modern times, a tribunal seeking to downplay arguments based on precedent might be expected to respond along the lines of “[w]hile our earlier decisions may be relevant and even persuasive in this case, we are not bound by these previous rulings.” But on the other hand, many administrative law practitioners have no doubt appeared before a tribunal who references its earlier decisions and the need for consistency to support a particular ruling. Perhaps all we can say for sure is that the application of *stare decisis* to administrative decision-making is a tricky business.

The need for consistency in administrative decisions is starting to gain some traction in Canadian administrative law at the expense of the traditional rule that a statutory tribunal is not bound by its prior decisions. In particular, this issue has arisen in the context of statutory interpretation by administrative decision-makers. I raised this point earlier in [Some Thoughts on the Presumption of Deference under the Dunsmuir Framework in Substantive Judicial Review](#) wherein I questioned the ruling in *Alberta Treasury Branches v Alberta Union of Provincial Employees*, [2014 ABQB 737](#), that it was lawful for a statutory decision-maker to completely depart from an earlier interpretation of provincial legislation.

In *Altus Group* the Court of Appeal has ruled that while an administrative tribunal is not bound by its previous decisions and is free to adopt any reasonable interpretation of its home legislation in a matter before it, previous interpretations given to that legislation will have some bearing on the reasonableness of the tribunal’s interpretation in a current matter (at paras 16 - 31). Whether this decision is helpful in clarifying the application of *stare decisis* in administrative decision-making is open to question. It seems to me while the Court begins by asserting that *stare decisis* is not applicable to an administrative decision-maker, in the end the Court rules that *stare decisis* does apply to how an administrative decision-maker interprets its home legislation. And since the

vast majority of administrative decisions involve some measure of statutory interpretation, this decision is arguably a significant change from the traditional rule.

The Court observes that little attention has been paid to conflicting statutory interpretations given by administrative tribunals and the need for consistency in statutory decision-making (at para 19). The issue is commonly understood as arising from the conflict between two fundamental norms in public law: (1) the separation of powers doctrine that calls on the judiciary to respect the intention of the legislative branch to empower an administrative tribunal to make legal determinations within its specialized area; and (2) the rule of law that abhors arbitrary decision-making by public officials and calls for similar treatment in legal determinations.

The leading authority on this topic is the Supreme Court of Canada's 1993 decision in *Domtar Inc v Quebec*, [1993] 2 SCR 756, [1993canlii106](#), which ruled that conflicting interpretations by an administrative tribunal of its home legislation does not constitute an independent basis for judicial review. Madam Justice L'Heureux Dubé held that allowing the superior courts to resolve conflicting administrative decisions would inevitably thwart the intention of the legislature to empower administrative decision-making to make legal determinations within its specialization, as jurisprudential conflicts would develop over time in mature administrative regimes and eventually demand intrusive judicial review. The Court stated that any conflicts within administrative law that are truly offside the rule of law should be remedied with legislative action (*Domtar* at 794-800). We might say this decision asserts the norm of curial deference over the rule of law.

This line of authority can be seen in the more recent iterations by the Supreme Court on applying the reasonableness standard to review the interpretation given by an administrative tribunal to its home legislation. Perhaps the most striking illustration of this is the Supreme Court's 2013 decision in *McLean v British Columbia (Securities Commission)*, [2013 SCC 67](#). This case involved a dispute over the interpretation of a provision in the *Securities Act*, [RSBC 1996, c 418](#), given by the British Columbia Securities Commission. In upholding the interpretation provided by the statutory agency, Justice Moldaver stated that there may be competing lawful interpretations of the same legislative provision (at paras 40, 41, emphasis by the Court):

The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to *any* reasonable interpretation adopted by an administrative decision maker, *even if* other reasonable interpretations may exist. Because the legislature charged the administrative decision maker rather than the courts with “administer[ing] and apply[ing]” its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation.

Accordingly, the appellant's burden here is not only to show that her competing interpretation is reasonable, but also that the Commission's interpretation is *unreasonable*. And that she has not done. Here, the Commission, with the benefit of its expertise, chose the interpretation it did. And because that interpretation has not been shown to be an unreasonable one, there is no basis for us to interfere on judicial review — even in the face of a competing reasonable interpretation.

Justice Moldaver applied the modern principle of statutory interpretation to conclude that the interpretations put forward by the Appellant and the Commission were both reasonable given the applicable facts and law, and that the principle of curial deference required the Court to uphold the interpretation given by the Commission rather than adopt the interpretation put forward by the Appellant.

The question more particularly at issue in this post would be whether the Commission is then able to adopt the Appellant's competing interpretation of the *Securities Act* in a subsequent proceeding on similar facts? Is it still the case that the curial deference espoused by Justice Moldaver requires the reviewing court to respect this choice by the Commission as well? One argument would surely be that since both interpretations were seen as reasonable by the Court in the *McLean* case, curial deference (and arguably *stare decisis* itself) requires that both interpretations remain reasonable in any subsequent proceedings. However the rising line of authority that calls for consistency in legal determinations suggests otherwise.

Canadian courts have supported the need for consistency in administrative decision-making on many occasions. The Supreme Court of Canada relied on the need for consistency when it qualified the rule of natural justice that "she who hears decides" by acknowledging the legitimacy of institutional consultations within an administrative agency on specific cases to ensure individual adjudicators or panels of that agency render consistent findings on substantively important topics within their regulatory area (*IWA v Consolidated Bathurst*, [1990] 1 SCR 282, [1990 CanLii 132](#)). More recently in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper*, [2013 SCC 34](#), Justices Moldaver and Rothstein (in dissent) speak of the need for statutory decision-makers to consider prior rulings in their field. *Irving Pulp & Paper* involved the review of an arbitration decision on a labour grievance dispute concerning random drug testing in the workplace, and Justices Moldaver and Rothstein remarked (at paras 77, 78):

Thus no arbitral board is an island unto itself. As it is with the common law, which matures with the benefit of experience acquired one case at a time, so it is with the arbitral jurisprudence. Indeed, in this case, the arbitral board cited multiple prior arbitral awards for the proposition that Mr. Day had a right to privacy in his workplace . . .

Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption – for the parties, labour arbitrators, and the courts – that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law.

This decision and others in this camp assert the rule of law over curial deference. The significance here is that once an administrative tribunal has adopted a particular interpretation of its governing legislation which is found to be reasonable by a reviewing court, the tribunal is no longer free to adopt another interpretation – arguably contrary to what the Supreme Court of Canada suggested in *McLean*. The scope of what amounts to a reasonable decision under the presumption of deference is significantly narrowed once a statutory tribunal has established a body of decisions in its area.

The *Irving Pulp & Paper* decision also illustrates some of the difficulty faced by a reviewing court when it digs into the jurisprudence of an administrative decision-maker. Just how far should a reviewing court dig? In assessing the reasonableness of the board's decision in *Irving*

Pulp & Paper, the majority of the Court found the arbitration board had given careful attention to the consensus of prior arbitral awards in balancing workplace safety and employee privacy (at paras 29-42). In contrast, the dissenting justices held the board departed from that consensus because it held the employer in this case to a higher evidentiary burden without any explanation, and that accordingly its decision was unreasonable because it departed from the jurisprudence without explanation (at paras 98-111). Arguably the *Irving Pulp & Paper* dissent is exactly the sort of intrusive review – guised as deference – that Justice L’Heureux Dubé cautioned against in *Domtar*.

In *Altus Group* the Court of Appeal likewise gives emphasis to the need for consistency in administrative decision-making over curial deference, noting it is difficult to conceive of meaningful legislation that allows for competing, reasonable interpretations (at paras 23-30). The Court concludes:

[W]hile an administrative decision-maker is unconstrained by the principles of *stare decisis* and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellant court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the *appellant court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.* (at para 31, emphasis mine)

Query whether a reviewing court can insist on consistency in administrative decision-making, while remaining true to the principle of curial deference called for under the reasonableness standard in Canadian administrative law? We can begin to see why the application of *stare decisis* to administrative tribunal decision-making is a fundamental problem for Canadian administrative law. Administrative decisions by their very nature usually involve statutory interpretation. As John Willis persuasively observed almost a century ago, the nature of legislative drafting is such that in cases where parties are willing to spend money to argue their case on a statutory provision you can be sure there are at least two compelling interpretations of that provision (John Willis, “Statutory Interpretation in a Nutshell” (1938), 16 Can Bar Rev 1). Thus most administrative decisions will require a statutory tribunal to choose between reasonable, competing interpretations of its governing legislation. How is it then possible to both defer to the interpretation given by a statutory tribunal and also insist on consistency in those interpretations? The real answer is that it is not possible to reconcile these public law norms in the case of statutory interpretation by administrative tribunals. Any attempt to reconcile will either be an application of correctness under the guise of reasonableness or some fudging on whether there is more than one reasonable interpretation of the statutory provision in question.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

