

Fundamental Legal Questions and Standard of Review in Alberta

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Case Commented On: *Stewart v Elk Valley Coal Corporation*, [2015 ABCA 225](#)

The Court of Appeal has issued another strong statement on standard of review and clearly asserts its intention to place boundaries on the application of a presumption of deference in the judicial review (or statutory appeal) of tribunal decisions. Readers may recall my earlier [post](#) where I commented on the direction taken by the Court on standard of review in *Edmonton (East) Capilano Shopping Centres Ltd v Edmonton (City)*, [2015 ABCA 85](#) particularly in relation to the Court's reluctance to defer to the interpretation by a tribunal of its home statute. It has seemed in recent years that the Supreme Court of Canada has come out strongly in favour of deference to legal determinations by statutory tribunals concerning their home legislation, and so the *Capilano* decision struck me as an outlier. The Court's reasoning in *Stewart v Elk Valley Coal Corporation* builds on its earlier *Capilano* judgment and thus further indicates the Court has plans to rework the presumption of deference in judicial review for Alberta.

The problem with these recent decisions isn't so much the Court's desire to curb the presumption of deference and apply correctness to review fundamental legal questions decided in the first instance by a statutory tribunal – this is well within the jurisprudence of *Dunsmuir v New Brunswick*, [2008 SCC 9](#) and seems to make good sense from most perspectives – but rather the ease with which the Court suggests we can decipher fundamental legal questions from the rest of the field in deciding when to apply the presumption of deference and when not to. When exactly is a legal issue 'fundamental' or simply a matter of concern within a particular area? I have doubts this line of reasoning will alleviate whatever seems to be troubling the Court about standard of review. Instead, I think this direction will ultimately take us back to the days when certain tribunals were subject to high judicial scrutiny because they were categorized into an area of fundamental or general concern – eg human rights tribunals – and others whose work was categorized into a specialized field - eg tribunals with more of economic mandate – were subject to less judicial scrutiny. Perhaps we have never left this categories approach, but the Supreme Court of Canada has certainly tried to make this appear like a more principled area of jurisprudence.

Stewart involves the appeal of an Alberta Human Rights Tribunal decision under the *Alberta Human Rights Act*, [RSA 2000, c A-25.5](#) concerning alleged discriminatory action by Elk Valley Coal. I am going to leave the substantive discrimination aspects of this decision to others (my colleague Jennifer Koshan [posted](#) on Justice Peter Michalyszyn's earlier decision at the Court of Queen's Bench ruling in this matter – *Bish v Elk Valley Coal Corporation*, [2013 ABQB 756](#)), and instead focus only on what the Court of Appeal has to say about standard of review in administrative law.

The Court sets out its standard of review analysis in paragraphs 47 to 59, and of note this aspect of the decision is unanimous (Justice Brian O'Ferrall dissents on other portions of the decision). The language chosen by the Court to explain standard of review seems curious to me, or at least

suggests the Court is aware that its direction here will be scrutinized and thus wants to flex some legal muscle. Early on the Court cites Oliver Wendell Holmes – a noted legal realist – and pushes the legislature into the back of the room when it comes to lawmaking (at paras 48, 49). Next the Court describes earlier decisions concerning the test for discrimination under human rights legislation as “common law elaborations of statute” (at para 50). Now I’m not sure exactly what this phrase means, but I do know that some will see it as code for trumping the legislative branch when it comes to lawmaking. And lastly we are reminded that judicial review is “firmly entrenched in our Constitution” (at para 54). I can’t think of why this reminder is necessary here, except to emphasize that the superior courts ultimately trump the legislature in our legal order.

The standard of review analysis in this case is essentially dealt with in paragraph 47 where the Court makes 2 findings that point to correctness: (1) the test for discrimination under human rights legislation is legal issue of general importance to the legal system as a whole (*Dunsmuir* states this attracts correctness at para 60) and (2) jurisdiction over questions concerning discrimination is shared between the superior courts and statutory tribunals (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 35](#) states this scenario of shared jurisdiction attracts correctness at paras 10-20). I also note that Justice Michalyshyn had also canvassed the precedents and determined the standard of review to be correctness when he heard this matter at the Court of Queen’s Bench in 2013 (*Bish v Elk Valley Coal Corporation*, [2013 ABQB 756](#) at paras 14-23).

The appropriate standard of review in this case does not seem particularly contentious in light of the foregoing – until one considers the argument from the Human Rights Tribunal that its determination is entitled to deference based on paragraphs 166 to 168 of the Supreme Court of Canada’s 2013 decision in *Saskatchewan (Human Rights Tribunal) v Whatcott*, [2013 SCC 11](#). It is here where I think you can see the divide between the recent Supreme Court of Canada jurisprudence and the direction of the Alberta Court of Appeal on standard of review. In *Whatcott* the Supreme Court of Canada is also considering the interpretation of human rights legislation by a human rights tribunal and makes short work of the standard of review indicating that the law post-*Dunsmuir* clearly calls for deference to the interpretation by the tribunal of its home legislation on questions within its expertise.

The Court of Appeal appears to be on a mission to curb the presumption of deference as it has been developed by the Supreme Court of Canada and thus cannot avoid some grand theorizing in administrative law here, and this is where the task gets considerably more difficult for the Court and it most certainly cannot be accomplished in the 13 paragraphs devoted to standard of review in this decision. We are given the familiar dichotomy that superior courts get the last word on fundamental points of law and statutory tribunals get the last word on questions of fact (at paras 52-54), and a curious statement to conclude this portion of the judgment (at para 59):

With the Constitutionalization of judicial review as a central feature of the role of the superior courts in the guarantee and enforcement of the rule of law, it may be time for the legal evolution of judicial review / tribunal appeals to reach the stage of a comprehensive rationalization. It may be that due respect for legislative intent is reflected not in semantics or presumptions about what sort of review attends a question of law, but in realistically defining what is a question of law (as compared to exercise of discretion or mixed fact and law).

Apparently the Court abandoned a longer version of this analysis (at para 55), and that is unfortunate because this abbreviated version falls well short of addressing the real problem in administrative law today – the problem that the Supreme Court of Canada has expressed countless times over and with *Dunsmuir* has positioned the presumption of deference as the tool to address it. The problem is simply stated as follows: Develop a principled approach to reconcile traditional accounts of the rule of law with the modern reality that administrative agencies and statutory tribunals who do not operate like or resemble the ordinary courts but who nevertheless occupy a large amount of space in our legal system and cannot avoid making legal determinations in exercising their statutory duties which often implicate individual rights and interests to a greater extent than judicial decisions. It may be that the answer to this problem lies in a more robust understanding of how to separate truly fundamental questions of law from the rest of the field – but it will take plenty more than what we have seen thus far from the Court to sort this out.

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