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ADMINISTRATIVE & REGULATORY LAW CASE REVIEW

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IN THIS ISSUE...

- Tribunal standing on judicial review
- Segmentation approach to standard of review divides the SCC – again
- Introducing new evidence on judicial review
- Enjoining unauthorized practice of regulated health care
- Granting adjournment requests to self-represented parties

Tribunal standing on judicial review: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44

FACTS: The Ontario Energy Board conducts rate-setting hearings to determine what rates utilities can charge their consumers. In the course of one such hearing, Ontario Power Generation sought approval from the Board to increase rates in order to cover certain expenditures, including $145 million in labour compensation costs. The Board did not allow OPG to increase rates to cover this amount, on the grounds that OPG's labour costs were out of step with those of comparable utilities.

OPG's initial appeal was dismissed, but its further appeal to the Court of Appeal was successful. Under s. 33(3) of the *Ontario Energy Board Act, 1998*,[1] the Board has standing to "be heard by counsel upon the argument of an appeal", and so the Board participated as a respondent before both the Divisional Court and the Court of Appeal. No other parties participated as a respondent to OPG's appeal.

The Board's position was that its rate-setting determination was a reasonable one. After the Court of Appeal found to the contrary, the Board appealed to the Supreme Court of Canada. In addition to arguing that the Board's decision was unreasonable and ought to be quashed, OPG also argued that the Board acted impermissibly in pursuing its appeal in this case, including by engaging in "bootstrapping".

DECISION: Appeal allowed. Decision of the Court of Appeal set aside and decision of the Board reinstated. The Board did not act improperly in making its arguments before the Court in this case.

Tribunal standing is a discretionary decision to be made by the court conducting the first instance review. Relevant factors to consider include whether: (i) there are other parties available to oppose the appeal or review; (ii) those parties have the necessary knowledge and expertise; and (iii) the tribunal adjudicates individual conflicts between two adversarial parties, or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. Applying these considerations, the Board's participation in this appeal was not improper. The Board was exercising a regulatory role, not an adjudicative one. It was also the only respondent on OPG's appeal, leaving the Board no choice but

[1] SO 1998, c 15, Sch B

to step in if the decision was to be defended on its merits.

A tribunal engages in "bootstrapping" where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely upon in the decision under review. The principle of finality requires that once a tribunal has decided the issues before it and provided reasons for its decision – absent a power to vary its decision or rehear the matter – it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. That being said, the principle of finality is not offended where, on appeal, a tribunal: (i) introduces arguments that interpret, or were implicit in, its original decision; (ii) explains its established policies and practices to the reviewing court, even if those were not described in the reasons under review; or (iii) responds to arguments raised by a counterparty.

A tribunal should pay careful attention to the tone of its submissions on appeal. Statements such as the Board's assertion that the test advocated for by OPG "would in all likelihood not change the result" if the decision were remitted to the Board for reconsideration may, if carried too far, raise concerns about the principle of impartiality. A court could limit tribunal standing so as to safeguard this principle.

COMMENTARY: This case marks the Supreme Court's first in-depth discussion on the issue of tribunal standing since 1989.[2] It provides important guidance in resolving the different approaches that have emerged on the question of whether, and to what extent, tribunals may participate in statutory appeals or judicial reviews. Eschewing the stricter posture of its earlier decision in *Northwestern Utilities Ltd v City of Edmonton*,[3] the factors articulated by the Court in this case reflect a relatively lenient approach to tribunal standing – particularly in the context of tribunals exercising a non-adjudicative function, such as the Board in a rate-setting context.

[2] *CAIMAW v Paccar of Canada Ltd*, [1989] 2 SCR 983
[3] [1979] 1 SCR 684

The Court adopts a similarly relaxed view of what arguments a tribunal can make if it has standing. While acknowledging concerns over the principle of finality, as a practical matter, the exceptions or qualifications the Court articulates will allow tribunals to raise most, if not all, relevant arguments on appeal or judicial review. Indeed, with just a little creativity, tribunal lawyers will likely be able to frame their arguments as ones that interpret, or were implicit in, the original decision under appeal or review.

One factor that gets surprisingly brief attention in the Court's reasons is the Board's statutory right to participate in any appeal. The statute provides no restrictions on the type of arguments that the Board may raise, unlike other similar statutory provisions for other tribunals.[4] One would think that this kind of provision is dispositive on the question of tribunal standing, without resort to the more general factors articulated by the Court in this case. It could also be argued that, all else being equal, an unrestricted statutory right to participate in an appeal militates in favour of giving a tribunal more latitude in the issues it seeks to address before the appellate court. Certainly, the Court's analysis does not foreclose this line of argument – but it offers no endorsement either.

Segmentation approach to standard of review divides the SCC – again: *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57

FACTS: SODRAC is a collective society organized to manage the reproduction rights of its members:

[4] See, for example, s. 51(2) of the *Public Service Labour Relations Act*, SC 2003, c 22, which provides that the Public Service Labour Relations Board has "standing to appear… for the purpose of making submissions regarding the standard of review to be used with respect to decisions of the Board and the Board's jurisdiction, policies and procedures."

authors, composers and publishers. Certain licences are required for CBC and other producers incorporate musical works into their television programs. In producing and preparing a program for broadcast, CBC makes several copies. "Broadcast-incidental copies" are created to facilitate broadcast of the program through CBC's digital broadcasting system. SODRAC asked the Copyright Board to fix the terms and conditions of a licence that would require CBC to pay royalties for broadcast-incidental copies. The Board imposed a licence on CBC that included royalty fees for broadcast-incidental copies and set the value for those royalties. The Federal Court of Appeal upheld the Board's decision.

DECISION: The Supreme Court split three ways on the approach to determining the standard of review of the Board's decision. Rothstein J, for the majority, segmented the case into five issues and conducted a brief standard of review analysis for each issue. In the result, one issue was subject to review for correctness while the other four were reviewed on the reasonableness standard. The one issue to which Rothstein J found the correctness standard applies was "whether broadcast-incidental copies engage the reproduction right, and thus whether the *Copyright Act* allows SODRAC to seek a licence for CBC's broadcast-incidental copying". That is a question of law. Under the unique statutory scheme in the *Copyright Act*, both the Board and the court have jurisdiction to consider that question at first instance. Following the Court's 2012 decision in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*,[5] Rothstein J concluded that the presumption of reasonableness is rebutted and the correctness standard applies.

Rothstein J held that the reasonableness standard applies to the remaining four issues in the appeal (two were questions of mixed fact and law, one was an exercise of the Board's discretion, and one was a question over which the Board enjoys exclusive first instance jurisdiction such that the *Rogers* exception does not apply). For reasons not central to the focus of this Case Review, Rothstein J held that the Board was correct in proceeding on the basis that broadcast-incidental copies engage reproduction rights under the *Copyright Act*, but its decision was unreasonable in other respects.

Rothstein J defended his issue-by-issue approach to standard of review against criticism by the dissenting judges, Abella and Karakatsanis JJ, by noting that the approach had been affirmed in *Mouvement laïque québécois v Saguenay (City)*[6] (see the October 2015 issue of this Case Review), which is now "the controlling authority".

Abella J was of the view that the Board's decision should be reviewed as a whole and that the central issue in the appeal – whether the Board ought to have imposed royalty fees on CBC for broadcast-incidental copies – is at the heart of the Board's specialized mandate and therefore reviewable on a reasonableness standard. Karakatsanis J would apply the correctness standard to the legal issue of whether broadcast-incidental copies engage reproduction rights, based on *Rogers*; the reasonableness standard applies to the balance of the decision.

COMMENTARY: In this case, the Supreme Court divides yet again over the thorny issue of segmentation – whether a decision under review should be parsed into discrete issues, each of which is subject to its own standard of review analysis. Each set of reasons has merit. As recently as April of this year, the Court confronted the same issue in *Mouvement laïque*, with an eight-judge majority adopting an issue-by-issue approach to standard of review. Abella J wrote separate reasons strongly disagreeing with the majority on this point. Rothstein J is right to consider *Mouvement laïque* the "controlling authority" on the question of segmentation. It is not in the interests of stability in this area of law for the Court to reverse course a mere seven months later.

At the same time, Abella J can hardly be blamed for remaining steadfast in opposing segmentation. She advocates for a single reasonableness standard for several compelling reasons. While

5 2012 SCC 35, [2012] 2 SCR 283

6 2015 SCC 16, [2015] 2 SCR 3 [*Mouvement laïque*]

segmentation is not, as she suggests, a "new" and "inexplicable" change being introduced for the first time in the majority's reasons, her concerns deserve more serious thought than the majority affords them. She warns that the majority's approach "further erodes the careful framework" established in *Dunsmuir* and criticizes it as "creat[ing] even more confusion in an area of jurisprudence already unduly burdened by too many exceptions". One can sense in her reasons some frustration that the majority hasn't come around to her view.

Karakatsanis J seems sympathetic to Abella J's position, but unable to work around *Rogers*. She therefore teases out a single issue in the appeal that is subject to correctness review while also expressing concern with Rothstein J's methodlogy of applying a specific standard of review to each individual issue. This is surprising, given that she joined the majority in *Mouvement laïque*.

We likely have not heard the last word from the Supreme Court on segmentation, but for the time being it appears to be a settled part of the standard of review doctrine. *CBC* does not, however, do any better than *Mouvement laïque* in setting out exactly how the segmentation approach should work, and in particular, how broadly or narrowly an issue is to be defined for the purposes of applying a standard of review analysis. One can only hope for further guidance the next time the Court tackles the issue.

Introducing new evidence on judicial review: *Bernard v Canada (Customs and Revenue Agency)*, 2015 FCA 263

FACTS: B sought judicial review of a 2015 Public Service Labour Relations and Employment Board decision refusing to reconsider a 2008 decision that B claimed was tainted by bias. The respondent Professional Institute of the Public Service of Canada moved to strike certain paragraphs and exhibits in an affidavit B filed in support of her application, claiming that the evidence had not been before the Board. B argued submitted that the evidence was relevant to her allegations of bias and overall breach of natural justice. For its part, the Board, which also wished to object to the affidavit, informally sought directions from the Court about how to voice this objection.

DECISION: The Institute's motion was granted. The Court also denied the Board's request for directions, noting that the Board had to review the Rules and decide for itself what steps to take.

The impugned paragraphs and exhibits of the affidavit violated the general rule that evidence that could have been placed before an administrative decision-maker is inadmissible before a reviewing court. The rationale underlying this rule is the need to recognize the differing roles of administrative decision-makers as "merits deciders" and judicial review courts as "reviewers". The three generally recognized exceptions to the rule – to provide background information, to disclose a complete absence of evidence, and to provide evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud – are consistent with this rationale and do not constitute a closed list.

The evidence B sought to admit here went to the merits of the matter before the Board and was available at the time of the Board's proceedings. It did not fall within any of the recognized exceptions and the rationale underlying the general rule supported its inadmissibility.

COMMENTARY: This decision provides a concise and thoughtful review of the considerations governing when new evidence can be introduced at the judicial review stage. Articulation of the rationale underlying the general rule gives counsel a principled starting point to advance arguments about whether new evidence should (or should not) be received by the review court. It also serves as a reminder of the best practice of objecting to perceived violations of natural justice and procedural fairness at the earliest possible opportunity, lest one be found at a later stage to have waived the right to do so.

Finally, the decision gently cautions that an administrative decision-maker who is neither a party to, nor an intervener in, the judicial review of one of its decisions would be well-advised to do two things prior to inserting itself into the proceedings. First, it should carefully consult the rules of the court concerning the challenge, in order to identify potential points of entry to voice any objections it may have. Second, it should carefully consider the potential implications of involving itself in the challenge – namely, concerns about tribunal impartiality – which, as the Court notes, were canvassed in the Supreme Court's recent decision in *Ontario (Energy Board)* (reviewed above).

Enjoining the unauthorized practice of regulated health care: *College of Traditional Chinese Medicine v Yin*, 2015 ONSC 5613 (Div Ct)

FACTS: The newly created College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario brought an application for an order permanently enjoining Y from the unauthorized practice of traditional Chinese medicine. Y held bachelor, masters and doctorate degrees in Chinese medicine, and from 1998 to April 1, 2013, openly and lawfully practised Chinese medicine in Ontario. However, since April 1, 2013, practitioners of Chinese medicine and acupuncture in Ontario have been regulated by the *Traditional Chinese Medicine Act*,[7] and must register with the College if they wish to practise. Y never registered with the College.

A College investigator visited Y's clinic on two occasions. On the first occasion, Y provided the investigator with a business card, identifying herself as a doctor of traditional Chinese medicine. On the second visit, Y examined the investigator's tongue and a cyst on his wrist, and gave a traditional Chinese medicine diagnosis. She did not perform acupuncture on the investigator, but her treatment room contained acupuncture needles and she demonstrated what acupuncture treatment would entail. She also charged the investigator $45.

The College alleged that Y was engaging in unauthorized practice contrary to the Act and the *Regulated Health Profession Act, 1991*.[8] Y denied those allegations. She claimed to have stopped practicing traditional Chinese medicine after the Act came into force, explaining that she did not want to register with the College because doing so would prohibit her from using the title "Doctor".

DECISION: College's application and request for injunction are granted.

Y's conduct violated ss. 4, 8(1) and 8(2) of the Act. Y engaged in unauthorized practice and held herself out to be a licensed professional. She also violated s. 30(1) of the RHPA, which prohibits non-members from providing treatment or advice in circumstances in which it is "reasonably foreseeable that serious bodily harm may result from the treatment or advice". She gave advice on a cyst and claimed the benefit of 30 years clinical experience. She not only gave advice, but she did so in circumstances where the consequences could be extremely serious.

COMMENTARY: This decision will be of interest to regulators and practitioners alike. It demonstrates the usefulness of a court application to control unauthorized practice, and provides guidance on the type of conduct that constitutes unauthorized practice and on what will be seen as "holding oneself out" to be a member of a regulated profession.

The decision also sends a strong message that the unauthorized practice of a regulated health profession will not be tolerated, which is a matter of particular importance to new regulators working to gain and maintain public confidence in their ability to govern previously unregulated areas of health care. As Mew J noted by way of postscript, "it is always disconcerting when the

7 2006, SO 2006, c 27

8 SO 1991, c 18

rules and regulations which pertain to one's profession or livelihood change". However, as this decision makes plain, defying the law is not the way to challenge those roles or regulations.

Granting adjournment requests to self-represented parties: *Bayfield v. College of Physiotherapists of Ontario*, 2015 ONSC 6808 (Div Ct)

FACTS: B, a member of the College of Physiotherapists of Ontario, was found guilty of professional misconduct. The day before the scheduled penalty hearing, B was served with the College's factum and brief of authorities. Unassisted by counsel, B attended the penalty hearing and requested an adjournment so that he could review the material served upon him and consult counsel. The Discipline Committee denied B's request. The Committee then went on to accept the College's submissions, find B ungovernable and revoke his certificate of registration.

B appealed the penalty decision on the basis that Committee violated the principles of natural justice and denied him of procedural fairness by refusing the adjournment.

DECISION: Appeal allowed. The penalty decision of the Committee is set aside the penalty, and the matter is remitted for a new penalty hearing.

The Court accepted that B had notice the matter would proceed to the penalty phrase and knew his professional livelihood was at stake. Materials provided to him at an earlier date referred to revocation of registration. However, "given the fresh step taken and the new materials served, a higher standard of justice is required when the right to continue one's profession or employment is threatened."

The Court also emphasized the fact that B was self-represented and that the Committee had a duty to ensure B had a fair opportunity to know and meet the case against him. The Committee was not required to grant an indefinite adjournment to allow B to obtain counsel, but it ought to have granted a brief adjournment to give him an opportunity to read the material served on him the night before and prepare submissions.

COMMENTARY: The decision serves as a reminder to administrative decision-makers of their duty to ensure that self-represented litigants have a fair opportunity to advance their position. The increase in self-representation among litigants creates real challenges for the justice system. Administrative decision-makers must be sensitive to the challenges that self-represented litigants face and take steps to ensure that those litigants have access to justice.

The decision also provides a useful list of factors to consider when a self-represented litigant seeks an adjournment. The fact that the adjournment is being sought in order to obtain counsel is a factor weighing in favour of granting the adjournment, as is the prejudice that the self-represented litigant will face if the adjournment is not granted. That being said, not all adjournment requests will be granted. In this case, B could not reasonably expect to be granted an adjournment of indefinite length for the purpose of instructing counsel but he was entitled to a reasonable period of time to review the materials and prepare his submissions. The consequences of the proceeding were most serious, and it was clear that as a self-represented litigant, B could not be expected to absorb, or respond to, the material served on him the night before the hearing.

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