On judicial review from a decision of the Tax Appeals Commission dated March 15, 2016.

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Docket: CI 16-01-02443
(Winnipeg Centre)
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The Deputy Minister of Finance (Manitoba)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	for the Applicant
Applicant,	)	
	)	Sean D. Boyd
-and-	)	for the Respondent
	)	
THE DEPUTY MINISTER OF FINANCE (MANITOBA),	)	JUDGMENT DELIVERED:
	)	AUGUST 15, 2017
	)	
Respondent.	)	

REMPEL, J.

Introduction

[1] The applicant corporation (the "Corporation") is a wholesale distributor of petroleum products. Between 2005 and 2011, the Corporation sold fuel to retailers in various Indigenous communities in Manitoba. The fuel sales included written agreements whereby the retailers would have the use of large fuel storage tanks ("Fuel Tanks") provided by the Corporation and that they purchase all fuel for retail sale exclusively from the Corporation.

[2] In 2014, the respondent (the "Minister") determined that the leasing agreements with respect to the Fuel Tanks were taxable transactions under *The Retail Sales Tax Act*, C.C.S.M., c. R130 (the "*RSTA*"), and issued a notice of assessment to the Corporation due to a failure to remit over $74,000 in tax. After the interest and penalties were applied, the total assessment issued to the Corporation was over $130,000.

[3] The Corporation appealed the assessment made by the Minister to the Tax Appeals Commission ("the Commission"). In the main, the Corporation argued that the use of the Fuel Tanks by its customers was a lease agreement that did not attract tax under the *RSTA* and even if it did, the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 ("the *Indian Act*"), exempted transactions such as this from taxation.

[4] By way of written reasons dated March 15, 2016, the Commission ruled against the Corporation and affirmed the assessment made by the Minister. The Corporation then filed a Notice of Application in this court appealing the decision of the Commission. Appeals to this court from decisions made by the Commission are authorized by Section 58 of *The Tax Administration and Miscellaneous Taxes Act*, C.C.S.M., c. T2 ("*TAMTA*").

[5] In its appeal, the Corporation seeks an order overturning the finding of the Commission that taxes and the resulting penalties and interest charges were payable by the Corporation.

The Deep Issue

[6] The deep issue in this appeal is the standard of review. The Minister argues that the reasons of the Commission ("the Reasons") articulate a transparent and intelligible justification for the decision to affirm the assessment and under the standard of review of reasonableness, the Reasons fall within the range of acceptable outcomes in matters

such as this. Accordingly, the reasonableness standard requires that I defer to the Reasons of the Commission.

[7] The Corporation disputes this and argues that the standard of review is correctness and no deference is owed by me as the reviewing judge. Even if it is wrong on this point, and the Minister is correct as to the applicable standard of review, the Corporation maintains that the Reasons of the Commission cannot survive scrutiny under the reasonableness standard.

Decision

[8] I am dismissing the appeal. My reasons follow.

Standard of Review

[9] In ***Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.***, [2016] S.C.J. No. 47, 402 D.L.R. (4th) 236 ("***Edmonton***"), the Supreme Court reaffirms the framework set out in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, 291 D.L.R. (4th) 577 ("***Dunsmuir***"), as the proper methodology to establish the appropriate standard of review (para. 20). At paragraph 21 in ***Edmonton***, the court writes:

> [21] The *Dunsmuir* framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (paras. 27-31).

[10] The trend post-***Dunsmuir*** shows a decline in the number of cases applying the correctness standard. In ***Loewen v. Manitoba Teachers' Society***, 2015 MBCA 13, 315 Man.R. (2d) 123 ("***Loewen***"), at paragraph 41, the Court of Appeal states that "This trend accords with the general emphasis on deference to the original decision-maker and the focus on more efficacy and proportionality in the justice system."

[11] It is a fundamental principle of administrative law that both statutory appeals and applications for judicial review require the reviewing judge to determine which standard of review is to be applied (***Loewen***, at para. 26).

Is the standard of review on *RSTA* cases settled?

[12] In cases where the jurisprudence is settled, an analysis as to the standard of review is not required (***Dunsmuir***, at para. 62).

[13] The Corporation argues that the standard of review in *RSTA* cases is correctness, and this was settled by virtue of ***TransCanada Pipeline Ltd. v. Manitoba***, 2013 MBCA 88, 299 Man.R. (2d) 47 ("***TransCanada***"). Therefore, an analysis with respect to the standard of review is not necessary according to the Corporation.

[14] ***TransCanada*** involved a tax assessment issued against a tax payer in 1998. Under the existing legislation at that time, the first level of appeal was to the Commission, and a subsequent appeal was then permitted to the Minister of Finance. Appeals from the Minister of Finance were made to this court. The Court of Appeal concluded in paragraph 36 of ***TransCanada*** that the decision as to what constitutes a taxable service under the *RSTA* should have been conducted under the correctness standard. The authorities cited by the Court of Appeal in support of this decision are ***Sheldon Inwentash and Lynn Factor Charitable Foundation v. Her Majesty the Queen***, 2012 FCA 136, 432 N.R. 338, at paras. 18-23, ("***Inwentash***"); and ***Bartlett v. Canada (Attorney General)***, 2012 FCA 230, 434 N.R. 241, at para. 46, ("***Bartlett***").

[15] The ***Inwentash*** decision involved a decision by the Minister of National Revenue to categorize the appellant as a private foundation, rather than a public foundation, under the ***Income Tax Act***, R.S.C., 1985, c. 1 (5th Supp.) ("*ITA*"). The Federal Court of

Appeal concluded that the Minister's interpretation of the definition of a term under the *ITA* was an "extricable question of law, to be reviewed on the standard of correctness" (para. 19). In ***Inwentash***, the standard of review question is neatly summarized in paragraphs 20 to 23:

> [20] To begin, the central inquiry when determining the standard of review is to ascertain the legislative intent of the statute which confers jurisdiction upon the decision-maker. This appeal is brought pursuant to paragraph 172(3)(a.i) of the Act, which permits an appeal to be brought directly to this Court from a decision of the Minister confirming the designation of a charitable foundation as a private foundation. Nowhere in the Act has Parliament enacted any privative provision to protect decisions of the Minister from review by this Court. The absence of a privative provision is a signal that no deference is owed to the Minister's interpretation of the Act. Indeed, questions of law which arise under the Act and which are appealed to the Tax Court of Canada and to this Court are always reviewed on the standard of correctness. I can see no principled basis for distinguishing the standard of review applied in those cases from the standard to be applied in this case.
>
> [21] Second, the proper interpretation of the definition of public foundation is a question of law, and the Minister does not possess any greater expertise than the Court where the question at issue is one of statutory interpretation.
>
> [22] Third, as counsel for the Minister acknowledged in oral argument, the Minister acts in an administrative, not adjudicative, capacity when confirming the designation of a charitable foundation. This is a further signal that the Court is to adjudicate on the correctness standard the proper interpretation of the Act by the Minister.
>
> [23] Finally, this Court has previously applied the standard of correctness to the review of extricable questions of law decided by the Minister (see for example, *Action by Christians for the Abolition of Torture v. Canada*, 2002 CAF 499 (CanLII), 2002 FCA 499, 302 N.R. 109 at paragraphs 23 to 24). This conclusion is also consistent with the recent decision of this Court in *Georgia Strait Alliance v. Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40 (CanLII), [2012] F.C.J. No. 157 at paragraphs 6 and 65 and following. In *Georgia Strait* this Court held that the reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise.

[16] The ***Bartlett*** decision, at paragraph 46, also concludes that correctness is the applicable standard when the issue is the interpretation of a statute by a minister responsible for the implementation that very statute.

[17] The difficulty I have with the argument of the Corporation on this point is that the legislative scheme for appeals under the *RSTA* has been changed dramatically from the appeal regime before the court in the ***TransCanada*** decision. The key point is that in ***TransCanada***, just like ***Inwentash*** and ***Bartlett***, the decision under review was that of the minister charged with administering the tax legislation in question, and the decision was arrived at without the benefit of an adjudicative process. The principle enunciated in ***TransCanada*** is that when a minister exercises a purely administrative function involving the interpretation of a home statute, the decision of the minister is subject to a review based on the correctness standard.

[18] The decision before me now is not a decision made by a minister exercising a purely administrative function but rather a quasi-judicial decision of the Commission. The appeals regime currently in place is not analogous to the one before the court in ***TransCanada*** and for that reason the correctness standard with respect to *RSTA* matters is not settled in law in Manitoba.

[19] At present, the right to appeal a decision of the Commission is provided for in Section 58 of *TAMTA*. In ***Michele Santarsieri Inc. v. Manitoba (Deputy Minister of Finance)***, 2015 MBCA 71, 389 D.L.R. (4th) 209 ("***Santarsieri***"), the Court of Appeal engaged in an extensive review of the nature of appeals under *TAMTA*. At issue in ***Santarsieri*** was not the applicable standard of review, but rather whether the right of appeal created by *TAMTA* called for a *de novo* hearing in the Court of Queen's Bench or a proceeding on the record that was before the Commission. The Court of Appeal in ***Santarsieri*** held that the latter approach was correct.

[20] In ***Santarsieri***, the Court of Appeal notes that the Commission is an administrative tribunal with quasi-judicial powers, enabling it to conduct a full hearing, including receiving evidence, in making findings of fact and reaching a decision. A contextual analysis of the language and legislative scheme of *TAMTA* created a presumption in favour of a review on the record. The Court of Appeal also noted "strong policy reasons" against a *de novo* hearing in this court given the protracted nature and costs associated with *de novo* hearings that do lend themselves to an "efficient process".

[21] The role of the Commission under *TAMTA* is clearly set out in the ***Santarsieri*** decision, at paragraph 28:

> [28] At the time *TAMTA* was enacted, all of the taxing statutes to which it applied were amended by repealing the ability to appeal to the minister (where one was allowed). In the result, the abolishment of the ability to appeal to the minister conferred on the commission the role of final administrative arbiter for the taxing statutes administered by *TAMTA*.

[22] The Court of Appeal, in ***Santarsieri***, was dealing with a new appeals regime under *TAMTA*, which is the same regime that applies to the appeal of the Corporation in this case. The new appeal regime no longer places the Minister in the role of the final administrative arbiter with respect to appeals involving the *RSTA*. The legislative scheme at issue in ***TransCanada*** with respect to appeals was quite different. That leaves the standard of review an open question in the case before me. My conclusion is that the standard of review in this case is not settled and an analysis as to the applicable standard is necessary under the ***Dunsmuir*** Framework.

The *Dunsmuir* Framework

[23] The Supreme Court of Canada writes the following at paragraph 22 of the ***Edmonton*** decision:

> [22] Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécoisv. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.), at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

[24] In the ***Edmonton*** decision, the Supreme Court of Canada confirms that ***Dunsmuir*** is the guiding authority as to reviews of administrative decisions. Two presumptions in favour of the reasonableness standard are set out in ***Dunsmuir***. The first is that reasonableness is normally the standard "where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (para. 54). The second ***Dunsmuir*** presumption is that reasonableness is normally the standard for questions of fact, exercises of discretion, policy decisions, and questions "where the legal and factual issues are intertwined with and cannot be readily separated" (para. 53).

[25] ***Dunsmuir*** sets out four presumptions in favour of the correctness standard. The Supreme Court of Canada, in ***Edmonton***, sets out these particular presumptions at paragraph 24 as follows:

> [24] The four categories of issues identified in *Dunsmuir* which call for correctness are constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or

> *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (S.C.C.), at para. 13; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at para. 22).

[26] The ***Dunsmuir*** Framework provides a clear answer that the reasonableness standard applies in this case. None of the four presumptions in favour of correctness apply here. This is a case where the Commission:

1. Is operating within "a discrete and special administrative regime in which the decision maker has special expertise" (***Dunsmuir***, at para. 55);
2. Is dealing with a policy question within its mandate that involves mixed fact and law arising within its own statue or statutes closely connected to its function (***Dunsmuir***, at paras. 53 and 54); and
3. Is functioning in a manner consistent with its purpose, as determined by an interpretation of its home statute *(**Dunsmuir***, at para. 54*).*

[27] In my view, the questions considered by the Commission in the case before me involved the application of law to the facts (issues of mixed fact and law), and the interpretation of contracts and tax statutes closely connected to the role and mandate of the Commission under its home statute. These kinds of determinations are reviewable on the standard of reasonableness.

Is the Corporation a "Purchaser" under the *RSTA*?

[28] As part of its business operations, the Corporation provided Fuel Tanks to retail customers who were permitted to use the Fuel Tanks to store petroleum products on their business premises. All the petroleum products were provided to retail customers

by the Corporation on an exclusive basis. Some of these retail customers were located on what Section 87 of the *Indian Act* describes as “Reserve Land”.

[29] The Minister has taken the position that the Corporation was a “Purchaser” as that term is defined in the *RSTA* when it acquired the Fuel Tanks, and that the Corporation failed to remit the tax. The Corporation responds by arguing that its acquisition of the Fuel Tanks does not make it a “Purchaser” as defined in the *RSTA*.

[30] The *RSTA* identifies when tax becomes payable as follows:

> **Tax on tangible personal property and taxable services**
>
> **2(1)** Every purchaser of tangible personal property or a taxable service must pay tax equal to the fair value of the property or service multiplied by the general sales tax rate.
>
> **Tax on lease of tangible personal property**
>
> **2(3)** For the purposes of subsections (1), (1.1) and (2), where the tangible personal property is the subject of a lease, the tax is payable on the rental or other consideration payable from time to time for the use of the property leased, and shall be paid at the time each payment of the rental or other consideration is due.

Position of the Corporation as to the Definition of “Purchaser”

[31] The Corporation argues that the *RSTA* is clear–in order for the Corporation to be a purchaser–it must have purchased tangible personal property:

a) for the purpose of consumption and not for resale (which includes a lease); or

b) for the purpose of a promotional distribution if the fair value of the tangible property is greater than any amount paid for it by the person to whom it was provided.

[32] The Corporation argues neither of these two scenarios apply in these circumstances. As to the issue of “consumption”, the Corporation takes the position it

did not purchase the Fuel Tanks for the purpose of consuming them–rather, they were consumed, via a lease, by the retail operators located on Reserve Land. These retail operators, who were Indians or Bands as defined in the *Indian Act*, are exempt from tax obligations under the *RSTA*. With respect to promotional distribution, the Corporation argues that the Fuel Tanks were not provided to promote or encourage any activity, but rather were provided as part of an agreement to provide petroleum products to the retail operators, and that the fair value of the Fuel Tanks was not greater than any amount paid for same by the retail operators.

[33] The Corporation further argues that Section 87 of the *Indian Act* exempts the personal property of an Indian or a Band from taxation. The relevant sections of the *Indian Act* state the following:

> **Property exempt from taxation**
>
> **87 (1)** Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:
>
> **(a)** the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> **(b)** the personal property of an Indian or a band situated on a reserve.
>
> **Idem**
>
> **(2)** No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.
> …

[34] The Corporation also points to the fact that *TAMTA* acknowledges the supremacy of the *Indian Act* in its preamble:

> **Interpretation of tax Acts**
>
> 1(5) For greater certainty, the tax Acts must be interpreted so as not to derogate from the exemption from taxation of property under subsection 87(1) or (2) of the *Indian Act* (Canada).

What is Reasonable

[35] Having determined that the standard of review is reasonableness, the question now becomes whether the decision rendered by the Commission falls within the range of possible and acceptable outcomes that the jurisprudence defines as "reasonable". This principle is set out by the Court of Appeal in ***Guinn v Manitoba***, 2009 MBCA 82, 245 Man.R. (2d) 57 ("***Guinn***"), at paragraph 30 as follows:

> 30 Thus, once the standard of reasonableness is chosen, so long as the explanation for the Board's decision was intelligible and justifiable and the decision itself "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", the court must defer to the outcome chosen by the tribunal.

[36] The Court of Appeal in ***Guinn***, at paragraph 30, then cites the following quotation from paragraph 47 of ***Dunsmuir***:

> …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[37] The deferential standard, which is part of what is described as reasonableness in ***Dunsmuir***, requires me to start with an analysis of the decision of the Commission. It is not my role as a reviewing judge to start such an analysis with what I might I think the correct outcome should be, as that would amount to a correctness review in the disguise of a reasonableness review.

[38] In ***Delios v. Canada (Attorney General)***, 2015 FCA 117, 472 N.R. 171, the Federal Court of Appeal sets out the proper role of a judge reviewing a decision on the reasonableness standard, at paragraph 28:

> [28] Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter - correctness review.

[39] The ***Dunsmuir*** decision notes, at paragraph 47, that not all questions before an administrative tribunal lend themselves to a particular or specific result. “Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.”…

The Reasons of the Tax Appeals Commission

[40] The Reasons work through an interpretation of the provisions of the *RSTA* relating to promotional distributions and for interpreting the written agreements between the Corporation and its customers. The Reasons also consider the law of contracts and then applies the law to the facts. Also set out in the Reasons are the sections in the *RSTA* applicable to promotional distributions to customers. Ultimately, the Reasons come to the conclusion that the provision of Fuel Tanks by the Corporation amounted to a “promotional distribution” that attracts the payment of tax under the *RSTA* by the Corporation.

[41] The analysis of the facts set out in the Reasons establish that consideration was given by the Commission to the nature of the legal arrangements between the Corporation and its customers that were created by the written agreements the parties entered into. The Commission concluded that the written agreements should be analyzed based on what an objective person would conclude was really happening and not the subjective intentions of the parties. The ultimate conclusion was that the Fuel

Tanks were provided to customers by the Corporation to promote and encourage an exclusive business arrangement. The analysis and conclusions of the Commission are reasonable, in my view.

[42] The Reasons conclude that the agreements between the Corporation and its clients did not amount to a lease of the Fuel Tanks, and the provision of the Fuel Tanks was a promotional distribution which creates an obligation for the Corporation to remit tax under the *RSTA*.

[43] In making this determination, the Commission applied the law relating to interpretation of contracts and found that the evidence should not be applied in the manner the Corporation suggested. The argument made by the Corporation that a violation of the *Indian Act* would occur based on the Minister's interpretation of the *RSTA* was also considered and rejected.

Conclusion

[44] The fact that I may have come to a different conclusion on the available evidence does not make the decision of the Commission unreasonable. The arguments submitted on behalf of the Corporation are not the only possible way one could reasonably interpret the statutes and apply the facts to the law. In my view, the Corporation is asking me to apply a correctness standard to the decision of the Commission, which the law does not permit in these circumstances.

[45] All of these findings are well articulated in the Reasons and show that the arguments made by the Corporation were considered and held to be inadequate to support a conclusion favourable to it. The conclusions arrived at by the Commission as set out in the Reasons are all possible and acceptable outcomes that are defensible in

respect of the facts and the law. Therefore, taken as a whole, the conclusion reached by the Commission is, in my view, reasonable and I am dismissing the application of the Corporation to overturn the decision of the Commission.

[46] The parties may speak to costs if they cannot agree.

REMPEL J.