IN THE MATTER OF AN APPEAL TO THE MUNICIPAL GOVERNMENT BOARD PURSUANT TO SECTION 690 OF THE MUNICIPAL GOVERNMENT ACT, R.S.A. 2000 CHAPTER M-26, as amended, REGARDING KNEEHILL COUNTY BYLAW 1657

BETWEEN:

WHEATLAND COUNTY

Appellant

- and -

KNEEHILL COUNTY

Respondent

REQUEST THAT THE BOARD CONSIDER NEW EVIDENCE

MERIT HEARING
(NOV, 18 & 19 2014)

SUBMITTED BY
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SUBMITTED TO:

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Solicitor for Badlands Resort
Development Corp.

This submission is made on behalf of the following residents and ratepayers within Wheatland County and Kneehill County:

Lois Melville, Wheatland County Mike Sanderman, Wheatland County Laura Sanderman, Wheatland County Mervin Clark, Kneehill County Della Poulsen, Wheatland County Robert Clive Elliott, Kneehill County Karen McMillan, Wheatland County Mark Lewandowski, Wheatland County Elaine Bellamy, Wheatland County Rick Skibsted, Wheatland and Kneehill Counties Linda Skibsted, Wheatland and Kneehill Counties Richard Clark, Wheatland and Kneehill Counties Wendy Clark, Wheatland and Kneehill Counties Jeanne Skytt, Kneehill County Randall Wiebe, Wheatland County Michael Borwick, Kneehill County Judy Borwick, Kneehill County James Snell, Wheatland County Trevor Aizzler, Wheatland County Renee King, Wheatland County Sarah Penner, Wheatland County George Comstock, Wheatland County Barbara Schlinke, Wheatland County Vincent Andersen, Wheatland County Paul Lassen, Wheatland County Jay Russell, Wheatland County	Leah Hearne, Wheatland County Renita Hamm, Wheatland County Royal Sproule, Wheatland County Brenda Kelemen-Tkachuk, Wheatland County Sue Miller, Wheatland County John Miller, Wheatland County Hans Andersen, Wheatland County Alice Andersen, Wheatland County Trish Lewandowski, Wheatland County Caleb Gordon, Wheatland County Lisa Reinhardt, Wheatland County Darcy Reinhardt, Wheatland County Barry Pallesen, Wheatland County Pauline Pallesen, Wheatland County Dan Gallaugher, Wheatland County Carrie Gallaugher, Wheatland County Jeffrey Skytt, Kneehill County Jaclyn Skytt, Kneehill County Maria G Fanti, Kneehill County Sharon Skibsted, Wheatland County Mark Skibsted, Wheatland County Jacqueline Skytt, Kneehill County Joanne Skibsted, Strathmore AB Roy Kenworthy, Strathmore AB Shauna Kenworthy, Strathmore AB Norma DeBernardo, Nacmine AB N. Christian, Nacmine AB Veronika Christian, Nacmine AB

The foregoing landowners will be individually and collectively referred to as the "Affected Land Owners."

The submission is a formal Request by the Affected Land Owners that the Board Consider New Evidence.

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OVERVIEW

Badlands Recreational Development Corporation ("Badlands") proposes to develop a motorsports resort within the riparian environment of the Rosebud River Valley (**TAB 1**). Included in the development are numerous uses, some of which are described in the Badlands Area Structure Plan and some of which are described in the related direct control ("DC") land use bylaw (Kneehill Bylaw 1657 (**TAB 2**).

Subsequent to the Merit hearing by the Municipal Government Board ('the Board"), but prior to the Board closing the hearing, Kneehill County is proposing to amend the relevant DC land use bylaw (**TAB 3**). The Board left the hearing open specifically for the purpose of potentially considering additional evidence or requesting new information.

The Factual Changes

The uses formerly included in the DC land use bylaw included the discretionary use of "Private Recreation Facility" which, amongst other criteria, restricted use of the land by description and by membership, but is now proposed to be redefined to allow for potentially far more intense use of the lands without restriction as to users.

The present definition:

> "Private Recreation Facility" means an area of land or a building used:
> • where members of a club or group assemble to participate in recreation, social or cultural activities
> • where there are sports, recreation, cultural, or social events for the members of the group
> • where there may be an area for the preparation or consumption of food
> • that may have meeting rooms for the administration of the group
> • where members of the club or group have restricted access to the land or

building through ownership, membership or invitation

The proposed definition:

"Private Recreation Facility" see Recreational, Major"

"Recreational, Major" means a use for a high intensity commercial recreation, sports or amusement where there may be many spectators. An Area Structure Plan or Area Concept Plan may be required. Typical uses my include a golf course, race track, fair/rodeo grounds, commercial equestrian arena, ski hill, Scout/Guide camps, religious outdoor retreat camps, Sport Camps, indoor ice arena, and curling rink." {emphasis added}

Essentially, white has been redefined to mean black.

The second factual change is that the Developer has approached Kneehill County demanding that the County amend its roadway standards to a standard which would be both significantly more expensive to construct and to maintain thereby potentially imposing greater risk to Wheatland County if the DC bylaw is not amended to require roadway construction prior to development commencing. [**TAB 4**]

The Legal Changes

On February 27, 2015, the Alberta Court of Appeal concurrently released two decisions which fundamentally alter administrative law in Alberta with respect to the standard of deference to be shown by superior courts to the decisions of administrative tribunals and imposing a duty on such tribunals to render consistent decisions. These two cases impose substantially different standards of decision making than administrative tribunals were previously required to meet.

Altus Group Limited v Calgary (City) 2015 ABCA 86 [**TAB 5**]

This case specifically considers the relationship of *stare decisis* ('what has been decided

before will be decided again' or 'precedent') and the standard of reasonableness. At paragraph 16 the Court reviews the case law affirming that administrative tribunals are not bound by prior decisions; i.e., that they are not bound by 'precedent' so that the principle of *stare decisis* does not apply.

But, commencing at paragraph 17, the Court analyses why "prior decisions provide important context to the analysis {*of an issue*}". The point being that "Consistent rules and decisions are fundamental to the rule of law." In short, while tribunals are not bound by prior decisions, inconsistent decisions do not result in the rule of law because everyone is to be treated equally under the law.

Similarly, while in theory reasonable decisions can encompass inconsistent decisions (even diametrically opposed decisions?), the Court observed at paragraph 23 that:

> Canadian Courts and commentators have noted the difficulty in accepting two conflicting interpretations by the same administrative tribunal as reasonable. In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law.

The Court concluded (paragraph 31):

> In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate 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.

Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)2015 ABCA 85 [**TAB 6**]

This case is important to administrative tribunals because it considered the criteria indicating whether it was the Legislature's intention that the board in question was required to interpret statutes "correctly" or only "reasonably." The difference is that when administrative tribunals must interpret statutes "correctly," there is only one correct interpretation.

The Court noted that the list of criteria is not intended to be exhaustive but included the following:

1. 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 will apply. [para. 24]
2. Where both the property owner and the municipality can appeal decisions of the tribunal and if, where a matter is sent back to the tribunal, then the tribunal must decide the matter as directed, that is an indication that a correctness standard of interpretation applies. [para. 26]
3. Where one of the standards on an appeal is that the appeal must be of sufficient importance to merit an appeal, then it is apparent the Legislature intends that the matter be of significance to the legal system as a whole so that a correctness standard should apply. [para 27]
4. Statutory interpretation is not a core expertise of tribunals. Therefore, deference to statutory interpretations by tribunal does not apply so that a correctness standard applies. [para 28]
5. Matters of taxation - which criteria does not apply in this case - are entitled to be determined correctly. [para 29]
6. Where there is an administrative regime involving multiple tribunals (panels), it is undesirable that a statute has one meaning in one part of the Province and another meaning in another part. There should be consistency in interpretation and result. [para 30]

While the Municipal Government Board does not meet all of the foregoing criteria, it clearly meets 4 and arguably meets 5 of them. Consequently, in matters of statutory interpretation, it is probable that the Board must meet the standard of "correctness."

The third factor, although it is not new to the hearing but is new to Board generally, is the duty imposed on the Board to adhere to the *South Saskatchewan Regional Plan*. The purposes of a the Alberta Land Stewardship Act are:

Purposes of Act

1 (2) The purposes of this Act are

(a) to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;

(b) to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples;

(c) **to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment**;

(d) **to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.**

{emphasis added}

2009 cA-26.8 s1;2011 c9 s2

Those purposes must now be considered in light of the new standard of review and requirement of consistency imposed on all administrative tribunals by the Court of Appeal's two recent decisions discussed above.

Analysis

Can it reasonably be said that the two following purposes of the *Alberta Land Stewardship Act*

> (c) to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
>
> (d) to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

can be met in light of the increased intensity of use now proposed for the Badlands Motorsports development which development is to occur in an area identified by Kneehill County as environmentally sensitive and lies within a riparian environment of which a significant portion is governed by the *South Saskatchewan Regional Plan*?

In light of the increased intensity of use now proposed for the Badlands Motorsports development and the Developer's apparent threat to sue Kneehill County if it does not alter its existing standard for roadways, can the D.A. Watt Transportation Impact Analysis presented to the Board be relied upon?

If the altered roadway standard involving retaining walls and drainage swales is adopted by Kneehill County, does the increased capital cost make it even more important that roadway construction be required to be completed prior to development of the proposed development?

Conclusion

One of the primary goals of the SSRP is to protect the environment within its boundaries and particularly watersheds (section 4 of the Implementation Plan). Placing "a high intensity

commercial recreation, sports or amusement where there may be many spectators" on three quarter sections of land within an "environmentally significant" essentially undeveloped riparian environment without, as a bare minimum, any investigation of the environmental consequences is clearly contrary to the SSRP, Part 17 of the Municipal Government Act, the Land Use Policies and any relevant good planning principles. The proposed amended DC Bylaw would clearly be contrary to the SSRP's provisions protecting the Rosebud River as well as its wetlands and riparian environment.

When the proposed amendment to the DC Bylaw is considered in light of the precautionary principle, it is submitted that the Board is obligated to prevent the development.

Due to the two Court of Appeal decisions, the Board's decision will now be measured against the standard of correctness.

Ignoring the *South Saskatchewan Regional Plan*, which the Board is legally obligated not to do, the Board must now also question the relevance of the D.A. Watt Transportation Impact Analysis which was not based on the potential for "a high intensity commercial recreation, sports or amusement where there may be many spectators".

Consequently, the new evidence is relevant and material to any decision the Board may make and should therefore be considered by the Board in coming to any decision.

Respectfully Submitted By

Municipal Counsellors
K Hugh Ham, Barrister and Solicitor
on behalf of the Affected Land Owners

TAB 1

Ex 7
Badlands TIA

TAB 2

Land Use Bylaw 1564

As amended January 14, 2014

"Private Recreation Facility" means an area of land or a building used:

- where members of a club or group assemble to participate in recreation, social or cultural activities
- where there are sports, recreation, cultural, or social events for the members of the group
- where there may be an area for the preparation or consumption of food
- that may have meeting rooms for the administration of the group
- where members of the club or group have restricted access to the land or building through ownership, membership or invitation

"Public or Quasi-public Use" means a use of land and/or a building for the purposes of public administration and service and shall also include the use of land and/or a building for the purpose of assembly, worship, instruction, culture, recreation or other community activity.

"Public Utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

(a) water or steam;
(b) sewage disposal;
(c) public transportation operated by or on behalf of the municipality;
(d) irrigation;
(e) drainage
(f) fuel;
(g) electric power;
(h) heat;
(i) waste management;
(j) telecommunications

and includes the thing that is provided for public consumption, benefit, convenience or use.

"Public Utility Building" means a building in which the proprietor of a public utility

(a) maintains its offices, or
(b) maintains or houses equipment used in connection with the public utility.

9. Specific Direct Control District 4

DC4 Location: 172.193 hectares (425.5 acres) in Section 22-27-21-W4M lying north of the Rosebud River and west of Range Road 212.

(1) Purpose

To accommodate a comprehensive motorsports resort as described in the ***Badlands Motorsports Resort Area Structure Plan*** Bylaw #1597, Sections 3.7 (Development Plan Components) through section 3.11 inclusive, and including but not limited to driving courses, maintenance and servicing facilities, recreational services, residential uses, park areas, conservation areas and other uses as deemed appropriate by Council.

(2) Permitted Uses

- ☐ None

(3) Discretionary Uses

- ☐ Accessory Buildings / Accessory Use
- ☐ Automotive and Recreational Vehicle Sales and Rentals
- ☐ Detached Dwelling
- ☐ Drinking Establishment
- ☐ Drive-Through Business
- ☐ Duplex
- ☐ Guest Child Care Facility
- ☐ Hotel / Motor Hotel
- ☐ Motor Vehicle Racing Track
- ☐ Motor Vehicle Servicing, Repair and Storage
- ☐ Multi-Attached Dwellings
- ☐ Office
- ☐ Outdoor Storage Facility
- ☐ Personal Services
- ☐ Private Recreation Facility
- ☐ Public Utility
- ☐ Public Utility Building
- ☐ Recreation Area
- ☐ Restaurant
- ☐ Retail Store
- ☐ Service Station

(4) Conditions of Subdivision or Development

The County shall not endorse a Plan of Survey for Subdivision of the Lands or approve a Development Permit for the Lands until the Developer has first:

- Executed a Development Agreement(s) with the Municipality in form and substance satisfactory to the County at its sole discretion to ensure all subdivision and development of the Lands conforms to the principals upon which this and other pertinent Bylaws are based, and shall address:
  - Construction or payment for the construction of a road or roads required to give access to the subdivision or development;
  - Construction or payment for the construction of a pedestrian walkway system to serve the subdivision or development or a proposed adjacent subdivision;
  - Installation or payment for the installation of public utilities that are necessary to serve the subdivision.
  - Submission to the Municipality of complete plans and specifications, and financial security to the satisfaction of the municipality.
- Submitted to the Subdivision and Development authorities in form and substance satisfactory to the County at its sole discretion the following documents:
  - Environmental Impact Assessment (EIA)
  - Road Access Route and Design
  - Transportation Impact Assessment (TIA)
    - Including all primary and secondary routes to the Plan area in both Kneehill County & Wheatland County
  - Water Supply and Distribution Design Options
  - Comprehensive Site Development Plan
  - Design Guidelines for Architecture, Planning and Landscape Architecture
  - Design Guidelines for Environmental Reclamation and Protection
  - Site Servicing Analysis (Storm, Sanitary, Gas, Power, Cable, Telephone)
- Complied with this or any other condition(s) issued by the subdivision or development authorities.

(5) Development Standards

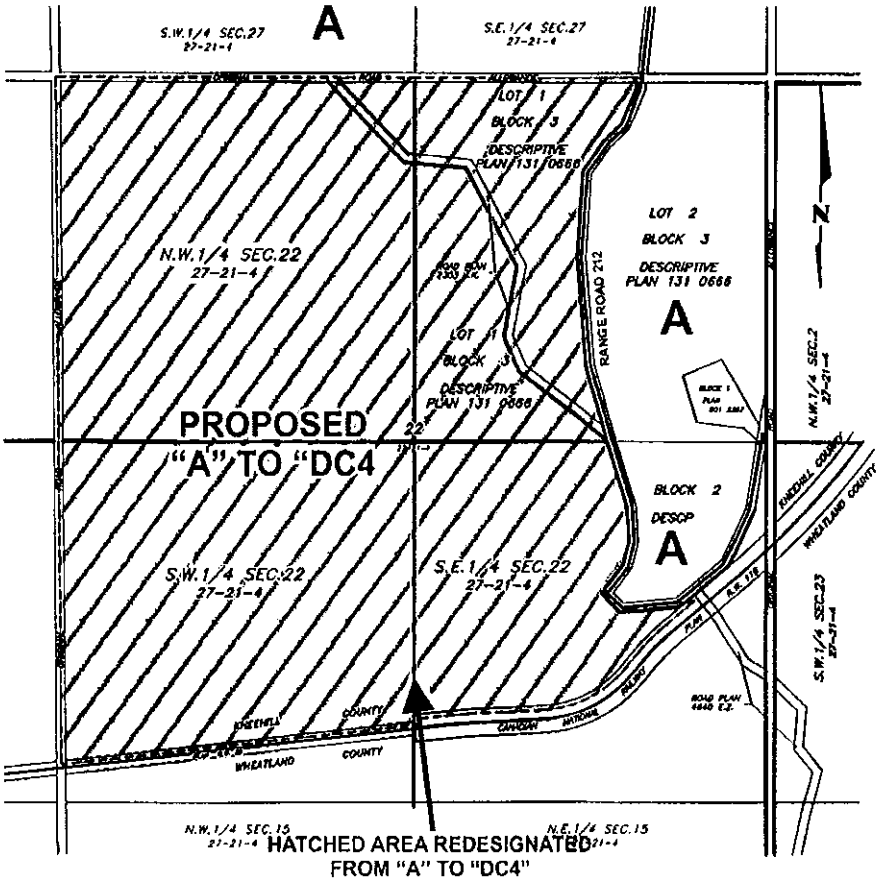
Those standards as further described in Sections 3.7 to 3.14 inclusive and Sections 3.16 and 3.17 of the *Badlands Motorsports Resort Area Structure Plan*, as informed by the Conditions Prior to Development or as approved by Council or its delegate.

(6) Maximum Number of Lots

The maximum number of fee-simple or bareland condominium lots will be determined by Council or its delegate as appropriate for the subject site based on sound planning principles, including but not limited to the Conditions Prior to Development.

(7) Minimum Parcel Size

The minimum parcel size will be determined by Council or its delegate as appropriate for the subject site, based on sound planning principles, including but not limited to the Conditions Prior to Development."



TAB 3

12.18 DC4 – SPECIFIC DIRECT CONTROL DISTRICT

DC4

12.18.1 DC4 Location:

172.193 hectares (425.5 acres) in Section 22-27-21-W4M lying north of the Rosebud River and west of Range Road 212.

12.18.2 Purpose

To accommodate a comprehensive motorsports resort as described in the Badlands Motorsports Resort Area Structure Plan Bylaw #1597, Sections 3.7 (Development Plan Components) through Section 3.11 inclusive, and including but not limited to driving courses, maintenance and servicing facilities, recreational services, residential uses, park areas, conservation areas and other uses as deemed appropriate by Council.

12.18.3 Permitted Uses

(a) None

12.18.4 Discretionary Uses

(a) Accessory Buildings / Accessory Use
(b) Automotive and Recreational Vehicle Sales and Rentals
(c) Detached Dwelling
(d) Drinking Establishment
(e) Drive-Through Business
(f) Duplex
(g) Guest Child Care Facility
(h) **Hotel**
(i) **Motel**
(j) Motor Vehicle Racing Track
(k) Motor Vehicle Servicing, Repair and Storage
(l) Multi-Attached Dwellings
(m) Office
(n) Outdoor Storage Facility
(o) Personal Services
(p) Private Recreation Facility
(q) Public Utility
(r) Public Utility Building
(s) Recreation Area

(t) Restaurant

(u) Retail Store

(v) Service Station

12.18.5 Conditions of Subdivision or Development

(a) The County shall not endorse a Plan of Survey for Subdivision of the Lands or approve a Development Permit for the Lands until the Developer has first:

i. Executed a Development Agreement(s) with the Municipality in form and substance satisfactory to the County at its sole discretion to ensure all subdivision and development of the Lands conforms to the principals upon which this and other pertinent bylaws are based, and shall address:

a. Construction or payment for the construction of a road or roads required to give access to the subdivision or development;

b. Construction or payment for the construction of a pedestrian walkway system to serve the subdivision or development or a proposed adjacent subdivision;

c. Installation or payment for the installation of public utilities that are necessary to serve the subdivision.

d. Submission to the Municipality of complete plans and specifications, and financial security to the satisfaction of the municipality.

ii. Submitted to the Subdivision and Development authorities in form and substance satisfactory to the County at its sole discretion the following documents:

a. Environmental Impact Assessment (EIA)

b. Road Access Route and Design

c. Transportation Impact Assessment (TIA)

d. Including all primary and secondary routes to the Plan area in both Kneehill County & Wheatland County

e. Water Supply and Distribution Design Options

f. Comprehensive Site Development Plan

g. Design Guidelines for Architecture, Planning and Landscape Architecture

h. Design Guidelines for Environmental Reclamation and Protection

i. Site Servicing Analysis (Storm, Sanitary, Gas, Power, Cable, Telephone)

iii. Complied with this or any other condition(s) issued by the subdivision or development authorities.

12.18.6 Development Standards

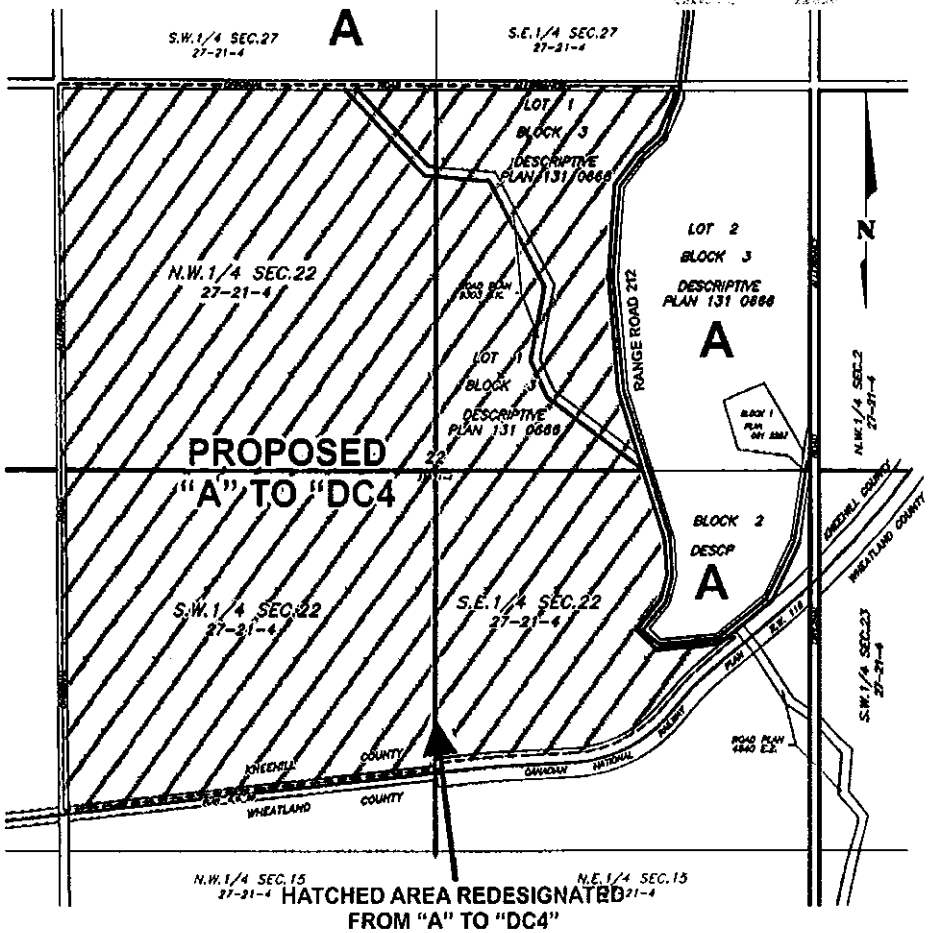
(a) Those standards as further described in Sections 3.7 to 3.14 inclusive and Sections 3.16 and 3.17 of the Badlands Motorsports Resort Area Structure Plan, as informed by the Conditions Prior to Development or as approved by Council or its delegate.

12.18.7 Maximum Number of Lots

(a) The maximum number of fee-simple or bareland condominium lots will be determined by Council or its delegate as appropriate for the subject site based on sound planning principles, including but not limited to the Conditions Prior to Development.

12.18.8 Minimum Parcel Size

(a) The minimum parcel size will be determined by Council or its delegate as appropriate for the subject site, based on sound planning principles, including but not limited to the Conditions Prior to Development."



"Porch" means a roofed Structure projecting from the exterior wall of a Building with walls, which open or are screened to facilitate Use as a seasonal outdoor living area. The projection of Porches into required **Setbacks** is regulated in Section 7.9.

"Portable Storage Container" means a secure, steel/wood structure that is portable in nature (e.g. Sea Can, cargo container, shipping container etc.).

"Principal" means the main or primary use, building, or structure.

"Private Recreation Facility" see **Recreational, Major.**

"Property Line" means a legal boundary of a Lot.

"Property Line, Exterior Side" means a Property Line other than a Front or Rear Property Line and is separating the Lot from the Flanking Street or across route in a bare land strata plan.

"Property Line, Front" means the Property Line separating the Lot from the Street and in the case of a **Corner Parcel** or Through Lot, the Property Line having the shortest length separating the Lot from the Street.

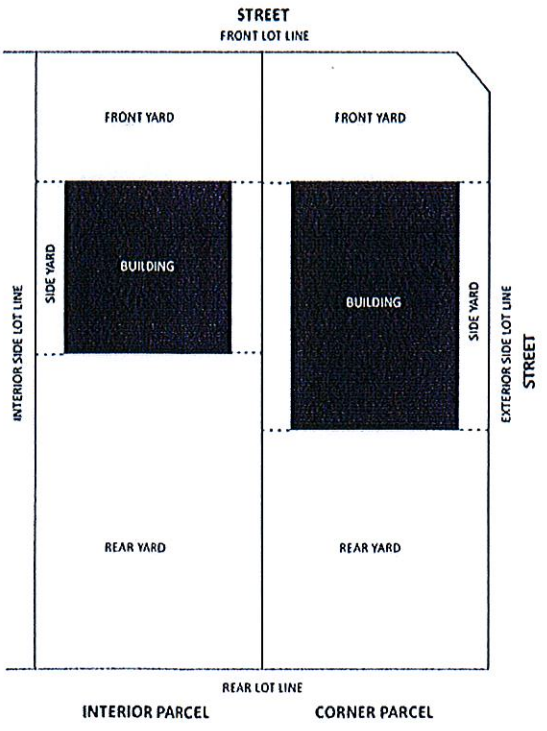
"Property Line, Interior Side" means a Property Line other than a Front, Rear, or Exterior Side Property Line.

"Property Line, Rear" means the Property Line or point of intersection of the Side Property Lines farthest from and opposite to the Front Property Line.

"Public or Quasi-public Use" means a use of land, building, works, equipment system or service own, operated, or enfranchised by the Municipality, Province of Alberta, or Government or Canada.

"Public Utility" means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use and includes the thing that is provided for public consumption, benefit, convenience or use.

- water or steam
- sewage disposal
- public transportation operated by or on behalf of the municipality
- irrigation
- drainage
- fuel



- electric power
- heat
- waste management
- telecommunications
- natural gas

"Public Utility Building" means a building in which the proprietor of a public utility maintains its offices, or maintains or houses equipment used in connection with the public utility.

Q

"Qualified Environmental Professional (QEP)" means individuals with one or more of the following designations or other related environmental professionals able to perform the necessary level of environmental review as appropriate.

- RPBio (Registered Professional Biologist)
- RF (Registered Forester)
- EP (Environmental Professional)
- EPt (Environmental Professional Trainee)
- QEP (Qualified Environmental Professional)
- EPI (Environmental Professional Intern)

R

"Rear Yard" see Yard, Rear.

"Recreation Area" means an area of land used by the public for recreational purposes. Activities may include, but are not limited to walking, running, cycling, horseback riding, cross country skiing, and riding of all terrain vehicles and snowmobiles.

"Recreational Resort" means a commercial development, which allows for leisure and vacation accommodation in association with indoor, outdoor, or passive recreation and other amenities, which form an integral part of the development.

"Recreational, Major" means a use for a high intensity commercial recreation, sports or amusement where there may be many spectators. An **Area Structure Plan** or Area Concept Plan may be required. Typical uses my include a golf course, race track, fair/rodeo grounds, commercial equestrian arena, ski hill, Scout/Guide camps, religious outdoor retreat camps, Sport Camps, indoor ice arena, and curling rink.

"Recreational, Minor" means a use for recreation, sports and amusement where patrons are predominantly participants and any spectators are incidental and attend on a non-recurring basis. Typical facilities would include athletic clubs; health and fitness clubs; outdoor

TAB 4

Feb 11 Three Hills C

@TheCapitalNews

Development Corp. questions

by Debi Hoon

Badlands Development Accuses County of Change to Road Standards

Badlands Recreation Development Corp. representatives, James Zelezo and Leo Kyllo came to Council to discuss what they view as "Changes to Road Standards". They were concerned that a small section of RR 2142, in the vicinity of the Badlands Motorsports site was viable with a less than 30 metre right of way with an engineered solution. "It is impossible to acquire additional land from the adjacent landowner to accommodate a 30 metre right of way along this short section of the roadway in the coulee adjacent to the north entry to the Badlands Motorsports site. Unless the County relaxes the new right of way standard only for this portion of the road, the entire project may be put in jeopardy. Failure would also force us to explore all available options to mitigate our losses, which would be in the millions of dollars. Our review of the schedule (terms), we noted that there have been two changes to the standards that were in place from 2002 until June 24, 2014, which are:

1/ This Minimum standard may only be reduced if written permission by the operations director is received prior to construction commencing.

2/ Minimum right of way (ROW) is 30 Metres.

Council maintains that they (the County) have made no changes to the road standard (with regard to minimum right was already described in cross section road diagrams that Badlands Recreation Corp. possesses. "It has been there in the main county," said CL Hollsworth. "We just clarified it in words, doing the math for you. The pictures are all the same; the math shows under 20 metres, and with the backslope it comes out to 30 metres." The engineering solution to this section of roadway at 20 metres with a 9 metre top and the topography issues, would have to involve a retaining wall.

"We have no authority to rule," said CAO Hoggan. "We are waiting for the ruling of Municipal Government. The hearing is still open and could be indefinite, but realistically, we anticipate something soon."

Finance

Council approved cancellation of arrears and penalties in the amount of $6,700 on tax arrears for two properties (owing prior to August 2012). "We have received a default judgment and a Writ of Enforcement has been filed against the company. Owing to the limitation period, the County has no opportunity to collect taxes and arrears owing prior to 2012, hence the need to cancel these arrears.

The current status of the Canadian dollar has prompted finance to request an amendment to the budget for "Capital Equipment Replacement Budget" for Equipment Vehicle purchases, by the drop in the c amendment is for from Capital Eq

Mirror Director of Corporate Services, "the equipment/vehicle purchases (both replacement and new) for 2015 is still under the total budgeted amount by $37,636.85."

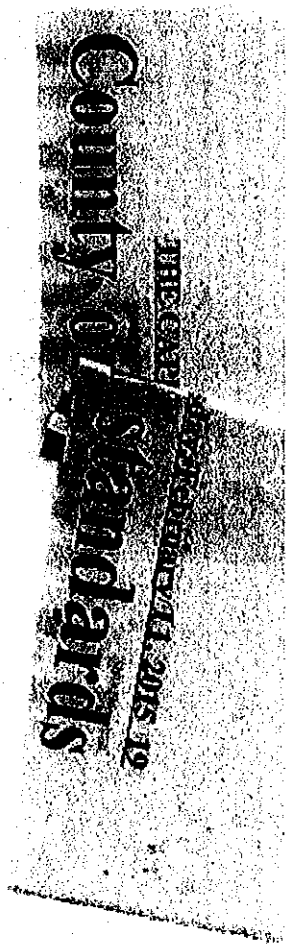
Also, due to the Canadian dollar, a budget amendment, increase of $55,655, for the new additional equipment, was approved, with funds to come from general revenue. This is for a grader, retriever, and packer.

Council gave third reading to authorizing a borrowing By-law 1677 for the years 2015, 2016, and 2017. This is a general practice, as an insurance policy in case it is ever needed for the purpose of financing operating expenditures, but with no intention of having to actually borrow. "Council has passed this bylaw every year dating back as far as 1996," said CAO Hoggan. Mike Morton advised that he was able to get approval for three years at a go, versus having to do this annually.

Council approved sponsorship of the Knechill Minor Hockey - Midget C Provincial Tournament in the amount of $300 (1/2 page ad).

Meetings/Open House

Council has set the date of April 23, 2015 for an open house consultation with ratepayers combining Strategic Plan and Road Plan. The open house would run from 3:30 p.m. to 9:00 p.m. with two



Wed. Feb 4 Three Hills

Kneehill County Counc

(Continued from Page 19)

Spring Meetings

A Strategic Plan for 2015-2018 (Phase I) was also being looked at for adoption. Although not a final document, Council approved the plan and made a motion to defer the date for public consultation to the next Council meeting (Feb. 10). Council was undecided if this public consultation item should be included as part of a rate-payer meeting or as a separate public meeting.

Land Use Bylaw open house March 3

A public consultation meeting date regarding the land use bylaw was scheduled for March 3, as an open house at the County building from 10:00 a.m. until 3:00 p.m. "This is going to be our busiest Spring ever," said Reeve Long. Council also has their spring convention to attend March 16-18 in Edmonton and the 201 Federation of Canadia Municipalities Conferen June 5-8 in Edmonton.

Road Engineer Report fo Badlands Motorsport

"For Information Only" Administration presente Council with an enginee ing report for the portio of a road that leads the Badlands Motorspo Resort. The propose access road north fro Hwy 9, consists of Ran Roads 212, 212A, 213 ar

Wednesday, Feb 4

Wed, Feb 11 Three

BMR ENGINEERING REPORT

7.9 Badlands Motor Sports Engineering Report 22/15

Councillor Hoppins moved that Council receive the R. A. Silvennoinen Engineering Report for the access road proposal for the Badlands Motorsport Resort as information.

CARRIED

Jan 27 Council M

TAB 5

In the Court of Appeal of Alberta

Citation: Altus Group Limited v Calgary (City), 2015 ABCA 86

Date: 20150227
Docket: 1301-0356-AC
Registry: Calgary

Between:

Altus Group Limited on behalf of Various Owners

Cross-Appellant on Cross-Appeal
(Respondent on Appeal)
(Applicant)

- and -

The City of Calgary

Cross-Respondent on Cross-Appeal
(Appellant on Appeal)
(Respondent)

- and -

The Assessment Review Board for City of Calgary

Cross-Respondent on Cross-Appeal
(Not a Party to the Appeal on Appeal)
(Respondent)

- and -

The Minister of Justice, Attorney General for Alberta

Not a Party to the Appeal
(Respondent)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice K.M. Eidsvik
Dated the 22nd day of October, 2013
Filed on the 28th day of November, 2013
(2013 ABQB 617, Docket: 1101-01047)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal and cross-appeal arise from a review of a Local Assessment Review Board (the "ARB decision"), which interpreted a municipal taxation bylaw and assessed business tax against the respondent, a group comprising landlords of commercial office space in the City of Calgary, for the lease of parking spaces to their tenants for the 2010 taxation year. The ARB held that the landlords were liable for business tax, as lease of the parking spaces constituted the use or operation of a "business in premises" within the meaning of s.4 of the City of Calgary Bylaw 1M2010 (the "Bylaw").

[2] An appeal to the Court of Queen's Bench of Alberta was allowed, and the ARB's decision to assess business tax liability against the respondent landlords was cancelled and referred back to the ARB for rehearing.

[3] The question of tax liability at issue in this case is not novel. This court addressed that same issue only two years ago in ***Calgary (City) v Alberta (Municipal Government Board)***, 2012 ABCA 13, 519 AR 259 (the "BTC Decision"). In that case, the Municipal Government Board interpreted the same Bylaw and found that the landlords of commercial space were *not* liable for business tax in connection with the lease of parking spaces to their tenants. On judicial review to the Court of Queen's Bench, a chambers judge found that the Board's decision was reasonable. An appeal to this court was dismissed. The court held that in the context of leased parking facilities, it was reasonable to require that the landlord be "operating a parking business" in the premises in order to assess tax under the Bylaw.

[4] The respondent landlords rely on the BTC Decision and say that the ARB unjustifiably refused to follow that reasoning. The appellant City argues that the BTC Decision is not binding and is inapplicable to assessing the reasonableness of the ARB's decision.

[5] The Bylaw in question provides:

> 4(1) Every person who operates a Business in Premises within the City shall be assessed by the Assessor for the purposes of imposing a Business tax.

II. Judicial History - *Altus Group Ltd v Calgary (City)*, 2013 ABQB 617

[6] On the appeal before the chambers judge, both parties agreed that the applicable standard of review was reasonableness – requiring review of the ARB's interpretation of the Bylaw for justifiability, transparency and intelligibility, and whether the result fell within a range of

reasonable outcomes defensible on the facts and law: (***Dunsmuir v New Brunswick***, 2008 SCC 9, [2008] 1 SCR 190, at para 47; ***Canadian Natural Resources Limited v Wood Buffalo (Municipality)***, 2013 ABQB 91, 230 ACWS (3d) 353 at paras 40-41).

[7] Following a detailed review of the legislation and case law, the chambers judge held that the ARB had erred, in part, by failing to distinguish the BTC Decision and reaching an opposite interpretation of the law without reasonable justification. In so doing, she rejected the City's assertion that the ARB decision was reasonable even though it came to a conclusion opposite to prior authority on point. She explained at paragraphs 83-85 of her reasons:

> The City however suggests that the analysis and opposite result found by the ARB here is defensible as an alternate reasonable decision on the law even though it is opposite to what our Court of Appeal has found to be a reasonable interpretation of the law.
>
> I agree that there is case law that may support such a bold statement in certain situations which I will discuss. However, in my view, this does not apply when you are dealing with a question of law and the interpretation of a section of legislation. The City's position would result in taxation chaos. For example, how can the City or taxpayers budget from year to year if the City's assessment on landlord/tenant parking may change from year to year depending on how an assessment board may chose and apply a test for assessiblity. Surely some clarity in the law would be better for all concerned. In my view, the legislature allowed for an appeal on the law to the Court of Queen's Bench from an ARB Decision in order to guard against such a result.
>
> In my view, the cases cited do not allow administrative boards to come to opposite results when they have failed to identify and misapplied the tests as is the case here – where there is an error of law.

[8] As a result, the chambers judge held that the ARB's decision to impose business tax on the landlords was unreasonable and not within the range of possible acceptable outcomes. The ARB decision was cancelled and the matter returned for rehearing to determine whether the respondent landlords were operating a business in premises, i.e. a business in the parking spaces in question.

[9] The City appeals.

III. Grounds of Appeal

i) Did the chambers judge properly apply the reasonableness standard of review and was she correct in concluding that the BTC Decision should have been followed by the ARB?

ii) Did the fact that the Chambers judge heard both the application for leave to appeal and the appeal itself, and some statements made by her at both hearings, give rise to a reasonable apprehension of bias?

iii) Issue on Cross-Appeal - Whether the chambers judge erred in finding the Bylaw establishing the Calgary Assessment Review Board satisfied the requirement of institutional independence.

Standard of Review

[10] The appeal before us proceeded on the basis that the correct standard of review for the chambers judge to apply to her review of the ARB decision was reasonableness. The chambers judge also agreed that that was the applicable standard of review. That is entirely understandable as that was also the standard of review endorsed by this court in the BTC Decision. The complaint now is that notwithstanding that acknowledgement the chambers judge failed to apply that standard of review.

[11] The concern is this. Since this appeal was argued and these reasons prepared, another panel of the court has heard a case which directly challenged the appropriateness of that standard of review where an assessment review board is interpreting provisions of the *Municipal Government Act*; ***Edmonton East (Capilano) Shopping Centres Limited v. Edmonton (City)*, 2015 ABCA 85,** released contemporaneously with this judgment. Following a thorough analysis and after noting that determination of the appropriate standard of review is in a state of flux and evolution, the court concluded that the appropriate standard of review in such cases is correctness. (para 30). The case before us involves the interpretation of a municipal bylaw, not a provincial statute, but we will leave any debate that may arise from that distinction for another day. Rather than invite further submissions from the parties we will decide this appeal on the basis it was presented, mindful that that standard of review is the most favourable to the appellant. As will be seen the outcome would be the same in any event.

i) Did the chambers judge properly apply the reasonableness standard of review and was she correct in concluding that the BTC Decision should have been followed by the ARB?

(a) Position of the Appellant

[12] The appellant submits that although the chambers judge said she would apply the reasonableness standard, she in fact applied a "disguised correctness" standard in her review of the ARB's decision and by applying the BTC Decision as binding precedent on interpretation of the Bylaw. With respect to the BTC Decision in particular, the appellant submits that it was open to the ARB to accept an alternative interpretation of the Bylaw in determining whether the landlords were operating a business in premises in the parking spaces, as one of a range of reasonable outcomes. Further, the appellant argues that the BTC Decision does not represent the current consensus on the proper interpretation of the Bylaw.

[13] To the extent that there is conflict between the ARB's Decision in this case and the reasoning in the BTC Decision, the appellant maintains that judicial deference requires this court to allow the ARB to resolve that conflict without interference.

(b) Position of the Respondent

[14] The respondent argues that the chambers judge properly identified and applied the reasonableness standard of review in assessing the ARB's decision. In particular, the respondent explains that in referring to the governing law, the chambers judge was required to consider the divergence from the BTC Decision and whether the ARB's interpretation of the Bylaw was reasonable in that context. In this respect, according to the respondent, the reasonableness standard requires a review of both the ARB's decision-making process and the merits of its decision.

[15] The respondent concedes that an administrative tribunal is entitled to deference and may choose from any reasonable interpretation that its home legislation may bear. However, in the face of jurisprudence that has supported an alternative interpretation of the law, the respondent argues that it was incumbent on the ARB to explain why, on the same facts and legislative provisions, its opposite conclusion was also reasonable. In failing to complete this path of reasoning or otherwise supporting their conflicting interpretation of the law, the respondent submits that the ARB decision is unreasonable and cannot stand.

c) Analysis

***Stare Decisis* and the Standard of Reasonableness**

[16] Strictly speaking, an administrative tribunal is not bound by its previous decisions or the decisions of its predecessor: ***Irving Pulp & Paper Ltd v LEP, Local 30***, 2013 SCC 34, [2013] 2 SCR 458 at para 6; ***Halifax Employers Assn v International Longshoremen's Assn, Local 269***, 2004 NSCA 101, 243 DLR (4^{th}) 101 at para 82, leave to appeal to SCC refused, [2004] 334 NR 197. Where numerous reasonable interpretations exist, the administrative tribunal may change its consensus or policy with respect to which one it will adopt. There is no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact situations: ***Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2012 ABCA 78, [2012] AWLD 2212 at para 39.

[17] Similarly, even where an appellate court has found one interpretation to be reasonable, that decision will not necessarily bind a future administrative tribunal considering the legislation afresh. Sara Blake summarizes this point in her text, *Administrative Law in Canada*, 5d ed (Markham: LexisNexis Canada Inc, 2011) at pages 140 – 141.

> If, in another case, a court determined the correct interpretation of a statutory provision, the tribunal must apply the court's interpretation. However, if a court has

merely upheld an earlier tribunal interpretation of the provision as reasonable, the tribunal need not follow that interpretation if it prefers another interpretation that is also reasonable.

[18] Nevertheless, prior decisions provide important context to the analysis. In ***Irving Pulp & Paper***, the Supreme Court dealt with arbitral decisions of the Labour Board and the interpretation of a collective agreement. The majority referred to existing precedents as a "valuable benchmark against which to assess the arbitration board's decision" (at para 6). Rothstein and Moldaver JJ., (in dissent, with McLachlin C.J.C. concurring), went on to explain this point in agreement with the majority's comment (at paras 75, 78).

> The context of this case is informed in no small part by the wealth of arbitral jurisprudence concerning the unilateral exercise of management rights arising under a collective agreement in the interests of workplace safety. We will say more about the "balancing of interests" test that has emerged from that jurisprudence in a moment, but for now the salient point is that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*. In that regard, we agree with our colleague, Abella J., who describes this "remarkably consistent arbitral jurisprudence" as "a valuable benchmark against which to assess the arbitration board's decision in this case" (paras. 16 and 6).
>
> ...
>
> 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. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332:
>
> > This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. [Emphasis added; p. 344.]

See, also D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at topic 1:3200 (including discussion of the "Presumption Resulting From Arbitral Consensus"); R. M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at p. 51 (identifying Professor Weiler's view as "typical").

> ... Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.

d) Addressing conflicting decisions

[19] Little direct authority exists for reviewing conflicting statutory interpretations by the same administrative body (See: L.J. Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014), 27 Can J Admin L & Prac 173 at 174).

[20] This issue was first addressed by the Supreme Court of Canada in ***Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)***, [1993] 2 SCR 756, a pre-**Dunsmuir** decision. In ***Domtar***, the question was whether divergent interpretations of the same legislation, albeit by two different administrative tribunals, could be raised as an independent basis for judicial review. The Supreme Court held that it could not. L'Heureux-Dubé J., writing for the Court, noted the importance of consistency in administrative decision making (at para 59):

> While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:
>
> > Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their [page785] affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".
> >
> > (H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446.)

[21] ***Domtar*** was considered by the Supreme Court in ***Ellis Don Ltd v Ontario (Labour Relations Board)***, 2001 SCC 4 [2001] 1 SCR 221 at para 28, in the context of institutional consultation by an administrative body. Noting the importance of proper consultation to ensure consistency in decision making, the majority held (at para 28):

> Inconsistencies or conflicts between different decisions of the same tribunal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality. It lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions (*Domtar*, *supra*, at p. 798).

[22] The same approach was endorsed in ***Thompson Brothers***, where this court considered the authority of the Workers' Compensation Appeals Commission to change its interpretation of existing policies: "The existence of allegedly conflicting decisions by a tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable" (at para 39, citing ***Ellis Don*** at para 28). Also see: ***I.A.F.F., Local 255 v Calgary (City)***, 2003 ABCA 136, 7 WWR 226 at para 27, leave to appeal to SCC refused, [2003] 328 NR 194; ***Hydro Ottawa Ltd v International Brotherhood of Electrical Workers, Local 636***, 2007 ONCA 292 at para 59, 281 DLR (4^{th}) 443, leave to appeal to SCC refused, [2007] 385 NR 379; ***National Steel Car Ltd v United Steelworkers of America, Local 7135*** (2006), 278 DLR (4^{th}) 345, 159 LAC (4^{th}) 281 (Ont CA) at para 31, leave to appeal to SCC refused, [2007] 374 NR 389.

[23] Canadian courts and commentators have noted the difficulty in accepting two conflicting interpretations by the same administrative tribunal as reasonable. In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law.

[24] For example, in ***Novaquest Finishing Inc v Abdoulrab***, 2009 ONCA 491, 95 Admin LR (4th) 121 at para 48, while the decision did not turn on this issue, Juriansz J.A. observed:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

[25] Similar concerns were raised by the Ontario Court of Appeal in ***Investment Dealers Association of Canada v Taub***, 2009 ONCA 628, 311 DLR (4th) 389 at para 67:

> I agree with Juriansz J.A. that it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation. It follows that where a statutory tribunal has interpreted its home statute as a matter of law, the fact that on appeal or judicial review the standard of review is reasonableness does not change the precedential effect of the decision for

> the tribunal. Whether a court has had the opportunity to declare the decision to be correct according to judicially applicable principles should not affect its precedential status. As in *Abdoulrab*, it is not necessary to decide the issue in this case.

[26] These comments were endorsed by the Federal Court of Appeal in ***Canada (Attorney General) v Mowat***, 2009 FCA 309, 4 FCR 579 at paras 45-47, aff'd ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2011 SCC 53, [2011] 3 SCR 471. In that case, the court noted the diversity of opinions between the Federal Court and Human Rights Commissions regarding the authority to award legal costs to a successful complainant in determining the proper standard of review. The issue did not receive direct comment by the Supreme Court of Canada on appeal.

[27] While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.

[28] Opposite interpretations of a legislative provision are also difficult to accept under the presumption of legislative coherence. An interpretation that is so broad that it fosters inconsistency or repugnancy should be avoided: ***Alberta Power Limited v Alberta Public Utilities Board***, 66 DLR (4th) 286, 19 ACWS (3d) 763 at para 31, leave to appeal to SCC refused, [1990] 120 NR 80. In the context of the statutory interpretation of taxation powers, consistency is also particularly important. Tax legislation should be interpreted to achieve "consistency, predictability and fairness" to achieve equity and finality in taxation and allow taxpayers to manage their affairs (***Husky Energy Inc v Alberta***, 2011 ABQB 268, 11 WWR 282, at para 12 leave to appeal to SCC refused, [2012] 447 NR 400; ***Canada Trustco Mortgage Co v Canada***, 2005 SCC 54, [2005] 2 SCR 601 at para 12; ***Toronto (City) v Municipal Property Assessment Corporation***, 2013 ONSC 6137, 234 ACWS (3d) 267 at para 30. at para 30).

[29] Sara Blake also notes that, in many cases, only one interpretation of a statutory provision will be reasonable at page 211:

> When the reasonableness standard of review is applied, conflicting interpretations of a question of law may be upheld by the courts if both are reasonable, though an interpretation may be held to be unreasonable if it is inconsistent with the prevailing interpretation. However, when the test of correctness is applied, it is not likely that different interpretations of the law will be upheld, because there can be only one correct interpretation, while there can be several reasonable interpretations. Given that most statutes are not ambiguous and do not permit more than one reasonable interpretation, there will not often be different interpretations that may both be upheld as reasonable.

[30] In a comprehensive review of the case law, one commentator has called on appellate courts to review administrative decisions in a way that ensures consistency in the interpretation of public statutes (L.J. Wihak at pages 198-199):

> Public statutes apply equally to all citizens and they should have universal, consistent application. Citizens are entitled to advanced knowledge, certainty, and clarity regarding their respective entitlements or obligations under these public statutes....
>
> Not only do judges have greater expertise in the law relative to administrative decision-makers, they also have a constitutional responsibility to ensure that each person in Canada is subject to the same law and legal principles, and that tribunals are acting legally. As such, "appellate courts require a broad scope of review with respect to matters of law" [citing *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 9].

Conclusions

[31] Assuming reasonableness applies as the standard of review of administrative tribunals in the interpretation of their home statute or closely connected legislation, while 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 appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate 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.

[32] In this case, the ARB adopted an interpretation of the Bylaw which found the respondent liable for business tax for the lease of parking spaces to tenants in connection with the lease of commercial office space. That result is opposite to the approach and outcome in the BTC Decision, which this court found to be reasonable. The apparent conflict between the ARB decision under appeal and the BTC Decision does not create an independent basis for judicial intervention. However, the BTC Decision provides a direct contextual comparison against which to judge the intelligibility, transparency and justifiability of the ARB's decision.

[33] The chambers judge appropriately referred to and relied on the analysis in the BTC Decision to inform her review of the ARB's decision on the appeal. In light of that context, the range of reasonable outcomes was significantly narrowed. Indeed, considering the importance of coherence in the interpretation of the Bylaw and its purpose in imposing a tax, it would be difficult to accept two opposite interpretations of the provision as reasonable.

[34] In the result, we find the chambers judge did not err in her consideration of the BTC Decision to the ARB decision under review.

ii. Did the fact that the chambers judge heard both applications for leave to appeal and the appeal itself, and some statements made by her at both hearings, give rise to reasonable apprehension of bias.

[35] The appeal to the court below required leave, which was granted by the same judge who eventually heard the appeal itself. The appellant submits that some of the judge's statements in the decision granting leave would lead "any reasonable person" to conclude that the chambers judge had "pre-decided" at least some critical issues. Of particular concern are the chambers judge's references, during the leave application, that the ARB had effectively ignored the BTC Decision to come to a different conclusion.

[36] We see no merit in this argument. That the BTC Decision of this court was effectively ignored by the ARB was the basis on which leave was sought. It is therefore not surprising that the chambers judge would refer to it and offer some preliminary thoughts as to the significance of that omission.

[37] Furthermore, if the appellant was truly concerned about the impartiality of the same judge hearing the appeal, that objection should have been taken at the beginning of that hearing, not for the first time on appeal. The appellant's conduct of remaining silent throughout, and thereby appearing content to proceed before the same judge who it now says was, or may have been, biased, offers some indication of the sincerity of this complaint. See also ***Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)***, 2012 ABCA 84, 40 Admin LR (5th) 331; and ***R v Curragh Inc.*** [1997] 1 SCR 537, 1 44 DLR (4th) 614.

[38] Finally, upon a review of the record we think that if the chambers judge in granting leave went beyond what was necessary to address the ARB's neglect of this court's decision in BTC, we read those comments as her expression of frustration and bewilderment. She is not alone with those feelings.

[39] While we find no merit in this argument, it fortifies our concern that generally when a court grants leave to appeal, little more than the grounds upon which leave is being granted need be identified. More elaborate reasons are best saved for those cases where leave to appeal is refused, as that will be the final word and the parties have a right to understand the reasoning leading to that conclusion.

[40] That disposes of the appeal. There is as well a cross-appeal. We will turn to that now.

iii. Issue on Cross-Appeal - Whether the chambers judge erred in finding the Bylaw establishing the Calgary Assessment Review Board satisfied the requirement of institutional independence.

[41] Although the matter was not raised before the ARB, the chambers judge granted leave on this issue as well, The cross-appellant argues that the legislative framework establishing the ARB is "minimalist" thereby raising questions whether the "guarantees" of independence such as security of tenure and remuneration are sufficient to create the perception of independence. The cross-appellant agrees that the common law requirements to establish independence are subject to legislative override, but maintains that must be done "expressly". In other words, where the legislation is silent or ambiguous, a court should find that the common law guarantees still apply. And, says the cross-appellant, in this case there was no express legislative intent to override the common law requirements of independence.

[42] The same submissions were made on appeal to the chambers judge who found them to be without merit. We agree with her assessment.

[43] To better frame the issue, there is no suggestion here that a board member's tenure or remuneration were at risk should that member, or a panel of members, make a decision not pleasing to the City, or that it was ever so. Rather, the cross-appellant argues that there remains the perception. In our opinion, the Supreme Court's decision in ***Oceanport Hotel Ltd v British Columbia (General Manager, Liquor Control and Licencing Branch)***, 2001 SCC 52, [2001] 2 SCR 781, is dispositive of this argument. The issue in that case was whether members of the Liquor Appeal Board were sufficiently independent to render decisions that imposed penalties in response to violations of the *Liquor Control Act*. The specific concern related to the tenure of board members who were appointed "at pleasure". Ultimately the Supreme Court found that this was a clear, unambiguous expression of legislative intent and accordingly there was no basis upon which to import common law doctrines of independence. (para 27)

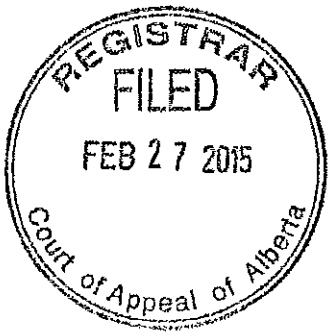
[44] In the case before us, the Provincial Legislature by ss. 454.1 and 454.2 of the *Municipal Government Act* delegated to the municipality the authority to enact bylaws which required the municipality to appoint persons to the ARB, to prescribe the term of office of each member, the manner in which vacancies are to be filled, and to prescribe remuneration and expenses for each member. The City of Calgary did so. It enacted ByLaw 25M2010 which provides that the General Chairman of the ARB and each member shall hold office for one year beginning on January 1 and ending on December 31 of the same year. (s. 6) The same Bylaw provides that remuneration and expenses payable to each member are to be determined by the City Clerk in consultation with the General Chairman. (ss. 9.1 and 9.2) As well, administrative controls are prescribed in both the regulations of the *Municipal Government Act* (310/2009) and s. 4 of the Bylaw.

[45] These provisions, which clearly express the legislature's intent regarding independence of the tribunal have ousted common law guarantees of independence. In the result, we find that ARB does not lack the necessary degree of independence required of a tribunal charged with taxation assessment.

[46] Judgment accordingly. The appeal and cross-appeal are dismissed.

Appeal heard on May 8, 2014

Memorandum filed at Calgary, Alberta
this 27th day of February, 2015



Martin J.A.

Rowbotham J.A.

Veldhuis J.A.

Appearances:

G.L. Ludwig, Q.C.
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for the Cross-Appellant/Respondent

M.J. Donaldson
P.G. Chiswell
for the Cross-Respondent/Appellant – The City of Calgary

P.J. Knoll, Q.C.
for the Cross-Respondent – The Assessment Review Board for the City of Calgary

TAB 6

In the Court of Appeal of Alberta

Citation: Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City), 2015 ABCA 85

Date: 20150227
Docket: 1303-0283-AC
Registry: Edmonton

Between:

Edmonton East (Capilano) Shopping Centres Limited (as Represented by AEC International Inc.)

Respondent (Applicant)

- and -

The City of Edmonton

Appellant (Respondent)

- and -

The Assessment Review Board for the City of Edmonton

Respondent (Respondent)

and The Minister of Justice and Attorney General of Alberta

Not a Party to the Appeal (Respondent)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Mr. Justice Berger
Concurred in by the Honourable Madam Justice Rowbotham

Appeal from the Order by
The Honourable Justice J.D. Rooke, Associate Chief Justice
Dated the 13th day of September, 2013
Filed on the 5th day of November, 2013
(2013 ABQB 526; Docket: 1103 13687)

Reasons for Judgment Reserved
of the Honourable Mr. Justice Slatter

[1] The issue on this appeal is whether an Assessment Review Board can increase a property assessment when a complaint is brought by a taxpayer seeking a reduction of the assessment. A chambers judge held that the Board could not do so: ***Edmonton East (Capilano) Shopping Centres Ltd. v Edmonton (City)***, 2013 ABQB 526, 14 MPLR (5th) 252.

Facts

[2] The respondent owns the Capilano Shopping Center, which was originally constructed as a "conventional" shopping center. It had an anchor tenant at one end of the mall, with doors that opened onto the general area of the mall. In 2006 Walmart took over as the anchor tenant, but reconfigured the store so that access was only from the parking lot. There was no longer a direct connection between the anchor tenant and the balance of the mall. The City assessor was aware of this change in configuration. For this, and other reasons, the mall was assessed as if it was a "community shopping center".

[3] In the 2011 taxation year the mall was again assessed as a "community shopping center" with an assessed value of $31,328,500, and it brought a complaint against the assessment. At about this time, a new individual at the office of the City assessor took responsibility for the file. That new person disagreed with the categorization of the mall, and when the assessment appeal was heard the City assessor applied to increase the assessment by $13,744,500, as if the mall was a "power shopping center". The Board accepted the assessor's argument in part, and increased the assessment by $9,467,000 to $40,795,500.

[4] The respondent applied for, and was granted leave to appeal the decision of the Board: ***Edmonton East (Capilano) Shopping Centres Ltd. (AEC International Inc.) v Edmonton (City)***, 2012 ABQB 445. The chambers judge who heard the appeal on its merits concluded that the City assessor could not, in effect, cross-appeal when an assessment complaint is filed:

> 4 The Board's Decision allowed the City to increase its assessment during the complaint process, and the Board, in accepting that changed assessment, acted without jurisdiction and made errors of law. Simply put, an assessment by the City of a property for a given year is not subject to amendment by the City during the complaint process, but is rather binding on the City absent agreement of the taxpayer. In other words, as argued by Capilano, at para 125 of its Brief, the *MGA* does not allow a municipality to complain about its own assessment and change it upwards, thereby acting as a *de facto* appellant. The City's remedy, if an error appears to have been made in the assessment, is to amend the assessment in accordance with the *MGA* (which it did not do) or leave the assessment as it was

> and merely render a new assessment, correcting the alleged error, for the next year. It is not allowed to amend the assessment during the process.

The chambers judge noted that an assessed person or taxpayer may appeal against the assessment by filing a complaint, but under s. 460(3) of the *Municipal Government Act*, RSA 2000, c. M-26 a municipality does not have any ability to file a complaint. The chambers judge concluded that it would effectively bypass this limitation on complaints if the municipality could file a cross-complaint, and effectively raise the assessment when the taxpayer had complained. The City has now brought this further appeal from that decision.

The Legislation

[5] The general scheme of the assessment provisions of the *Municipal Government Act* provides that each property is to be assessed each year. The assessment is done by the City assessor, based on market value. The initial assessment is done without any particular input from the property owner. In this respect the municipal tax system can be compared to the income tax system, the latter being largely based on "self-assessment" by the taxpayer. Under the municipal taxation system the City assessor sets the value, and the taxpayer may challenge it. Under the *Income Tax Act* the taxpayer assesses itself, and the tax collector then does its own assessment from that base.

[6] Review of municipal property assessments has always been available. The assessment review provisions in the *Municipal Government Act* were changed significantly as of January 1, 2010. An examination of the provisions in force before and after that date is required to resolve this appeal.

[7] Prior to 2010, a municipal taxpayer's initial appeal (or "complaint") was to the Assessment Review Board. A further appeal was available to another administrative tribunal, the Municipal Government Board. While only the taxpayer could file a complaint with the Assessment Review Board, both the taxpayer and the municipality could appeal to the Municipal Government Board. Section 506 of the statute (as it read before 2010) provided that there was "no appeal from a decision of the [Municipal Government] Board". The absence of a right of appeal did not, however, preclude common law judicial review of that Board: see for example ***Boardwalk Reit LLP v Edmonton (City)***, 2008 ABCA 220, 91 Alta LR (4th) 1, 437 AR 347.

[8] The amendments that came into effect in 2010 significantly changed the review structure. Under s. 460, the municipal taxpayer's initial complaint is still to the Assessment Review Board:

> 460(1) A person wishing to make a complaint about any assessment or tax must do so in accordance with this section. . . .
>
> (3) A complaint may be made only by an assessed person or a taxpayer. . . .

(5) A complaint may be about any of the following matters, as shown on an assessment or tax notice:

(a) the description of a property or business; . . .

(Subsection (5) lists a number of other topics on which an appeal is permitted, such as the assessment class or the type of property.) This section carries forward the rule that only the taxpayer, and not the assessor, can file a complaint. This is consistent with the assessor being the one who initially sets the assessed value; having set that value, the assessor can hardly have any reason to "complain".

[9] Starting in 2010, however, the Municipal Government Board was removed from the process. Instead, s. 470 provides for a direct appeal, with leave, from the Assessment Review Board to the Court of Queen's Bench:

470(1) An appeal lies to the Court of Queen's Bench on a question of law or jurisdiction with respect to a decision of an assessment review board.

(2) Any of the following may appeal the decision of an assessment review board:

(a) the complainant;

(b) an assessed person, other than the complainant, who is affected by the decision;

(c) a municipality, if the decision being appealed relates to property that is within the boundaries of that municipality;

(d) the assessor for a municipality referred to in clause (c).

(3) An application for leave to appeal must be filed with the Court of Queen's Bench within 30 days after the persons notified of the hearing receive the decision under section 469, and notice of the application for leave to appeal must be given to

(a) the assessment review board, and

(b) any other persons as the judge directs. . . .

(5) On hearing the application and the representations of those persons who are, in the opinion of the judge, affected by the application, the judge may grant leave to appeal if the judge is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance to merit an appeal and has a reasonable chance of success.

The implementation of direct appeals to the Court of Queen's Bench was undoubtedly a recognition of the fact that the "no appeal" provision previously in place did not prevent judicial review. Intermediate appeals to the Municipal Government Board were replaced by direct appeals to the Court of Queen's Bench, subject to the screening mechanism of "leave to appeal". Any decision of the Court would be subject to further appeal to the Court of Appeal.

[10] In accordance with the post-2010 regime, the appellant initially brought its complaint before the Assessment Review Board. The Court of Queen's Bench granted leave to appeal, and subsequently adjudicated the appeal on its merits. This appeal followed.

Standard of Review

[11] The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day.

[12] Judicial review has evolved, starting in the 1970s and 1980s, from its foundation in the idiosyncratic vagaries of the "prerogative writs" and the companion concept of "jurisdictional error". It evolved through a hoary "functional and pragmatic" search for an appropriate balancing of the role in the superior courts in the system of administrative justice. Today's philosophical foundation is "deference" and the companion "standard of review analysis".

[13] The concept of the "standard of review" is not a value unto itself. The underlying value is maintaining the integrity of the system of administrative justice, illustrated by the need to extend deference to the decisions of administrative tribunals: ***Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc.***, 2013 FCA 250 at paras. 35-6, [2014] 2 FCR 557.

[14] But maintaining the integrity of the system of administrative justice is not the only value at play. Judicial review was originally formulated by the common law courts in support of the rule of law, a constitutional principle of the first order. Indeed, the Supreme Court of Canada has noted that this principle is so important, that it might well be unconstitutional for a legislative body to attempt to abolish judicial review: ***Crevier v Attorney General of Quebec***, [1981] 2 SCR 220 at p. 236; ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras. 31, 52, [2008] 1 SCR 190.

[15] There are other values at play, and a second one worth emphasizing is "legislative intent". The Supreme Court of Canada has stated on numerous occasions that the ultimate objective of the standard of review analysis is to ascertain the intent of the legislature:

> The central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed. (***Pushpanathan v Canada (Minister of Citizenship and Immigration)***, [1998] 1 SCR 982 at para. 26)

> . . . the "weighing up" of contextual elements to identify the appropriate standard of review, is not a mechanical exercise. Given the immense range of discretionary decision makers and administrative bodies, the test is necessarily flexible, and proceeds by principled analysis rather than categories, seeking the polar star of legislative intent. (***Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)***, 2003 SCC 29 at para. 149, [2003] 1 SCR 53)
>
> . . . In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent. (***Dunsmuir v New Brunswick***, 2008 SCC 9 at para. 30, [2008] 1 SCR 190)

Where the legislature clearly specifies the standard of review, that specification prevails over the common law test. Even where a standard of review is not explicitly stated, in some cases the statutory administrative law regime may well provide compelling signals about the intended standard of review.

[16] That leads to the observation that judicial review as originally formulated, based on the prerogative writs, was entirely "external" to the administrative law structure. The legislature would create administrative tribunals, charge them with certain responsibilities, but make no mention of the role (if any) of the superior courts. The superior courts would nevertheless, using their inherent jurisdiction, impose judicial review on the administrative structure. For decades the only mention of the prerogative writs that one would find in statutes were in privative clauses, which purported to prevent judicial review. There was a long tradition in the superior courts of narrowly construing privative clauses, to the point that they were largely ineffective. In ***Pushpanathan v Canada (Minister of Citizenship and Immigration)***, [1998] 1 SCR 982 the Court confirmed that rights of appeal and privative of clauses were merely "one factor" in the standard of review analysis.

[17] The "external" model of judicial review is no longer universal. Legislatures are increasingly recognizing the role of the superior courts in balancing the need to maintain the integrity of the administrative law system with: 1) the need to maintain the rule of law, and 2) the legitimate expectations of parties in having their rights protected by proportional but effective error correcting mechanisms. Sometimes statutes specifically state the standard of review. On other occasions, rights of appeal to the superior courts (sometimes only with leave, and sometimes directly to the Court of Appeal) are built right into the administrative structure. This represents a recognition that while the administrative tribunal has "expertise", so do the superior courts. A right of appeal is a signal that the Legislature wishes to take advantage of (and make available to affected citizens) all the expertise available in the system. Where there is a right to appeal, the superior courts are a part of the system of administrative justice, not external to it.

[18] As the standard of review analysis has evolved since the 1980s, so too has the legislative response. The legislatures have not simply been idle while the Supreme Court of Canada has

searched for the proper balance between deference and review, through trying, and then rejecting or modifying various approaches. Increasingly, legislative drafters have started to place orderly methods of review of administrative action by the superior courts directly into the legislation. The 2010 changes to the *Municipal Government Act*, incorporating direct appeals to the Court of Queen's Bench, but only with leave, are an excellent example.

[19] Modern administrative statutes therefore tend to be much more sophisticated in blending the roles of administrative tribunals and courts. That does not eliminate the concept of "deference", nor does it eliminate the need to do a standard of review analysis. The Supreme Court of Canada has indicated that the method of analysis was the same whether there was a statutory appeal or not: ***Pezim v British Columbia (Superintendent of Brokers)***, [1994] 2 SCR 557 at pp. 591-92 and 598-99; ***Dr. Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, [2003] 1 SCR 226 at para. 21. That is undoubtedly so, but just because the method of analysis is the same, does not mean that the outcome will be the same. As has subsequently been recognized in the cases, since legislative intent is the "polar star" of the analysis, the presence of a right of appeal is an important factor.

[20] The modern legal structure of judicial review (of alleged errors of fact and law, as opposed to issues like bias, natural justice, etc.) first took shape in ***Pushpanathan***, where the Supreme Court of Canada identified four factors underlying a nuanced "functional and pragmatic" approach that would help identify the appropriate standard of review:

(a) the presence or absence of a privative clause, or at the other end of the spectrum, a right of appeal;

(b) the relative expertise as between the court and the statutory decision maker;

(c) the purpose of the act as a whole, and the provision in particular; and

(d) the nature of the question, and particularly whether it involves issues of law, fact, or policy.

As previously noted, the benchmark of the analysis was still an attempt to find the legislative intent.

[21] In ***Pushpanathan*** the pragmatic and functional analysis led to a standard of correctness. A key factor was that the statute specifically provided for review of legal questions by the courts, but only if the question was certified to be of "general importance". As the Court noted:

> 43 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" (emphasis added). 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 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. This view accords with the observations of Iacobucci J. in *Southam*, *supra*, at para. 36, that a determination which has "the potential to apply widely to many cases" should be a factor in determining whether deference should be shown. . . . (emphasis added)

The issue was also one of statutory construction, over which the tribunal had no expertise relative to that of the courts.

[22] ***Dunsmuir*** eliminated the standard of "patent unreasonableness", but confirmed the basic four part ***Pushpanathan*** test. ***Dunsmuir*** also contained the first hints of the identification of categories of issues, as signposts showing when the correctness standard of review would apply:

(a) constitutional questions,

(b) questions of law that are of central importance to the legal system as a whole and that are outside the tribunal's expertise,

(c) questions regarding the jurisdictional lines between two or more competing specialized tribunals,

(d) true questions of jurisdiction or *vires*.

The analysis was further refined in ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 SCR 654 at para. 34 through a "presumption" that deference was due to the tribunal's interpretation of its home or closely-connected statutes.

[23] These signposts were never intended to be hard and fast categories, and the standard of review analysis remains sensitive to the statutory and factual context: ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at para. 22, [2013] 3 SCR 895. These categories may bring a measure of predictability and clarity to the analytical framework, but a mechanical and formalistic test for the standard of review is not reflective of the subtlety of the underlying issues. A few overlapping observations can be made about these four "exceptions" to a "presumptive" reasonableness standard of review:

(a) First of all, they are only presumptions; there is no universal rule that the correctness standard of review never otherwise applies. As was pointed out in ***McLean*** at para. 22, "The presumption endorsed in *Alberta Teachers*, however, is not carved in stone. . . . a contextual analysis may "rebut the presumption of reasonableness review for questions involving the interpretation of the home statute"".

(b) Secondly, any common law presumption must yield to the express or implied legislative intent, reflected by the precise structure of the administrative law regime in question.

(c) Thirdly, the four listed exceptions should not be regarded as a "closed" list; there may well be other general exceptions, or at least variations on the four named examples.

(d) Fourthly, the four exceptions should be read in a flexible and open ended manner; they are not statutory provisions.

As noted several times now, administrative law has been evolving continuously since the 1970s. That evolution is not yet over, and if the history of administrative law has taught us anything, it is that the ***Alberta Teachers' Association/McLean*** formulation of the evolving test is unlikely to be the final word on judicial review.

[24] This appeal presents either an addition to or a variation of the four "presumptive" categories. As noted, the "polar star" of the analysis is legislative intent. The fact that the *Municipal Government Act* was amended in 2010 to replace the Municipal Government Board with the Court of Queen's Bench is a strong indication that the legislature intended the superior courts to have a significant and direct role in interpretation of the taxing statute. ***McLean*** at para. 33 noted this link to legislative intent:

> That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired *the administrative decision maker* -- not the courts -- to make. Indeed, the exercise of that interpretative discretion is part of an administrative decision maker's "expertise". (Emphasis in original)

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*** at para. 43 (quoted *supra*, para. 21), 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.

[25] The principle of the overriding importance of legislative intent was recently confirmed in ***Tervita Corp. v Canada (Commissioner of Competition)***, 2015 SCC 3 at para. 39. In that case the

governing legislation signalled a correctness standard of review for questions of law, because it provided that the decisions of the Commissioner should be reviewed as if they were decisions of a court. While the provisions of the *Municipal Government Act* are not that explicit, read in the entire context it is clear that the Legislature intended that the Court of Queen's Bench would conduct its own analysis of the proper interpretation of the statute.

[26] Secondly, while only a taxpayer may launch a complaint to the Board, the municipality also has a right to appeal the Board's decision to the courts: s. 470(2)(c). It is clearly intended that these second level appeals may go beyond issues normally considered by the Board, and outside the core expertise of the Board. Further, s. 470.1(2) provides that if the Court allows an appeal, the matter must be referred back to the Board, but the Board must then decide the matter as directed by the Court. The existence of a right of appeal to the Court, and the specific mandatory parameters of that right, give strong signals of a correctness standard of review.

[27] Thirdly, the issues which are brought forward on appeal are, by definition, "of sufficient importance to merit an appeal": s. 470(5). The Legislature has specifically built an element of "deference" into the system by including a screening method: the application for leave to appeal. Those issues that pass the screening test may not be of general interest to the "legal system as a whole", but they are of interest to the "municipal taxation system as a whole". As noted in ***Pushpanathan***, this is a signal that the Legislature wishes to have questions of this sort reviewed by the superior courts, and the legislative intent is not fully realized without a correctness standard of review. In this way the legislative regime balances the need to protect the integrity of the administrative law system, while having in place appropriate error correcting mechanisms. The proper balancing of "deference", protection of the rule of law, and protection of the rights of individual taxpayers is built right into the legislation.

[28] Fourthly, the 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.

[29] Fifthly, the existence of a right of appeal is in keeping with the general democratic principle that taxpayers are entitled to have their liability to the government determined by the ordinary courts. This has always been the case, even though municipal assessments have been dealt with by administrative tribunals for generations. As was stated in ***Lougheed Tomasson Inc. v Calgary (City)***, 2000 ABCA 81 at para. 9, 255 AR 179 "... a taxpayer is entitled to an assessment

that is both equitable and correct." In this case the nature of the issue also signals a correctness standard of review.

[30] Sixthly, the municipal assessment regime is an example of an administrative system involving multiple tribunals. There is not just one assessment review board in the province; every municipality has one, and any one of them could regard the statutory provisions as its "home statute". Nevertheless, it is undesirable for the *Municipal Government Act* to mean different things in different parts of the province. It is here that the superior courts have a legitimate role to play in ensuring consistency of interpretation and result: ***Canada Trustco Mortgage Co. v Canada***, 2005 SCC 54 at para. 12, [2005] 2 SCR 601; ***Focaccia Holdings Ltd. v Parkland Beach (Summer Village Subdivision and Development Appeal Board)***, 2014 ABCA 132 at para. 9, 575 AR 11. This is undoubtedly one reason why there is a statutory right of appeal, and it is also the reason why the standard of review should be correctness. This is analogous to the role of the courts in drawing jurisdictional lines between different tribunals applying the same legal concepts. 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: ***Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada***, 2012 SCC 35 at para. 16, [2012] 2 SCR 283; ***Pushpanathan*** at para. 43.

[31] When all of these factors are weighed and considered, the appropriate standard of review of decisions of assessment review boards in interpreting provisions of the *Municipal Government Act* is correctness.

[32] It is worth noting that a correctness standard of review does not mean that the opinions of the tribunal are ignored. When the court is applying its legal expertise to the interpretation of the statute, it should always take note of the tribunal's perspective on the issue from a policy point of view. The two are not mutually exclusive. The correctness of a particular interpretation of a statute is not determined in the abstract, but only by considering the statutory provisions in the full policy and factual context.

The Right to Re-assess

[33] The chambers judge primarily relied on the fact that only a taxpayer can file a complaint. The municipality has no ability to complain about an assessment, and the statute is noticeably silent about any ability to "cross-complain" or increase an assessment. While the general methods of interpreting statutes apply to taxation statutes, there has always been a subtle difference in the approach to taxation statutes: ***Canada Trustco Mortgage Co. v Canada***, 2005 SCC 54 at para. 11, [2005] 2 SCR 601. Generally the courts are not willing to fill in gaps in the statute in favour of the taxing authority.

[34] The appellant argues that a municipality can increase the assessment when a complaint is filed, because s. 305 permits the correction of errors, omissions, or misdescriptions. As the chambers judge observed, no error was shown; the assessor merely changed its mind about how to

assess this property. Further, the assessment roll was never amended (if only because that was prevented by s. 305(5)), and it was the Board that increased the assessment, not the assessor.

[35] The appellant also points out that the Board is authorized to "change" the assessment. That wording, it is argued, accommodates both an increase and a decrease in the assessment. The word "change" is deliberately and necessarily broad, because not all of the issues on which a complaint can be launched are directly monetary in nature. For example, a complaint can be launched about the name of a taxpayer, or school support. Any wording that the Board could "increase" or "decrease" a finding on those issues would be inapt. The wording "change" was undoubtedly selected to be flexible, not necessarily to signal that the Board could make any variations to the assessment that it chooses.

[36] That argument is in any event somewhat circular, because the underlying issue is what the Board can "change". Section 471 says the Board can change "any matter referred to in section 460(5)". Section 460(5) states that a "complaint may be made about any of the following matters", immediately following the provision in s. 460(3) that only a taxpayer can "complain". Reading these three sections in context, only the taxpayer can raise issues that the board can "change". As the chambers judge put it ***Canadian Natural Resources Ltd. v Wood Buffalo (Regional Municipality)***, 2012 ABQB 177 at para. 166, 535 AR 281: "A complaint belongs to the taxpayer, not the Municipality." If the taxpayer complains that an assessment is "too high", that does not (in the present context) lead easily to the conclusion that the taxpayer has also raised the issue of whether it is "too low".

[37] This interpretation is reinforced by s. 9(1) of the *Matters Relating to Assessment Complaints Regulation*, AR 310/2009, which provides that the board "must not hear any matter in support of an issue that is not identified on the complaint form". The respondent identified the "Issues of Complaint" on the prescribed complaint form as: "The assessed value of this property is greater than its actual market value".

[38] The appellant argues that an underlying principle of the statute is that assessments should be fair and equal. It argues, therefore, that it should be allowed to cross-complain when it perceives an assessment is too low. If, however, the intention was to use the complaint process to increase inadequate (and therefore inequitable) assessments, there is no explanation why a municipality cannot file a complaint. Even under the *Income Tax* regime, where the taxpayer initially self-assesses, the Minister is not able to appeal her own ultimate assessment: ***Last v Canada***, 2014 FCA 129 at para. 23, 461 NR 230, leave denied SCC #36007. Effectively, the appellant argues that it can correct inequitable assessments only in those situations when the taxpayer files a complaint. That is not a reasonable interpretation of the statute.

[39] Overall, the scheme of the statute reflects a balancing of interests. The municipality has the ability to reassess every property, every year. Accordingly, an arguably "unfair" assessment will only prevail for one taxation year if a municipality is not allowed to cross-complain. (In fact, for the 2012 assessment year the Board came to the conclusion that the Capilano Mall was, as the

respondent maintains, a "community center" not a "power center": *AEC International Inc. v The City of Edmonton*, 2012 ECARB 1064 at para. 37.) Concurrently, taxpayers are protected from retroactive increases in their tax liability. Each property is to be assessed as of December 31 of the previous year, and once the assessment is issued a taxpayer can plan its affairs on the assumption that its tax liability will not be re-opened by the assessor. A taxpayer can complain about an assessment being too high, without the danger of it being increased even further. This is consistent with Canadian expectations about the imposition of taxes; retroactive taxation is possible, but not presumed: ***CNG Producing Co. v Alberta (Provincial Treasurer)***, 2002 ABCA 207 at para. 32, 5 Alta LR (4th) 37, 317 AR 171; ***Last v Canada*** at para. 23.

[40] When the statute is considered as a whole, it discloses an intention to permit a complaint by a taxpayer only. Once a complaint is filed, the assessment is fixed until the Board renders its decision. There is no room in the complaint procedure for a municipality to effectively mount a cross-complaint and seek an increase in the assessment.

[41] No reviewable error has been shown, and the appeal is dismissed.

Appeal heard on November 25, 2014

Reasons filed at Edmonton, Alberta
this 27th day of February, 2015

REGISTRAR FILED FEB 27 2015 Court of Appeal of Alberta

Slatter J.A.

I concur: Berger J.A.

I concur: (Authorized to sign for) Rowbotham J.A.

Appearances:

G.J. Ludwig, Q.C. and J.B. Laycraft, Q.C.
for the Respondent Edmonton East (Capilano) Shopping Centres Limited

C.J. Ashmore
for the Appellant

K.L. Hurlburt
for the Respondent Assessment Review Board for the City of Edmonton