ADMINISTRATIVE LAW IN 2016:
UPDATE ON CASELAW, RECENT TRENDS AND RELATED DEVELOPMENTS

PART II—AN ADDITIONAL CASE

Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Limited
2016 SCC 47

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW 2016

PART II: ADDITIONAL CASES

In addition to the cases noted in Part I of my annual paper, the following very recent decision by the Supreme Court of Canada also deserves comment.

1. *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Limited*

On 4 November 2016, a sharply divided five-to-four Supreme Court of Canada issued its decision in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Limited.*[1]

The majority's decision was written by Justice Karakatsanis and concurred in by Justices Abella, Cromwell, Wagner and Gascon. The minority's decision was written by Justices Côté and Brown and concurred in by Chief Justice McLachlin and Justice Moldaver.

The majority and the minority differ fundamentally on (a) the standard of review applicable where a statute specifically provides a right of appeal to the courts; (b) whether the four "correctness" categories in *Dunsmuir* are descriptive or exhaustive; (c) whether the presumption that reasonableness is the applicable standard of review when the statutory delegate is interpreting its home statue can be rebutted; (d) whether context is relevant to standards of review analysis, (e) what constitutes "expertise" ; and (f) the concept of "a true jurisdictional question".

1. 2016 SCC 47.

Background

The taxpayer company objected to the City's assessment of its shopping centre. The Assessment Review Board accepted the City's submission that the assessment was too low, and increased it (and therefore the property taxes payable).

Pursuant to the statute, the company applied for and received leave to appeal to the Court on a question of law or jurisdiction—namely, whether the Board's power to "change" an assessment included the power to increase it. In the Court of Queen's Bench, Associate Chief Justice Rooke characterized the issue as a true question of jurisdiction as described in *Dunsmuir*, applied the correctness standard of review, held that the Board lacked jurisdiction to increase the assessment at the City's request, and remitted the matter back to the Board for a *de novo* hearing.

The Court of Appeal[2] unanimously dismissed the City's appeal. Writing for the court, Justice Slatter examined the statutory context and concluded that the legislature intended correctness to be the applicable standard of review when it included the provision for a statutory appeal with leave to the court, although he did not agree that the issue was a "true question of jurisdiction". In reaching his conclusion about legislative intent, Justice Slatter made the distinction between "internal judicial review"—where the legislation includes a right of appeal to the courts—and "external judicial review" at common law which would otherwise be available to review the decision of a statutory delegate. While he recognized that previous jurisprudence established that correctness would not always be the applicable standard of review in every case where there is a statutory right of appeal, he concluded that the correctness standard of review was applicable in this particular case, taking into account

2. Berger, Slatter and Rowbotham JJ.A.

the entire context, including the nature of the statutory regime and the various statutory provisions, the requirement for leave was required for an appeal, the nature of the issue in question which was a question of law which did not fall within the Board's expertise, and the court's determination of the correct interpretation of the Act would be applicable throughout the province and not just in that particular municipality.

The majority's decision

Justice Karakatsanis, writing for the majority, reversed the unanimous decisions below, holding that reasonableness was the applicable standard of review and that the Board's implicit decision that it had authority to increase the assessed value was reasonable.

Following *Dunsmuir*, the majority recognized that precedent might have established the standard of review for the particular type of decision by the statutory delegate. That not being so in the present case, the majority then asserted that the next step was to consider whether the issue involves an interpretation by the statutory delegate of its own statute or a statute closely connected to its function—in which case there is a presumption that the standard of review is reasonableness. The majority justified this presumption as respecting the principle of legislative supremacy in delegating the decision to the tribunal rather than the courts, which fosters access to justice. The majority asserted that this presumption could only be rebutted if the case fell within one of the four categories which *Dunsmuir* recognized as engaging the correctness standard of review.[3]

3. The four categories are: (1) constitutional questions regarding the division of powers; (2) issues of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; (3) true questions of jurisdiction or vires; and (4) issues regarding the jurisdictional lines between two or more competing specialized tribunals. If the issue falls within one of these categories, correctness is the applicable standard of review, and no further analysis is required.

The majority held that there was no "true question of jurisdiction" in the present case. The Board had authority to hear a complaint about a municipal assessment, and the statutory interpretation issue simply arose in the course of carrying out that mandate.

The majority disagreed with Justice Slatter that the existence of the statutory right of appeal in this case should be recognized as an addition or variation of the correctness categories enumerated in *Dunsmuir* because it is an indication that the legislature intended the courts to show less deference than they would in an ordinary application for judicial review. They referred to six recent cases they said were strong jurisprudence to the contrary.[4] They noted the reference in their recent decision in *Saguenay* that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal."[5] The majority also distinguished its decision in *Tervita*[6] on the basis that the statutory appeal provision in that

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4. The six cases are: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. V. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633 (but the majority did not refer to the Court's subsequent decision in *Ledcor Construction Ltd. V. Northbridge Indemnity Insurance Co.,* 2016 SCC 37 which applied the correctness standard of review); *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219. The majority might also have referred to *Pezim*, *Southam* and *Khosa.*

5. *Movuvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 at paragraph 38 *per* Gascon J. The majority also referred to *Dr. Q. v. College of Physicians and Surgeons of British Columbia,* 2003 SCC 19, [2003] 1 S.C.R. 266 at paras. 17, 21, 27 and 36; and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paras. 2 and 21.

   But note that this quote from Justice Gascon refers to the distinction between *Dunsmuir* and *Housen v. Nicolaisen* — the distinction between the principles applicable to appeals in administrative law matters and appeals in the normal litigation process in the courts. However, applying "the administrative law principles" from *Dunsmuir* does not in and of itself determine that the applicable standard of review is reasonableness, rather than correctness—one must go through the *Dunsmuir* analysis in order to determine the applicable standard of review.

6. *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161.

case was unique and treated the statutory delegate's decision as if it were a judgment of the Federal Court (which therefore justified applying the correctness standard of review, as would have been the case if the appeal had in fact been from the Federal Court); *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.

While Justice Karakatsansis acknowleged that the presumption of reasonableness can be rebutted if the context indicates that the legislature intended the standard of review to be correctness,[7] she found no need to examine the context in light of the strong line of jurisprudence applying the reasonableness standard of review to statutory appeals, even those requiring leave.[8] She simply asserted that if a contextual analysis were undertaken, the result would have been the same,[9] without responding in detail to Justice Slatter's analysis of the context that led the Court of Appeal to the opposite conclusion. Finally, she expressed some frustration with the need for analyzing the context in which the particular issue arises:[10]

> [35] I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common.

Justice Karakatsanis then examined the Board's decision, and determined that it was reasonable.

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7. Citing *Saguenay* at para. 46; and *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 3283 at para 16.

8. Paragraph 34.

9. *Ibid.*

10. In British Columbia, the standard of review for a question of law is correctness: s. 59 of the *ATA*.

The minority's decision

Writing for the minority, Justices Côté and Brown would have applied the correctness standard of review because the existence of the statutory appeal clearly indicated the legislature's intention that the courts should provide standardized answers applicable throughout the province to questions of law and jurisdiction. With respect to the merits, the minority would have dismissed the appeal, maintaining the lower courts' setting the Board's decision aside.

With respect to standard of review, the minority emphasized that the overall aim is to discern legislative intent, which is the polar star of this analysis.[11] Taking into account the statutory scheme and the Board's lack of relative expertise in interpreting the law, the minority concluded that the legislature intended that the Board's decisions on questions of law and jurisdiction appealed to the Court of Queen's Bench were to be reviewed on the correctness standard. Even if there were a presumption that the Board's interpretation should be showed deference because it was interpreting its home statute, that presumption is rebutted by clear signals of legislative intent.

In reaching this conclusion, the minority agreed that the mere presence of a statutory right of appeal is not—in and of itself—a new "category" of correctness review. However, an analysis of the context may well indicate that correctness is the appropriate standard of review for *this* question decided by *this* decision-maker. *Dunsmuir* did not limit correctness review to the four categories it gave as examples, but rather recognized that context may indicate the appropriateness of correctness review in other circumstances. Limiting correctness review to those four categories would be pointless formalism.[12]

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11. Citing *C.U.P.E. v. Ontario (Minister of Justice)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149; also *Dr. Q* at para. 26.

12. Paragraph 72.

> Disregard for the contextual analysis would represent a significant departure from *Dunsmuir* and from this Court's post-*Dunsmuir* jurisprudence.

Accordingly, a statutory right of appeal, taken in combination with other contextual factors, may well lead to the conclusion that the proper standard of review is correctness.[13]

The minority disagreed with the majority's assertion that a contextual analysis was not necessary because of the six recent decisions involving statutory appeals where reasonableness was found to be the applicable standard of review. None of those decisions states or even implies that a right of appeal is not a relevant factor in the contextual analysis.[14]

The minority then examined the specific statutory right of appeal in this particular case. It noted that it only applied to a limited range of issues (whereas common law judicial review—"external judicial review"—applied to all other issues, which the legislature must have been aware of). The appealable issues transcend the particular context of a particular disputed assessment, and have broader implications for the municipal assessment regime throughout the province (and not just in that particular municipality). As Justice Bastarache observed in *Pushpanathan*:[15]

> First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" . . . . The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept

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13. *Canada (Citizenship and Immigration) v. Khosa,* 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 55 (*per* Binnie J.). Similarly, in revers, a privative clause is an important indicator of legislative intent for deference.

14. And each case must be decided on its own merits, in its own context.

15. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para.

> decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.

And there were other aspects of the statutory scheme which indicated that the legislature intended the courts to have the final and binding word on questions of law and jurisdiction, as well as need for consistency throughout the province.

Finally, the minority was of the view that the statutory interpretation issue was not within the Board's expertise. While it acknowledged that the notion of "expertise" is the basis (the "catch-all trigger") for the presumption of deferential review of a statutory delegate's application of its home statute, the minority not only noted that the presumption was rebuttable, but also challenged the majority's ignoring or explaining away factors that might rebut it (thereby risking making the presumption irrebuttable). After considering what sorts of things might qualify as "expertise", the minority emphasized that expertise is a relative concept. One cannot assume that the mere creation of an administrative tribunal means that it possesses greater relative expertise in all matters it decides, especially on questions of law. One must examine the particular legislative scheme to determine whether the legislative intent was to recognize the superior expertise of the statutory delegate or the courts with respect to the particular matters forming the subject of the statutory appeal.[16] After examining the particular provisions at issue in this appeal, the minority concluded that the Alberta legislature intended the courts to have the final say on the issues with respect to which the appeal could be taken (that is, that the correctness standard of review should be applied).

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16. In addition, it is possible for the legislature to intend the courts to have the final say (that is, applying the correctness standard of review) even with respect to a matter on which the statutory delegate is undoubtedly an expert. In British Columbia, the legislature has made it clear that in the absence of a privative clause (which is the hallmark of expertise), correctness is the standard of review for all questions of law, regardless of how expert the statutory delegate might otherwise be: sections 58(1) and 59(1) of the *Administrative Tribunals Act*.

The minority also addressed Justice Karakatsanis's concern that a contextual analysis could generate uncertainty and prolonged litigation concerning the applicable standard of review. On the one hand, the minority emphasized that legislative supremacy and the rule of law remain the lode star of the analysis of the context. Further, context remains important once whichever standard of review has been selected; even where reasonableness is the applicable standard of review, the determination of whether the impugned decision is reasonable can only be determined by reference to its context.

Given its analysis, the minority did not find it necessary to determine whether the issue in this case was a "true question of jurisdiction".

The minority then turned their attention to the merits of the appeal. After an extensive review of the structure of the Act and the specifics of its various provisions determined that the Board's decision was incorrect as a matter of law. (The minority did not address the issue of whether, if the reasonableness standard of review were applicable, the Board's decision was also unreasonable, but one can surmise that would have been their conclusion.)

Comments

It will probably not surprise readers who have followed my commentaries over the years that I strongly think that the minority's decision is right, both in principle and in result.

A. What does a statutory right of appeal indicate about the legislature's intention?

- There used to be a time when the presence of a statutory right of appeal indicated the legislature's intention that the courts should have the final word about the matter under appeal. Conversely, the presence of a privative clause indicated the legislature's intention that the courts should defer.

- While the Supreme Court's jurisprudence for the last 15 years or so makes it clear that the presence of a statutory right of appeal does not automatically engage the correctness standard of review,[17] it is not clear how the selection of a deferential standard of review (reasonableness) accords with the legislature's intention in creating the right of appeal.

- At best, the six cases referred to by the majority can only establish precedent with respect to the particular appeal provisions in those particular statutory contexts. They do not—and cannot—establish an iron-clad or irrebuttable rule that the standard of review on every statutory appeal must be reasonableness. Doing that would obliterate any consideration of legislative intent (which is the polar star of judicial review).

- Even if there were a rebuttable presumption that reasonableness is to be the standard of review in any statutory appeal, there would need to be serious discussion of what sorts of circumstances could rebut the presumption. A specific statutory provision specifying that correctness is to be the standard of review? The specific ability of the court to substitute its own decision (or to amend, vary or vacate the impugned decision)? A contextual analysis of the structure and all the relevant specific provisions of the legislation? The practical need for there to be one answer?[18]

- Is there a difference in legislative intent between "internal judicial review" (a statutory appeal and "external judicial review" (residual, inherent, common law judicial review)? Has this distinction been lost by describing a statutory appeal

17. *Southam* and *Pezim*, for example.

18. This case is one example of that need. *Wilson* is another: *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.

as "judicial review"?[19] While both vehicles provide for consideration by the courts, aren't they inherently different, with different implications about legislative intent? The minority clearly understands the distinction, and its consequences, whereas the majority disregards both.

- Surely the minority is right that the mere existence of an administrative tribunal cannot conclusively demonstrate a legislative intent that the courts should defer in all questions (particularly where the legislature has created a statutory right of appeal), or that the administrative tribunal is an "expert" about everything and therefore is entitled deference on all questions.[20]

B. Are the four "correctness" categories in *Dunsmuir* descriptive or exhaustive?

- The judges in *Dunsmuir* clearly contemplated that there were other circumstances in which correctness would be the appropriate standard of review, beyond the four categories they specifically identified as examples. That is why they referred to the need for an analysis of the context—which was perfectly in line functionally with the previous jurisprudence about a pragmatic and functional approach for determining the nature of the issue and legislative intent about the standard of review.

- However, there has been a marked tendency in the Court subsequently to treat those four categories as being exhaustive—if the issue in question does not fit into one of those four categories, that has been the end of the analysis.[21] If the four categories are exhaustive, there is no need for a contextual analysis or to

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19. Going back to *Dr. Q.*

20. Recall Justice Cromwell's comments in *Alberta Teachers Association* that limitations on an administrator's scope of action will most frequently be found in its home statute.

21. *Smith v. Alliance Pipeline*, for example.

even consider legislative intent.

C. Is a contextual analysis ever necessary today?

- The majority short-circuited any contextual analysis when it made its decision about the applicable standard of review—they simply asserted that an analysis of the context would have reached the same result as they did at an earlier stage in the process, namely that the presumption that reasonableness is the applicable standard of review (when the statutory delegate is interpreting its home statute) had not been rebutted.

- But if there is to be such a presumption, then how can it be rebutted if the whole context is not taken into account? How can one assume that an analysis of the context would reach the same result as the presumption, without doing the analysis?

- Justice Karakatsanis's concern that the "conceptual approach" can generate uncertainty and endless litigation concerning standard of review is a cry for specific legislative statements about the intended standard of review, like B.C. has done. That might be desirable, though it runs the risk of casting the current law permanently in concrete (like the *Federal Court Act* did in 1971 when it referred to "judicial or quasi-judicial" functions). However, in the absence of such legislative action, the courts must determine the applicable standard of review in each specific case. Relying on practically irrebuttable rules and closed categories will make the law formalistic, unconcerned with the context of the actual issue before the court in any particular case. While it is true that an analysis of the context takes time and judges may disagree about what to conclude from such an analysis, this is also true about applying either standard

of review. And if reasonableness ever becomes the only standard of review,[22] that will not achieve either certainty or less litigation— there will be every incentive for litigants to take every case up the line in the hope of persuading the next judge that their interpretation is reasonable. Nor will it achieve consistency where there are two or more different reasonable interpretations.[23]

D. What does "expertise" mean?

It is clear that the majority and the minority differ sharply on what constitutes "expertise", which is one of the justifications for deferring to a statutory delegate.

The majority seems to have accepted (without actually holding) that the Board had expertise in interpreting its home statute:

> [33] The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68). As this Court has often remarked, courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" (*McLean*, at para. 31, quoting *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J.).

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22. As Justice Abella suggests in her *obiter* in *Wilson*, which Justice Karakatsanis refers to in the present case.

23. Like in *Wilson* and in the present case.

By contrast, the minority had this to say about expertise:

> [81] In our view the question at issue is not one which falls within the Board's expertise. Indeed, the Board's lack of expertise in statutory interpretation suggests that the legislature would have wanted courts to review Board answers on questions of law on a more exacting standard.
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> [82] We acknowledge that the notion of "expertise" has become a catch-all trigger for deferential review in this Court's jurisprudence, since an administrative decision maker is simply presumed to be an expert in matters regarding the application of its home statute. We wish, therefore, to be clear: our point of departure from the majority is whether the presumption has been rebutted. And we add this: in strengthening the presumption by ignoring or explaining away any factors that might rebut it, the majority risks making this presumption irrebuttable.
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> [83] Despite its prevalence, this presumption of expertise has rarely been given much explanation or content in our jurisprudence: L. Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003), 27 *Adv. Q.* 478, at pp. 490-91; B. Bilson, "The Expertise of Labour Arbitrators" (2005), 12 *C.L.E.L.J.* 33, at p. 41. As McLachlin C.J. explained in *Dr. Q*, expertise "can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone" (para. 29). Some administrative decision makers are required to possess expert qualifications or experience in a particular area as a condition of appointment: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 50-53. Other administrative decision makers may accumulate "a measure of relative institutional expertise" by habitually making findings of fact in a particular specialized legislative context: *Dr. Q*, at para. 29; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1336, per Wilson J. This specific or institutional expertise may command deference, though the question of expertise is "closely interrelated" to the nature of the question that forms the basis of the application for judicial review: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at para. 32. In other words, an administrative decision maker is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional.
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> [85] . . . The majority's view that "expertise is something that inheres in a tribunal itself as an institution" (para. 33) risks transforming the presumption of deference into an irrebuttable rule. Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law. After all, "some administrative decision makers have considerable legal expertise. . . . Others have little or none": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 84, per Binnie J., concurring. Respect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker, or creating an administrative decision maker with expertise in some areas but not others.... We must

> therefore examine the legislative scheme to determine whether the legislative intent was to recognize the superior expertise of the Board or the courts on matters forming the subject of an appeal pursuant to s. 470.

Note that the minority observes that (a) there is a wide variation in the expertise of different statutory delegates; (b) one must determine whether the particular statutory delegate is expert in the particular issue at hand—just because a statutory delegate is an expert in one aspect of its mandate does not necessarily make the statutory delegate an expert about all possible issues that might arise in the course of exercising its mandate; (c) the mere creation of an administrative tribunal does not in and of itself mean that it is an expert; and (d) expertise is a relative concept.

The minority also make the interesting point that one must determine whether the legislature designated and delimited the presumed expertise of a particular administrative decision-maker with respect to a particular matter. Where there is a right of appeal, did the legislature intend to recognize the superior expertise of the statutory delegate or the courts in the matters forming the subject of the appeal? This recourse to legislative intent is, of course, entirely consistent with legislative intent being the polar star to determine the applicable standard of review.

Given the minority's pushback on the majority's blanket concept of expertise, it will be interesting to see how the Court deals with expertise in future cases.

E. "True issues of jurisdiction"

There has been a tendency in the Supreme Court of Canada to try to assume away the concept of jurisdiction—at least since the *Alberta Teachers Association* case.[24] Certainly, there has

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24. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 33-34. See also *Canadian Broadcasting Corporation v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para. 39.

been a tendency to narrow the concept of jurisdiction to issues of *acquiring* jurisdiction, rather than the earlier broader concept of significant errors which could take a statutory delegate outside of the jurisdiction which the legislature conferred on it. This leaves the courts with using the standard of review to justify setting aside such decision as being either unreasonable or incorrect.

However, this leaves an unanswered conceptual question: Precisely what gives the court the ability to set aside a decision which is unreasonable? Where does the court get that authority? In a statutory appeal, that authority might come from the statute itself (if the statute gives the court the authority to confirm, vary or vacate the administrative decision, or if it is a true *de novo* appeal). But if the vehicle is "external judicial review", the courts' power must come from its inherent ability to keep administrative bodies within their jurisdiction. In other words, an unreasonable decision (if that is the applicable standard of review) must be something the statutory delegate has no jurisdiction to make, which is why the courts have authority to set it aside.[25]

While I agree with Justice Dickson's observation in *NB Liquors* in 1979 that one must not quickly characterize something as being jurisdictional in nature when it reasonably could be characterized as being within jurisdiction, that caution does not justify obliterating the concept of jurisdiction. Doing so removes the conceptual foundation for the courts' ability to grant judicial review.

F. Three other points

- Is the majority's decision another example of the court actually applying the correctness standard of review disguised as reasonableness? For example, in

25. And the same conceptual point must apply to justify the courts' ability to set aside decisions where there was procedural unfairness or a breach of natural justice.

paragraph 60, Justice Karakatsanis says: "Properly understood, s. 9(4) does not preclude a municipality from changing its mind about an assessment...."

- Given that the majority say that they are applying the reasonableness standard of review, and that this particular municipality's board's decision was reasonable, what happens if the board of another municipality applies the opposite interpretation? Unless one says that there is only one reasonable interpretation (in which case, there is only one correct interpretation), the second board's different interpretation could not be set aside either. And that would lead to a patchwork across the various municipalities in the province—which, of course, is exactly why the Court of Appeal and the minority in the Supreme Court of Canada focused on the binding and universal effect which the legislature attached to a judgment by the court.

- Note Justice Karakatsanis's discussion of reasonableness review in the absence of reasons, starting at paragraph 36. A failure to give any reasons at all where required to do so may constitute a breach of procedural fairness. If there is no procedural fairness issue (as there wasn't in the present case), the court may itself consider reasons which *could* have been given: *Dunsmuir*. So Justice Karakatsanis reviewed the reasonableness of the Board's decision in light of the reasons which (she thought) could have been offered in support of it.

CONCLUSION

The Court's decision was 5-to-4. Justice Cromwell has now retired. It will be interesting to see whether Justice Rowe will in future cases side with the majority or the minority in *Edmonton East (Capilano).*

dpj

November 14, 2016.