Supreme Court Affirms a Tribunal's "Right to be (really, really) Wrong"

Authors: John Stefaniuk, K.C.

published 04/12/2017

It's tough to appeal a decision of an administrative tribunal. By way of a five-four split decision, the Supreme Court of Canada judgment issued November 4, 2016 in *City of Edmonton* v. *Edmonton East (Capilano) Shopping Centres Ltd.*, made those appeals that much tougher.

Canadian courts have long recognized that tribunals have a "right to be wrong". This used to be in relation to decisions based on facts; courts were reluctant to substitute their own findings so long as a board's decision was not "patently unreasonable" and so long as there was some evidence before the board that would support its decision. After all, the judge was not there to hear the evidence and probably should not be second-guessing.

More recently, that deference was extended to "mixed fact and law" (itself an expanding category) and then, at least to some extent, to a board's interpretation of its governing legislation. The standard was changed to a reasonableness test.

The *Edmonton* decision relates to an assessment appeal for an Edmonton shopping centre property. The owner filed a complaint with the Assessment Review Board. The owner said that the Assessor's $31 Million valuation was higher than the market value of the mall and that it was inequitable when compared to the assessed values of other properties. It was looking for an assessment reduction to $22 Million. The Assessor did not file its own appeal.

When the Assessor got to looking at the owner's submissions to the Board, it found an "error" in its original assessment. Despite not having filed an appeal of its own, it asked the Board to increase the assessed value to $45 Million. The Assessor relied on a provision of the Alberta *Municipal Government Act* that provided that an assessment review board may, upon hearing a complaint, "change" the assessment or "decide that no change is required". The Assessor took the position that this meant a change either upward or downward. The owner (quite reasonably) complained that if the Assessor wanted to increase the assessment, it should have filed its own appeal when it had the chance, and that it was wrong to let the Assessor come in by the back door. The Board decided to increase the assessment to about $41 Million.

The owner successfully appealed this to the Alberta Court of Queen's Bench, which set aside the Board's decision and ordered it to hold a new hearing. The Alberta Court of Appeal

www.tdslaw.com | ©2024 TDS Law. All rights reserved.

agreed. Although the Court of Appeal recognized that courts must give deference to the decisions of administrative tribunals, the gist of its decision was that sometimes a tribunal just has to “get it right”, and that a legal interpretation that is “reasonable” is not always good enough; that it should be “correct”.

After all, administrative law also says that tribunals, unlike courts, are not bound by their past decisions. If one panel interpreted its legislation one way, and a second panel of the same board interpreted it another way, could both decisions stand if they were both “reasonable”, even if they led to opposite results? How, then, could a party predict its chances of success going in to a hearing, or know how to present its case?

The majority of the Supreme Court disagreed with the decisions of the two lower courts. Justice Karakatsanis, writing for the majority, held that courts should give broad deference to the decisions of administrative tribunals. Where an administrative tribunal is interpreting its own governing legislation, then it should be presumed that its decision should not be interfered with so long as it is within a range of decisions that the tribunal could reasonably make (even if the court to which an appeal would be taken might disagree with the interpretation). The theory is that a court should not interfere unnecessarily with matters that have been delegated by the legislature to a more flexible administrative process, heard before an expert tribunal, in a speedier and less expensive decision-making process.

She did place some limits on this deference. Decisions still have to be “correct” when they deal with constitutional divisions of powers between the federal and provincial governments (not something that comes up in your everyday tribunal hearing), issues of law that are outside of the tribunal’s area of expertise *and* that are of central importance to the legal system as a whole; true questions of jurisdiction of the tribunal; and questions as to overlap between the jurisdictions of different specialized tribunals.

One of the fundamental assumptions in her decision is that your typical board or tribunal will have an ”institutional expertise” that goes beyond the specific expertise of its individual members. Here is one area where there may be a gap between the idealized vision of legislative intent and gritty reality.

In my experience, the institutional capacity of different boards and tribunals in Manitoba varies greatly. Some boards do not have formal orientation and training programs, including training in relation to application of their own governing legislation. Some boards are less than ideally equipped to interpret their own governing legislation; neither do they have lawyer members (who, in any case, do not necessarily have expertise related to the subject matter of the tribunal), nor do they have access to board legal counsel to assist them in their considerations. Some board members attend voluntary education sessions put on by organizations like the Manitoba Council of Administrative Tribunals, but that is sporadic and cursory. Many tribunals do not provide detailed written reasons dealing with all of the arguments that are raised in the course of a hearing.

 ©2024 TDS Law. All rights reserved.

In my own experience, I can recall having a conversation with a former member of the Municipal Board who told me that he liked to “saw things off in the middle” on assessment appeals (not quite the same as fulfilling his duty to apply the law to the facts that were presented at a hearing). I have attended a planning approval hearing where I have had to explain to a panel member what *The Planning Act* was, and why I was referring to it. I am reasonably sure that this is not the “institutional expertise” that Justice Karakatsanis had in mind.

The case has generated a good deal of critical commentary in the legal world. One might anticipate some pushback through the lower courts and some judge-made refinement of this approach. Apart from that, the only “fix” is for the Legislature to be more specific as to the scope of appeals that may be taken from administrative tribunal decisions and the breadth of the court’s role on appeal.

In her reasons Justice Karakatsanis referenced the words of Justice Slater, in the Alberta Court of Appeal decision, where he said, “The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review.”. She replied by saying “That day has not come, but it may be approaching”. That approach looks to be slow and distant.

This article was written for, and published in ***Municipal Leader*** *magazine and is reproduced with permission.*

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors’ and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.